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ALTERNATIVE REVENUE SOURCES: Snapshot of a National Trend

A number of subscribers to *The Spangenberg Report* have expressed interest in learning about alternative revenue sources, outside of general fund appropriations, that can be used to supplement appropriated budgets for indigent defense services. We spoke to indigent defense program administrators around the country to learn about their efforts to generate alternative revenue. Our survey revealed that an increasing number of indigent defense programs are making innovative efforts to procure supplemental funds outside of the traditional funding source: the general fund. Creativity and cooperation are the keys to implementing a successful alternative revenue funding program. Most often these efforts involve working with state legislatures or the courts in a collaborative effort to improve funding, and thus delivery of services, for indigent defense or more broadly the criminal justice system.

Ways in which the alternative revenue is generated are numerous and varied. This article discusses several methods of collecting additional non-general fund revenue, including application or registration fees, surcharges on court costs, filing fees and bond forfeitures. This article also identifies those approaches which are most successful, and describes how alternative sources of revenue for indigent defense have been used.

A preliminary consideration for evaluating any alternative revenue program is whether the revenue is deposited into the general revenue fund or a specific indigent defense fund. An indigent defense fund is preferable because it directly benefits indigent defense programs, but depositing revenues into the general fund is another option. While there is not as much incentive for an indigent defense program to pursue alternative revenue if the program does not directly benefit from the additional revenues generated, the indigent defense program's efforts to generate supplemental revenue may have positive effects, in terms of budget appropriations as well as an improved relationship with other government agencies.

Our survey revealed that many jurisdictions, particularly those where indigent defense is state funded, do not use the proceeds of alternative revenue programs to specifically augment indigent defense funding, but instead deposit the revenue into the general fund. However, a number of jurisdictions have found ways to supplement indigent defense funds by establishing "dedicated" funds where income is earmarked for specific costs such as conflict counsel fees and death penalty expenses.

Application/Registration Fee

Some states have established application or registration fees (sometimes called "assessment fees")

to generate revenue for indigent defense services. Such a fee is typically charged to defendants who receive court-appointed counsel at the time of screening. Fees range from $10 in New Mexico to $100 in Massachusetts. Because of the potential for the application fee to have a chilling effect on defendants' Sixth Amendment right to counsel, none of the states which have an application fee deny representation due to a defendant's inability to pay the fee. Legislation creating the fees stipulates that payment must be waived for those defendants who are determined to be unable to contribute.

Massachusetts has fared most successfully in collecting its assessment fee, which was recently raised to $100. In FY 1994, when the assessment fee was $75, it produced a total of $1,558,007, which reverted back to the state's general fund. The Massachusetts Department of Probation is responsible for screening for indigency and collecting the assessment fee from defendants who receive court-appointed counsel.

Connecticut imposes a $25 registration fee on public defender clients; the total revenue generated in FY 1994 was $95,000. Part of the reason for this comparatively low return may be that unlike other jurisdictions, where collection is handled by a separate agency, public defender offices in Connecticut collect the registration fee directly from their clients. Critics have pointed out that this arrangement may create an ethical dilemma for public defenders who must ask their clients for a registration fee while at the same time doing all they can to protect their clients' rights.

Colorado's application fee of $25 generated $146,000 in FY 1994. The Clerk of the Court in Colorado is responsible for all administration concerning the assessment and collection of the fee. The Colorado State Public Defender does not benefit from the fee's income directly, as all revenue is directed to the state's general fund.

South Carolina passed legislation in 1993 that established both a $25 application fee and a criminal conviction surcharge of 10% on fines imposed on virtually all criminal offenses except non-moving traffic offenses (discussed below). The revenue collected on the fee and surcharge is forwarded to the South Carolina Office of Indigent Defense which distributes the monies to local public defenders and two designated funds. In the first year that the application fee was implemented, the $25 charge netted $82,814, only 5% of its projected total. One of the reasons the goal was not reached was the inconsistency of the collection procedure. From county to county, administrative duties regarding collection fell to a variety of agencies: public defender offices, court clerks, and magistrates. In FY 1995, South Carolina made significant progress, largely due to some minor modifications to the collection procedure. The total application fee revenue in FY 1995 was $132,307.

The South Carolina Statewide Public Defender Commission developed a detailed formula under which the Office of Indigent Defense distributes revenue from the application fee and the surcharge into three accounts. Of each dollar generated, 50 cents goes to a Death Penalty Fund, 15 cents goes to a fund for court-appointed counsel and 35 cents goes to a fund distributed amongst the local public defender offices. Once the death penalty fund reaches $2.75 million and the assigned counsel fund reaches $1million, all revenue generated from the surcharge and application fee goes to local public defender offices.

The Death Penalty Fund provides payment to counties which have incurred expenses as a result of an indigent defendant death penalty trial. Specifically, the fund pays for attorney fees as well as lab work, expert witness and other expenses. The court-appointed counsel fund covers fees for court-appointed attorneys who handle indigent defense cases when the local public defender has a conflict of interest. Both funds are distributed in response to applications for reimbursement, on a first-come, first-served basis, until all resources are depleted.

South Carolina's Office of Indigent Defense Director Tyre Lee projects that the funds for death penalty and conflict costs will reach their maximum caps next year, allowing the local public defenders to see a significant increase in their budgets.

New Mexico has dedicated the proceeds of a $10 application fee to the enhancement of the Public

Defender Department's automation system. Roughly $67,000 in FY 1994 was used to upgrade computers and case tracking technology in New Mexico's public defender offices.

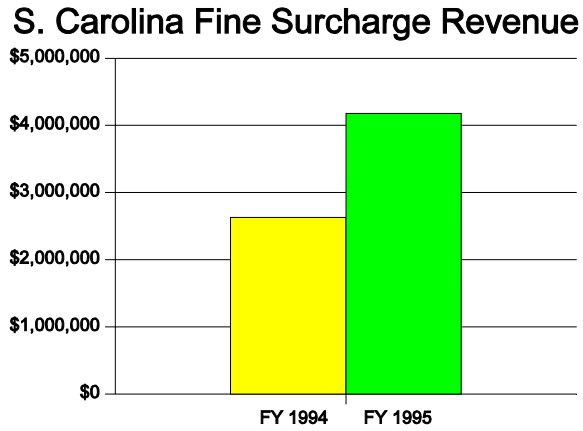
Application fees are one of the most efficient mechanisms for generating alternative revenue for indigent defense programs. Because the fees are assessed at the onset of a case, rather than at its conclusion, indigent defense does not "compete" with fines that benefit other interests, such as victim restitution, court fees, and other assessments that are typically made after the disposition of a case and given a higher priority status. More importantly, it is reported that when indigent defendants make some sort of contribution toward their representation, regardless of the amount, they are more likely to feel that they have a vested interest in their representation and are more likely to cooperate with their attorneys.

Surcharges

Surcharges on filing fees and criminal conviction fines have long been used by the courts to generate money for projects or programs outside of their appropriated budget. Typically, a surcharge is imposed for a set period of time and dedicated to a specific purpose or function. Surcharges may be a fixed dollar amount, or a percentage of the total amount being taxed. Surcharges can range from less than a dollar to in excess of $50.

Surcharges implemented to supplement indigent defense budgets tend to be levied on fines and fees that are related to criminal offenses, rather than civil filings. In Kentucky, the legislature added a surcharge of $50 to the DUI fine and prorated the revenue generated by the surcharge among criminal justice agencies. In contrast, other states, such as South Carolina, place small surcharges on virtually every type of criminal fine except non-moving traffic offenses, from minor misdemeanors to more serious criminal charges.

In 1993, legislation passed in South Carolina mandated a 10% surcharge on fines levied against persons convicted of all criminal offenses under the jurisdiction of general sessions and magistrate or municipal courts, except non-moving traffic offenses. Both this surcharge, which cannot exceed $500 per person, and the revenue from a $25 application fee imposed on indigent criminal defendants, as discussed above, are forwarded to the Office of Indigent Defense for disbursement to local public defender offices and to two funds for specific indigent defense costs. In FY 1994, South Carolina collected $2,628,535 from fine surcharges; in FY 1995, the amount nearly doubled, to $4,177,245.



