THE SPANGENBERG REPORT

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ILLINOIS FEDERAL DISTRICT COURT FINDS UNCONSTITUTIONAL DELAY IN PROCESSING DIRECT APPEALS IN FEDERAL HABEAS CLASS ACTION

Great news from Illinois! In our last issue, we reported on the September, 1995, hearing in Green v. Washington, 1996 U.S. Dist. (N.D. Ill.), No. 93 C-7300 2/23/96, a federal habeas corpus class action regarding appellate delay in the First Judicial Appellate District in Cook County (Chicago), Illinois. On February 23, 1996, Senior Judge Milton Shadur issued his opinion, which unequivocally finds in petitioner's favor.

The lawsuit, filed by the MacArthur Justice Center, a private public interest legal organization in Chicago, alleged unconstitutional delay in processing direct appeals of indigent clients of the First District (Cook County) Office of the State Appellate Defender (OSAD). The class certified by Judge Shadur consisted of indigent defendants who: 1) have been convicted of a non-capital felony; 2) are represented in their direct appeal by OSAD's First District office; 2) 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, or have been notified that it will be more than a year before their brief will be filed.

In addition to Locke Bowman, Kathy Banar and Dana Sukenik of the MacArthur Justice Center, counsel for this case included Randolph Stone of the Mandel Clinic of the University of Chicago Law School, and William Von Hoene and Edward Malone of Jenner & Block, whose pro bono work and other resources contributed substantially to the case's success.

In its opinion, the court adopted the position of the Tenth Circuit Court of Appeals in Harris v. Champion 48 F.3d 1127 (10th Cir. 1995), another federal habeas case involving appellate delay filed in Oklahoma in 1990. Judge Shadur's opinion adopted the Tenth Circuit's most recent holding in Harris, that if a petitioner's direct appeal of his conviction in state court has been pending for two years without decision, a federal court may presume the prisoner has been prejudiced by the delay. Applying the facts adduced at trial to this standard, Judge Shadur concluded: "Petitioners have established a clear violation of their constitutional rights and are entitled to an appropriate remedy for that violation."

Bob Spangenberg and David Newhouse, The Spangenberg Group's computer analyst, both testified at the trial. The court accepted Mr. Spangenberg's findings and expert opinions in a number of areas:

- OSAD's work standard constitutes a satisfactory measure of attorney performance;

- OSAD performance as appellate counsel was appropriate and OSAD bears no responsibility for the systemic delay;
- The delays in pending and new cases are excessive and inordinate because they exceed every known normative reference point; and
- Because of the delays at OSAD's First District office, approximately 45%, nearly one-half, of the members of the class will have completed their sentence before a decision on their appeal is made.

These opinions were strengthened by the testimony of Dean Norman Lefstein of the Indiana University School of Law at Indianapolis. Dean Lefstein's expert testimony focused on the ethical responsibilities of OSAD's attorneys when faced with excessive workload. As with Bob Spangenberg's testimony, the court accepted Dean Lefstein's expert opinions in a number of areas:

- No more than approximately 25 indigent felony appeals should be assigned to a single attorney in any calendar year;
- OSAD's method of assigning the priority for briefing cases on a first-in-first-out basis is entirely appropriate;
- "Fast-tracking" those cases that have "clearly winnable issues" poses the same conflict of interest problems as fast-tracking short-sentence cases; and
- It is not appropriate for an indigent appellate defender who is appointed to a larger number of cases than he or she can appropriately handle to seek to resolve the problem by filing Anders motions; Anders is not a docket management tool.

In his February 23, 1996 opinion, Judge Shadur did not specifically shape a remedy to address petitioner's constitutional violations. Instead, he ordered that on March 22, 1996, the Attorney General produce a list of all class members as of that date, and that on April 2, 1996, respondents produce a proposed remedy to petitioner's ongoing and worsening situation. According to the Wednesday, March 6, 1996 Chicago Daily Law Bulletin, there have been some positive signs from Illinois' Governor Edgar, whose Chief Legal Counsel stated, in response to Judge Shadur's opinion, that additional funding increases for the representation of non-capital defendants would be proposed in Governor Edgar's FY 1997 budget on the basis of further findings in Green v. Washington.

Upon request, we would be happy to provide any subscribers of The Spangenberg Report with a copy of Judge Shadur's opinion.❖

Allegheny County (Pittsburgh), Pennsylvania Public Defender Office Suffers Debilitating Budget and Personnel Cuts

Over the course of the last three months, the county-funded Allegheny County (Pittsburgh), Pennsylvania, public defender's office has had its 1996 budget reduced by 25%, its attorney staff cut by 30% and its investigative department eliminated, though the county claims it plans to replace the 10 fired investigators with a new staff. The impetus for these Draconian cuts? In last November's general election, two of the three democratic county commissioners were replaced by their republican rivals, who promised voters significant property tax rate reductions. When the two new commissioners took office in January, they slashed many county department budgets in order to fulfill their campaign promise to cut property taxes.

The public defender's office has been particularly hard hit. Prior to the cuts, the office had 62 part-time attorneys: 25 attorneys in the trial division, which handles felony and misdemeanor cases; eight appellate attorneys; five juvenile attorneys; seven preliminary hearings attorneys; four homicide attorneys; six mental health attorneys; and six probation attorneys. In addition, there were 35 full-time support positions, including 10 investigator positions.

Most of the firings took place at the end of January. At that time, 15 attorneys were let go, based on seniority, and the entire investigator staff was fired. In early March, positions for two additional attorneys were eliminated. The remaining public defenders have been shuffled around from court to court, which has served to exacerbate difficult working conditions.

The recent cuts and layoffs were targeted at one of the nation's most under-funded urban public defender offices. In August, 1995, at the request of the Allegheny County Public Defender's former director, Bob Spangenberg and Catherine Schaefer of The Spangenberg Group made a site visit to the Allegheny County Public Defender's office on behalf of the American Bar Association Bar Information Program. Among the findings and recommendations in their resulting November, 1995 report are the following:

- The Allegheny County Public Defender program is suffering seriously from years of neglect.
- Attorney salaries, which range from $24,888 to $32,243 per year, are miserably low and, in many cases, do not reflect what is truly a full-time job, despite the misnomer of "part-time."
- Office space is inadequate. The main office, which houses the public defender's administrators, investigators, appellate attorneys, preliminary hearing attorneys, and other division supervisors, is one mile from the courthouse. The suite of two offices in the courthouse, for 25 trial attorneys, is so small that it would be impossible for all 25 trial attorneys to meet, let alone work at once in the office.
- The budget of the Allegheny County Public Defender is significantly less than that of other public defenders in counties of comparable size around the country.
- Staffing decisions must be made with the approval of the County commissioners, and, in many cases, these decisions are tainted by patronage concerns. The Director does not have the ability to independently make personnel decisions based on merit.

In the face of these serious threats to the delivery of indigent defense services in Allegheny County, the judiciary's response has been swift and supportive of the public defender. Days after the cutback plans were announced, 13 of the 15 criminal court judges in Allegheny County attended a meeting with the county solicitor where, it is reported, they expressed concern about the cuts. It was further reported that Robert Dauer, president judge of the Allegheny County Courts, has maintained that the criminal court judges will not hesitate to utilize (more costly) court-appointed counsel. Common Pleas Judge David Cashman has also been a vocal critic of both the cuts and the conflict created by the County Solicitor's office's involvement in the day-to-day operations of the public defender's office. In a February 29, 1996 letter to state representative Greg Fajt, Judge Cashman proposed that Pennsylvania's Public Defender Act be amended to prohibit future involvement by the County Solicitor's Office in the activities of the public defender's office. On the same day, he also wrote to the recently appointed assistant county solicitor to express his concerns about the conflicts created by the assistant county solicitor's involvement in the running of the public defender office.

The public defender's union has also offered strong support for the attorneys whose positions were eliminated. Last December, Allegheny County's public defenders and assistant district attorneys voted to join the United Steelworkers of America. In response to the recent events, in which many of those attorneys fired were also active in the union drive, the union filed an unfair labor practices complaint against the county for bargaining in bad faith and for firing the 15 attorneys. ❖

Trials and Tribulations: An Update on Capital Post Conviction Representation in Oklahoma

After a year of turbulence stemming from a series of setbacks, on April 1, 1996, the Oklahoma Capital Post Conviction Division received a supplemental appropriation to replace staff lost after the U.S. Congress voted to eliminate all funds for federal Post Conviction Death Penalty Organizations (PCDOs). The supplemental came on the heels of a study completed in March, 1996 by The Spangenberg Group, which analyzes the current status of capital post conviction representation for indigent defendants in Oklahoma. The report was conducted for the Oklahoma Indigent Defense System (OIDS) and

produced under a contract with the ABA Post Conviction Death Penalty Representation Project.

The report chronicled the events leading up to and following the U.S. Congress's elimination of funding for PCDOs in the 1995-96 legislative session. This move resulted in a 78% reduction in funding for the Capital Post Conviction Division of OIDS as of October 1, 1995, and a loss of seven of its nine attorneys.

In addition, as of November 1, 1995, a new measure enacted by the Oklahoma legislature, H.B. 1659, went into effect, which attempts to streamline the appellate process for convicted capital defendants by joining the direct appeal and state post conviction proceedings into a consolidated process. H.B. 1659 placed an enormous strain on the remaining two attorneys in the Capital Post Conviction Division.

