THE SPANGENBERG REPORT

Volume II, Issue 4

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1996 STATE LEGISLATIVE SESSIONS SCORECARD: Developments Affecting Indigent Defense

Introduction

The goal of *The Spangenberg Report*'s annual state legislative survey is to provide our readers with a synopsis of those measures, both enacted and failed, that will affect public defenders and indigent defense services across the nation in the coming fiscal year. For three weeks this summer, The Spangenberg Group conducted informal telephone interviews with public defenders, state court administrators, department of corrections representatives, state and local bar officials, legislators, and national organizations. The subjects covered in this year's survey include: public defenders' FY 1997 budgets, juvenile reform, stricter sentencing measures, prison expansion, indigent defense system changes, and the death penalty. The following report reflects the information provided by individuals in 49 of the 50 states. Because 1996 was an off-year for states that have biennial legislative sessions, some interviewees could only provide us with budget and statistical data. We thank all of you who took the time to speak with us. What follows is a summary of legislative action reported to us by the above respondents.

Overview

In 1992, 35 states faced budget deficits. Tough fiscal decisions produced serious strain on the justice system in many parts of the United States. Compounding the problem, revenue shortfalls hit the majority of states at the same time their constituents were demanding that political leaders become "tough on crime." The combination of a call for stricter sentencing reform, a national war on drugs, and serious fiscal constraints brought many states' courts and indigent defense systems to a crisis point.

By 1995, the National Association of State Budget Officers reported that the majority of states were ending their fiscal year with a budget surplus. These new surpluses reflected a startling 671% increase in additional funds over 1991 figures. With a combined $20.8 billion in surplus, one might expect state legislators to give priority to the needs of the justice system during the 1996 legislative sessions. However, although 12 states reported increases in FY 1997 public defender budgets, overall the courts and indigent defense services were once again funded at only a fraction of that provided to law enforcement and corrections. For example, the Missouri state legislature allocated a 20% increase over FY 1996 funding for the state public defender's office ($22,398,245). However, the same legislature allocated $290 million for 9,254 new prison beds. All together, 14 states allocated over $770 million to new prison construction.

Despite the financial recovery of most of the states, the National Association of Counties reports that the economic forecasts for counties are not as rosy. Burdened by many federal and state unfunded mandates, counties have not always been the beneficiaries of the states' economic good fortunes. On average, counties must provide 45% of all court, prosecution and public defense funding. As a result, many financially strapped counties have continued to under-fund their justice system.

Crime Rates

In April 1996, The U.S. Department of Justice's Bureau of Justice Statistics (BJS) released the results of the *National Crime Victimization Survey* for 1994. For the third year in a row the violent crime rate has remained "essentially unchanged." With many states adopting stricter sentencing reform measures in recent years, we were curious to see if the BJS results were consistent with the general perceptions held by those we interviewed. We took an informal poll of officials we spoke to in 26 states. A full 77% speculated the crime rate was down. Another 15% estimated that crime was up, and 8% thought the rate remained flat. Interestingly enough, out of those states where individuals reported that the crime rate had dropped, 50% of the respondents also declared that juvenile crime had risen significantly. Such a trend is consistent with the FBI's *Uniform Crime Rate* report. In a November 1995 press release, FBI Director Louis Freech stated that the report highlights an "ominous increase in juvenile crime."

State legislatures across the country responded to the noted increase in juvenile crime. In the 1995 Summer edition of *The Spangenberg Report*, we reported that ten states had passed juvenile reform legislation. This year an additional 16 states changed the way juvenile offenders are handled in the justice system. Moreover, half of those states that enacted reform measures in 1995 continued the activity in 1996. Additionally, large states like Michigan, New York and California have juvenile reform measures still pending.

Juvenile Reform: A Closer Look

Alabama, Idaho, Kentucky, Massachusetts, Nevada, North Carolina, Pennsylvania, Virginia and Wisconsin reportedly enacted the most dramatic changes in their juvenile laws. Virginia's Senate Bill 44, we were told, announces a new philosophical platform: public safety takes precedence over the protection of juvenile defendants. Further, the measure establishes a new category of Violent Juvenile Felonies for children 14 and under. Also, individuals 14 and over who have been adjudicated as delinquents are now treated as adults when charged with a felony. Despite its 52-page length, Virginia's reform is dwarfed by Wisconsin's juvenile reform package. Wisconsin's Act 77 reassesses the state's position on victims' rights, juvenile court jurisdiction, confidentiality of juvenile court proceedings, and corrective sanction programs. Kentucky created a new Department of Juvenile Justice to oversee detention, treatment, rehabilitation, probation and parole. This same legislation included a measure to build a new juvenile criminal correction facility and a measure to loosen the restrictions on opening juvenile records.

Juvenile reform in other states includes:

- Youths charged with both serious and lesser charges will have all of the charges sent to adult court (Alabama).
- Juveniles who have amassed 19 prior criminal record "points" will have the most severe adult-sentencing options available applied to them. Points are assessed based upon degree of prior criminal activities (North Carolina).
- Juveniles convicted of murder will face mandatory sentences of life in prison. Additionally, adult transfers are allowed for any juvenile with a prior criminal conviction or any juvenile who caused and/or threatened bodily harm (Massachusetts).
- Fifteen-year old juveniles with a prior serious crime conviction can be tried as adults when charged with using a deadly weapon in the act of committing a violent offense. Also, court proceedings/records for 14-and-older juveniles charged with crimes considered felonies at the adult level and for 12 and 13 year-old juveniles charged with serious crimes were opened.

Idaho took a more cautious approach to juvenile reform. Records of juveniles are exempt from disclosure unless the juvenile is 14 or older and the offense was a felony. Yet even in this case, the Idaho Supreme Court has ruled that the juvenile record may be subject to disclosure--the final decision is left to the presiding judge's discretion.

In California, 52 separate juvenile reform bills are being considered in this legislative session. They include:

- Seven bills defining new crimes, penalties and sentence enhancements for juveniles.
- Seven bills involving transfer proceedings: lowering the age of mandatory remand, setting up a matrix that determines automatic transfers based on age/type of offense/mitigating circumstances, and allowing prosecutors to decide in which court to try the offender.
- Six bills dealing with confidentiality: opening proceedings to the public, easing the exchange of information between agencies and law enforcement, and forbidding the sealing of records of juveniles tried for violent crimes.
- Three bills holding the parents liable for the crimes of their children.

The most notable defeat of juvenile reform legislation occurred in Arizona where a comprehensive series of changes were voted down. Governor Fife Symington is now preparing a juvenile reform initiative for the fall ballot. If passed, the initiative will repeal Article 6, section 15 of the Constitution of the State of Arizona, which gives the superior court exclusive original jurisdiction in all matters affecting dependent, neglected, incorrigible or delinquent children, or children accused of crime, under the age of 18 years. Judges may now suspend criminal prosecution of children at their discretion, following in camera examinations of juveniles accused of crimes. By eliminating this section of the Constitution, Governor Symington would not only hand over all juvenile reform decisions to the legislature and voting public through referendum questions but would also remove exclusive court jurisdiction over proceedings concerning abused and neglected children.

On January 1, 1996 Ohio implemented the changes required by juvenile reform measures enacted during its 1995 legislative session. The provisions were similar to the legislative measures passed in other states this year. Mandatory transfers are now required for juveniles 14 or older with one prior conviction. How has the application of these measures affected Ohio's juvenile justice system? The *Columbus Dispatch* reports that juveniles convicted as adults often spend less time in prison than juveniles sentenced under the old guidelines. The adult prison credits juveniles for the time they have already spent in custody--a credit not routinely handed out in juvenile court. More importantly, the *Dispatch* notes that "plea bargaining is more rampant in the adult system and kids are more likely to get a break from a naive jury than from a juvenile judge. There are no juries in juvenile court." This article also reports that juveniles in adult prisons are finding it harder to obtain service programs for substance abuse, anger management, and literacy that are readily available in juvenile facilities.