In 1994, Kentucky passed legislation increasing the surcharge for persons convicted of drunk driving to $200, a $50 increase. The Department of Public Advocacy, which administers indigent defense services for the state, will receive 25% of the revenue generated by this surcharge (also referred to as the "DUI Service Fee"). Because the collection of the surcharge has only recently been implemented, income figures are not yet available.

In Louisiana, local indigent defender boards benefit from bond forfeiture revenue, an atypical alternative revenue source for indigent defense programs. Louisiana Revised Statute 15:571.11 provides that 25% of the bond forfeiture revenue collected by local authorities and the Attorney General may be distributed among the state's district indigent defender boards. Similarly, R.S. 22:1065.1 states that 25% of the annual license fee for commercial surety underwriters shall be dedicated to the district indigent

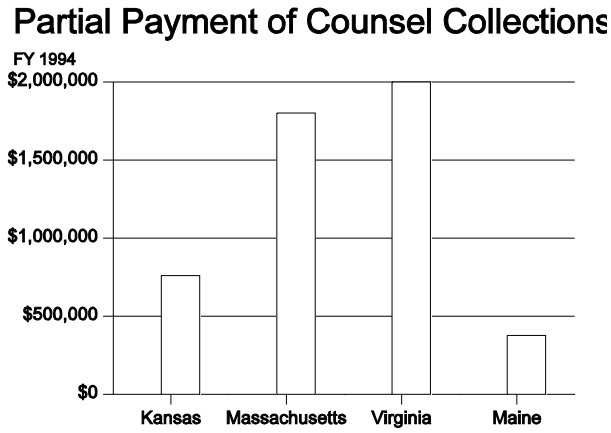
defender boards. Revenue data for these two surcharges are not available.

Finally, the Knoxville, Tennessee, public defender has made use of a $12.50 surcharge that is assessed to all persons against whom any type of criminal warrant, including warrants for moving traffic violations, has been filed. Revenues generated by this surcharge are earmarked exclusively for indigent defense representation. Two years ago the Tennessee state legislature passed legislation enabling all counties to impose such a surcharge, provided the surcharge was approved by the county legislative body by a two-thirds vote. Prior to this time, only the four major metropolitan areas (Knoxville, Memphis, Chattanooga and Nashville) were authorized to impose this surcharge. Despite the availability of this alternative revenue source, however, only the county commissions of Knox County (Knoxville) and Davidson County (Nashville) have voted to impose the $12.50 surcharge. Since January 1995, when the Knoxville office tapped into this alternative revenue source, it has received roughly $180,000.

Surcharges can be an effective means of generating additional revenue quickly. Because they draw on a much larger pool of users, the total revenue generated by many surcharge initiatives is far greater than those from application fees. However, surcharges may also carry with them a significant administrative burden if a specific plan for uniform collection and record-keeping is not developed at the time the surcharge is implemented.

Partial Payment of Counsel Costs and Recoupment

Many defendants who qualify for representation by a public defender or court appointed counsel may be able to make some contribution to the cost of their defense. A number of jurisdictions have established, by statute or court rule, a schedule of fees for partially indigent criminal defendants. In some jurisdictions, payment schedules set by statute or court rule specify contribution according to income. In other jurisdictions, the judge is responsible for determining a reasonable contribution based on information concerning costs of representation and the defendant's income.



Massachusetts Supreme Judicial Court Rule 3:10 establishes guidelines outlining the procedure for the financial screening of criminal defendants who seek court appointed counsel. Defendants whose income level is above 125% and below 250% of the state poverty level are deemed "indigent, but able to contribute" to the cost of their defense and are assessed a "reduced counsel fee." Payment amounts are assessed during the screening process and are expected to be paid before disposition. Defendants may ask the court for payment deadline extensions due to extreme financial hardship or other reasonable grounds. The Department of Probation is primarily responsible for the screening process, although court officials are also allowed to screen defendants. Through this mechanism, Massachusetts collected $1.8 million in FY 1994, all of which reverted to the state's general fund.

In 1992, the Administrative Office of the Court in Maine established the Indigency Screening Program as a pilot project. Because of its success the program has continued and was recently expanded. In December of 1991, the Maine Superior Court adopted Administrative Order SC-91-5, which establishes guidelines for determining both financial eligibility and partial, pre-disposition payment for court appointed counsel. Shortly thereafter, court officials began the Indigency Screening Program on a trial basis to

determine whether they could improve the indigency screening process.

During the first year of the pilot program, the state spent $100,000 for a contract with a temporary employment agency that supplied six full-time screeners. Screeners use administrative guidelines to devise payment schedules for those defendants determined to be capable of paying some part of the cost of their representation. Supervision is handled by an employee of the Administrative Office of the Court on a part-time basis. Screening is conducted in both superior and district courts in Maine's three most populous counties: Androscoggin, Cumberland, and York. In FY 1996, the screening staff was expanded to eight. The entire cost of the project currently is approximately $140,000 per year.

Prior to implementing the screening program in 1992, payment revenue totalled $50,000. During its first year, the Indigent Defense Screening Program collected $376,000 from defendants represented by court appointed counsel. In FY 1995, the state collected $446,000. The Administrative Office of the Courts projects that with the addition of two more screeners, the revenue collected in FY 1996 will reach $500,000.

States such as Kansas and Virginia have been particularly successful in their attempts to recoup the costs of representation from defendants who were represented by court-appointed counsel and are convicted of a crime. Pursuant to K.S.A., 21-4610(4)(c), as a condition of probation, judges determine the amount to be repaid by the convicted defendant based on information provided in part by the Kansas Board of Indigent Defense. The Board prepares a bi-monthly report, filed with the Office of Probation, detailing attorney fees by client. The judge determines the total cost for which the defendant is responsible and communicates this information to the Department of Probation. The Clerk of the Court collects the money, which is deposited into the state's general fund. In FY 1994, the state recouped $760,000; 8% of its FY 1994 $9.2 million appropriation to indigent defense services.

Several years ago, Virginia's efforts to recoup indigent defense costs intensified. In FY 1994, Virginia collected $2 million from defendants who were appointed a public defender or court-appointed counsel and were later convicted. This amount accounted for nearly 8% of the $32 million that the state spent on court-appointed counsel fees that year. Money is allocated to two funds: the Public Defender Commission Fund and the Criminal Fund. Virginia's Public Defender Commission oversees the quality of representation for indigent clients and disburses monies from the Public Defender Commission Fund to defray personnel costs to local public defender offices, which handle approximately one-quarter of the state's indigent defense cases. The bulk of Virginia's indigent criminal representation (72%) is provided through court-appointments. Fees for court-appointed attorneys are paid directly by the Supreme Court, through the Criminal Fund. While 70% of Criminal Fund monies are spent on court-appointed attorney costs, nearly 30% of the Criminal Fund is dedicated to expenses for services such as interpreters, blood withdrawals and DNA testing.

Conclusion

Burgeoning caseloads, diminishing dollars and political savvy have prompted many public defenders and indigent defense advocates to explore alternative methods of generating revenue for indigent defense services. Several jurisdictions have had particular success in collecting additional revenue from defendants through application or registration fees. Another effective method of generating revenue is implementation of careful indigency screening procedures coupled with reasonable sliding scale fees for defense costs.

A final strategy for securing more money for indigent defense services is to create a dedicated fund for a particular project or purpose. These special funds can provide the financial resources to cover expenses relating to computers and software, death penalty costs, or conflict counsel expenses.

