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Representation of Children in Abuse and Neglect Cases: An Overview

Introduction

Over the past few years, violent juvenile offenders have captured the attention of the media and politicians in America. Almost all 50 states have made major changes to their laws governing juvenile justice that make it easier to try juvenile offenders in the adult criminal system, to lock them up longer, and to strip juvenile proceedings of some of the practices originally intended to protect youths, such as closing delinquency court proceedings and expunging delinquency records. Less attention is paid to systems designed to protect juveniles from the home situations that wreak emotional and physical havoc and frequently steer youths into delinquent behavior: abuse and neglect by parents or guardians.

This article focuses on the legal representation provided to juveniles who are alleged to be victims of abuse or neglect and appear in proceedings which are referred to interchangeably as dependency or child protective proceedings.

Although juvenile delinquency caseloads have risen in recent years, child protection cases have, in comparison, exploded. According to the U.S. Department of Health and Human Services, in 1994 2.9 million children were the subjects of alleged maltreatment. Over 1 million of these children were victims of substantiated or indicated[1] abuse and neglect, an increase of 27 percent since 1990. Another source, the national Court Appointed Special Advocates Association, reports that in 1995, 450,000 children in the United States went through abuse and neglect court proceedings.

When these cases enter the judicial system, children typically receive attorneys or Guardians Ad Litem appointed to represent them; children do not typically retain counsel for themselves. The increasing costs of providing counsel in dependency cases present cause for concern in many jurisdictions.

The systems for providing legal representation to juveniles in these proceedings vary markedly throughout the country. In some jurisdictions, public defenders are appointed to represent children, in others, private attorneys are appointed by the court, and in still others, lawyers work under contract programs administered by bar associations. In some jurisdictions, children are appointed GALs who may or may not be lawyers. There are also multiple definitions of what constitutes a child advocate's role and responsibilities. GALs may be appointed to serve the "best interests" of a child -- a practice also known as "substitute judgment" -- rather than to advocate for a child according to the traditional attorney role. There can be confusion whether a GAL's loyalties lie with the judge who appointed her, or with the child she is appointed to represent.

This article is intended as a brief overview of some of the major issues affecting the child protective area,

and does not address the numerous ethical issues that surround the area of child advocacy.

Right to Counsel

In 1967, the U.S. Supreme Court decided that juveniles charged with delinquent behavior in this country are constitutionally entitled to the assistance of counsel. In re Gault, 87 S.Ct. 1428 (1967). There is no equivalent constitutional entitlement to counsel for juveniles subject to abuse and neglect proceedings. Each state has its own legislation or case law governing representation of juveniles in dependency proceedings.

However, in 1974 the U.S. Congress enacted Public Law 93-274, the "Child Abuse Prevention and Treatment Act," which provides financial assistance to states for the prevention of abuse and neglect. In order to qualify for the federal assistance, the legislation mandates that states appoint a guardian ad litem to represent an abused or neglected child's best interests in every case which results in a judicial proceeding. The legislation does not, however, specify whether the GAL has to be an attorney. In fact, the U.S. Department of Health and Human Services, which has responsibility for overseeing the states' compliance with the Act, has funded numerous GAL programs in which the child's advocate is not a lawyer.

There has been continuing debate over whether volunteer lay advocates or legal advocates are best for juveniles in child protection cases. Cost is the primary factor in appointing non-attorneys rather than lawyers in dependency cases, however, some studies concluded that volunteer lay advocates provide as good or better overall representation for children in child protection cases. The American Bar Association's Center on Children and the Law estimates that approximately half of the states require attorneys to be appointed as advocates for children in child protective proceedings, while the other half rely on non-lawyer, volunteer GALs. New Hampshire recently enacted legislation which precludes the appointment of attorneys to serve as GALs. In November, Arizona voters will decide on an initiative sponsored by Governor Fife Symington proposing, among other things, to remove dependency cases from the jurisdiction of the courts entirely, thereby making the matters administrative proceedings which do not involve judges or lawyers.