The Ohio legislative measures prohibit housing juveniles with hardened criminals in adult prisons. House Bill 1 stipulated that juveniles must be housed separately or, in the event of a shortage of space, only with 18-21 year old inmates.

New Responsibilities Added to Public Defenders

Several states this year added new responsibilities for their public defenders. In Alaska, caseloads may be significantly impacted with the passage of a new domestic violence act. This measure broadens the type of conduct that can be considered domestic violence and requires mandatory arrests of all perpetrators. The Georgia Indigent Defense Council has a new Mental Health Advocacy Division. Other states now require public defenders to:

- Represent serious youth offenders (Utah)
- Verify the financial information provided by their clients (Wisconsin)
- Represent clients charged under Megan's law (New Jersey, New York, Pennsylvania).

Illinois public defenders have concerns that the state's sexual offender notification laws will greatly impact their responsibilities. Though legislation does

not require it, some Illinois public defenders feel that if there is a challenge to the sex offenders notification act on constitutional grounds, the responsibility for representing these individuals will fall onto their offices. Such a lawsuit resulted in newly mandated public defender responsibilities in Kentucky. The ruling from M.K. v. Wallace requires that public defenders must now handle juvenile post-dispositional and post-conviction work. (However, $300,000 was added to their budget for these duties.) Similarly, Idaho public defenders are now required to represent in civil proceedings those parents or guardians who fail to pay child support and are subject to punitive jail time.

Last session's "Sexual Predator Law" has greatly impacted public defenders in several counties in California. Under the law, a petition can be filed to classify a convicted felon as a sexual predator. If a jury rules against the individual, the inmate is detained for two more years. Because there is no limit to the number of successive petitions which can be filed, a person found to be a sexual predator can conceivably remain in prison for the rest of his life. Although a lower court has ruled that the law is unconstitutional based upon ex post facto considerations, sexual predator petitions are still being filed on writ pending the appeal. The Los Angeles County public defender office currently has 30 sexual predator cases. Orange County has seven.

Arizona public defenders successfully pushed for legislation that would permit them to represent parties in dependency cases. It is anticipated that this may result in cost savings for counties, which until now had to rely on court-appointed or contract counsel to handle all dependency cases.

All of these additional duties arrive at a point in time when a third of our public defender respondents stated that their caseloads have risen since last year. Comparatively, only public defender respondents in two states felt that court appointments were significantly down.

The Continuing Movement Toward Stricter Sentencing

Two factors contributed in 1996 to fewer efforts to enact stricter sentencing reform. Besides being an off year for most biennial legislative sessions, many states enacted sweeping reforms in the prior two legislative sessions. Even so, Massachusetts, Michigan, New York and Rhode Island have substantial reforms still pending. Also, Missouri and Montana have authorized commissions to make recommendations for future sentencing reform. Additionally, several states did pass newsworthy reforms.

To begin with, many states expanded the list of capital crimes to include:

- Death during an aggravated rape (Louisiana)
- The murder of a child under 12 (Virginia)
- The murder of a women the defendant knows to be pregnant (Pennsylvania)
- Burning, torturing and/or mutilating a victim (Indiana)
- Drive-by-shootings (California)
- Death during an attempted rape (Oklahoma).

While bills to permit sentencing of persons convicted of first degree murder to life without parole were defeated in Wyoming, the legislature passed mandatory life without parole for first and second degree sex offenders. New legislation in Kansas provides for defendants convicted of second degree murder to receive a maximum sentence of life imprisonment. Additionally, Kansas law requires mandatory time in prison for second degree manslaughter convictions. The state of Alaska implemented a new three-strikes measure.

Ohio defined two new categories of felons: Repeat Violent Offenders and Major Drug Offenders. If a defendant is classified as either, a judge can add one to ten years onto the sentence above what is required by law. These felons also fall under Ohio's new "Super Penalty," which, in effect, abolishes parole. The prisoner must now serve the full length of his or her sentence with only one day per month of credited "good time." Moreover, the state's new "Post-Relief Control" board has the authority to re-commit a person for up to half of his original sentence if he violates parole. These guidelines apply even if the person had served the majority of his initial term.

Ohio also enacted a sexual violent predator law. Once a convicted sexual offender receives parole, a prosecutor can now charge the individual and have him held for up to 30 days on the suspicion that he is going to commit a repeat offense; no probable cause is necessary. The accused must be evaluated before a judge, but the law does not specifically stipulate that the defendant has a guaranteed right to counsel.

Earlier this year, a lower Mississippi court ruled in favor of convicted defendants who were subjected to that state's stricter sentencing measures of 1995, despite having committed their crimes prior to enactment of the legislation. An appeal is expected shortly.

In Utah, the legislature voted to move away from mandatory sentences. Although maximums still remain, many minimum sentencing requirements were removed.

Other Notable Prison Policies

The most recent "get tough on prisoners" policies include:

- The elimination of weight training equipment (California, Georgia, Ohio)
- The elimination of "good time" (South Dakota)
- The establishment of restrictions on private televisions and personal computers in cells (Alaska)
- The elimination of smoking in prisons (Minnesota)
- The establishment of chain-gangs (Georgia).

Indiana was just one of the several states that defeated inmate chain-gang initiatives. In Missouri, a chain-gang bill was defeated because the state already requires inmates to have a job, attend classes and/or attend treatment services (e.g., substance addiction, mental health, or sex offender programs) for six hours per day, five days per week. The state has set a two year plan to accept bids to privatize both the educational and treatment services. The New Mexico legislature considered bids to end "good time" and to add new death penalty crimes before failing to pass them. New Mexico still has a pending bill which would require prisoners to reimburse the state $64/day for their incarceration. The states of Maine and Maryland saw some educational programs eliminated from state prisons, though this was a result of the Department of Corrections' decreased funding rather than specific legislation.

State Post-Conviction & Death Penalty Procedures

On April 24, 1996, President Clinton signed the Anti-Terrorism and Effective Death Penalty Act into law. While the federal law severely curtails the ability of federal district and appeals courts from considering habeas petitions, some states took additional measures of their own to tighten procedures.

Pennsylvania instituted new time limits for filing post-conviction petitions in capital cases. These new time limits drastically speed up the processing time for capital post-conviction cases.

Other states' changes include:

- The removal of the State Public Defender's ability to appoint counsel to pursue sentence modification brought outside direct appeal time limits (Wisconsin)
- The speeding up of state post-conviction procedures (Illinois, Oklahoma and Ohio).

Other Legislative Measures That Failed

There were several initiatives that failed this year that would have helped to improve indigent defense services:

- The establishment of a statewide indigent defense board (Arizona)
- The implementation of up-front fees (Kansas)
- Comprehensive changes in discovery laws (New Hampshire).

A bill that would have allowed defendants to use racial discrimination statistics in appeals passed in both houses of the Kentucky Assembly, however the Governor vetoed the proposal. The effect of the Governor's veto was compounded by the fact that he has now begun to sign execution warrants immediately after the first appeal.

Other measures vetoed by Governors include:

- Indexing public defender funding to 75% of the total appropriated prosecution fund (New Mexico)
- Opening two new public defender offices (Virginia).

In Nebraska, the introduction of new property tax caps will affect county revenues. Since funding for indigent defense in Nebraska is still primarily a county responsibility, there is concern that the restriction of property tax revenue may eventually impact indigent defense.

Legislative Gains

In California, public defenders are pressing for legislative approval of a $25 up-front registration fee. As the measure is currently written, no one will lose the right to counsel if they truly cannot pay. Although it is a state-wide initiative, if passed, the measure must be adopted locally as well. Because the initiative is being promoted as a way for indigents to take responsibility for their own counsel, most survey respondents felt that this legislation will pass. Los Angeles County's indigent defense system presently represents 500,000 individuals each year. If the fee was collected from half of those defendants, up to $5 million could be added toward indigent defense funding each year.

New Jersey successfully obtained a stay of the notification section under Megan's law. Kentucky now allows defense attorneys complete access to government records regarding a child defendant.