The Oklahoma legislature did not provide any additional funds before April 1, 1996 either to compensate for the loss of federal funds, or as relief for the agency's increased workload resulting from requirements of H.B. 1659. In fact, the state legislature reduced the FY 96 budget for OIDS by 2.5% prior to the passage of H.B. 1659.

The Capital Post Conviction Division in Oklahoma is statutorily required to provide representation to indigent defendants pursuing state post conviction relief from a capital sentence. In addition, since 1989, the Division received federal funds as one of the country's 20 death penalty resource centers, or, as they were later called, post conviction defender organizations, to represent defendants pursuing federal habeas corpus claims challenging death sentences. The state of Oklahoma enjoyed substantial savings in funding capital post conviction representation during the years that it used federal funds for this state responsibility.

As a result of the elimination of federal funds, the Capital Post Conviction Division of the Oklahoma Indigent Defense System lost 15 of its former 19 staff members. This loss of staff was even more debilitating in the face of Oklahoma's new, expedited appeals process.

H.B. 1659, which went into effect on November 1, 1995, changes state post conviction capital law in Oklahoma by requiring that capital defendants file their state post conviction petition prior to affirmance on direct appeal. In cases where defendants have filed their original brief on direct appeal, and no application for post conviction representation had been filed in the Court of Criminal Appeals prior to November 1, 1995, the post conviction petition must be filed within 180 days from November 1, 1995.

In all other cases, after November 1, 1995, the defendant has 90 days from either the filing of the appellee's brief on direct appeal in the Court of Criminal Appeals or the filing of defendant's reply brief to file his post conviction petition in the Court of Criminal Appeals.

H.B. 1659 imposed a burden on OIDS's Capital Post Conviction Division that is impossible for just two attorneys to assume. On November 1, 1995, the office received over 40 new H.B. 1659 cases, all of which fall under the 180-day rule and thus must have the application for post conviction relief filed by April 29, 1996. These cases were additions to the Division's other cases that were pending on November 1, 1995, for a total of 91 cases.

On March 15, 1996, the Division's two remaining attorneys filed with the Court of Criminal Appeals an Application for Briefing Schedule, which contained two proposed schedules for filing post conviction petitions for their current cases. The first schedule was based on the reduced staff of two attorneys, and estimated that the application for the last of the Division's current caseload would be filed on December 31, 2007. The second schedule assumed that a supplemental appropriation would be granted -- which would allow previous staffing levels to be restored -- and estimated that the application for the last of the Division's current caseload would be filed on September 30, 1998.

Despite extensive efforts by the Division Chief of the Capital Post Conviction Division and the Executive Director of the Oklahoma Indigent Defense System to inform the Oklahoma legislature, judiciary and executive branch of the dire consequences

resulting from the loss of federal funds and the imposition of H.B. 1659, until recently there was no government response to the situation.

The supplemental recently passed for the Capital Post Conviction Division restores $240,000 to the Division for the period April 1 - June 30, 1996, and enables the Division to hire 15 new staff members, eight of whom will be attorneys, immediately. The proposed FY 97 budget provides a $1,000,000 increase in funds for the Division over what was provided by the state in FY 96.

While the restoration of staff is welcomed by the Division, the pressures of H.B. 1659 will continue for the agency. In the same Act granting a $240,000 supplemental to the Capital Post Conviction Division, the Governor vetoed a $120,000 appropriation passed by the legislature to accommodate increased appeals caseloads imposed on OIDS under H.B. 1659. Further, the supplemental benefits the Capital Post Conviction Division only, while other divisions of OIDS, particularly the Non-Capital Trial Division, continue to suffer from serious under-funding. In FY 1996, the average cost per non-capital trial case was $141.44, ranging from a high of $300 per case in some counties to a low of $73.55 in others.

The Spangenberg Group's report for the Oklahoma Indigent Defense System was produced after Robert Spangenberg and Marea Beeman spent two and one-half days in Oklahoma in September, 1995, talking to individuals in the legislature, executive branch and judiciary who have an ability to help ameliorate the crisis. The report details this visit, provides an overview of the history of under-funding for indigent defense in Oklahoma, and chronicles all of the meetings, letters and legal steps taken in response to the crisis affecting the Capital Post Conviction Division. ❖

NEWS FROM AROUND THE NATION

Massachusetts' Committee for Public Counsel Services Audit Report is Issued

In February, 1996, the C.P.A. firm of Daniel Dennis & Company issued its review of The Committee for Public Counsel Services (CPCS), Massachusetts' public defender agency. The study, conducted pursuant to a 1994 legislative mandate, addressed the effectiveness, operation, management and fiscal affairs of CPCS. The system in Massachusetts relies primarily upon private court-appointed attorneys to represent indigent parties. In fact, private attorneys represent over 90% of CPCS' clients. The balance of the caseload, which is generally comprised of the more complicated felony cases, is handled by CPCS attorneys.

In FY 1995, the agency's budget was $63 million; of this, 81% consisted of payments for private attorneys (overseen by CPCS), and other indigent defense court costs approved by the courts.

Among the findings and recommendations the auditors made in their executive summary are the following:

- The organization generally is operating efficiently and effectively;
- The inconsistent definitions of "case" used by different parties (the courts, court-appointed attorneys and CPCS attorneys) make data analysis and comparison extremely difficult;
- CPCS' structural organization should be re-evaluated to consolidate administrative and financial operations;
- CPCS' computer system needs improvement;
- An inherent weakness exists in the system of control over the payment of bills submitted by private attorneys;
- CPCS is taking steps to improve its bill-paying operations;
- The policies and procedures concerning both recovery of overpayments to and discipline for over-billing by private attorneys need improvement;
- CPCS attorneys should be required to maintain time sheets; and

- The quality of representation generally provided by CPCS staff attorneys appears to be somewhat higher than the quality of representation generally provided by private court-appointed attorneys.

At this time, it is unclear how the Massachusetts legislature will make use of this report. ❖

New York City Poised to Contract with Three New Organizations

The Giuliani Administration in New York City recently reached preliminary agreement to enter into two-year contracts with three newly formed public defender organizations to handle criminal trial and appellate cases that previously would have been assigned to the New York Legal Aid Society's Criminal Defense Division (CDD) and Criminal Appeals Bureau (CAB). The three new groups -- the Brooklyn Defender Services, the Queens Law Associates, and the Appellate Advocates --are led by former Legal Aid Society supervisors. If the contracts are finalized, the groups will begin accepting cases on July 1, 1996.

The City of New York issued an RFP in October 1995 seeking 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 handled by the New York Legal Aid Society. The RFP solicited contractors to handle 10,000 trial cases in Brooklyn, the Bronx and Queens; 12,500 trial cases in Manhattan; all trial cases in Staten Island; and 400 appeals citywide, for each year of the two-year contracts. The RFP sought seven separate entities: one trial provider for each of the City's five boroughs and one appellate provider for each of the two appellate divisions. The three providers were selected to handle trial cases in Brooklyn and Queens and appeals in the second department of the Court of Appeals. Apparently the City did not receive acceptable bids for trial work in the Bronx, Staten Island or Manhattan, or for appeals in the first department of the Court of Appeals.

From June 1995 to February 1996, Robert Spangenberg conducted an extensive, computerized review of staffing, caseload, expenditure and efficiency of CDD and CAB. Based on this analysis he was able to prepare a projection of funding and staffing necessary for contractor organizations to fulfill the Queens and Brooklyn trial contracts, as well as the appellate contract, according to the specifications of

the RFP. It appears from review of the proposed plans that the contractors failed to thoroughly consider two critical factors. First, the organizations propose to begin with full staffing on day one of the contracts, despite the fact that it will take several months before the programs reach their full intake level. Second, the organizations failed to consider that after the two-year contract period is up, there will be months, and in the case of appeals, years, beyond that period in which the organizations will have open and active cases still pending from the two-year period. It appears there will be no additional funds to complete these cases beyond the two years, even if the contracts are renewed.

Mr. Spangenberg's analysis showed that if the three contracts are signed it will cost the City several million dollars more to complete the work compared to the current costs of the Society. Additional procedures are required by the City Comptroller and the City Council before the contracts can be signed.

Look for more details on the situation in the next edition of The Spangenberg Report. ❖

Nebraska Commission on Public Advocacy Names Chief Counsel

The Nebraska Commission on Public Advocacy, which was created in 1995, has appointed James R. Mowbray, from Lincoln, Nebraska, as its Chief Counsel. (See Volume II, Issue 1 of The Spangenberg Report for history of the Commission's formation.)

Mowbray assumed the role of Chief Counsel in February following 12 years in private practice. His current responsibilities include hiring staff both from state funds and from a federal Edward Byrne Memorial grant awarded to the Commission to represent trial and appellate clients in serious felony and drug cases. As a veteran criminal defense practitioner with capital case experience, Mowbray intends to remain involved in casework as Chief Counsel of the Commission. Administrative duties, however, should keep him preoccupied in the immediate future. ❖

New Mexico Public Defender Department Gets 25% Funding Increase

The New Mexico State Public Defender Department has just received a $1 million supplement to this year's budget to assure contract attorneys throughout the state will be paid through June 30th. In addition, the Department will receive another $4 million for FY 97. The $5 million provides a 25% increase over the FY 96 budget of $15 million.