While the methods of generating additional revenue discussed in this article are representative of

the current trends across the country, we are interested in hearing about others. Please contact us with your alternative funding ideas.❖

BYRNE FORMULA GRANT FUNDS: THE FEDERAL ALTERNATIVE FUNDING SOURCE

Federal funding for indigent defense programs is often overlooked by public defenders trying to find alternative funding sources. The Edward Byrne Memorial State and Local Law Enforcement Assistance Program, created by the Anti-Drug Abuse Act of 1988, is a federal grant program administered by the Bureau of Justice Assistance ("BJA"). BJA makes Byrne Grant funds available through two programs: a smaller discretionary grant program under which BJA awards discretionary grant funds directly to public and private agencies and private nonprofit organizations, and a more substantially funded formula grant program under which grant funds are awarded to state and local units of government.

Through the formula grant program, which received a FY 1995 appropriation of $450 million, BJA works in partnership with Federal, State and local governments to provide safer communities and a high quality of justice. The total appropriation is divided among the states as follows: each state receives a base amount of 0.25 percent of the total formula allocation, with the remaining funds allocated on the basis of population. The formula grants also require a 25% non-federal match.

For FY 1995 applications, there were 26 legislatively authorized program purposes. Proposals for formula grants must fit within one of the authorized purposes areas. Among the most relevant program purposes for indigent defense programs are the following:

- (10) Programs that improve the operational effectiveness of the court process by expanding prosecutorial, defender, and judicial resources and implementing court delay reductions programs.
- (13) Programs that identify and meet the treatment needs of adult and juvenile drug-dependent and alcohol-dependent offenders.
- (16) Innovative programs that demonstrate new and different approaches to enforcement, prosecution, and adjudication of drug offenses and other serious crimes.
- (20) Programs that provide alternatives to detention, jail, and prison for persons who pose no danger to the community.
- (26) Programs that assist States in the litigation processing of death penalty, Federal habeas corpus petitions.

Under the Anti-Drug Abuse Act of 1988, each state is required to adopt a statewide strategy to improve the functioning of the criminal justice system. Applications for Byrne formula grants are to be made directly to your state's criminal justice planning agency.

The most recent NLADA review of awards of Byrne formula grants to indigent defense programs, "Indigent Defense and the FY 93 BJA Formula Grant Program," published in June 1994, indicates that of the authorized program areas, indigent defense grant applications were most likely to be successful in the following areas: data development, sentencing alternatives, training programs, and drug and juvenile offenses. A new NLADA review, which will contain a state-by-state summary as well as descriptions of grant applications, is due to be published by mid-December and can be ordered by calling NLADA at (202) 452-0620.

For further information on Byrne grants, please refer to the Bureau of Justice Assistance Fact Sheet entitled "Edward Byrne Memorial State and Local Law Enforcement Assistance" or call the BJA Clearinghouse at 1-800-688-4252. ❖

NEWS FROM AROUND THE NATION

<u>BJS "Prisoners in 1994" Reports Continuing Growth of Prison and Jail Populations Nationwide</u>

Not surprisingly, the latest Bureau of Justice Statistics report on prisoners in the United States reports that nationwide prison and jail populations continue to escalate. Among the more significant findings are the following:

- At year end 1994 the total number of prisoners under jurisdiction of state or federal correctional authorities was 1,053,738.

- The 1994 growth rate, 8.6%, was greater than the percentage increase recorded during 1993 (7.4%). The 1994 increase translates into an additional 1,602 inmates each week.

- California and Texas together hold more than one in five inmates in the nation (125,605 and 118,195 respectively). At the other end of the spectrum, 17 states, each holding fewer than 5,000 inmates, together held 4% of all prisoners.

- In 1993 (the most recent available data), the incarceration rate of blacks was seven times that of whites.

- The percentage of state prisoners serving a drug sentence more than tripled from 1980 to 1993 (6% to 22%). The percentage of federal prisoners serving a drug sentence more than doubled from 1980 to 1994 (22% to 60%).

- As a percentage of all state and federal inmates, violent offenders fell from 57% in 1980 to 45% in 1993, property offenders fell from 30% to 22%, drug offenders rose from 8% to 26%, and public-order offenders rose from 5% to 7%.

NIJ Publishes Annual State Court Caseload Statistics

The National Institute for Justice has released its most recent review of the caseloads and compositions of state courts, "Examining the Work of State Courts, 1993." The annual report, a joint project of the Conference of State Court Administrators, the State Justice Institute, the Bureau of Justice Statistics and the National Center for State Courts' Court Statistics Project, provides the most recent profile of the volume and types of cases handled by state courts across the country. The report indicates that state courts received 90 million new cases in 1993, a decrease from 1992's new case filings. Among the more interesting findings of the survey are the following:

- Total felony filings, the largest part of criminal caseloads in courts of general jurisdiction, increased 68 percent since 1984. This translates into a steady nationwide increase of about 8 percent per year over the last decade. However, falling felony rates in several populous states were reflected in a two percent dip in felonies at the national level from 1992 to 1993.

- The serious burden traffic cases impose on many courts (overall, they account for over half the new cases filed in 1993), coupled with the increase in most types of cases over the past 10 years, has prompted many courts to decriminalize less serious traffic cases and to shift a substantial part of the traffic caseload to an executive branch agency. As a result, total traffic filings have decreased by 10% over the last 10 years.

- In both federal and state court steep increases of 32% and 33% respectively characterize criminal caseloads since 1984, although both state and federal courts experienced dips in criminal filings between 1992 and 1993. The decline in felony filings between 1992 and 1993 is consistent with the decrease in the nation's reported crime rate during the same period.

- The ten year trend indicates that the most dramatic increase in filing rates occurred in felony cases. While federal and state felony filing rates grew at the same pace from 1984 through 1987, after 1987, state felony filing rates grew at a much faster rate than federal felony filing rates.

NIJ's report contains much valuable information and can be ordered through the National Center for State Courts' Court Statistics Project by calling (804) 253-2000.

In Response to Systemic Litigation, Jones County, Mississippi Board of Supervisors Triples FY 1996 Indigent Defense Budget

In a victory for public defenders David Ratcliff, Tony Buckley, and Jean Clark and indigent defendants in Jones County, Mississippi, this September the Jones County Board of Supervisors more than tripled the previous year's indigent defense budget, in response to a lawsuit alleging the systemic failure of the Jones County Public Defender Office due to underfunding and excessive workloads.

In 1993, John Holdridge, then of the Mississippi and Louisiana Trial and Assistance Project, went to Jones County to review the serious problem of under funding. John then called upon Bob Spangenberg to conduct an independent study of the system and to file a report with the Circuit Judge. This work was made possible by the ABA's Bar Information Program.

Shortly thereafter, Mr. Holdridge filed a state court lawsuit in which Mr. Spangenberg testified as an expert witness. At the time the lawsuit was filed, the Jones County Board of Supervisors allocated $32,000 a year for indigent defense: $13,000 per year to each of two part-time public defenders (David Ratcliff and Jean Clark) and $3,000 per year for expenses. When the part-time attorneys were hired in 1992, they were shocked to learn that they had inherited over 400 open felony cases. Their workload never abated. Countywide, there are approximately 500 initial appearances each year; the indigency rate hovers around 90%.

The case was on appeal to the Mississippi Supreme Court when the County Board of Supervisors passed its FY 1996 budget. Under the new budget, effective January 1, 1996, four part-time public defenders will each receive $18,000 per year in salary and an annual office allowance of $9,000. There will also be an expert and miscellaneous expense fund of $10,000, with expenses to be approved on a case by case basis by the Circuit Judge. The FY 1996 total indigent defense budget is $118,000. With this significant infusion of funding resources the quality of legal services for indigent criminal defendants in Jones County is destined to improve.

New York City Seeks Bids To Assume Part of the New York Legal Aid Society's Caseload

In an effort to secure an "alternative to the primary defender," the City of New York issued an RFP for bids from non-profit and for-profit entities to provide representation to indigent criminal defendants in trial and appellate cases that otherwise would have been assigned to the New York Legal Aid Society. Proposals were due December 1, 1995 and awards will be announced January 17, 1996 for contracts that begin July 1, 1996.