Practice Standards

The American Bar Association's "Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases" were approved by the ABA House of Delegates on February 5, 1996. The Standards contain two parts. The first part addresses the specific roles and responsibilities of a lawyer appointed to represent a child in abuse and neglect cases. The second part provides a set of standards for judicial administrators and trial judges to assure high quality legal representation.

The Standards clearly favor the appointment of a lawyer as the "child's attorney" who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. The Standards acknowledge that some jurisdictions appoint lawyers as Guardians Ad Litem to protect the interests of the child and are thus not bound by the child's expressed preferences. However, the Standards recommend that to the greatest extent possible, given the developmental level of a child, an attorney should advocate as the child's attorney.

The Standards set forth detailed actions to be taken by counsel in child protection cases, effectively functioning as attorney performance standards. Standards concerning court practice call for judicial administrators and trial judges to play a stronger role in the selection, training, oversight, and prompt payment of court-appointed attorneys in child protective cases.

Types of Systems

While public defenders routinely represent juveniles in delinquency proceedings, it is less common for them to represent juveniles in dependency cases. Public defenders are more likely to represent parents in dependency proceedings. The reasons for this are myriad: dependency cases, which are civil proceedings, are considered by some to be inappropriate for the public defender to handle. They

are perceived by many criminal lawyers as less legal work than social work. When given a choice, public defenders may elect to represent adults involved in these proceedings because they are more comfortable representing adults than children. Many public defender programs lack social workers and other staff who have backgrounds in child development and are so critical to the child's attorney. The fact that these cases can continue, potentially, from a child's infancy through well into his or her teens further sets them apart from a criminal trial lawyer's typical experience. Finally, all too often, public defender programs that do represent juveniles treat both delinquency and dependency cases as a low priority. With inadequate funding for juvenile representation, the cases become stepping stones for new attorneys to cross before moving on to "real cases:" felony trial work.

Of course, not all public defender programs hold this attitude toward dependency cases. The Juvenile Rights Division ("JRD") of the Legal Aid Society of New York, to an extent unlike perhaps any other agency in the country, takes a holistic approach to the representation of juveniles. JRD is one of six primary divisions of the Legal Aid Society (the others are the Civil Division, the Criminal Defense Division, the Criminal Appeals Bureau, the Federal Defender and the Volunteer Division).

In addition to an appellate division and a special litigation division, JRD has a trial office in each of New York City's boroughs, and its attorneys represent all children going through New York City's Family Court in abuse and neglect, termination of parental rights, Persons in Need of Supervision and delinquency proceedings. Continuity of counsel is a hallmark of the program, and once an attorney is appointed to a juvenile's case, the same attorney will represent the child in any subsequent proceeding, be it a delinquency or child protective matter. This approach is uncommon; very few juvenile defenders in the country carry mixed caseloads of dependency and delinquency cases.

In San Diego, the county public defender's Child Advocacy Division has two sections devoted to representation of juveniles: a dependency section and a delinquency section.

The Public Defender's Dependency Section is expected to represent all children in dependency proceedings filed in San Diego County. Parents are represented by the Alternate Public Defender (first parent) and by members of a specialized panel of private lawyers (second parent and any other parties requiring counsel). The panel also represents children the public defender cannot represent due to a conflict of interest.

The dependency program has a regional structure, with offices at or near the four dependency courts in the county. The section is staffed with 17 lawyers, 14 investigators, one legal assistant, and various clerical staff. The lawyers must have a previous professional or other pertinent background working with juveniles. Of the current staff, for example, one attorney is a former pediatric nurse, one is a former teacher, and one is a former counselor. The investigators are all former social workers with the Child Protective Services agency of the Department of Social Services. Significantly better salaries drew the most experienced CPS social workers to the public defender.

Other noteworthy characteristics of the program include extensive training provided to both new and experienced attorneys, and an active relationship with clinical programs from local law schools.