The increase is welcome news to the Public Defender Department, which has suffered from high staff turnover in recent years, attributed, in part, to high caseloads and a shortage of support staff. Public defender staff attorneys working in the Albuquerque handle almost 700 cases apiece each year. In developing its 1997 budget request, the Department estimated it would need 22 additional full-time lawyers in order to comply with National Advisory Commission caseload standards of 150 felonies per attorney per year; or 200 juvenile cases per attorney per year; or 200 mental commitments per attorney per year; or 400 misdemeanors per attorney per year; or 25 appeals per attorney per year.

The increase in funds to pay contract attorneys was an immediate need: payments to contract attorneys increased 29% in the past year alone. In FY 1994, the Department ran out of money to pay contract attorneys two months before the close of the year.

In addition, the rates of compensation for contract attorneys in New Mexico rank among the lowest in the country. Until recently, per case payments have totaled $325 for felonies and $150 for misdemeanor and juvenile cases. With the increase in funds for contract attorneys, the Department will be able to make modest increases to these rates: $500 for felonies and $250 for juvenile and misdemeanor cases.

The success of this effort would not have been possible without the substantial efforts of the New Mexico Bar Association's Task Force on Criminal Indigent Defense, led by its Chairman, Justice Gene E. Franchini of the New Mexico Supreme Court, and by Ms. Sarah M. Singleton, President of the State Bar of New Mexico. The Task Force has been meeting since

last summer to support the increase in funding for the State Public Defender Department.

Task force members met frequently with both the Executive and Legislative branches before and during the most recent legislative session. In working with both the Public Defender Department and the Task Force under a grant from the ABA's Bar Information Program, members of The Spangenberg Group have seen once again the strength of a broadly based and committed Task Force on Indigent Defense.

District Defender offices of the New Mexico Public Defender Department are located in six of the state's 13 Judicial Districts. Other staffed units which serve the entire state include a death penalty unit, an appellate defender, and a mental health unit. The Department contracts with attorneys to provide representation in all cases in those districts without staff offices and in cases which the district offices, the death penalty unit, or the appellate unit cannot handle due to a conflict of interest. ❖

Kansas Creates New Death Penalty Unit

On July 1, 1994, Kansas became the 37th state in the country to permit the imposition of the death penalty, and over the past year and a half, the state legislature has taken steps to provide funds for court-appointed counsel in capital cases. During their 1995 session, the Kansas state legislature appropriated $1.3 million for the creation of the State of Kansas Death Penalty Defense Unit of the Kansas Board of Indigent Defense. The unit, which was created on July 1, 1995, is headed by Ron Wurtz, who served as the Chief Public Defender for Cheyenne County from 1979 through 1994. In 1994, he stepped down as Cheyenne Public Defender to become the coordinator of the assigned counsel program for capital cases that preceded the creation of the Death Penalty Defense Unit. In this position, Mr. Wurtz oversaw the assignment of capital cases to private attorneys by creating a list of qualified private attorneys and negotiating rates of compensation.

The Death Penalty Defense Unit is staffed by five attorneys (including the director), one investigator and two support staff. There is also a mitigation specialist who works on retainer. Two attorneys are assigned in all capital cases in Kansas. In addition to providing direct representation, the unit also provides consultation services and training for private attorneys handling capital cases. The director of the unit negotiates a fee for compensation in cases assigned to private counsel. In the five capital cases which have been assigned to private counsel since the law permitting imposition of the death penalty went into effect, compensation rates have ranged from $85 to $150 per hour, exclusive of costs for investigative, expert and other necessary support services. Payment for these services comes out of the unit's annual budget.

The FY 1996 budget for the State of Kansas Death Penalty Defense Unit is $1.2 million. ❖

North Carolina State Bar Association Designates a One-Year Grant for the Creation of the Center for Death Penalty Litigation

In October, 1995, the North Carolina State Bar Association designated a one-year, renewable grant to create the Center for Death Penalty Litigation, which focuses on capital trial consultation. The amount of the award is $250,000. The new center has replaced the state's PCDO, which has been winding down since the receipt of the state bar grant. The new Center for Death Penalty Litigation is staffed by three full-time attorneys, one part-time attorney, one investigator/mitigator and one secretary, all of whom worked for the former PCDO.

The primary emphasis of the Center for Death Penalty Litigation is providing trial consultation services. In addition, the center is also representing ten to twelve state post conviction petitioners (the hourly rate of $85 has been established by rule of the Administrative Office of the Courts,) and providing some consultative services to other appointed counsel handling state post conviction capital cases. ❖

Texas Slowly Moves Forward in Implementing Legislation to Provide Counsel to All Capital Post Conviction Petitioners

Texas' newly-created right to counsel in state post conviction proceedings in capital cases has existed for over eight months, but as of March, no attorneys have been appointed, and the list of eligible petitioners is growing. During the legislature's 1995 session, Texas joined the ranks of most of the 38 states which permit imposition of the death penalty, by creating a state right to counsel for state post conviction representation in capital cases. Under Murray v. Giarratano, 109 S.Ct. 2765 (1989), the U.S. Supreme Court held that there is no Fourteenth Amendment right to counsel for assistance in state post conviction capital proceedings. However, most states have created such a right under state law.

Texas' Death Penalty Counsel Act, effective September 1, 1995, "establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death." The new law was passed with a primary purpose of expediting the capital appeals process, and the legislation's time requirements attempt to do just that: the appointed state habeas lawyer must file an application for a writ of habeas corpus within 45 days after the state answers the defendant's direct appeal petition. If an applicant who was convicted before September 1, 1995, does not have an original application for a writ of habeas corpus pending on September 1, 1995, and has not previously filed an application, the applicant's original application must be filed not later than the 180th day after the date the court criminal appeals appoints counsel, or not later than the 45th day after the date the appellee's original brief is due on direct appeal, whichever is later.

Under the new law, "competent" counsel is mandatory for indigent prisoners in state capital post conviction proceedings and each administrative judicial region of Texas must form a committee to adopt standards for the qualification of attorneys for appointment to all stages of death penalty cases. Additionally, the legislation provides that the court shall provide reasonable compensation to court-appointed attorneys and reasonable expenses of litigation.

The Texas Legislature appropriated $1.0 million each year, for FY 1996 and FY 1997, to fund the counsel provision. This appropriation has been criticized by many criminal defense attorneys in Texas as being insufficient to carry out the new legislation's mandate. Defense attorneys had originally asked for $2.5 million per year to fund attorneys' services under the new law.

Under the Death Penalty Counsel Act the Court of Criminal Appeals will administer the assigned counsel program and process payment vouchers. During the spring and summer of 1995, the Texas Court of Criminal Appeals' Advisory Committee on Senate Bill 440, made up of defense attorneys and state district judges along with representatives from the governor's and lieutenant governor's offices, worked on a plan for establishing a fee schedule and a panel of qualified attorneys. In late 1995, the Court of Criminal Appeals set the compensation rate at $100 per hour with a $7,500 cap on attorneys' fees and a $2,500 cap on expenses. If an attorney dedicates more than 75 hours to a case and wishes to be compensated for the additional time beyond the $100 per hour, $7,500 cap, he or she must seek and obtain permission from the Court of Criminal Appeals.

The 75-hour compensation cap is far below the average amount of time required to prepare a state post conviction petition, both in Texas and at the national level. In 1993, under a grant from the Texas Bar Foundation, The Spangenberg Group conducted a study of representation in capital cases in Texas. This report included information on The Spangenberg Group's 1993 national survey on behalf of the ABA Post Conviction Death Penalty Representation Project, the amount of time private attorneys devoted to state post conviction representation in capital cases: the median number was 665 hours. The Spangenberg Group's study also included a survey of private attorneys in Texas who had represented a defendant in a capital case in Texas in the past five years. Thirty-three attorneys indicated that they had represented 44

individual defendants during this period of time, and they reported that the median number of hours devoted to state post conviction representation in capital cases in Texas was 350. Finally, in the fall of 1992 the Texas Resource Center conducted a survey in which it asked the same question. This survey revealed that the median number of hours devoted to state post conviction representation in capital cases in Texas was 400.

After establishing its compensation guidelines, the Court of Criminal Appeals sent qualification questionnaires, along with compensation information, to approximately 3,000 criminal practitioners in Texas. According to the Court of Criminal Appeals' Chief Deputy Clerk, as of March, 1996, the Court has received just 50 formal applications to become a panel member.

The implementation of the Death Penalty Counsel Act has been further slowed down by two separate challenges to the legislation's constitutionality which are presently pending on an expedited schedule at the Court of Criminal Appeals. Among the claims raised by the petitioners are that: the legislation violates the separation of powers doctrine by limiting the number of state habeas petitions a death row prisoner may file; the legislation violates the Texas Constitution's habeas corpus provision; the legislation is improperly retroactive; and the legislation violates the Equal Protection Clause of the Texas Constitution by applying only to capital petitioners. Petitioners also claim that the legislation denies capital petitioners due process of law and effective assistance of counsel, and that it violates the open courts doctrine.