The New York Legal Aid Society has been the primary provider of representation to indigent criminal defendants in New York City since 1966. The Society's Criminal Defense Division and Central Appeals Bureau handled almost 250,000 cases in FY 1995. The City's RFP seeks to take away over 20% of the Society's adult criminal defense work by bidding out over 50,000 trial cases: 10,000 cases in Brooklyn, the Bronx and Queens, 12,500 cases in Manhattan, and all of Legal Aid Society's cases in Staten Island, as well as 400 citywide appeals. The City has prohibited the Legal Aid Society from bidding on any of the work, which may be awarded to seven separate entities (five trial contracts and two appellate contracts).

The driving force for the RFP process appears to be Mayor Rudolph Giuliani's frustration with the Legal Aid Society following a four-day strike waged by the program's union lawyers in October 1994. An 11/14/95 New York Times article quotes the Mayor's criminal justice coordinator explaining that the mayor realized "that the city of New York found itself in a situation where its constitutionally mandated services were all in one basket." The City has not specified any price caps or ranges of prices for the services to be contracted out; it is not necessarily looking to underbid the Legal Aid Society. The City has acknowledged that the move to a new contract system could drive up the cost of indigent defense services.

The RFP amounts to the mayor's second rebuke to the Legal Aid Society for last fall's walkout. The City trimmed its appropriation to the Society for criminal defense by $13 million, forcing a reduction of

approximately 100 attorneys, primarily from middle and senior management, this past January. Despite these reductions in staff, the Society increased its total intake and dispositions since the layoffs.

The competitive bidding plan announced in New York drew the concern of the American Bar Association and other legal authorities. Roberta Cooper Ramo, the President of the American Bar Association, sent a letter to Mayor Giuliani conveying the ABA's opposition to competitive bidding for indigent defense services, based on its review of such programs around the country. The ABA's research has found that competitive bid programs do not result in more efficient or better quality representation, and over time, costs for competitive bid programs often exceed those for institutional defender programs.

The RFP stands to jeopardize the work of a second institutional defender in New York City, Harlem's Neighborhood Defender Services (NDS). NDS is a private public defender group which serves the residents of Harlem and has operated in the past five years under a grant from New York City. The 12,500 cases that are up for bid in Manhattan under the RFP include 2,500 cases which originate in Harlem.

A close examination of the City's RFP reveals that it mirrors much of the ABA Standards for Criminal Justice; Providing Defense Services, Chapter 5. In this regard it is almost unique among RFP's put out by funding sources in recent years. The Spangenberg Group has been working with the Legal Aid Society since June 1995, assisting it in better utilizing its computerized information system to provide the most accurate caseload and cost information. This information points to the cost effectiveness, quality and productivity that characterize the Legal Aid Society today. It will be difficult for bidders to meet the quality requirements of the RFP at a price close to the Legal Aid Society's costs.

Rhode Island Supreme Court Interprets State Constitution as Providing Same Right to Counsel as U.S. Constitution

This November, in an advisory opinion, the Rhode Island Supreme Court formally overruled its 1971 decision in State v. Holliday, which held that the Rhode Island state constitution guarantees a defendant the right to counsel whenever he or she is charged with a crime which could potentially result in more than six months' imprisonment. Last May, Rhode Island Governor Lincoln Almond, who has pursued the matter of cutting back on indigent defense expenditures, asked the Rhode Island Supreme Court to issue an advisory opinion on whether the Rhode Island Constitution requires the state to provide legal representation to indigent criminal defendants if a judge determines that no jail time will result from a guilty finding.

The Rhode Island Supreme Court heard oral arguments on the issue in early October and this November issued its advisory opinion. In its four to one advisory opinion, the Rhode Island Supreme Court stated that, despite the fact that it had affirmed Holliday as recently as 1987, the Holliday decision was made in 1971, prior to the U.S. Supreme Court decision in Scott v. Illinois. The supreme court went on to conclude: "the United States Supreme Court's interpretation of the Sixth Amendment as a guarantee of a criminal defendant's right to counsel only when imprisonment is actually imposed represents the appropriate standard that should be applied under ... the Rhode Island Constitution."

The four justices in the majority rejected the positions of the one dissenting justice and amicus counsel who argued that the Governor's question was not properly the subject of an advisory opinion because the judges of the Rhode Island Supreme Court are "constitutionally obligated to give their advice only when the question propounded raises an issue regarding the constitutionality of existing statutes which require implementation by the Chief Executive, or when the question propounded has a bearing upon present constitutional duty awaiting performance by the Governor."

The November 1995 advisory opinion follows a related Supreme Court order made in the spring of 1994. The order addresses the Rhode Island Supreme Court's over expenditure of its appropriation for appointment of counsel for indigent litigants by more

than $300,000 during both FY 1993 and FY 1994. In this order Rhode Island Supreme Court Chief Justice Joseph Weisberger ordered lower court judges to stop paying court-appointed counsel with public funds for their representation of certain indigent litigants. The order focuses on situations involving conflicts or overload, where court-appointed counsel is involved. (The Rhode Island Public Defender handles most of the state's indigent criminal defense cases.) The Supreme Court Justice's order has four pertinent provisions: 1) indigent adult criminal defendants are not entitled to a court-appointed lawyer unless the penalty is likely to include a jail term; 2) indigent juvenile defendants facing misdemeanor charges in Family Court are not entitled to a public defender or a court-appointed lawyer unless the case is likely to result in a sentence at the Rhode Island Training School; 3) appointment of guardians ad litem from the private bar is no longer made, except on a pro bono basis; and 4) appointed counsel in cases involving parental rights and child abuse and neglect is no longer provided through payment of public funds.

In response to the order, the ACLU filed suit in federal court, alleging the chief justice's order violates the U.S. Constitution's guarantee of due process and equal protection.

Oklahoma Bar Association Adopts Strong Resolution in Support of Oklahoma Indigent Defense System

In November, the Oklahoma State Bar Association passed a strong resolution in support of Oklahoma's statewide indigent defense system.

The Oklahoma Indigent Defense System (OIDS), as evidenced dramatically by the resolution, is facing a crisis of constitutional dimension if it does not receive a substantial increase in funding. The text of the resolution as follows:

> BE IT RESOLVED by the House of Delegates that the Resolution published in the October 14 and 21, 1995 issues of the *Oklahoma Bar Journal* urging adequate funding for indigent defense by the State of Oklahoma be adopted as a part of the Oklahoma Bar Association Legislative Program. (Submitted by the OBA Legal Services Committee. Approval recommended by the Board of Governors.)
>
> WHEREAS, the Legislature has enacted House Bill 1659 into law, amending the provisions of the Oklahoma Post-Conviction Procedure Act, effective November 1, 1995, and the United States Congress is "defunding" all Capital Post-Conviction Defender Organizations in the United States, effective October 1, 1995, both of which cause a need for increased funding of the Capital Post-Conviction Division of the Oklahoma Indigent Defense System by the Legislature;
>
> WHEREAS, since 1992, the non-capital cases to which the Oklahoma Indigent Defense System has been appointed have increased, overall, 43.4% in all categories and, specifically, 33.4% in non-capital felony appointments, 97.8% in misdemeanor and traffic appointments, 94.0% in guardianship appointments, 36.5% in juvenile appointments, 24.4% in mental health appointments, and 70.0% in contempt appointments;
>
> WHEREAS, since 1992, because of the reduction in available funding and the increase in non-capital trial appointments, the average rate of compensation for all non-capital contract attorneys has decreased from $253.77 per case to $141.68 per case, a reduction of 44.3%, ranging from a contract low of $73.00 per case to a high of $300.00 per case in State Fiscal Year 1996 based on county caseload projections;
>
> WHEREAS, the Oklahoma Bar Association agrees with the Oklahoma Supreme Court's statement in *Lynch v. State*, 796 P.2d 1150 (Ok Cr. 1990), that, although lawyers have an ethical obligation to provide legal representation for indigents, the legal

obligation to do so rests with the State and, therefore, providing for appropriate and adequate funding for indigent representation is a matter for Legislative action;

BE IT, THEREFORE, RESOLVED that the adequate funding for indigent defense is essential and required and that the Governor and Legislature are strongly urged to expeditiously act to address the present underfunding of the Oklahoma Indigent Defense System and, further, in the future, to appropriately provide adequate funding to the Oklahoma Indigent Defense System and indigent defense in general to meet the requirements of the Oklahoma and United States Constitutions to provide adequate and competent legal service to indigents.