Other "gains" for indigent defense were achieved by proposed legislation which did not pass. Examples of such unsuccessful legislation include:

- The prevention of a defendant from visiting a crime scene prior to trial even if it was the defendant's home (Indiana).
- The establishment of the death penalty (Alaska, Michigan).
- The criminalization of transmitting the HIV virus (Alaska).
- The loosening of competency requirements (Missouri).
- The enactment of Megan's law (Maryland).

Other Reported Gains by Public Defenders

Respondents in several states wanted to let us know about positive changes within their respective states. The Maricopa County Public Defender in Phoenix ended its fiscal year with extra funds. The program advocated for and received a comprehensive automated computer system with the surplus funds. The Iowa State Public Defender received a 1996 federal Edward Byrne Memorial Grant to update and improve its computer capabilities. The office received over $118,000 in federal and matching state aid. The public defenders in Salt Lake County used their fiscal surplus last year to bolster legal research capabilities by purchasing a CD-ROM system and subscribing to Westlaw.

Although requests for computer upgrades were denied in Virginia, the Public Defender Commission was allocated monies for 17 new attorney positions. These new positions may offset some of the expected caseload increase generated by the newly enacted juvenile reform bill. Virginia also used a federal Office of Juvenile Justice and Delinquency Prevention grant to look at alternative juvenile sentencing. They currently have pre-detention specialists trying to shorten juvenile detention stays by offering treatment services and/or by trying to get the children back in the family. The state of Maryland has started a centralized booking unit in Baltimore that gets public defenders involved earlier in the proceedings. More plea-bargaining has resulted in less court delay. Vermont added a $50 surcharge on DUI convictions. The monies collected are earmarked to revert to the Public Defender and will enable the state to pay attorneys to cover DUI night calls. Washington state established an Office of Public Defense which will administer all criminal appellate indigent defense services throughout the state. Although it has no representational capacity, its administrative role should bring more uniformity to the state's handling of direct appeals for indigent defendants.

The Spangenberg Group is always interested in court or legislative actions which affect the indigent defense function. Has any legislative or court action affected your work? Has your funding been increased or cut? If you want to share your experiences, please contact us by phone (617) 969-3820 or fax us (617)965-3966. ❖

NEWS FROM AROUND THE NATION

Kentucky Department of Public Advocacy Supplements its Budget by $2.5 Million From Alternative Revenue Sources

The Kentucky Department of Public Advocacy ("DPA") is reaping significant benefits from three alterative revenue sources designed to supplement the DPA's annual appropriation. In fact, if present trends continue, the DPA's FY 1996 budget of $16.5 million will be increased by approximately fifteen percent through revenues generated by these three alternative revenue sources. In addition to revenues generated by recoupment orders, which have been available to the DPA for many years, in 1994 the Kentucky legislature established a $40 up-front administrative fee and earmarked all revenues generated by this fee to the DPA. In 1994, the legislature also increased to $200 the DUI service fee which is assessed against all persons convicted of drunk driving in Kentucky, and designated 25% of the revenues generated by this fee to the DPA.

During the first nine months of FY 1996, the DPA received $614,712 in recoupment funds, $457,725 in up-front administrative fees and $825,775 in DUI service fees. At an annualized rate, these funds will add an additional $2.5 million to the DPA's coffers. ❖

Illinois Office of State Appellate Defender FY 1997 Budget Approved by State Legislature

After weeks of wrangling, the Illinois General Assembly at the end of May passed the Illinois Office of State Appellate Defender ("OSAD") budget. This year's budget appropriation process was highly scrutinized because of the federal habeas class action lawsuit, Green v. Washington. Last February U.S. District Court Judge Milton Shadur indicated he would grant habeas relief to the class of approximately 400 petitioners if the state could not design a viable approach to remedying the excessive delay in processing petitioners' direct appeals in the First District (Cook County). See Volume II, Issue 3 of *The Spangenberg Report* for details on the case.

While OSAD's FY 1997 budget appropriation of $8.8 million is approximately $1.5 million greater than that of FY 1996, the increase will not permit OSAD to hire additional staff, as almost all of the increase was designated by the General Assembly for private contract attorneys who will be solicited to help relieve the organization of its statewide backlog. Private attorneys will competitively bid for a total of 735 direct appeals, including 325 class members' appeals. Under the terms of newly-passed legislation, these attorneys will be compensated $40 per hour, up to $2,000, per appeal. Attorneys representing the petitioners in Green have supplemented the record with this budget appropriation information and expect Judge Shadur to issue his writ in late July.

In addition to the $8.8 million appropriation, OSAD's Capital Post-Conviction Litigation Unit also received just over $1.0 million, to make up for the unit's loss of federal funding. ❖

For Non-Violent Drug Offenders, Drug Courts Reduce Recidivism

A newly-released study reports that drug offenders who complete drug court treatment programs show less than a four percent recidivism rate. In contrast, at least 45% of defendants convicted of drug possession in regular courts who receive no treatment commit a similar offense within two to three years. The study, Summary Assessment of the Drug Court Experience, prepared by the Drug Court Clearinghouse and Technical Assistance Project at American University, was sponsored by the Drug Courts Program Office of the Office of Justice Programs, U.S. Department of Justice. Researchers, collecting data from eleven drug courts, also reported that of all participants in the study, including those who did not complete treatment, between five percent and 28% committed a new crime.

Drug court treatment programs, which are expanding across the country, include daily counseling, therapy and education. They also require frequent drug testing and at least bi-weekly reports to the judge. ❖

In Response to Criticisms of Patronage, Oakland County, Michigan Reforms Its Court Appointment System

Volume I, Issue 3 of *The Spangenberg Report* reported on the September 1995 study by the Oakland County Bar Association Criminal Law Committee Subcommittee on Indigent Defense. That report, highly critical of Oakland County's appointment system for providing indigent defense services based on patronage, served as the starting point for reform that is now set to take place in Oakland County.

Under the administrative order issued by Chief Judge Edward Sosnick, effective July 1, 1996, a ten-member Criminal Assignment Committee, consisting of five judges from the Oakland County Circuit Court and five representatives appointed by the President of the Oakland County Bar Association, will serve as a standing committee to determine the qualifications of attorneys applying for appointment as assigned counsel. Under the order, the Criminal Assignment Committee will also be responsible for establishing the training and continuing legal education requirements for attorneys seeking to maintain their eligibility to serve as indigent defense counsel. The order also provides that the Criminal Assignment Committee shall develop and produce a performance survey to allow for feedback from the judiciary regarding assigned attorneys.

Under the new, rotational system, there will be three classifications of attorneys: Category I (capital offenses - those offenses that carry a maximum sentence of life); Category II (major felony offenses - those offenses with sentences in excess of five years, up to less than life); and Category III (felony/high misdemeanor case offenses - those offenses carrying up to five years' imprisonment). Probation violations, paternity cases, Personal Protection Orders, support arrearages, line-ups, emergency petitions, extradition cases and other "similar miscellaneous matters" are specifically excluded from the rotational system. The Criminal Assignment Committee is to determine eligibility based upon the following factors: trial experience, continuing legal education seminar attendance, participation in the Oakland County Mentor Program, second chair experience and judicial feedback.

Under the plan, when making assignments for Category III cases, the Circuit Court Administrator is required to refer to the list of Category III eligible attorneys, and to chose the next available attorney on that list. For Category I and II cases, the Circuit Court judge may either 1) appoint an attorney to represent the indigent defendant from the list of attorneys eligible to handle the offenses with which the defendant is charged or 2) request the Circuit Court Administrator to make the appointment in rotation from the appropriate Category I or II list.

Hopefully this plan for providing assigned counsel services marks the beginning of a new chapter in the history of Oakland County's indigent defense system. Chief Judge Sosnick's order will remove patronage and its attendant appearance of conflict of interest from Oakland County's indigent defense program. Mandating that performance, experience and training form the basis for selecting appointed counsel is a substantially improved approach to structuring a county's indigent defense system. ❖

North Dakota Revises Indigent Defense Guidelines

The North Dakota Legal Counsel for Indigents Commission (NDLCIC) has recently revised the *North Dakota Judicial System Indigent Defense Procedures and Guidelines*. Among the most notable changes was a recommendation to raise the hourly compensation rate for court-appointed counsel outside a contract from $50 per hour to $75 per hour. Although the new increase is only a suggested guideline, it appears that the $75 per hour rate will become standard in North Dakota.