As of March, no appointments have been made and the Court of Criminal Appeals estimates that over 200 prisoners, including 175 prisoners convicted before Texas' new Death Penalty Counsel Act went into effect on September 1, 1995, are eligible for post conviction counsel. ❖

Florida's Capital Collateral Representative Receives Favorable Review

The latest saga in the Florida Capital Collateral Representative's effort to provide high quality representation to death row post conviction petitioners in the face of high caseloads and limited resources has ended with a largely positive report from former Florida Attorney General Robert Shevin. In June of 1995, Mike Minerva, Director of Florida's Capital Collateral Representative (CCR), the state's legislatively created and funded organization which handles state post conviction capital cases exclusively, filed a motion for relief from the Florida Supreme Court's one-year deadline (one year from denial of certiorari from affirmance on direct appeal in the Florida Supreme Court) for filing post conviction petitions in capital cases. At the same time, Mr. Minerva stopped designating individual staff counsel to represent death row inmates whose one-year statute of limitations had begun. In addition, as of March, 1996, there are 41 inmates for whom CCR is the statutorily authorized representative, but for whom CCR is not the attorney of record either because of conflict or because pro bono private attorneys are providing counsel.

This situation was precipitated in large measure by the Florida Supreme Court's 1994 affirmance of 46 new death penalty cases, which is twice the historical annual average. Mr. Minerva's June, 1995 motion claimed that CCR, which has a staff of 20 full-time attorneys, could not accept all of these cases into its caseload of 138 clients, because to do so would cause CCR staff attorneys to violate their ethical duty of providing effective assistance of counsel.

In August, 1995, Mr. Minerva supplemented his motion for relief after the Florida Volunteer Lawyers' Post Conviction Defender Organization, formerly known as the Volunteer Lawyers' Resource Center (VLRC) announced that because it was losing its federal funding, the representation of some or all of its 41 clients might be passed to CCR. VLRC's annual budget for 1995-96 was $1.5 million in federal funds. On March 1, 1996, VLRC closed its doors. While it was operating, VLRC recruited pro bono counsel from Florida and throughout the nation to handle state post conviction capital cases. VLRC's important complementary role was providing consultative

services to attorneys who volunteered to take on these extremely complex and time consuming cases.

The Attorney General initially opposed CCR's motion to extend the one-year filing deadline, claiming that it was not based on empirical data regarding attorney workload and that the Attorney General's office handled more cases with fewer attorneys.

Despite CCR's increasingly difficult situation, the Florida Supreme Court denied its motion for relief. In December, 1995, Mr. Minerva wrote a detailed letter to Florida Supreme Court Chief Justice Stephen Grimes informing the court that CCR would not be able to accept new appointments because to do so would violate CCR's attorneys' ethical obligation to provide effective assistance of counsel. In response, the Florida Supreme Court requested that Robert L. Shevin, a former Florida Attorney General and present senior partner at Strook & Strook & Lavan in Miami, "study the situation and the claims of the interested parties, and...prepare a report in the nature of a Special Master's Report." Specifically, he was asked to address two questions. First, is CCR capable of accepting the 40 new cases in which they had so far refused to designate counsel? And second, how should the State of Florida provide support to private counsel in the 41 cases that were previously assisted by the VLRC?

Mr. Shevin's review of CCR's situation included consultation with CCR employees as well as representatives from the Attorney General's office, the Florida Supreme Court and the Office of the Governor. Mr. Shevin also spoke with the chair of the House Criminal Justice Committee, the President of the Board of VLRC, criminal court judges, Bennett Brummer, Public Defender of the Eleventh Judicial Circuit, and Michael Millman, Executive Director of the California Appellate Project. In addition, Mr. Shevin reviewed numerous written materials, including the 1987 Caseload Workload Formula developed for CCR by The Spangenberg Group.

Mr. Shevin's comprehensive report makes the following recommendations:

- The Florida Legislature should adopt the Governor's recommended FY 1997 budget for CCR, which includes an increase of $730,000 for the creation of 14 new positions (six new staff attorneys, six new investigators and two new secretaries).

- CCR should be required to designate counsel in all 40 unassigned cases on an incremental schedule that allows a full 11 months to file motions for post conviction relief in individual cases.

- The Florida Legislature should provide additional, separate funding in the range of $750,000 to $1 million to create a VLRC-type program to handle the 41 former VLRC cases.

- The method of obtaining discovery at the state post conviction stage of the proceedings is inadequate, as an attorney must rely on Chapter 119, the public records act, to conduct discovery. Because this time-consuming and cumbersome method is at odds with the Florida Supreme Court's requirement that motions for state post conviction relief be filed within one year after the judgment and sentence become final, the Supreme Court should enact a rule of discovery applicable to these proceedings with expedited time schedules.

- For each case CCR should list, without argument, those issues that are clearly not dispositive but that CCR believes must be preserved as a matter of procedural formality.

- Because part of the delay in prosecuting motions for post conviction relief occurs at the trial court level, the Florida Supreme Court should adopt a rule of judicial administration requiring expedited processing of these motions.

- CCR, which is located in Tallahassee, but represents clients throughout the state, should establish two branch offices to reduce travel time and expense.

- The Florida Legislature should require CCR staff attorneys and investigators to keep contemporaneous time records that can be converted into computer-generated time reports. This will substantially assist in evaluating CCR's workload in the future for funding purposes.

The Florida Supreme Court has expressed support for Shevin's recommendations that CCR be

appropriated additional funds for both expanding its current staff and creating a new division to fill the void left by the dissolution of VLRC. The Governor has recommended a supplemental budget of $2.0 million for CCR which would provide for 12 additional attorneys, 12 investigators and seven support staff for a total of 30 new employees. If appropriated, CCR would open two branch offices, one in south Florida and one in central Florida.

The appropriation has been approved by the House and is currently pending in the Senate. ❖

Florida Public Defender Association Adopts New Funding Formula

In an attempt to distribute new state funds for public defense more fairly throughout Florida's 20 judicial circuits, the Florida Public Defender Association (FPDA) recently voted to abandon its long-standing "funding formula" and to create a new distribution formula. In February 1996, the FPDA presented to the Appropriations Committee of the Florida Legislature a new method of distributing new state funds among the 20 elected public defenders who represent the state's 20 judicial circuits for the 1996-1997 fiscal year. The previous FPDA funding formula, developed in 1983, was considered a model when it was created because it generated a legislative budget request based on each circuit public defender's workload. Over the past 12 years, however, budget requests that were viewed by some as inflated, and case-counting modifications to the formula have made legislators skeptical about the formula's validity as an accurate measure of public defenders' financial need. In fact, for several years, the Legislative Appropriations Committees have opted instead to fund the FPDA at 50% of the prosecuting attorneys' annual budget appropriation.

Funding inequities among the 20 public defender circuits existed before the implementation of the original funding formula, and were perpetuated under the formula. The original funding formula was adopted by the FPDA on the condition that only additional monies received over the previous year's state appropriation would be distributed according to the funding formula. The additional money appropriated since FY 1983 is referred to as "new workload money." Each of the circuits' funding levels were "held harmless" at their pre-1983 levels.

The result of this approach was that inequities that existed among public defender offices before 1983, when public defenders lobbied for their own appropriations, were not corrected under the new funding formula. Prior to the FPDA's adoption of the original funding formula, there was no direct relationship between circuits' workloads and budgets. Some circuits were better funded, in part, because some public defenders had more success in lobbying than others. Other circuits were severely under-funded because the counties in the circuit were poor. However, none of the circuits was adequately funded.

Work on developing a new funding formula for the FY 1997 budget came as a result of a contract between the FPDA and The Spangenberg Group. The FPDA commissioned a study from The Spangenberg Group in February, 1995, and specifically requested that we make recommendations regarding a new method of distributing the state funds, which make up the majority of each circuit public defender's budget. From the onset of the study, the FPDA acknowledged that funding inequities existed among individual judicial circuits and that while all circuit public defenders were under-funded, there were varying degrees of inadequate funding.

In September 1995, after The Spangenberg Group conducted extensive site work, visiting nearly 50 public defender offices, we recommended that for the 1996 legislative session, the FPDA concentrate on addressing the inequities by augmenting the budgets of those judicial circuits that need it most. For the long-term, The Spangenberg Group recommends that the FPDA develop a funding formula based upon a comprehensive case-weighting study.

In developing a new way to distribute funds, The Spangenberg Group examined statistics on crime, caseload, staffing and budget of all criminal justice agencies in the state to determine which factors most greatly affected the workload of public defenders in

Florida. These categories included data pertaining to population, crime rate, arrest rate, consumer price index, criminal county and circuit court filings, budgets for the Florida Public Defender Association and the Florida Prosecuting Attorneys Association, and the number of judges and public defender offices in each circuit. After careful consideration, The Spangenberg Group recommended to FPDA the following factors as the best indicators of a public defender's total workload: general population of the circuit; criminal court filings for each circuit; and the comparison of public defender and prosecution funding in each judicial circuit. The FPDA accepted these recommendations and added an additional factor: the consumer price index, to reflect the high cost of living in certain judicial circuits in Florida.