BE IT FURTHER RESOLVED that the Board of Governors of the Oklahoma Bar Association and the House of Delegates of the Oklahoma Bar Association support and encourage educational efforts by the Bar Association itself to make citizens and legislators aware of the indigent defense funding crisis and work toward an adequate solution. (Submitted by the OBA Public Defenders Committee. Approval recommended by the Board of Governors.) ❖

CASE NOTES

Counsel Filing Anders Brief Where Defendant Pleaded Guilty Must Provide Supplemental Information, Second Circuit Holds

Expanding on the decision of Anders v. California, 386 U.S. 738 (1967), where the U.S. Supreme Court set forth the requirements for court-appointed counsel seeking to withdraw from representation of an indigent defendant on direct appeal on the basis that the appeal is frivolous, the Second Circuit Court of Appeals in U.S. v. Ibrahim, 57 CrL 1478, held that where the direct appeal results from a guilty plea and the court-appointed attorney wishes to file an Anders brief, counsel must supplement the brief beyond the usual requirements set forth by the U.S. Supreme Court in Anders. An attorney filing an Anders brief must demonstrate that a conscientious examination of the record has been made and that there are no non-frivolous issues on which an appeal can be based.

However, as the Second Circuit pointed out, counsel's reason for withdrawal from an appeal involving a guilty plea may be the belief that invalidation of the plea agreement could result in an even harsher sentence. Thus, under Ibrahim, an Anders brief of a guilty plea case should always include a discussion regarding the guilty plea. If a defendant has not requested that counsel challenge the validity of the plea, an Anders brief should either: 1) state that counsel, having considered both the possible risks and benefits, believes that challenging the validity of the plea creates an unacceptable risk of adverse consequences or 2) discuss the validity of the plea and why there are no non-frivolous grounds for appeal. If the latter approach is taken, the attorney should provide the transcript of the plea allocution to the court.

Two Federal Habeas Cases Find Ineffective Assistance of Counsel

While Strickland v. Washington, 466 U.S. 668 (1984) sets a high standard for making successful ineffectiveness of counsel claims - a defendant must show first that counsel provided representation that was not reasonably effective and then must show that as a result of this deficient performance prejudice occurred - this hurdle is possible to overcome, as a pair of recent cases demonstrates. In Williams v. Washington, No. 3376 (July 6,1995), the Seventh Circuit affirmed a federal district court's decision to grant Emmaline Williams' federal habeas petition alleging ineffective assistance of trial counsel in violation of her Sixth Amendment rights. In 1986, both Emmaline and her husband Roy were convicted of crimes related to their alleged sexual abuse of their 13 year old daughter. The trial, in which both were represented by the same attorney, turned upon a confession signed by Roy which implicated Emmaline.

In affirming the district court's decision, the Seventh Circuit noted that trial counsel had failed to properly use as exculpatory evidence a letter written by the Williams' daughter which undermined her claims of sexual abuse, failed to interview witnesses, failed to impeach the daughter's reputation, failed to move to discover the state's evidence and failed to suppress Roy's confession.

In Genius v. Pepe, No. 94-1904, another federal habeas case, the First Circuit Court of Appeals also found that the facts surrounding petitioner's representation at trial met the Strickland standard for proving ineffective assistance of counsel. In 1979, petitioner had been convicted of murder for stabbing his girlfriend to death in Massachusetts. In his habeas petition, petitioner claimed that he was denied effective assistance of counsel because his attorney failed to pursue the insanity defense on his behalf. Defense counsel failed to challenge a court-appointed psychiatrist's conclusion that Genius was mentally deficient but not criminally irresponsible. The First Circuit rejected the argument that defense counsel's decisions to ignore the insanity defense were made for valid tactical purposes, and reversed the federal district court's decision.

California Federal District Court Issues Structural Injunction to Improve Mental Health Care in California State Prisons

In mid-September the U.S. District Court for the Eastern District of California found that the mental health care offered to prisoners at most of California's prisons is unconstitutional. In Coleman v. Wilson, 58CrL 1017, the district court approved a magistrate judge's findings regarding numerous problems at the Department of Corrections: inadequate processes for screening inmates for mental illness; understaffing of mental health care providers; lack of an effective method of employing competent mental health staff; delays and denials in accessing necessary medical attention; mismanagement of medication; involuntary prescription and administration of medication; deficiencies in medical records systems; and deliberate indifference, on the part of officials, to these problems. The district court issued an injunction requiring California corrections officials to develop plans, protocols and forms to address the problems. It also appointed a special master to supervise and oversee the progress of the Department of Corrections in remedying its mental health care problems.

Requiring Capital Defendant To Wear Shackles at Sentencing Phase of Case May Deny Due Process, Ninth Circuit Court of Appeals Rules

In a case of first impression, the U.S. Court of Appeals for the Ninth Circuit held that it is presumptively unconstitutional to require a capital defendant who has been convicted during the guilt phase of his trial to wear shackles for the penalty phase of his trial. In Duckett v. Godinez, a federal habeas case, petitioner was sentenced to life in prison for murdering his aunt and uncle. 58 CrL 1003. In his federal habeas petition, petitioner argued that the trial court's requiring him to wear prison attire and to appear in shackles during the sentencing phase of his trial created unconstitutional prejudice. The Court of Appeals for the Ninth Circuit, reversing the District Court, agreed with petitioner's argument regarding his appearance in shackles and remanded the case for determination of whether prejudice was created.

Citing Allen v. Illinois, 397 U.S. 337, 344 (1970), in which the U.S. Supreme Court stated that shackling detracts from the dignity and decorum of the proceeding and impedes the defendant's ability to communicate with his counsel, the Court of Appeals also noted its prior decision of Spain v. Rushen, 882 F.2d 712, 720-21 (1989), in which it pointed out that physical restraints "may confuse and embarrass the defendant, thereby impairing his mental facilities" and "may cause him pain." The court concluded that these rationales against shackling defendants apply to the sentencing phase of a trial just as they would to any other phase of a trial.

However, the court also stated that shackling is not per se unconstitutional and may be used when courtroom security and the just administration of the law are in jeopardy. In the Ninth Circuit, per Castillo v. Stainer, 983 F.2d 145, 147-48, a court must first

conclude that some measure is needed to maintain security within the courtroom and then pursue alternatives less restrictive than shackling. In this case, the trial court had not made these determinations.

Unlike shackling, the court stated, requiring a capital defendant to wear prison clothing during the penalty phase cannot be considered inherently prejudicial, as the jury already knows that the defendant has been deprived of his liberty. While the presumption of innocence functions to prohibit a capital defendant from wearing prison clothing during the guilt phase of the trial, if a capital defendant has been found guilty, no unconstitutional prejudice is created by requiring the defendant to wear prison clothing during the penalty phase of the proceedings.

U.S. Supreme Court Reverses Ninth Circuit Ruling That Prosecution's Failure to Disclose Key Witness' Failure of Polygraph Test Violates Brady

In a per curium opinion, the U.S. Supreme Court reversed a Ninth Circuit ruling in Wood v. Bartholomew, 34 F.3d 870 (1994), that the prosecution's failure to disclose that its key witness in habeas petitioner's murder trial did not pass a polygraph test violated Brady v. Maryland, 373 U.S. 83 (1963). Under Brady, a prosecutor is obliged to turn over material, favorable evidence to a defense attorney. The Ninth Circuit ruled that a violation of Brady had occurred, whether or not the witness' failure to pass the test would have been admissible at trial. The Ninth Circuit reasoned that if admissible, these results would have aided petitioner's attempts to impeach the key witness and would have created reasonable probability that petitioner would have been convicted of simple, rather than first degree murder. On the other hand, even if the test results were inadmissible, they could have prompted defense counsel to depose the witness and attempt to elicit an admission which could be have been used to impeach the witness. As a result, the Ninth Circuit concluded, failure to disclose the test results so impaired petitioner's ability to prepare and present his case as to undermine confidence in the outcome of the case.