The NDLCIC is an eight-member council appointed by the Chief Justice of the Supreme Court from nominations by judges, the State Bar, the Attorney General, and the Legislative Assembly. The commission's responsibilities include reviewing data regarding indigent defense caseloads, preparing recommended indigent defense budgets, and adopting qualification standards for appointed counsel. While the NDLCIC originally pushed for the compensation increase to be binding, the final recommendation removed the binding language because judges generally follow the NDLCIC guidelines whenever possible. For example, North Dakota judges use the

NDLCIC recommendations to set target figures that must be met when firms bid for public defense contracts. Because of the cooperative relationship between North Dakota's judges and the NDLCIC, the commission agreed that judges throughout the state should be allowed to use their discretion when applying the guidelines.

Because North Dakota operates on a biennial budget and funds 100% of its indigent defense system at the state level, the impact of the NDLCIC's recommendation will not be felt until July 1997. It is the commission's hope that its 1998-1999 budget will reflect the suggested rate increases. ❖

Florida Legislature Passes Bill Which Creates $40 Administrative Up-Front Fee to Supplement Public Defender Budget

This past legislative session brought major successes to Florida's Public Defender Association ("FPDA"), which is comprised of all 20 of Florida's circuit public defenders. In addition to a $6.6 million increase in its FY 1996-1997 appropriation, the FPDA will also benefit from the creation of a new revenue source dedicated to indigent defense: a $40 administrative fee, assessed at the time of application for representation by a public defender. The new legislation provides that the fee may be waived if the court finds, after reviewing the financial information contained in the application affidavit, that the fee should be reduced, waived or assessed at disposition of the case. If the defendant does not pay the fee prior to the disposition of the case, the sentencing judge is to be informed of this fact and may either assess the fee as part of the defendant's post-disposition costs or assess the fee as part of the sentence or as a condition of probation.

All fees collected are to be remitted into the county depository and transferred to a newly-created, dedicated Indigent Criminal Defense Trust Fund, which is administered by the state Judicial Administration Commission (JAC), "for the purpose of supplementing the general revenue funds appropriated to public defenders" (emphasis added). The JAC is required to return these funds to the Circuit Public Defender's Office "proportional[ly] to each circuit's collections."

The new law also aims to tighten up indigency screening by expanding the affidavit which applicants for public defender services must submit in order to be appointed counsel. Towards this same goal, the legislation also provides funding to permit each judicial circuit to hire an indigency examiner. Finally, the legislation creates a new category of indigency, "indigent but able to contribute," for criminal defendants with an income of more than 125 percent but less than 250 percent of the then-current federal poverty income guidelines.

New York Legal Aid Society Sues City Over RFP Process

On June 25, 1996, the New York Legal Aid Society filed suit against the City in the Manhattan State Supreme Court challenging the City's move to seek bidders to handle a portion of the Legal Aid Society's criminal casework, and precluding the Legal Aid Society from participating in the process.

The lawsuit contends that city officials broke municipal bidding rules, as well as State and Federal laws, when they awarded contracts in June to three new legal providers, all run by former lawyers at Legal Aid, to represent indigent defendants in criminal trial and appellate cases. (See Volume II, Issue 3 of *The Spangenberg Report.*) Meanwhile, two of the new providers, the Brooklyn Defender Services and the Appellate Advocates, began accepting cases under the new contracts on July 1. The Queens Law Associates will begin accepting cases on August 1.

The Society's complaint claims the contracts violate the City's own procurement rules because the Society was precluded from bidding and because the RFP contemplated impermissible multiple awards. Directed at the Giuliani administration, the lawsuit alleges violation of state law under which indigent defense is provided after the governing body of the city -- the City Council -- adopts a plan. The complaint also alleges that the City violated Federal labor laws because the contracts' underlying purpose was to interfere with the Society's right to bargain with the unions that represent its employees.

The Society's Board of Directors voted unanimously to bring the lawsuit after numerous steps were taken to avoid this action. These included: raising legal and practical concerns with Corporation Counsel and the Criminal Justice Coordinator of the City; raising concerns in public hearings held by the Committee on Contracts of the City Council; compiling and submitting to the City a large number of letters, many from the judiciary, objecting to the City's plan; submitting a response to the RFP, despite determination by the City that the Society was not permitted to participate; and presenting findings prepared by Bob Spangenberg that alternate providers would be more costly to the City.

The City has publicly conceded that alternate providers will cost more than the Legal Aid Society. Responding to the lawsuit, Mayor Rudolph Giuliani was quoted in the *New York Times* as saying, "This is not to serve the poor. This is to make the Legal Aid Society a monopoly." Giuliani has stated in the past that he initiated the RFP process to provide the city with alternatives to the Legal Aid Society, in case the Society ever waged another strike like the four-day walkout of staff attorneys in October 1994.

A hearing on the lawsuit is scheduled for late July; we will provide you with the latest developments in our next newsletter. ❖

Tennessee Loses Staunch Supporter of the Sixth Amendment

Tennessee lost one of its most vocal supporters of the right to counsel with the recent death of former State Attorney General William M. Leech, Jr. Throughout his career Mr. Leech advocated for the rights of indigent defendants across the state.

Several years ago, Mr. Leech formed the Tennessee Criminal Justice Funding Crisis Group (CJFCG) which represented all of the statewide bar associations and many local bar associations. Under the leadership of Mr. Leech, in 1992 The Spangenberg Group conducted a statewide study of indigent defense in Tennessee.

As a result of the study, CJFCG petitioned the Tennessee Supreme Court to create by court rule a statewide commission on indigent defense. On August 18, 1994, the Tennessee Supreme Court issued an order creating the Indigent Defense Commission of the Supreme Court of Tennessee, "In order to establish a constitutional, adequate and effective indigent criminal justice system." Mr. Leech became the chair of the commission and guided its work over the past two years.

Without his wise counsel, hard work and political savvy, these important steps to improve Tennessee's indigent defense system would not have been taken.

Tennessee and the nation have lost one of the true champions of the Sixth Amendment. ❖

Oklahoma Indigent Defense System's Struggles Continue

In FY 1997, the Oklahoma Indigent Defense System ("OIDS") will have fewer responsibilities than it had in the last fiscal year, but it continues to lack adequate funding to carry out all of its responsibilities.

OIDS received the same state appropriation for FY 1997 as it received in FY 1996. While on the surface flat funding sounds less than devastating, the underlying story is one of serious and continuing under-funding for the state's primary provider of indigent defense services.

As was documented in Volume II, Issue 3 of *The Spangenberg Report*, OIDS struggled with under-funding for its Capital Post Conviction Division during much of FY 96 following the elimination of federal funds for Post Conviction Defender Organizations ("PCDOs") and the passage of strict new time limits for capital post conviction cases in Oklahoma. Federal funds accounted for over 75% of the Division's funding. In April 1996, the Division received a supplemental state appropriation which allowed it to re-hire the staff it was forced to lay off following the U.S. Congress' termination of federal funds for PCDOs, which went into effect October 1, 1995.

Unfortunately, the Governor failed to annualize the supplemental provided this past spring for FY 97, and instead funded OIDS at the 1996 level, which was established before it was learned the Congress would eliminate funds for PCDOs. Failure to annualize the FY 96 supplemental means that OIDS will actually receive less state appropriated funds in FY 97. Making things worse, the FY 96 state appropriation for OIDS had been $1.6 million short of what the agency needed to operate. To compensate for this, across-the-board reductions in operating costs were made last year.