The Spangenberg Group solidly supports and commends the FPDA for the tremendous effort that was involved in the development of the FY 1997 distribution formula. More importantly, early response to the new distribution formula from legislative staff persons has been positive, and the new formula promises to be given more credence by the legislators who determine the FPDA's annual appropriation. ❖

Judy Clarke, Co-Counsel in Susan Smith Case, Donates Her Fee To the South Carolina Post Conviction Defender Organization

In an inspirational act of generosity, Judy Clarke, chief federal public defender in the eastern district of Washington state and NACDL President-Elect, recently donated to the South Carolina Post Conviction Defender Organization (PCDO) $82,944, the entire fee she earned for her representation of Susan Smith during her recent murder trial. Ms. Clarke was appointed as co-counsel in the Smith case in February 1995, and took an unpaid leave of absence from her federal public defender position to represent Smith in the highly publicized case. David Bruck of South Carolina, who specializes in death penalty case representation, also served as co-counsel.

When Ms. Clarke, who devoted over 1,000 hours to the case, submitted her voucher to Judge William Howard, in recognition of her excellent work, he set her compensation at $80 per hour in-court and $100 per hour out-of-court. South Carolina state law sets a normal hourly rate of $50 to $75 for court-appointed counsel in capital cases, but permits trial judges to award higher rates where appropriate.

According to John Blume, director of the PCDO, Ms. Clark's gift will be used to create a fellowship for recent law school graduates who will spend one year assisting in the representation of indigent South Carolina death row prisoners. ❖

Washington Appellate Indigent Defense Commission Introduces Bill to Create Office of Public Defense

The Appellate Indigent Defense Commission of the Supreme Court of Washington has filed a bill with the Washington State Legislature that would create an Office of Public Defense to oversee indigent appellate services funded by the state of Washington. The proposed legislation seeks to transfer the duties and functions pertaining to appellate indigent defense that are currently vested with the Supreme Court and the Administrator for the Courts to an independent agency of the judicial branch.

The Appellate Indigent Defense Commission was created by the Supreme Court of Washington in February 1995, and mandated to develop a comprehensive plan for the delivery of legal services to indigent defendants in the state appellate court system. Components of this plan include development of: indigency criteria; a schedule of reasonable compensation for attorneys appointed to represent indigent appellants; a method for selecting attorneys; a projected budget for payment of the attorneys each fiscal year; and recommendations to the Supreme Court for rules or procedures to implement the plan and a projected budget. The Commission's ten members are appointed through a process which includes the Chief Justice of the Supreme Court (three appointees, including the Commission chair), the Governor (two non-lawyer appointees), the Chair of the House Law and Justice Committee and the Chair of the Senate Law and Justice Committee (both

appoint a legislator), the Court of Appeals Executive Committee and the Washington Bar Association.

The Commission's proposed Office of Public Defense would be overseen by an advisory committee, whose members would be appointed in much the same fashion as are the Commission's members, except that the legislature would have four appointees rather than two. The Chair of the Appellate Indigent Defense Commission would be one of the members appointed by the Chief Justice to the advisory committee.

Creation of an Office of Public Defense would provide budgetary independence and protection from the Supreme Court for the administration of indigent appellate services. However, the proposed bill specifies that the office would not provide direct representation for clients. Appellate representation is provided by an appellate defender in one of the state's three appellate districts, while assigned counsel provide representation in the other two districts.

The Administrator for the Courts currently oversees payment to counsel appointed to represent indigent appellants. The AOC makes payments according to a fee schedule which specifies flat rates for most categories of appellate cases except for death penalty cases, in which counsel are paid on an hourly basis at $50/hour. ❖

Second Public Defender Operating in Maricopa County

In an effort to reduce the high cost of contract attorneys and improve the quality of representation, in April 1995 Maricopa County opened a second public defender office to handle serious felony cases and other felonies in which the Maricopa County Public Defender has a conflict of interest. Operating in Phoenix and staffed with 13 attorneys and 14 support staff, The Office of the Legal Defender (OLD) is designed to handle serious conflict cases in Maricopa County more effectively and cost efficiently than private, contract attorneys.

With the introduction of OLD in FY 1995, the county was able to eliminate 10 contracts for serious felonies under which private attorneys receive $8,000 a case and handle 10 cases a year.

Legal Defender for the office is Robert S. Briney, who previously served as deputy public defender with the Maricopa County Public Defender office. Briney has hired both experienced and newer attorneys, seven of whom do death penalty cases, first degree murder and major felonies, and six of whom do "regular" felonies. Support staff include investigators, experienced legal secretaries and death penalty mitigation specialists.

The attorneys handling regular felonies are expected to handle 150 cases per year. The office is currently exploring caseload standards for attorneys who handle capital cases. Many serious felony cases in Arizona start out as death penalty cases but by the time they reach trial have been reduced to life without parole, so the office is looking into developing standards that reflect this practice.

Maricopa County has been grappling with what to do with conflict of interest cases for several years as the number and costs of these cases have been steadily rising. The County has an extensive contracting system for serious felonies, other felonies, appeals and juvenile delinquency cases. In other conflict cases, such as mental health, private attorneys are appointed and paid for their work at an hourly rate.

Dependency cases in Maricopa County are handled by court-appointed attorneys who, up until July 1995, were paid on an hourly basis and now are paid under a contract system. Costs for dependency cases have skyrocketed in recent years, yet one possibility for helping to contain their costs - relying on public defenders to represent one of the parties to a dependency case - is not possible in Arizona. By law, public defenders in Arizona are precluded from participating in dependency cases. There is currently legislation pending that would modify the state's public defender enabling statute to allow public defenders to represent parties in dependency cases. If this law passes, the Office of the Legal Defender would possibly take on dependency cases as another area in which it can deliver a cost efficient service to the county and quality representation to its clients. ❖

ABA Report Finds Many Juvenile Defendants Go Unrepresented

Juvenile defendants charged with delinquent acts in the United States do not receive adequate legal representation, according to a report recently released by the American Bar Association. Many juveniles appear in court without counsel, or with a lawyer whose caseload makes effective representation impossible. This is particularly troubling, the report indicates, given the current trend toward more punitive sanctions for juvenile offenders.

"A Call for Justice: Access to Counsel and Quality of Representation in Delinquency Proceedings," is a national assessment of the current state of representation in juvenile courts, and an evaluation of training, support and other needs of juvenile defense practitioners. Based on a survey of hundreds of lawyers who represent juveniles, the report found that public defenders frequently handle more than 500 cases each year, 300 of which are juvenile cases. The report documented several sites where children met their lawyers for the first time as they sat down at counsel table in detention hearings. At the same time, "A Call for Justice" notes, juvenile offenders today face harsher consequences, including longer sentences, mandatory minimum sentences and time in adult jail or prison, making the need for qualified juvenile court lawyers even more urgent. Yet another disturbing finding by the report is that appeals are rarely taken by juvenile attorneys.

The report attributes the poor representation provided juveniles to numerous factors. In addition to large caseloads, many defender offices suffer from under-funding, low morale, high turnover, low salaries, and low status. Many public defender programs treat juvenile court work as a stepping stone to adult felony trial work; the majority of juvenile public defenders remain in their jobs for less than two years. Compounding this serious problem is the lack of adequate training for these attorneys. The report found that 87% of all public defender programs surveyed do not have a budget for lawyers to attend training programs.

"A Call for Justice" was prepared jointly by the American Bar Association Criminal Justice Section's Juvenile Justice Center, and two advocacy organizations, the Youth Law Center in Washington and the Juvenile Law Center in Philadelphia. Funds were provided by the Office of Juvenile Justice and Delinquency Prevention. The project director was Patti Puritz.

For more information or to receive a copy of the report, contact the ABA Juvenile Justice Center at (202) 662-1515, 740 15th Street, N.W., Washington, DC 20005. ❖

CASE NOTES

Supreme Court of Arizona Strikes Down Yuma County Plan to Force Bar Members to Represent Indigent Defendants

The Arizona Supreme Court recently invalidated portions of a plan by Yuma County's presiding judge to provide indigent defense services through a mix of contract attorneys and attorneys appointed on a rotating basis from the private bar. Zarabia v. Bradshaw, 58 CrL 1439. Under the plan, court-appointed counsel were not required to have any criminal or trial experience and were compensated at the rate of $17.50 per hour.

Two of the petitioners in Zarabia were private court-appointed counsel. Both attorneys had been assigned to represent defendants charged with serious felonies. One of these attorneys had practiced law for 24 years, and his practice consisted of estate planning and other non-litigation work. He had no experience in criminal law and had never tried a jury case of any kind. The other attorney had limited experience in criminal law, but his current practice focused on civil transactional work. Both attorneys' requests that they be permitted to decline appointment were refused by the presiding judge.

A third petitioner was a contract attorney who, in reliance upon State v. Joe U. Smith, requested that the superior court refrain from assigning additional cases because her current caseload exceeded her ability to

provide competent representation. In response to the contract attorney's request, without holding a hearing, the attorney was assigned additional cases by the Yuma County chief judge. Under Joe U. Smith, the Arizona Supreme Court invalidated Mohave County's contracting system, which used as its criteria for selection the lowest annual fee bid, without considering the attorney's experience, ability or workload and without limiting the number of clients for which he is responsible, or the hours of work he must perform. 140 P.2d 355. In reaching its decision in Smith, the court quotes extensively from NLADA and ABA standards relating to caseloads. The court also cited with favor the national numerical standards first promulgated by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), courts, Standard 13.12 (1977) which states that the annual caseload of a (full-time) public defender should not exceed 150 felonies, or 400 misdemeanors, or 200 juvenile cases, or 200 mental commitments or 25 appeals.