Hair Comparison Testimony Inadmissible in Capital Trial Due to Lack of Scientific Reliability

In Williamson v. Reynolds, 58 CrL 1024, the U.S. District Court for the Eastern District of Oklahoma granted petitioner's habeas corpus petition, holding that expert testimony concerning the comparison of hair is inadmissible under Daubert v. Merrell Dow Pharmaceuticals Inc., 113 S.Ct. 2786 (1993). At trial, the physical evidence against petitioner consisted of semen found in the victim's vagina and hairs found at the crime scene. Petitioner was convicted of murder and sentenced to death.

Under Daubert, the trial judge must ensure that any scientific testimony or evidence admitted is reliable and trustworthy as well as relevant. The trial judge is required to determine whether the reasoning or methodology underlying the testimony is scientifically valid and capable of being applied to the disputed facts. Central to making this determination are two factors: whether the theory or technique can be and has been tested and whether the theory or technique has undergone peer review and publication. The court should also consider the known or potential rate of error. Finally, the trial judge may also exclude scientific testimony if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury.

Applying the above considerations to petitioner's case, the district court found that testimony concerning hair comparisons did not meet Daubert's standards for three reasons. First, there is a scarcity of scientific studies regarding the reliability of hair comparison testing, and the few studies the court reviewed found the testing to be unreliable. Second, the evaluation of hair evidence is subjective, so the weight the examiner gives to the presence or absence of a particular characteristic depends upon the examiner's subjective opinion. Other studies were similarly critical of the reliability of this method of testing. Further, published rates of error were as high as 30.4%. Third, the court pointed out, expert testimony in general is suspect because jurors may be impressed by an "aura of special reliability and

trustworthiness" which may cause undue prejudice, confuse the issues or mislead the jury.

Virginia Court of Appeals Accepts Use of Prior Uncounseled Convictions Resulting in Suspended Sentence in Later Charge of Driving Under the Influence After Having Been Convicted of a Like Offense

In Griswold v. Commonwealth, 58 CrL 1043, a majority of the Virginia Court of Appeals, sitting en banc, held that two prior uncounseled convictions for driving under the influence, for which the defendant received a suspended sentence and a suspended sentence with two days in jail, could be used at a later trial for driving under the influence after having been previously convicted of a like offense. The majority dismissed the argument that the previous convictions were invalid as applied to the later charge under Nichols v. U.S., 114 S.Ct. 1921 (1994). Nichols 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 the assistance of counsel.

The majority stated that both Nichols and Scott v. Illinois, 440 S.Ct. 367 (1979) make clear that actual imprisonment, and not the threat of imprisonment under a suspended sentence, triggers a defendant's right to counsel under the Sixth Amendment. Under Scott and Nichols, the majority reasoned, defendant's prior uncounseled convictions did not render the conviction invalid as applied in the present case.

Two justices dissented, arguing that the defendant's right to counsel was violated because the conviction was used as an element of the second offense, and not as a sentencing enhancer, as in Scott and Nichols. Two other justices dissented, arguing that the Sixth Amendment was violated by the later use of two prior uncounseled convictions.

Pennsylvania District Court Disqualifies Lawyer Who Refuses to Reveal Who is Paying His Fees

In U.S. v. Castro, 58 CrL 1041, the U.S. District Court for the Eastern District of Pennsylvania recently disqualified an attorney for refusing to reveal who was paying his fees. The attorney unsuccessfully argued that the matter of who was paying his fees was protected by the attorney-client privilege. The attorney represented three separate but related clients: Lebron, a prior client who was shot and killed after he began cooperating with authorities in a drug and gun trafficking investigation; the defendant; and M.L., who was imprisoned on drug charges and was also, according to the government, a suspect in Lebron's death. The government also suspected that M.L. was funding the defendant's representation. Based on these claims, the government argued that the attorney could not properly represent the defendant because, given his representation of M.L., he will not be motivated to counsel the defendant to mitigate his criminal liability by cooperating with the government.

In dismissing the attorney, the court cited its duty to assure that trials are conducted within the ethical standards of the legal profession. The court noted that if M.L. was in fact paying defendant's fees to the attorney, this would be a basis for a habeas corpus proceeding, should defendant be convicted. The court also stated that should the attorney reconsider his position and reveal who was paying his fees, it too would reconsider its position on the attorney's disqualification.

Pennsylvania Supreme Court Affirms Trial Court's Removal of Public Defender Who Reviewed Prosecution Witness' Privileged Psychiatric Records

In another Pennsylvania case, Commonwealth v. Johnson, 57 CrL 1501, the Pennsylvania Supreme Court recently held that a Pennsylvania trial court did not violate defendant's federal or state constitutional right to counsel by removing his public defender after the public defender had reviewed the confidential psychiatric records of a state's witness.

The defendant was arrested in 1993 for the 1981 murder of a woman. When the victim was discovered, her 2 1/2 year old son was found sleeping on his dead mother. For the next 12 years, the son received

psychiatric evaluation and treatment at four different institutions.

In 1993, the son provided information leading to defendant's arrest. Following his arrest, defendant's public defender sought to examine the son's psychiatric records. The trial court determined that the proper procedure was for the court to review the records in camera. Following the court's review, some records were released to defense counsel. The court ordered that other records be produced in court; instead, the records were mistakenly delivered to defense counsel, who read and photocopied the records.

When the son's child advocate realized what had happened, she argued that the son's psychiatric records were absolutely privileged, pursuant to Commonwealth v. Kennedy, 60 A.2d 1036 (Pa. 1992). The child advocate also argued that to protect the son's confidentiality the best recourse would be to remove defense counsel. The trial court agreed. Although the trial court recognized the right to counsel, it pointed out that neither the U.S. Constitution nor the Pennsylvania Constitution guarantee indigent defendants the right to counsel of their choice. The court considered less drastic measures to undo the damage of defense counsel's having reviewed the records, but concluded that removal of the public defender was the only viable solution.

The Pennsylvania Supreme Court, in affirming the district court's actions, stated: "It was defense counsel's blatant disregard for the court's unambiguous order and child witness's right to confidentiality which placed the fairness and integrity of appellant's trial in jeopardy."

Fourth Circuit Court of Appeals Enjoins State Trial in Double Jeopardy Case

The Fourth Circuit Court of Appeals, en banc, granted petitioners' request to enjoin their second trial while the U.S. District Court rules on the merits of petitioners' habeas corpus petition in which they claim their Fifth Amendment right not to be twice put in jeopardy for the same offense is violated by subjecting them to a second trial. Gillian v. Foster, 57 CrL 1463.

During the original trial of several defendants charged with murder, the judge declared a mistrial when the jury mistakenly received a group of photographs that had not been admitted into evidence. A police officer had used these photographs to refresh his recollection during the course of his testimony. While the defense attorney had not sought to have the photographs admitted, two other similar sets of photographs of the murder scene had been admitted. Upon learning that the jury had seen the set of photographs not admitted into evidence, the prosecution immediately moved for a mistrial. The trial judge declared a mistrial, despite defense counsel's offer to recall the police office who had originally referred to them and/or to seek to have the photographs admitted.