For these reasons, flat funding leaves the OIDS Board of Directors with too little money to adequately fund all of the agency's divisions for FY 97. OIDS consists of four staffed units: the Capital Post Conviction Division, the Capital Trial Division, the Capital Direct Appeals Division and the General Appeals Division. Except for two county-funded public defenders in Tulsa and Oklahoma City, non-capital trial work in Oklahoma is handled by private attorneys throughout the state who, until this year, worked under contract with OIDS. A small Executive Division administers the program.

After much discussion and debate concerning how to provide constitutionally required services with inadequate funding in FY 1997, the OIDS Board chose to fully fund the capital trial and capital and non-capital appellate divisions to the inevitable detriment of the non-capital trial processes in the state.

Based on the Board's decision, the funds available to pay for non-capital trial representation of indigent defendants in Oklahoma in FY 1997 will be approximately 44% less than what was available in FY 1996, when a 17% reduction in funds was imposed due to the $1.6 million under-funding.

The Board further decided not to automatically renew the statewide contracting program for non-capital trial work, for several reasons. First, legislation concerning changes in OIDS' non-capital trial responsibilities was still pending at the time OIDS was to negotiate contracts for FY 97. Second, it was clear that funding would not be adequate for the full year. Third, OIDS was waiting to learn where in the state a pilot program for representation of indigent defendants was to be established. Legislation amending the Indigent Defense Act called for the Chief Justice of the Supreme Court to designate a District Court Judicial District where the pilot program would be implemented. OIDS will not be responsible for non-capital trial work in that district, which was just selected in July.

In the Spring, the Board decided that, because legislation regarding OIDS' non-capital trial responsibilities was unresolved and the location of the pilot project was uncertain, it would not enter into contracts, but would develop for the courts lists of volunteer attorneys who will accept court-appointments. OIDS will pay the attorneys an hourly rate of $60 per hour for in-court services and $40 per hour for out-of-court services, up to the statutory

maximums of $3,500 for a non-capital felony case and $800 for all other categories of non-capital cases. This system of reimbursement stands to cost considerably more than the contract system, where the average cost per case ranged from a high of $300 per case in some counties to a low of $73.35 in others.

In July 1996, after issues from the pending legislation were resolved, OIDS resumed contracting in some counties. Out of 74 counties in which OIDS is responsible for non-capital trial work, attorneys from 15 to 20 counties were willing to work under contract with OIDS, at an average per case cost of $85. OIDS Executive Division staff project that the system will run out of funds for non-capital trial work in October 1996, only four months into the fiscal year.

There was one area of relief for OIDS in this past legislative session, when responsibility for representation in certain non-criminal matters (including guardianship, mental health, juvenile dependency and contempt proceedings) was removed from OIDS and placed with volunteer attorneys who are appointed and paid by the courts. The Executive Division estimates this work would cost the System approximately $1 million for FY 97, and it was permitted to retain this funding. In addition, OIDS will now receive the first $20 of any portion of a $40 application fee paid to the court clerk by indigent defendants seeking representation by OIDS. The revenue from the application fee, plus the elimination of responsibility for certain non-criminal matters, will help offset slightly the under-funding of the Oklahoma Indigent Defense System. However, with funds expected to run out for non-capital trial representation in October, the state risks intervention by either Federal courts or the Oklahoma appellate courts into the provision of indigent defense services.

A joint House and Senate committee of the Oklahoma legislature is expected to review the operations and funding of the Oklahoma Indigent Defense System later this year. ❖

BJA-Administered Local Law Enforcement Block Grants Available

A new source of funding for indigent defense programs recently became available: a $503 million appropriation for the implementation of the Local Law Enforcement Block Grant Program, which was included in the recently-passed FY 1996 federal budget. The program, to be administered by the U.S. Department of Justice's Bureau of Justice Assistance ("BJA"), is to provide units of local government with funds to underwrite projects to reduce crime and improve public safety. While the funds may be used for one or more of seven defined purpose areas, two purpose areas are particularly appropriate for indigent defense programs. The first involves programs establishing or supporting drug courts. To be eligible, a drug court program must include both continuing judicial supervision over offenders who have substance abuse problems but are not violent offenders, and substance abuse treatment for each participant. The second area of particular interest to indigent defense involves programs which enhance the adjudication of cases involving violent offenders, including violent juvenile offenders.

Applications must be received by BJA by August 9, 1996; awards will be made by September 30. For an application kit and more information about the Local Law Enforcement Block Grant Program, call the U.S. Department of Justice Response Center at 1-800-421-6770.

An additional $475 million, up $25 million from FY 1995, is available through the Edward J. Byrne Memorial Grant State and Local Law Enforcement Assistance Program, which is also administered by BJA. Applications for Byrne Grant funds are due August 9, 1996. More information about the Byrne Grant program is also available through the U.S. Department of Justice Response Center. ❖

Florida's CCR Seeks to Hire Attorneys to Represent Capital State Post-Conviction Petitioners

Florida's Office of the Capital Collateral Representative (CCR) is seeking ten attorneys with experience or interest in criminal law for capital post-conviction litigation in state and federal court. CCR's main office is located in Tallahassee, with branch

offices in central and south Florida scheduled to open soon. Salaries vary according to experience level; the salary is approximately $31,000 for recent law school graduates. The compensation plan also includes general liability and workers' compensation insurances, a state-paid pension program, and group health and life insurance, with co-payment by the insured. All CCR attorneys must become members of the Florida bar. Interested individuals should submit a resume, along with the names of three professional references, to: Attn: Attorney Application, Office of Capital Collateral Representative, Post Office Drawer 5498, Tallahassee, FL 32314-5498. ❖

CASE NOTES

Alabama Supreme Court Holds Indigent Defendant's Hearing Requesting Expert Must Be Ex Parte

Affording indigent defendants greater protection than the U.S. Supreme Court required in Ake v. Oklahoma, 47 U.S. 80 (1985), the Alabama Supreme Court held in April that an indigent criminal defendant is entitled to an ex parte hearing on whether expert assistance is necessary, based on the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. Ex parte Moody, 59 CrL 1095. Moody, an indigent defendant charged with capital murder, filed a mandamus action raising the issue of whether he was entitled to certain court-appointed experts, and, if so, whether these experts should be paid in advance of testifying.

The Alabama Supreme Court first found that under Ake and subsequent Alabama case law, an indigent defendant is entitled to psychiatric as well as other types of experts, upon showing of a substantial need for an expert, without which the fundamental fairness of the trial would be questioned. Next, the court turned to the issue of whether a defendant is entitled to an ex parte hearing on a request for an expert witness. Relying upon the Criminal Justice Act, 18 USC 3006A(e)(1), which provides for ex parte hearings for indigent defendants requesting expert assistance, the court ruled that indigent defendants in Alabama are entitled to the same protection. The opinion states: "Requiring an indigent defendant to prematurely disclose evidence in a hearing where the state is present encroaches on the privilege against self-incrimination, which applies at all stages of the criminal proceeding..." Citing U.S. v. Tate, 419 F.2d 131 (6th Cir. 1969), the court also expressed concern for equality between "indigents and those who possess the means to protect their rights" and stated: "An indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose."

The Alabama Supreme Court also addressed the questions of whether an indigent defendant is entitled to the expert of his or her choice, and whether the expert is entitled to payment in advance of testifying. The court answered both questions negatively, holding that an indigent defendant is not entitled to the expert of his or her choice, but is entitled to a competent expert in the field of expertise that has been found necessary to the defense, and that Section 15-12-21(e), Ala.Code 1975, which provides that within a reasonable time after the conclusion of the trial or ruling on a motion for new trial, or after acquittal or other judgment disposing of the case a bill for services may be submitted for payment, is appropriate. ❖

Illinois Supreme Court Rules Free-Standing Claim of Innocence Is Appropriately Raised at State Post-Conviction

Relying on the Illinois Constitution's due process provision, the Illinois Supreme Court ruled in April that a defendant may raise at state post-conviction a claim of newly-discovered evidence showing the defendant to be actually innocent of the crime for which he was convicted. People (Illinois) v. Washington, 59 CrL 1120. Defendant Washington was convicted of murder after a trial at which he put on many alibi witnesses, and the state put on a number of witnesses who identified defendant as the killer. Over six years later, the former girlfriend of one of the state's witnesses came forward and said that she had been in a car with her boyfriend and another of the state's witnesses. She remained in the car while the other two got out of the car and went into the victim's

apartment complex. The former girlfriend, who heard two gunshots, remained silent about these events for years because her former boyfriend threatened her life.