As to the first two petitioners' claims, the Arizona Supreme Court found that this system of appointing private attorneys offends the requirements of A.R.S. §13-4012 which permits the use of assigned counsel for providing representation to indigent defendants. The court also found that the plan violates Rule 6.5 of the Arizona Rules of Criminal Procedure, which states that appointment of counsel to represent criminal defendants "shall be made in a manner fair and equitable to the members of the bar, taking into account the skill likely to be required in handling a particular case." The court vacated the appointment of one of the private attorneys; prior to the Arizona Supreme Court's decision, the other attorney had been removed from his case.

Because one of the private attorney's regular hourly rate was $150, and his overhead expenses were approximately $75 per hour, the court also found "obviously unreasonable" Yuma County's compensation schedule for court-appointed counsel: $17.50 for the first 24 hours spent on a case, and $50 per hour for every additional hour. The court ordered the Yuma County presiding judge to provide a "fair and equitable fee schedule for lawyers appointed from private practice" and stated: "The fee schedule shall consider all appropriate factors, including the bar's obligation to serve the public."

Finally, the court held that because the contract attorney had raised colorable questions concerning her ability to provide adequate representation given her large caseload, her request for relief should not have been summarily dismissed. The court ordered respondent to hold an evidentiary hearing to determine whether the contract attorney must withdraw from existing assignments or can properly accept new appointments. The court also ordered respondent to hold an evidentiary hearing for "any other appointed attorney who reasonably asserts that he or she will be unable to provide effective assistance of counsel to an indigent defendant because of a lack of adequate training or experience or because of currently existing professional commitments."

The court found: "Whatever appointment process a court adopts should reflect the principle that lawyers have the right to refuse to be drafted on a systemic basis and put to work at any price to satisfy a county's obligation to provide counsel to indigent defendants." ❖

Minnesota Supreme Court, Though Unable to Provide Relief For Lack of Injury in Fact, Is Sympathetic To Public Defender's Insufficient Funding

In April 1992, William Kennedy, Chief Public Defender for the Fourth Judicial District in Minnesota, filed a declaratory judgment action in the Hennepin County District Court, alleging that Minn. Stat. Sec. 611.27 (1994), which establishes the funding system for Minnesota's public defenders (and assigns that responsibility primarily to the state legislature), violates the constitutional rights of indigent defendants to effective assistance of counsel by failing to provide sufficient funds for the operation of his office. The district court found the statute unconstitutional, and, on appeal, the Minnesota Supreme Court reversed the lower court's opinion because Kennedy did not allege

sufficient facts upon which relief could be granted. Kennedy v. Carlson, 58 CrL 1537.

Chief Justice Keith wrote:

> Minnesota's judiciary has long recognized the importance of criminal defense counsel, and we are concerned that adequate funds be available for public defense services to indigent juveniles and adults. Under the current system, public defenders must rely almost entirely upon state funding for their budgets. This fact, combined with increasing numbers of juvenile and serious crimes, the revised juvenile criminal code, increased statutory penalties, a fluctuating economic climate and other individual pressures on state budgets, has dramatically increased the type and severity of cases handled by public defenders, and prevents Kennedy's office from providing an "ideal" level of public defense services. Nonetheless, we are constrained by Minnesota's case law and the facts before us in this case. Because Kennedy has failed to show an "injury in fact" to support his claim as required under Minnesota law, we must reject his request for judicial intervention.

Though Kennedy cited the caseloads of the attorneys in his office as far exceeding the Minnesota Board of Indigent Defense caseload standards, the court reversed the lower court for Kennedy's failure to allege any specific injury that resulted from either these excessive caseloads or other manifestations of the state's insufficient funding for his office. ❖

Alabama Court of Criminal Appeals Decides That Office Overhead Constitutes an "Expense Reasonably Incurred"

On September 3, 1993, the Alabama Court of Criminal Appeals issued its opinion in May v. State, Ala. 1993, Ct. of Crim. A., 9/3/93, in which it held that office overhead expenses constitute "expenses reasonably incurred" by appointed attorneys and are therefore reimbursable under sec. 13A-10-130, Code of Alabama. Mr. May, a court-appointed attorney, also claimed that Alabama's $1,000 statutory cap on attorneys fees was unconstitutional in that it violates the Due Process and Equal Protection clauses of the U.S. Constitution, and that it constitutes an unlawful taking of property without just compensation. The Court of Criminal Appeals did not rule on this latter claim, but urged the Alabama Supreme Court to grant certiorari to review the constitutionality of the cap as set by law.

Nearly two and a half years later, the case has finally been resolved, and the Court of Criminal Appeals' decision will stand.

Both parties appealed the Court of Criminal Appeals' decision, and the Alabama Supreme Court granted certiorari on both the office expense and $1,000 cap issues. Both parties filed briefs in the appeal, and in December, 1995, over two years after the Court of Appeals' decision, the Supreme Court of Alabama quashed its writ of certiorari, opting to let the Court of Criminal Appeals' decision stand. At this time, the rate at which office overhead will be set is uncertain.

These recent events have prompted a bill, to be considered during the 1996 legislative session, to increase compensation rates for court-appointed counsel. In February, the bill was unanimously approved by the Alabama Bar Commissioners. Under existing law, an attorney appointed to represent an indigent defendant, a juvenile, or certain other persons is compensated at the rate of $20 per hour for out-of-court time and $40 per hour for in-court time on a case. The total fee which may be paid to an attorney in a case is $1,000 except in a case involving a capital offense or a charge which carries a possible sentence of life without parole, where the attorney can be paid a maximum of $1,000 for time expended on out-of-court preparation, while there is no limit for in-court work.

Also under existing law, a portion of the docket fees in juvenile and criminal court is earmarked to pay attorney's fees, and fees collected are paid into a "Fair Trial Tax Fund."

This bill would rename the docket fee currently assessed the "Fair Trial Fee" and rename the fund the "Fair Trial Fee Fund." This bill would also increase docket fees in certain drug-related cases and earmark the proceeds to pay indigent attorney fees. Finally, this bill would provide that the rate of compensation for an attorney representing an indigent defendant, a

juvenile or certain other persons would be increased to $55 per hour for in-court and out-of-court time, and would set the following caps for fees: $3,500 for a Class A felony; $2,500 for a class B felony; $1,500 for a Class C felony. Under the bill, courts may approve for good cause shown an attorney's fee in excess of the maximum amount. There would be no maximum fee for cases involving a capital offense or a charge which carries a possible sentence of life without parole. Finally, the bill leaves intact the state's obligation to reimburse court-appointed counsel for "expenses reasonably incurred," which includes the obligation to compensate appointed counsel for office overhead expenses under the May decision.

Missouri Court of Appeals Finds Uncounseled Questioning by Social Worker in Jail Violates Fifth and Sixth Amendments

The Missouri Court of Appeals, Western District, recently found the questioning of a sex crime defendant by a social worker which took place in a jailhouse setting, and outside of the presence of his appointed counsel, violated the Fifth and Sixth Amendments. State (Missouri) v. Dixon, 58 CrL 1341.

The defendant had been charged with sexual abuse and sodomy, and was awaiting trial when he was interviewed by a social worker. Prior to the interview, the social worker read to the defendant a form which stated that the purpose of the interview was not to look for evidence of crime. However, she did not notify defense counsel of her desire to conduct the interview, nor did she advise defendant of his constitutional rights. During the course of the interview the defendant made inculpatory statements which were later admitted at trial. The state claimed that the social worker was acting as a private citizen, but the court did not agree. The court stated that the social worker in this case was not working independently of police and was obliged to share what she learned with them. Additionally, the defendant has been formally charged and was in custody at the time the social worker's interview occurred.

Sixth Circuit Court of Appeals Overturns Death Sentence for Habeas Petitioner Whose Lawyers Failed to Develop Any Mitigating Evidence

A majority of the U.S. Court of Appeals for the Sixth Circuit recently held that an Ohio prisoner's death sentence must be overturned on the ground that his trial counsel failed to develop any mitigating evidence that could have been used in his favor during the penalty phase of the trial. Glenn v. Tate, 58 CrL 1365. The Court of Appeals found that "virtually no information" was presented to the jury on the habeas petitioner's history, character, background, or, most importantly, "global brain damage" which doctors who examined the petitioner after his trial said he had suffered at birth. The fact that the evidence on the petitioner's guilt was very strong served to increase the importance of developing strong mitigating evidence, according to the court. However, counsel did almost nothing to prepare for the sentencing phase of the trial until the guilty verdict came in.

The court cited as particularly egregious trial counsel's failure to speak to petitioner's siblings, failure to examine his school or medical records, failure to speak to his probation officer, and failure to press for appointment of a medical expert. In addition, counsel failed to object to the state medical expert's evaluation of petitioner. The majority concluded it could not "have much confidence in the jury's weighing of the factors relevant" to the penalty question, "considering both the nature of the material presented to the jury that should not have been and the nature of the material presented to the jury that should have been."