In granting the temporary restraining order, the Court of Appeals pointed out that in a jury trial jeopardy attaches when the jury is empaneled and sworn. Once jeopardy has attached, a defendant has a constitutional right to have the tribunal decide his guilt or innocence. Pursuant to Arizona v. Washington, 434 U.S. 497, 505 (1978), only when there is "manifest necessity" for a mistrial granted over defendant's objection will the double jeopardy bar be waived. The Court of Appeals found that none of the factors which characterize "manifest necessity" were present in the case before it. Inadmissible material was not presented to the jury. The jury would not have been prejudiced by having seen the photographs. Moreover, the judge refused to even inquire as to whether the jury had seen the photographs. Finally, the trial judge did not entertain either of defense counsel's proposed solutions to rectifying the situation.

In granting the temporary restraining order, the Court of Appeals also addressed the concerns expressed by some panel members that granting the injunction violated the principle of federalism. The court stated that while Younger v. Harris, 401 U.S. 37, 43 (1971) unquestionably "prohibits federal courts from routinely interfering with state criminal proceedings, Younger recognized that it may be appropriate for federal courts to do so when there has been a 'showing of bad faith, harassment, or any other

unusual circumstance that would call for equitable relief.'" (Emphasis by court.)

Ohio Supreme Court Imposes Affirmative Duty Upon Law Enforcement Officers Stopping a Motor Vehicle to Notify the Driver When Purpose of the Traffic Stop Has Ceased

The Ohio Supreme Court recently tightened up requirements for police officers who seek to conduct a search of a motor vehicle during a routine traffic stop. In State v. Robinette, 653 N.E.2d 695 (Ohio 1995), Robinette, who was indicted for a drug offense, sought to suppress evidence obtained during the search of his automobile which occurred during the course of a stop for a traffic violation. In 1992, Robinette was pulled over for speeding in a construction zone. The arresting officer, who was on the county drug interdiction patrol at the time, issued a warning to Robinette, as was his custom for speeding violators in this construction zone, then asked Robinette if he was carrying any contraband and if he could search Robinette's car. Robinette testified that he was so shocked at the request to search his car that he automatically replied "yes," as he believed he did not have the right to refuse the police officer. During the course of the search, the police officer found illegal drugs.

On direct appeal, the Court of Appeals held that the evidence should be suppressed, as Robinette remained detained when the deputy asked to search the car, and since the purpose of the traffic stop had been accomplished prior to that point, the continuing detention was unlawful and the ensuing consent was invalid. In affirming the Court of Appeals opinion, the Ohio Supreme Court focused on the facts that the police officer never intended to issue a speeding ticket to Robinette, and that the police officer nonetheless detained him for a reason unrelated to the original, constitutional stop. The court stated: "When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying the extension of the detention, the continued detention constitutes illegal seizure." 653 N.E.2d 695, 697-698. The court went on to state that "the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in consensual interrogation." Id. at 699.

New Mexico Supreme Court Affirms Lower Court's Ruling That Public Defender Must Represent Defendant Who Did Not Meet Public Defender Indigency Guidelines

We recently uncovered a 1993 New Mexico Supreme Court decision which held that when a court finds that application of the state Public Defender's indigency criteria would result in an "improper deprivation of counsel to a particular defendant," the court may depart from the state Public Defender's decision to deny representation.

In State v. Schnedar, 855 P.2d 562 (N.M. 1993), the New Mexico Supreme Court considered the case of Javier Gurrola, who was arrested and detained on drug charges. The Public Defender did not assign an attorney to represent the defendant because he did not meet the Public Defender's eligibility criteria. At the defendant's arraignment, the district court judge ordered the Public Defender to represent the defendant. The Public Defender, claiming that the trial court judge had exceeded his jurisdiction by ordering it to provide counsel to defendant, filed a Petition for Writ of Prohibition in the New Mexico Supreme Court.

In affirming the trial court's finding, the court reviewed the two legislative acts which create an administrative system for enforcing the constitutional right to counsel. The first, the Public Defender Act ("PDA"), directs the Public Defender to both provide legal representation to indigent criminal defendants and adopt indigency standards and guidelines. The second, the Indigent Defense Act ("IDA"), requires that the courts make the final decision on eligibility.

Adhering to the rule of statutory construction which favors harmonizing and construing together two statutes which address the same subject matter, the court stated that the Public Defender's standards for determining indigence are "the authoritative general guide." The New Mexico Supreme Court also stated that lower courts should ordinarily follow the Public Defender's standards and defer to its independent evaluation of whether a defendant is indigent. However, the court went on hold that in the unusual circumstance when a court finds that application of the state Public Defender's indigency criteria would result in an "improper deprivation of counsel to a particular defendant," the court may override the state Public Defender's decision to deny representation.

U.S. Supreme Court to Hear Selective Prosecution Case This Term

At its session on October 31, 1995, the U.S. Supreme Court granted review to U.S. v. Armstrong, 48 F.3d 1508, a Ninth Circuit case in which the Court of Appeals held that evidence of a "colorable basis" for believing that racially discriminatory selective prosecution has occurred (for example, evidence of significant racial disparity in race of those prosecuted for particular offenses) warrants discovery on defense claim of selective prosecution. The Court of Appeals also held that evidence that all 24 crack cases handled by the public defender's office during one year involved black defendants was sufficient to support the district court's discovery order and affirmed the district court's dismissal of the case based on the prosecutor's failure to comply with the discovery order.

In granting cert, the U.S. Supreme Court agreed to consider the following question: Did the court below err in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from government on a claim of selective prosecution, absent evidence that similarly situated persons of different race have not been prosecuted for that offense? ❖

WHAT'S NEW AT THE SPANGENBERG GROUP

Computer Consultant David Newhouse Joins The Spangenberg Group as Of Counsel

The Spangenberg Group is extremely pleased to announce that Attorney David J. Newhouse has joined our staff in an of counsel capacity. David will provide computer related services to clients of The Spangenberg Group. In the last year he has played a major role in both the Green v. Peters litigation (discussed below) and the New York Legal Aid Society's work (See page 8). For these two projects he has:

- Analyzed the computer databases of the Illinois Office of State Appellate Defender (First District), the Cook County Court of Appeals and the Cook County Public Defender (Appellate Division) and developed a computer model to project average processing times for class members in Green v. Peters.
- Analyzed the New York Legal Aid Society's computerized case tracking system to determine processing times, disposition rates, and productivity rates and cost.

David is also currently assisting with our weighted caseload studies for the public defender programs in Colorado and Marion County, Indiana (see page 18).

In the past five years David has also:

- Installed a computer network linking Vermont Legal Aid's six statewide offices using Lantastic, Paradox and WordPerfect.
- Provided extensive computer support to the Vermont Legislative Joint Fiscal Office.
- Provided expert computer consultation involving systems hardware and software maintenance, database management and electronic research for the Vermont Law School Environmental Law Center.

In addition to his computer expertise, David also brings to The Spangenberg Group a background in indigent defendant services. David is a graduate of Vermont Law School and is currently a part-time public defender who handles conflict cases in

Vermont. Through his background and skills, David will add a new dimension to The Spangenberg Group. He will be available to assist our clients by designing and implementing case tracking systems, installing networks, and providing indigent defense systems with technical information regarding both indigent defense and computer automation.

Bob Spangenberg Testifies in Federal Habeas Corpus Case Alleging Excessive Appellate Delay

This September, Bob Spangenberg provided expert testimony regarding appellate delay in a federal habeas corpus case filed in the U.S. District Court in the Northern District of Illinois (Chicago). Green v. Peters, filed by the MacArthur Justice Center, a private public interest legal organization in Chicago, alleges unconstitutional delay in processing direct appeals of indigent clients of the First District (Cook County) Office of the State Appellate Defender ("OSAD"). Petitioners claim that the delay violates both the Fourteenth Amendment's due process clause and analogous sections of the Illinois Constitution.

One of the most valuable legal precedents for Green v. Peters is an Oklahoma federal habeas corpus case, Harris v. Champion, which was filed in 1990. While the Tenth Circuit Court of Appeals has issued a number of relevant decisions regarding the right to a timely appeal in Harris v. Champion, it most recently held that if a prisoner's direct appeal of his conviction in the state court has been pending for two years without decision, a federal court may presume that the prisoner has been prejudiced by the delay. 56 CrL 1515 (1995).