At state post-conviction, Washington introduced this evidence, and the trial judge granted him a new trial. The state appealed, but the Illinois Supreme Court affirmed after considering whether a "free-standing" claim of innocence, which does not implicate the conduct of the trial, can be raised under Illinois' Post-Conviction Hearing Act, 725 ILCS 5/122-1 et seq., to entitle Washington to a new trial.

The Illinois Supreme Court rejected the U.S. Supreme Court's approach to such a situation in Herrera v. Collins, 506 U.S. 390 (1993), where it held that neither the Eighth nor the Fourteenth Amendment was implicated in a free-standing claim of innocence by a death row inmate in Texas. Instead, the court held that as a matter of both procedural and substantive due process, under the Illinois Constitution, additional process should be afforded when newly discovered evidence indicates that a convicted person is actually innocent. ❖

Tenth Circuit Court of Appeals Finds Right To Counsel Violated By Failure to Inquire Into Conflict of Interest

The U.S. Court of Appeals for the Tenth Circuit granted relief to a habeas petitioner after the trial court failed to conduct an inquiry into the accused's claim that counsel's joint representation of a co-defendant created a conflict of interest. Selsor v. Kaiser, 59 CrL 1101.

Petitioner Selsor and his co-defendant were charged with murder and other related crimes stemming from a robbery, and both were assigned public defenders from the same public defender office in Tulsa, Oklahoma. One attorney actually represented both defendants while the other supervised. Over the course of representation, the public defender motioned the court for severance of Selsor on five separate occasions, and each time the court denied the motion. Selsor was convicted of first-degree murder, armed robbery and shooting with intent to kill.

In reaching its decision to grant habeas relief, the Court of Appeals relied upon Holloway v. Arkansas, 435 U.S. 465 (1978). In Holloway, the U.S. Supreme Court considered the issue of ineffective assistance of counsel because of joint representation and held that the test for ineffectiveness is two-pronged: the court must first determine if petitioner's objection at trial was timely; if so, the court must determine whether the trial court took "adequate steps to ascertain that the risk [of a conflict of interest] was too remote to warrant separate counsel." If the trial court failed to take adequate steps, the court in Holloway found that the defendant need not show actual conflict, as prejudice is presumed. Using this standard, the Court of Appeals, in Selsor, found that the trial court failed to appoint separate counsel or make an adequate inquiry into the alleged conflict, and thus prejudice must be presumed and habeas relief must be granted. ❖

Michigan Court of Appeals Finds Trial Court's Removal of Public Defender is Per Se Reversible Error

The Michigan Court of Appeals held in late April that a trial court's improper removal of a public defender is per se reversible error. People (Michigan) v. Johnson, 59 CrL 1154. The trial judge, without authorization, removed the public defender handling defendant's case for his challenge to the court's "interim investigation order" which required the public defender to collect and provide the court with information on defendant's prior convictions.

A majority of the Court of Appeals found that adversarial proceedings had begun when the judge dismissed the public defender without authorization to do so. This, the majority found, violated the defendant's Sixth Amendment rights. The majority looked to the U.S. Supreme Court's decision in Brecht v. Abrahamson, 507 U.S. 619 (1993), where the court distinguished between "trial" and "structural" errors, to characterize the error in the case at bar as a "structural error that infected the entire trial mechanism because defendant's Sixth Amendment right to counsel was violated by the trial court by its removal of [the public defender] before trial began."

The majority also distinguished this case from People v. Anderson, 512 N.W.2d 538 (Mich. 1994), in which the Michigan Supreme Court applied a harmless-error analysis to a related Sixth Amendment violation of counsel involving defense counsel's statements to the police. The court found that the Anderson case involved "trial error" as the error occurred when the case was being presented to the jury. ❖

Second Circuit Affirms - Counsel Who Slept During Critical Portions of Trial Rendered Ineffective Assistance of Counsel

The U.S. Court of Appeals for the Second Circuit recently affirmed a district court decision to grant relief to a habeas petitioner who claimed his trial counsel, who slept through most of his trial, had provided ineffective assistance of counsel. Tippins v. Walker, 58 CrL 1548. The trial court found that defense counsel was unconscious for "numerous extended periods of time during which the defendant's interests were at stake." In fact, the trial court found that defense counsel slept every day during defendant's trial, including during the testimony of an important prosecution witness and during damaging testimony by the co-defendant.

While the court refused to create an additional category of per se ineffectiveness, it found that in this case, where the adversary nature of the proceedings was jeopardized numerous times, there was no need to distinguish between when prejudice will be presumed and when it must be demonstrated. The court affirmed the district court's opinion that the facts of this case met the Strickland ineffectiveness standard, writing: "Such circumstances implicate a fundamental value that Strickland enjoins us to keep in mind: In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. Strickland, 466 U.S. [668,] 696 [(1984)]." ❖

Second Circuit Finds Counsel Ineffective for Failing to Dissuade Defendant From Accepting Plea Bargain

The U.S. Court of Appeals for the Second Circuit granted relief to a habeas petitioner who was sentenced to 20 years to life in connection with a cocaine charge, after defense counsel failed to discourage defendant from rejecting a plea bargain which would have included a one- to three-year sentence. Boria v. Keane, 59 CrL 1175. At the district court habeas proceeding, defense counsel testified that he believed defendant had no chance of being acquitted. Defense counsel further testified that he did not believe defendant would ever accept a plea bargain because he would never want to suffer the embarrassment of admitting such a charge in court, before his children.

In reaching its decision, the court referenced the American Bar Association's Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992), which states: "[a] defense attorney in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable." The court then went on to find that both prongs of the Strickland test had been satisfied. First, the court found that counsel's conduct fell below an objective standard of reasonableness, writing: "[i]t would be impossible to imagine a clearer case of a lawyer depriving a client of constitutionally required advice." Second, the court found that this incompetence prejudiced the defendant, reasoning that if defense counsel had advised petitioner, as well as petitioner's father, to accept the plea, the result of the proceeding would have been different. ❖

Ninth Circuit Affirms - Pro Se Petitioner Not Entitled to CJA-Compensated Advisory Counsel

The U.S. Court of Appeals for the Ninth Circuit recently ruled that the Criminal Justice Act, 18 USC 3006A, does not authorize a district court to compensate an attorney whose only role is to act as advisor to an indigent defendant who has elected to proceed pro se. U.S. v. Salemo, 59 CrL 1088. Petitioner in this case wished to represent himself, but

also requested that the court appoint counsel to advise him. The district court informed petitioner that if his pro se application were accepted, the court would not also appoint counsel to advise him, so petitioner withdrew his pro se petition. The Ninth Circuit found that the district court's approach was correct, citing its decision in U.S. v. Kleinberger, 13 F.3d 1354, 1356 (9th Cir. 1994), in which it held that a defendant does not have a constitutional right to represent himself while at the same time having appointed counsel to serve in an advisory capacity. ❖

Fourth Circuit Finds Habeas Relief Appropriate for Petitioner Whose Standby Counsel Took Over Pro Se Petitioner's Direct Appeal

In February, the U.S. Court of Appeals for the Fourth Circuit granted habeas relief to a petitioner who wished to handle his direct appeal pro se, but was appointed standby counsel who took control of the case. Myers v. Johnson, 58 CrL 1533. After conviction, Myers asked the state court to allow him to represent himself on direct appeal. The state court granted this request, but also appointed standby counsel to assist Myers with his appeal. The court did not indicate to appointed counsel that she was to serve in a standby capacity for a pro se defendant, so counsel prepared and filed Myers' appellate brief with the understanding that she was assigned to represent Myers. At one point Myers requested from counsel a copy of the trial transcript, but she ignored this request.