Fifth Circuit Court of Appeals Finds Defendant, Whose Counsel Violated Batson Is Entitled to Relief

The Fifth Circuit Court of Appeals recently concluded that because defense counsel's improper exclusion of potential jurors on the basis of race by use of peremptory challenge violates Batson v. Kentucky, both defendant's conviction and that of his co-defendant must be reversed. U.S. v. Huey, 58 CrL 1491.

Defendants Huey, who is white, and Garcia, an Hispanic-American, were convicted of drug conspiracy and other offenses. The co-defendants were tried together. At the close of the voir dire, Huey's counsel moved to exclude six potential jurors, all of the African-Americans, and those with Hispanic surnames in the jury pool. Huey's counsel stated that the government would be playing tapes and offering transcripts that contained offensive racial slurs that were made by his client and argued that for this reason, no minority juror would be able to make an unbiased decision regarding defendant's guilt or innocence. The district court refused counsel's request.

When jury selection began, Huey's counsel used all five of his peremptory challenges to remove five African-Americans from the jury pool. Both the government's and Garcia's counsel objected to these challenges, arguing that they violated Batson v. Kentucky, 476 U.S. 79 (1986), which held that equal protection principles prohibit a prospective juror from being peremptorily challenged on the basis of race. The trial proceeded, and both defendants were convicted.

On appeal by both defendants, the Fifth Circuit agreed that Batson had been violated by counsel's peremptory challenges. The court found that both defendants' convictions must be reversed because of the trial court's failure to follow Batson's three-step inquiry as to whether race-neutral peremptory challenges had occurred. At trial, both the government's and Garcia's counsel made a prima facie showing that the proponent of a strike exercised it on the basis of a juror's racial background, which satisfied the first step of the inquiry. However, the court failed to examine whether the proponent of the strike failed to articulate a race-neutral explanation for removing the juror in question (the second step of the inquiry) or determine whether the opponent of the strike had proved purposeful discrimination (the third step). The court noted, "We are not unaware that there is some irony in reversing Huey's conviction given that it was his counsel who made the discriminatory strikes. We are convinced, however, that this result is consistent with the teachings of Batson and its progeny." ❖

Trial Courts Have Inherent Authority to Order Public Defender To Serve As Standby Counsel For Pro Se Capital Defendant

Both the Florida Supreme Court and the Maryland Court of Special Appeals recently ruled that trial courts have the inherent authority to appoint the public defender as standby counsel where the defendant in a capital case has elected to proceed pro se.

In Behr v. Bell, 58 CrL 1366, the Florida Supreme Court held that it is constitutionally permissible for a trial court to insist that a public defender serve as standby counsel for an indigent defendant who has elected to represent himself at trial. The focus of the court's ruling was its concern for threats to the "administration of justice," and stated that standby appointment of public defenders should be limited to cases where standby counsel will preserve orderly and timely proceedings.

In Harris v. State, 58 CrL 1336, the Maryland Court of Criminal Appeals' holding was more broadly rooted in its concern for "the prospect of a fractious, inefficient, and potentially unfair trial." The court stated that trial courts have the inherent authority to prohibit withdrawal of counsel in a criminal action, under Md. Rule 4-214(c), and, under U.S. v. Bertoli, 994 F.2d 1002 (CA 3 1993). The inherent authority including the ability to force private counsel, who had already entered an appearance in the case, to continue as standby counsel, even after being discharged by defendants. With this inherent authority established, the court reasoned, a trial court also has the inherent authority to order counsel to serve as standby counsel where an indigent capital defendant has elected to represent himself.

The court pointed out that its holding is based in part "on the determination that such counsel serves the interests of the court as well as that of the defendant" and that "absence of such counsel may indeed delay the trial - if not in its commencement, at least in its prosecution - or be prejudicial to a party, or not serve the interests of justice." The court also recognized the

potential problems created by appointing standby counsel: over participation by counsel; determination of when confidentiality attaches; "the extent to which standby counsel is obliged to blindly do the defendant's bidding;" and the extent to which the defendant may later assert a claim for post conviction relief based on the standby counsel's representation.

Despite these potential problems, in a case involving a capital defendant with a history of mental illness, where the state intends to call over 70 witnesses and the imprisoned defendant will be unable to interview any of them, the court reasoned that appointment of standby counsel would lessen the chance of prejudicial error occurring. ❖

Ninth Circuit Court of Appeals Holds that Reimbursement of Court-Appointed Counsel Fees is not a Valid Condition of Probation

Expanding on its recent decision in U.S. v. Eyler, 67 F.3d 1386 (CA9 1995), where it held that under federal law, a sentencing court may not make repayment of court-appointed attorneys' fees a condition of supervised release, a majority of the Ninth Circuit Court of Appeals recently held that reimbursement of CJA funds used to pay a defendant's court-appointed attorney is not a valid condition of probation, either. U.S. v. Lorenzi, 58 CrL 1289.

In Eyler, the Ninth Circuit indicated in its opinion, "The lawfulness of conditioning supervised release on repayment of attorneys fees appears to be an issue of first impression. However, some courts have addressed the issue in the context of probation. These courts have adopted conflicting positions based on deficient interpretations of the probation statute. Although supervised release and probation are often treated similarly, they are distinct in status.

The majority in Eyler reasoned that repayment has no reasonable nexus to the goals set forth in the CJA at 18 USC 3553(a)(1)(A)-(D) and that the deprivation of liberty is not reasonably necessary to accomplish the statutory purposes. Under Section 3563(b), which references Section 3553(a)(2), discretionary conditions of probation must involve only such deprivations of liberty or property as are reasonably necessary to accomplish the goals of sentencing, and must be reasonably related to one of the following objectives: (A) considering the nature and circumstances of the offense and the history and characteristics of the defendant; (B) affording adequate deterrence of criminal conduct; (C) protecting the public from further crimes by the defendant; and (D) providing the defendant with needed training, medical care or other correctional treatment.

The court in Eyler dismissed objectives (B), (C) and (D) as not being furthered by requiring reimbursement of court-appointed attorney fees, and concluded that the goals of objective (A) are not

advanced by making repayment a condition of probation.

The court in Lorenzi, also concluded that conditioning probation on repayment of attorneys' fees is not reasonably necessary to any legitimate sentencing objective because the court has less drastic means by which to enforce an order to repay attorneys' fees. ❖

California Supreme Court Refuses to Follow Recent U.S. Supreme Court Decision Limiting Collateral Attacks of Prior Convictions in Capital Cases

A majority of the California Supreme Court recently ruled that a capital defendant, charged with the death penalty because of a prior murder conviction, can collaterally attack the prior murder conviction at his capital trial as being flawed by fundamental constitutional errors. In so ruling, the court refused to follow Custis v. U.S., 114 S.Ct. 1732, a 1994 U.S. Supreme Court decision which limited collateral attacks to complete denial of counsel. People (California) v. Horton, 58 CrL 1300.

Defendant was convicted of murder and sentenced to death. One of the two special circumstances found by the jury was that he had previously been convicted of murder in Illinois. Mid-way through the capital trial in California, defendant made a motion to strike this special circumstance allegation, arguing that the Illinois conviction was tainted by numerous constitutional deficiencies, including violations of defendant's right to counsel, which rendered the Illinois conviction constitutionally invalid. Most egregiously, at the Illinois trial, after the case went to the jury, defendant's counsel asked that his co-defendant's attorney stand in for him when the jury returned their verdict. Instead of a verdict, the jury reported that it was going to declare a deadlock, and co-defendant's attorney objected, on behalf of both defendants, without the consent of either defendant or his absent counsel.

On appeal, the California Supreme Court considered the government's argument that it should follow Custis v. U.S., 114 S.Ct. 1732 (1994), a recent U.S. Supreme Court decision which limited collateral attacks to complete denial of counsel. However, the court distinguished defendant's capital conviction from Custis, in which after Custis' conviction of a federal firearm offense, the prosecutor sought to enhance his sentence under 18 USC 924(e)(1) by relying on three prior state felony convictions. Custis challenged two of his prior convictions on the ground that they violated his right to effective assistance of counsel and the constitutional rules on guilty pleas. The U.S. Supreme Court found that Custis' collateral attacks were inappropriate, holding that as a matter of federal law "a defendant has no such right...to collaterally attack prior convictions," with the one exception of convictions obtained in violation of the right to appointed counsel established in Gideon.

The California Supreme Court found that defendant's collateral attack were appropriately made: "In the present case, the nature of at least one of the alleged constitutional violations that occurred at defendant's Illinois trial - denial of the assistance of counsel at a critical stage of the trial - constitutes a serious infringement of a defendant's fundamental right to counsel under the Sixth Amendment...A conviction flawed by a constitutional violation of this magnitude is antithetical to the heightened need for reliability in the determination that death is the appropriate sentence." ❖

Nebraska Supreme Court Confirms Prior Convictions Used For Sentencing Enhancement May Be Challenged in Separate Proceedings

Two recent U.S. Supreme Court decisions regarding sentencing enhancement do not apply to Nebraska law which permits separate collateral attacks on prior convictions, a majority of the Nebraska Supreme Court held in State (Nebraska) v. LeGrand, 58 CrL 1299.