The Green v. Peters lawsuit was filed on behalf of a class of indigent defendants who: 1) have been convicted of a non-capital felony; 2) are represented in their direct appeal by OSAD; 3) have been sentenced to serve no more than 20 years; and 4) in each instance, the appeal has been pending for one year or more with no opening brief filed on their behalf.

The situation in Cook County has worsened significantly since the summer of 1993, when the lawsuit was filed. At that time, the unbriefed backlog in OSAD's First District office was 420 cases; by the time of the trial the unbriefed backlog had skyrocketed to nearly 700. ("Unbriefed backlog" is defined as cases with records in the office that are ready to be briefed and cases assigned to the appellate defender for which records have not yet been received.) As the unbriefed backlog has grown so too has the delay in processing appeals. The First District Office has partially rebounded from the drastic budget cuts it suffered in fiscal years 1992 and 1993 (resulting in a 20% reduction in attorney staffing as well as a near elimination of support and investigative staffing). However, given the backlog, during the course of his testimony, Bob Spangenberg expressed grave concerns about the ability of the 19 appellate attorneys employed at the time of the trial to file direct appeal opening briefs for class members within a constitutional timeframe.

In addition to testimony from Bob Spangenberg, petitioner also put on the witness stand Theodore Gottfried, Appellate Defender of the statewide OSAD organization, Michael Pelletier, Deputy Director of OSAD's First District office, David Newhouse, a consultant to The Spangenberg Group, a number of incarcerated class members and a psychologist.

Petitioners expect a decision from Senior Judge Milton Shadur within the next couple of months.

Draft Indigency Screening and Cost Recovery Guidelines for the Louisiana Indigent Defender Board

The Louisiana Indigent Defender Board ("LIDB") recently retained The Spangenberg Group to provide technical assistance in carrying out its Louisiana Supreme Court directive to promulgate standards and guidelines on "uniform eligibility criteria for determining indigency and the ability of defendants to qualify for indigent defender representation at the district and state level; the screening of defendants to determine eligibility and to verify the accuracy of information provided by defendants; [and] cost recovery and recoupment to assure that those indigent defendants who have the current ability to contribute part of the cost of their legal defense be required to do so."

The LIDB was formed by Louisiana Supreme Court rule on July 1, 1994 to address indigent defense on a statewide basis. Prior to this time, each of Louisiana's 64 parishes maintained its own indigent defense system, and there was little uniformity among the parishes. This lack of uniformity was and still is problematic in terms of indigency screening. Recognizing this problem, the Louisiana Supreme Court specified that this is one of the areas which the LIDB must address. By the end of the calendar year, with the assistance of The Spangenberg Group, the LIDB will have draft indigency screening criteria. To address the supreme court's concern for cost recoupment, drawing on its experiences across the country, the Spangenberg Group will also provide the LIDB with proposed cost recoupment mechanisms.

Weighted Caseload Studies in Colorado and Marion County, Indiana

The Spangenberg Group is wrapping up a weighted caseload study for the Colorado State Public Defender which will result in caseload standards that are tailored to Colorado criminal law practice and based on actual public defender workload, rather than caseload counts alone.

To measure public defender workload, a time-based, case-tracking study is employed. This past summer, a sample of 70 public defenders with varying levels of experience, drawn from the program's 18 regional trial offices, tracked their time for 10 weeks on time sheets specially designed to capture both case-related and non-case related activities. The data from these time sheets are used to calculate the average amount of time required to complete each of the types of cases which public defenders handle. "Weights" are then developed for each of the various types of cases, taking into consideration their severity and complexity. Under such a system, a homicide will carry more weight than a lower-level felony, such as a non-violent property crime, which requires, on average, far less attorney time to reach disposition.

The Colorado State Public Defender has used a "felony equivalent" case weighting method since the early 1980s. Under this system, a felony, regardless of its complexity or severity, counts as one case, a juvenile delinquency case counts as three-quarters of a case, a misdemeanor counts as one-third of a case, etc. Budget requests are then made on staffing needs for the projected felony equivalent caseload. The method has a number of limitations. For example, it does not differentiate between various classes of felonies, account for necessary professional development or training time, or give consideration to necessary and time consuming travel and waiting time. The new caseload standards will address each of these considerations.

This caseweighting methodology has been successfully applied by The Spangenberg Group for public defender systems in several other jurisdictions, including Minnesota, Wisconsin, California (the Office of the State Public Defender) and New York City (the New York Legal Aid Society).

The Spangenberg Group also began a caseweighting study for the Marion County (Indianapolis) Public Defender this September. A sample of 30 part-time and full-time juvenile, misdemeanor and felony attorneys began an 11-week time study in December.

Orange County, California Indigent Defense System Studied

In November, The Spangenberg Group completed a review of the indigent defense system in Orange County, California, which underwent a dramatic restructuring in an effort to reduce costs after the county entered bankruptcy in December 1994. The Orange County Attorneys Association, which is the union for prosecuting attorneys and public defenders in Orange County, hired The Spangenberg Group to prepare an independent report with recommendations for improvement to the county's indigent defense program.

The bankruptcy forced more than $40 million in reductions to Orange County agencies mid-way into Fiscal Year 1995. The impact from the cuts on the county's indigent defense program was chaotic; a system that for over 15 years had served the low-income residents of Orange County in criminal proceedings fragmented into a factious, make-shift arrangement that left bitter feelings among the Public Defender Office, private lawyers, county supervisors and judges.

Since 1980, private lawyers have contracted with the county to represent indigent defendants that the public defender could not represent due to a conflict of interest or case overload. In an effort to cut costs following bankruptcy, the county board of supervisors eliminated the felony and misdemeanor contracts and restructured the public defender office so that it could represent co-defendants previously represented by the contractors. The total budget for indigent defense was cut in mid-year from $33.2 million to $29.5 million. The Alternate Defense Agency, which oversees the contract and hourly payments to private attorneys, absorbed the vast majority of the reduction.

Virtually overnight, felony and misdemeanor contractors were out of business midway into the fiscal year, while the Public Defender scrambled to establish and staff two entirely new offices, the Associate Defender and the Alternate Defender. The new segments allowed the public defender to represent up to three co-defendants without relying on the private contractors.

The Spangenberg Group conducted an exhaustive review of Orange County's indigent defense system following the restructuring, which included an independent analysis of the legality of segmentation, review of more than 20 reports that have been prepared on the county's indigent defense system over the years, and several site visits to meet with bar members, judges, court personnel, county officials, and public defender staff. The Group concluded that segmentation, despite its seeming expediency in the post-bankruptcy crisis, is not a defensible solution because: there is no current legal authority for segmentation of the public defender office; the segmentation causes possible conflict of interest problems; logistical problems impede the ability of the segmented offices to adequately respond to and serve the courts of Orange County; and the exclusion of the private bar threatens the loss of a historically strong ally that has been actively interested in and involved with the provision of indigent defense services.

The Spangenberg Group Members to Attend NLADA Annual Meeting in New Orleans

Bob Spangenberg, Marea Beeman, Catherine Schaefer and Meghan McCollum will all be attending the NLADA Annual Meeting in New Orleans from December 13 -16.

We would enjoy meeting all of our subscribers and members of your organization. We would be happy to arrange time to meet with you to discuss any problems, issues or innovative ideas that you might have. Please call us in advance of the 13th or look for us at the conference. We look forward to meeting you in New Orleans.

Reports and Studies of The Spangenberg Group Are Available Free of Charge to All Subscribers

In response to numerous requests, all studies and reports prepared and published by The Spangenberg Group are available free of charge, to subscribers to the *The Spangenberg Report*, upon request, subject to the approval of the client for whom the requested report was prepared. ❖

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We welcome your comments on this issue and would be pleased to entertain your suggestions for future articles. *The Spangenberg Report* is written and produced by members of The Spangenberg Group:

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