Caseload in the public defender's dependency division is kept to 200 open cases per attorney, where one child equals one case. If a family has five siblings, the same attorney will represent all of them, counting as five cases. New cases are picked up as cases are dismissed or closed.

The San Diego Public Defender's Dependency Section has proven competitive with, and perhaps even more cost effective than, relying on court appointed counsel. Because of the explosion of child protective filings in recent years, and because separate counsel may be appointed for multiple parties (the child, other siblings, each parent, and sometimes a grandparent or other party interested in the welfare of the child), cost is a huge factor in determining what type of system a jurisdiction will use to assign counsel in these cases.

Last July, Arizona's Maricopa County (Phoenix) embarked on a new approach to juvenile dependency

representation which has the dual purpose of containing the costs of dependency counsel while maintaining quality representation. In the past, with multiple attorneys appointed to parties in dependency cases, in addition to GALs appointed to most parties, hourly court-appointment costs were skyrocketing in Maricopa County. To address the problem, the county's Court Appointed Counsel Contract Administrator developed a new contract scheme for attorneys appointed to represent parties in dependency proceedings. Attorneys are under no obligation to participate in the program, as it is the Court, not the Court Appointed Counsel Contract Administrator, which makes appointments. However, many attorneys agreed to move from the case-by-case, hourly compensation fee structure to the new contract system.

Whereas attorneys formerly received $40/hour for work on dependency cases, they now get an initial $1,000 per assignment, and $450 per year per open case (for petitions involving up to four siblings) thereafter. The reasoning behind this structure is that most work in dependency cases occurs during the first 120 days after assignment, up through the dispositional hearing. Post-disposition work consists primarily of bi-annual review hearings and reports plus visits and reviews of the child's placement. Contractors receive $300/year if assigned to represent a parent or other interested party. If a case which began as a dependency case becomes a severance of parental rights case, the same contractor will handle the severance proceedings, for which he or she will receive an additional sum.

Attorneys participating in the contract program must accept at least 20 cases a year. There is no specified cap on how many appointments they may take beyond the required 20.

In Arizona's 1996 legislative session, the state's Public Defender Enabling Act was modified to allow local county boards of supervisors to determine whether they will permit their public defender programs to represent parties in dependency cases. There is currently discussion in Maricopa County about utilizing the Public Defender to represent one party to a dependency case and utilizing the Office of the Legal Defender to represent another party to a dependency case. This could result in further cost savings for the county.

Numerous jurisdictions rely on court-appointed counsel to represent juveniles in dependency cases. In North Carolina, specially trained, volunteer guardians ad litem are appointed to assist attorneys representing children in child protective cases. The use of GALs substantially reduces the state's dependency case costs, as GALs, rather than the attorneys, conduct much of the investigation, interviewing and monitoring necessary in these cases.

The guardians ad litem in North Carolina function similarly to Court Appointed Special Advocates ("CASAs"), which are lay-people who volunteer to undergo special training so they may be appointed by judges to one or two cases at a time in which they are to represent the best interests of a child in court. In many instances, the CASA volunteer provides services that complement those of the attorney assigned to the case. In some jurisdictions, however, these lay volunteers are the only advocates made available for the child. In 1989 the American Bar Association endorsed the concept of utilizing CASAs in dependency proceedings but only in addition to providing attorney representation. The National CASA Association, headquartered in Seattle, prepares training materials and supports local CASA programs, which are located in all 50 states.

Conclusion

Juvenile dependency cases, if handled properly, require multiple resources beyond that of the attorney or the guardian ad litem. Social workers, psychologists, psychiatrists, and a host of agency service providers are involved in the world of child protection cases. The attorney must orchestrate and monitor all of these resources, stay on top of court orders, follow up with agencies and foster families, and stand ready to petition the court when the dispositional plan is not followed. Child advocates should participate in regular training, not only in child protective law, but also, ideally, in child development. It has been stated in numerous articles concerning child advocacy that children are not little adults.