The defendant in this case asked the trial court to invalidate two of his earlier convictions for driving under the influence, arguing that neither of these two prior convictions showed that he entered his guilty plea freely, voluntarily, knowingly and intelligently. The trial court denied both petitions and the court of

appeals affirmed, stating that under Nichols v. U.S., 114 S.Ct. 1921 (1994) and Custis v. U.S., 114 S.Ct. 1732 (1994), a separate proceeding to attack prior state convictions is not constitutionally mandated. (Nichols held that certain uncounseled misdemeanor convictions may be used for enhancement, while Custis prohibits collateral attacks on prior convictions under the Armed Career Criminal Act.) On appeal to the Nebraska Supreme Court, defendant argued that the court of appeals erred in interpreting Nichols and Custis as authority to invalidate "separate proceedings" in Nebraska.

The Nebraska Supreme Court found that because states are "free to afford their citizens greater due process protection under their state constitution than is granted by the federal constitution" neither decision would affect its prior holding in State v. Wiltshire, 491 N.W.2d 324 (Neb. 1992), that separate proceedings for making collateral attacks are permissible. Moreover, the court found that neither Nichols nor Custis suggest that Nebraska separate proceedings are invalid. ❖

Vermont Supreme Court Adopts Holding in Nichols v. U.S.

A majority of the Vermont Supreme Court in State v. Porter, 58 CrL 1374, recently held that the right to counsel provided by the Vermont Constitution permits an uncounseled prior conviction for a misdemeanor, for which no prison time was imposed, to enhance the sentence for a later crime. In reaching this decision, the court adopted the position of the U.S. Supreme Court in Nichols v. U.S., 114 S.Ct. 1921 (1994), which held that an uncounseled prior misdemeanor conviction may be used to enhance a later sentence so long as no prison time was actually imposed on the prior conviction.

The majority was persuaded by the U.S. Supreme Court's reasoning in Nichols that "Enhancement statutes [such as]...recidivist statutes which are common place [sic] in state criminal laws, do not change the penalty imposed for the earlier conviction." The majority went on to state, "The legislature has seen fit to address the problem of repeat drunk-driving by enacting a recidivism statute that imposes enhanced penalties for each subsequent offense. The increased penalty for a subsequent offense does not repunish a defendant for the first offense, but rather punishes with greater severity the last offense committed by the defendant." Justice Johnson, dissenting, wrote, "The majority's insistence that defendant was punished for his most recent offense unfairly glosses over the defendant's serious constitutional claim: that his prior uncounseled conviction is not reliable enough to serve as a predicate for a sentence of imprisonment." ❖

Ninth Circuit Grants Habeas Relief to Death Row Petitioner for Trial Court's Failure to Give Jury Option Other Than Death Sentence or Acquittal

The Ninth Circuit Court of Appeals granted habeas relief to a death row petitioner for the trial court's failure to give the jury a "third option" between convicting defendant of a capital crime and acquitting him. Villafuerte v. Lewis, 58 CrL 1483. Defendant was charged with committing felony-murder in Arizona, where felony-murder has no lesser included offenses. All that was necessary for the jury to make the defendant death-eligible based on felony-murder was to find that he committed the crime of kidnapping and that the victim died. The jury was unable to find any lesser crime than kidnapping.

The court found that the facts of this case show that the jury was presented with precisely the type of "all or nothing" choice characterized by the U.S. Supreme Court in Beck v. Alabama, 447 U.S. 625 (1980), as being inconsistent with the Fourteenth Amendment's Due Process Clause. The Ninth Circuit stated that the trial court should have instructed the jury on unlawful imprisonment, the lesser included offense to kidnapping. The court noted that the jury could have found that, because of his drunkenness, the defendant had the mental state consistent with unlawful imprisonment rather than kidnapping and concluded, "Here, where because of the death of the victim, conviction of kidnapping automatically triggered the first-degree murder conviction, the only meaningful third choice was unlawful imprisonment." ❖

Court's Obligation To Grant Stay of Execution To Permit Counsel To Prepare Habeas Petition Ends Only When Defendant Has Intentionally Relinquished Right to Pursue Relief

A majority of the Third Circuit Court of Appeals recently interpreted the U.S. Supreme Court's admonition in McFarland v. Scott, 114 S.Ct. 2568 (1994), that a district court would not abuse its discretion in denying a stay of execution pending the presentation of a federal habeas petition to a "dilatory" petitioner who "inexcusably ignores [the] opportunity [for counsel and for that counsel meaningfully to research and present a defendant's habeas claims] and flouts the available processes..." 114 S.Ct. 2568, 2573. The Third Circuit stated that "under McFarland, a district court may properly refuse a stay to a dilatory defendant who has waived his right to counsel and meaningful habeas review and his state court remedies." The court went on to hold that "Since here, however, the defendant, even though dilatory did not waive his rights or remedies...the district court's decision to deny counsel was not consistent with a sound exercise of discretion." Duffey v. Lehman, 58 CrL 1369.

In Duffey, the petitioner waited six years after affirmance of his conviction on direct appeal, until soon after his death warrant was signed, before commencing state and federal post conviction proceedings. Pursuant to McFarland, Duffey requested that his execution be stayed to permit counsel to prepare a formal habeas petition. Applying a cause and prejudice standard for habeas petitioners with deficient claims, the district court held that Duffey was not entitled to a stay of execution pending habeas review, finding: that Duffey was aware that state and federal collateral review procedures are available to capital defendants; that Duffey knew that he no longer had legal representation and that a collateral challenge to his conviction and sentence was not being mounted on his behalf following the Pennsylvania Supreme Court's affirmance of his conviction and sentence; that Duffey was capable of deciding and had decided to delay the invocation of

the post conviction process in order to forestall the imposition of his sentence; and that the Resource Center (Duffey's counsel) had proceeded in this matter in good faith.

The majority of the Third Circuit found the district court's use of the cause and prejudice standard erroneous, saying the language of McFarland itself is the best source for setting the standard for denying a stay to a death row inmate. The court wrote: "We first observe that delay alone is not dispositive; the Court referred to denying a stay not just to a 'dilatory' defendant, but to a defendant who has also behaved in a particular manner and displayed a certain attitude with regard to the opportunity for counseled habeas review and available processes. The words the Court chose to describe the conduct it denounced - 'inexcusably ignore' and 'flout' - connote knowing disregard, which borders on contempt for and a turning away from, one's federal and state rights." The court concluded that based on this language, under McFarland, a defendant must actually waive ("intentionally relinquish or abandon") his or her right to pursue post conviction relief in order for a court to deny a petitioner's request for a stay of execution. ❖

Alabama Supreme Court Finds Admission of DNA Evidence Without Meeting State's Three-Pronged Test Can Never Be Harmless Error

Admission of DNA evidence without compliance with the state's established three-pronged test can never be dismissed as harmless error, a majority of the Alabama Supreme Court found recently. Ex Parte Hutchinson, 58 CrL 1277. In drawing this conclusion the court relied upon its 1991 decision in Ex Parte Perry, 586 So.2d 242 (Ala SupCt 1991) where it set forth a three-pronged test for admission of DNA evidence. First, the court must consider whether a theory generally accepted in the scientific community supports the conclusion that DNA forensic testing can produce reliable results. Second, the court must examine whether there are current techniques that are capable of producing reliable results in DNA identification and that are generally accepted in the scientific community. And third the court must consider whether, in the particular case, the testing laboratory performed generally accepted scientific techniques without error in the performance or interpretation of the tests.

In Hutchinson, defendant was convicted of a capital murder following the admission of the DNA evidence. The court found the trial court's admission of this evidence without consideration of the Perry examination could not be characterized as "harmless error" stating, "The prejudicial impact of both DNA 'matching' evidence and the DNA population frequency statistics creates such a possibility for prejudicial impact upon the jury that the admission of DNA evidence without complying with Perry can never be harmless error." ❖

Missouri Court of Appeals Finds That Appointed Counsel Committed Contempt by Leaving Courtroom Despite Trial Court's Order to Stay

The Missouri Court of Appeals recently found that a court-appointed attorney committed contempt when he left the courtroom, in direct contradiction to the judge's order, after the judge refused to grant counsel's request for a continuance. Picerno v. Mauer, 58 CrL 1492.

Picerno represented a defendant charged with sex crimes, kidnapping and other offenses. He had been appointed two months prior to the trial, after defendant's first and second attorneys had withdrawn. On two occasions prior to the trial date, Picerno requested continuances, and both times the court denied Picerno's requests. On the trial date, Picerno again requested a continuance, and once again, the trial court denied his motion and ordered the case to proceed. Picerno said he would not stay in the courtroom during the trial, and the judge stated that if he left, he would be arrested and held in contempt of court. Following further discussion Picerno left the courtroom and was later arrested for direct criminal contempt.

On appeal, Picerno argued that if he had honored the court's demand that he proceed with the trial this would have violated his ethical obligations to assure competent representation and protect his client's

constitutional rights. However, the court found that the trial judge's order was limited: that Picerno remain in the courtroom, not that he participate in the trial. The court found that counsel had willfully disobeyed the court's order, which both implied bad faith and violated his duties to obey judicial orders and uphold the legal process.

The case is now on petition for certiorari to the Missouri Supreme. ❖

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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