In reversing the district court's denial of habeas relief, the Fourth Circuit looked to McKastle v. Wiggins, where the U.S. Supreme Court established limitations on the participation of standby counsel at trial. 465 U.S. 168 (1984). Starting with its prior decision in Faretta v. California, 422 U.S. 806 (1975), where the court held that implicit in the Sixth Amendment is the right of a criminal defendant to waive the assistance of counsel and represent himself at trial, the Supreme Court in McKastle then held that under Faretta, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. However, once a pro se defendant permits or asks for substantial participation by standby counsel, pro se defendant's rights under Faretta no longer exist.

The Fourth Circuit extended the McKastle rule to pro se defendants on direct appeal, holding: "a criminal defendant who clearly and unequivocally asserts his right to present pro se briefs on the first direct appeal must be allowed to 'preserve actual control over the case he chooses to present' to the appellate court - i.e., he must be allowed to determine the content of his appellate brief." The court also rejected the state's argument that the error was harmless under the U.S. Supreme Court's decision in Arizona v. Fulminante, 499 U.S. 279 (1991). ❖

New York Court of Appeals Rules Defendant Was Wrongly Excluded from Sidebar Conference With Prospective Juror

The New York Court of Appeals recently ruled that defendant's right to be present at a sidebar conference with a prospective juror regarding the prospective juror's ability to be fair and objective is not voided if the juror is eventually excused. People (New York) v. Feliciano, 59 CrL 1065. In a 1992 decision, People v. Antommarchi, the court recognized this right under New York statutory law. 604 N.E.2d 95 (NY CtApp 1992). The court found that a reviewing court should consider whether the defendant would have made a meaningful contribution to the conference, and disregarding defendant's absence is only appropriate where defendant's presence would have been "useless" or "the benefit but a shadow." The court also found that defendant's absence at the sidebar conference could be overlooked if the trial court later holds a de novo hearing, in the defendant's presence, on the same question. The court found defendant's exclusion from the bar conference to be reversible error as the conference led to defense counsel's exercise of peremptory challenges against six potential jurors. ❖

Ohio Supreme Court Orders Death-Sentenced Defendant Re-Sentenced After Inappropriate Jury Instruction

A majority of the Ohio Supreme Court recently ordered a trial court to re-sentence a death-sentenced defendant following improper jury instructions which required the jury to unanimously determine that the death penalty was inappropriate before considering a life sentence. The majority criticized these instructions for a number of reasons. First, they were contrary to state law, which does not limit when a jury may consider a life sentence. Second, the instructions were inconsistent with the logic behind precedent which allows jurors to consider a lesser included offense without first acquitting the defendant of the more serious charge. Third, under Mills v. Maryland, 486 U.S. 367 (1988), the instructions violated the Eighth Amendment's prohibition against cruel and unusual punishment because they prevented jurors from giving due consideration to factors pointing to a penalty less severe than death.

The majority also relied upon the Seventh Circuit's application of Mills in a similar case, Kubat v. Thieret, 867 F.2d 351 (1989). In Kubat the Seventh Circuit reasoned that the reliability of a jury verdict is called into question if the jury instruction leads just one juror to wrongly believe that his or her vote will not affect the verdict. The Ohio Supreme Court concluded: "a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point forward should be so instructed." ❖

Prior Juvenile Adjudication Does Not Count As A Strike In Most Situations, California Court of Appeal Rules

The California Court of Appeal, Fourth District, recently ruled that a prior juvenile adjudication will not count as a "strike" under the California "three strikes" law, Penal Code Section 667(b)-(i), unless the state tried unsuccessfully to have the juvenile tried as an adult. People (California) v. Renko, 59 CrL 1134. In an issue of first impression, the court considered the meaning of one of the four conditions that must be met in order for a juvenile adjudication to qualify as a "strike." The condition, found in section 667(d)(3)(C), is that "[t]he juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law." The court concluded that this finding must be express rather than implied, and found that an express finding is only made in response to a motion for a fitness hearing under California Welfare and Institutions Code Section 707. Most often, Section 707 motions are made by the prosecution, and only in very serious cases. The court found significant differences between the procedures involved in an express versus an implied finding that the juvenile is a fit and proper subject to be dealt with under the juvenile court law: "...the former [express] requires that a W & I section 707 petition be filed and that an extensive evaluation of the minor be conducted with specific findings supporting the evaluation; the latter requires only that the person be a minor."

The court went on to conclude: "Because section 667, subdivision (B) converts an otherwise noncriminal juvenile adjudication into a felony conviction, we do not think the Legislature intended to include all juvenile adjudications of serious offenses to be 'strikes.' Rather, we conclude that by including express reference to a finding of fitness in section 667, subdivision (d)(3)(C), the Legislature intended that to be treated as a prior strike within the three strikes law, the juvenile offense must be an offense which the prosecutor or court considers so egregious as to warrant (1) the filing of a W & I section 707 petition and (2) the evaluation of a minor with supporting findings. It follows that section 667, subdivision (d)(3)(C) requires an express finding of fitness." ❖

Despite U.S. Supreme Court Decision in Custis, California Court of Appeal Finds Defendants May Challenge Prior Conviction Based on A Guilty Plea

On rehearing, the California Court of Appeal, Second District, held in early May that a defendant has a right to a hearing at sentencing on a collateral challenge to a prior conviction based upon a guilty plea. People (California) v. Allen, 59 CrL 1155. In so holding, the court gave California defendants greater rights than those established by the U.S. Supreme Court in Custis v. U.S., 115 S.Ct 1732 (1994), where the court held that the federal Constitution does not guarantee a defendant, charged under a recidivist

statute, the right at sentencing to challenge a prior guilty plea unless he or she was deprived of the Sixth Amendment right to counsel in the prior proceedings. Instead, the court looked to People v. Sunstine, 36 Cal.3d 909 (Calif SupCt 1984), which was based on California rather than federal law, and granted defendants charged under recidivist statutes with broader rights to challenge prior convictions.

The Court of Appeal was also persuaded by People v. Horton, 11 Cal.4th 1068 (1995), a California Supreme Court decision issued after the appellate court's original decision in this case. In Horton, the majority of the California Supreme Court made clear that in a capital case, Custis does not operate to modify prior California law on the subject of collateral challenges to prior convictions at sentencing. ❖

U.S. Supreme Court Rejects Oklahoma's Requisite Level of Proof To Be Declared Mentally Ill and Therefore Unfit for Prosecution

A unanimous U.S. Supreme Court recently struck down as violative of the Fourteenth Amendment, Oklahoma's requirement that criminal defendants must prove their incompetency to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 59 CrL 2011. In so doing the court affirmed its earlier ruling that the Fourteenth Amendment is not violated by a rule requiring that the defense must demonstrate by a preponderance of the evidence that the defendant is incompetent to stand trial. Medina v. California, 505 U.S. 437 (1992).

In striking down Oklahoma's statutory provision, Justice Stevens, writing for the court, rejected the state's claim that its clear and convincing standard reasonably accommodates "the opposing interests of the State and the defendant." Justice Stevens found that Oklahoma's rule has no roots in historical practice, as under both early English and American common law, the proper standard was preponderance of the evidence. He also observed that this is the standard used by 46 states, as well as by the federal courts. Further, the court found that Oklahoma's standard does not exhibit "fundamental fairness" in operation, as an incorrect determination of competence for defendants who have demonstrated that they are more likely than not incompetent has dire consequences and threatens the basic fairness of such trials. Finally, the court found that Oklahoma's law failed to sufficiently protect defendants' fundamental constitutional right to due process. ❖

District Court Allows Expert Testimony Regarding Reliability of Eyewitness Identification

The U.S. District Court for the Western District of New York recently admitted expert testimony regarding the reliability of eyewitness identification in an armed robbery case where defendant's identity was a central issue. U.S. v. Jordan, 59 CrL 1191. Defendant was charged with a number of offenses stemming from an armed robbery. The prosecution's witnesses included a number of co-defendants who agreed to testify for the state, and a bank teller who would identify the defendant. The teller first identified defendant 47 days after the robbery, and her second identification of defendant, at the preliminary hearing, occurred almost two years later.

Though the court recognized that in the past federal courts have been reluctant to admit the testimony of "eyewitness identification" experts, it noted that federal courts had recently become more receptive to such experts, citing U.S. v. Brien, 59 F.3d 274 (CA 1 1994) and U.S. v. Rincon, 28 F.3d 921 (CA 9 1994). Relying on Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the court found that the testimony of an expert in the field of memory and perception should be permitted to testify on the subject of the reliability and accuracy of eyewitness identification, as the testimony would be both scientifically based and helpful. ❖

Seventh Circuit Affirms Habeas Relief for Petitioner Convicted Following Joint Alibi Defense

The U.S. Court of Appeals for the Seventh Circuit affirmed in late May a district court's grant of relief to a habeas petitioner who had been convicted of murder after trial counsel presented a joint alibi defense without pursuing an alternative defense that would have better served petitioner. Griffin v. McVicar, 59 CrL 1212. Griffin and two co-defendants allegedly

murdered three individuals and seriously injured one other. Griffin originally maintained that he was an innocent bystander to the crimes, and communicated this to his first attorney. However, the first attorney was dismissed and Griffin's family hired another private attorney to handle the case. The private attorney was also representing one of the other co-defendants (the third co-defendant was never apprehended). He moved unsuccessfully to try the defendants separately, and did not again raise the issue. At trial, the central issues were identification of the three defendants and the role each had played. Despite Griffin's earlier claims that he was an innocent bystander, defense counsel put on the defense of a joint alibi for both of his clients.

The court found "no suggestion in the record that [defense counsel] pressed Griffin as to the validity of the alibi, discussed with him the possibility of a bystander defense or pointed out the comparative weakness of the State's case against him as opposed to the case against [his co-defendant]." In affirming the district court decision, the appellate court relied upon Cuyler v. Sullivan, 446 U.S. 335, 48 (1980), which set out the standard for a finding of ineffective assistance of counsel based upon multiple representation: "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Under Cuyler, once a defendant has shown that an actual conflict exists, no showing of prejudice is required, and courts "may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict may exist."

Under U.S. v. Cirrincione, another Seventh Circuit case involving ineffectiveness claims when one attorney represented co-defendants, the court found that Griffin must show, "specific instances where [his] attorney could have, and would have, done something different if that attorney had represented only one defendant." 780 F.2d 620, 630-631 (CA 7 1985). The court, citing Cirrincione, found that defendant had met this standard and concluded: "the record in this case undoubtably provides 'specific instances where [Griffin's attorney] could have, and would have, done something different if that attorney had represented only one defendant.'" ❖

New Jersey Supreme Court Sets Standard for Ineffectiveness at Juvenile Transfer Hearing

The New Jersey Supreme Court recently announced its standard for ineffectiveness of counsel at a juvenile transfer hearing. State (New Jersey) v. Jack, 59 CrL 1264. Under the new standard, a juvenile defendant must first make a prima facie showing to the appellate court that the juvenile's counsel failed to present evidence of a potential for rehabilitation, and that there was evidence of a genuine potential for rehabilitation that counsel did not present to the juvenile court. If these conditions are met, the juvenile court should consider first, whether the potential for rehabilitation was not presented at the waiver hearing due to the ineffectiveness of counsel, and second, whether a showing of that potential by effective counsel could have made a difference.

At age 15 defendant Cameron Jack was charged with juvenile delinquency in connection with an armed robbery. New Jersey state law creates a presumption that juveniles aged 14 and over will be transferred to adult court for certain offenses, including robbery. Under the law, jurisdiction may not be transferred if the juvenile can show that the probability of his or her rehabilitation before the age of 19 substantially outweighs the reasons for a waiver. At the waiver hearing, defense counsel presented no testimony or other psychiatric or psychological evidence of Jack's potential for rehabilitation. After he made a limited presentation on the issue of Jack's potential for rehabilitation, the juvenile court concluded that Jack should be transferred to adult court, given the statutory presumption and defense counsel's limited argument that Jack could be rehabilitated. Jack pleaded guilty but reserved his right to appeal the waiver issue. The intermediate appellate court ordered a new waiver hearing, based on its conclusion that defense counsel was ineffective, and the state appealed.

In arriving at its new standard, the New Jersey Supreme Court first found that the Sixth Amendment's guarantee of effective assistance of counsel applies to juvenile waiver hearings, citing Strickland v. Washington, 466 U.S. 668 (1984). The court also looked to the holding of U.S. v. Cronic, Strickland's companion case: where the level of counsel's participation may make the idea of a fair trial a nullity, prejudice is presumed. 466 U.S. 648, 659 (1984). However, the court stated that it is difficult to assess the issue of a Cronic presumption in the context of a juvenile waiver proceeding. In State v. Savage, 120 N.J. 594, 619 (1990), the court found it "incomprehensible" that trial counsel did not consider a psychiatric defense despite strong evidence that defendant may have been suffering from mental problems. The court characterized counsel's actions in Savage as not a strategic decision, but a total lack of decision, as is contemplated in Cronic. Based on this case law, the court crafted the following rule in the context of juvenile waiver hearings: A juvenile defendant must first make a prima facie showing to the appellate court that 1) the juvenile's counsel failed to present evidence of a potential for rehabilitation, and 2) there was evidence of a genuine potential for rehabilitation that counsel did not present to the juvenile court. If these conditions are met, the juvenile court should consider whether the potential for rehabilitation was not presented to the waiver court due to the ineffectiveness of counsel, and whether a showing of that potential by effective counsel could have made a difference. ❖

North Carolina Court of Appeals Finds Right to Counsel Attaches When Civil Child Abuse Proceedings Are Filed

In early June the North Carolina Court of Appeals found that even if no criminal charges have been filed, the Sixth Amendment right to counsel attaches once civil child abuse proceedings have been filed. State (North Carolina) v. Adams, 59 CrL 1271. The case before the court involved a mother who, pursuant to North Carolina statutory law, was represented by counsel in connection with child civil abuse proceedings. The court ruled that the mother could not be questioned by the police in the absence of counsel or waiver of her right to counsel. The court based its decision on the fact that in North Carolina the social services department and law enforcement agencies have mutual obligations to inform each other of evidence of abuse. Because of the reciprocal nature of the civil and criminal abuse investigation divisions, both divisions work against a defendant once abuse proceedings have started in either civil or criminal court. This dual relationship, the court reasoned, invokes the Sixth Amendment right to counsel. ❖

U.S. Supreme Court Rules That Psychotherapist-Patient Communications Are Protected

In mid-June the U.S. Supreme Court expanded the type of confidential communications to which a privilege under Fed.R.Ev. 501 applies, to include psychotherapist-patient communications. Jaffee v. Redmond, 59 CrL 2130. The issue was raised during the course of a civil rights lawsuit growing out of a fatal shooting by a police officer. Following the shooting, the officer began seeing a licensed social worker, and the decedent's family sought copies of notes of the counseling sessions between the police office and her counselor. The U.S. Court of Appeals for the Seventh Circuit held that the communications were privileged, relying upon Fed.R.Ev. 501, which authorizes federal courts to carve out new privileges where appropriate.

In a seven to two decision, the Supreme Court affirmed, resolving a split among the circuits. Justice Stevens, writing for the majority, found that Rule 501 authorizes federal courts to define new privileges by interpreting "the principles of the common law...in the light of reason and experience." Justice Stevens wrote that both private and public interests are served by recognizing a psychotherapist privilege, because a successful relationship with a therapist depends upon an atmosphere of confidence and trust, and because the population's mental health is as important as its physical health. The fact that all 50 states as well as the District of Columbia recognize some form of psychotherapist privilege is mentioned as an additional reason for federal courts to adopt such a privilege. Justice Stevens concluded that the privilege, which clearly applies to psychiatrists and psychologists, also applies to confidential communications made to licensed social workers during the course of psychotherapy. ❖

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

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