Lawyers need to be prepared for the challenges, both ethical and strategic, of representing children who are, for instance, pre-verbal, or not yet adolescents. The decisions made in a child protective proceeding will have enormous impact on the rest of that child's life. Additionally, children who suffer abuse and neglect are in danger of becoming involved in delinquent behavior if their needs for support and proper placement remain unmet. Concern for the child's immediate welfare and for the possible ramifications of failing to address situations of abuse and neglect should motivate states and counties to devote special attention to assuring that dependency cases are handled effectively and efficiently by trained advocates whose primary loyalty lies with the child.

[1] The Department of Health and Human Services used "indicated" as a disposition in cases where there is reason to suspect maltreatment but there is insufficient evidence under state policy to confirm maltreatment.❖

NEWS FROM AROUND THE NATION

Report on Three Strikes Laws Issued By Campaign for an Effective Crime Policy

In mid-September the Campaign for an Effective Crime Policy, a non-partisan organization formed in 1992 with the goal of encouraging "a less politicized, more informed debate" about crime issues, issued a public policy report entitled *The Impact of "Three Strikes and You're Out" Laws: What Have We Learned?*. The report's findings are summarized as follows:

- At least 22 states and the federal government have enacted three strikes laws since Washington State became the first state to adopt such a policy in 1993. With the exception of California, these laws have been used very infrequently; for example, Wisconsin has applied its law only once, and the law has not yet been used in Tennessee, New Mexico, or Colorado. Most jurisdictions have drafted laws much more narrowly than California and for this reason, or perhaps because they have not seen the need, prosecutors nationwide have not extensively applied three strikes legislation.
- Although a great deal of attention was devoted to the federal three strikes law during the crime bill debate in 1994, only nine offenders have been sentenced under its provisions, and 24 additional cases are pending.
- While the California law has resulted in the imprisonment of 1,300 offenders on third strike felonies and over 14,000 for second strike felonies, there is considerable dispute about its effect on crime. Political leaders claim that the law is responsible for substantial crime rate reductions but others have pointed out that the crime rate had declined substantially before the law passed; that there was a reduction by over 100,000 men in the crime prone age categories; and that the unemployment rate decreased by 2%.
- Questions have been raised about the appropriateness of offenses targeted under California law because its breadth applies to many non-dangerous offenders. More than twice as many marijuana possessors (192) have been sentenced for second and third strikes in California as for murder (4), rape (25) and kidnaping (24). Eighty-five percent of all offenders sentenced under this law are sentenced for nonviolent offenses.
- The California law has resulted in the early release of some offenders, thus obscuring its effect on crime. Because of the crowding caused by people accused under three strikes awaiting trial, offenders with sentences of one year or less are being released from jail early in some jurisdictions. In Los Angeles, offenders with one year sentences are serving 71 days, down from 200 days before three strikes.
- The law is also having an impact on the disposition of civil and criminal cases. By March, 1995, one year after enactment of the law in California, 148 people had been convicted in third strike cases, while 7,400 second and third strike cases had been filed. Because of the severity of the penalty in these cases many defendants are going to trial in third strike cases. Second and third strike cases

accounted for only 3% of the filings in Los Angeles but accounted for 24% of the jury trials. The effects of the increased workload on judges, prosecutors and defense attorneys and the delay caused in other criminal and civil cases have been raised as matters of great concern.

- It appears that the law is being used as a tool in plea bargaining, and that there is great variation in this throughout California. For example, in San Diego, three strikes charges are reduced in 20-25% of the cases, while in Sacramento, there have been reductions in 67% of the cases. Similarly, the law is not used for drug cases in San Francisco while it is in Los Angeles.
- Racial disparity in the application of the laws is also a matter of concern. A study in California indicates that African Americans are sent to prison under the law thirteen times as often as whites. Forty-three percent of the third strike inmates in the state are African-American, though they make up 7% of the state's population and 20% of its felony arrestees.

In his conclusion, author Walter J. Dickey, Special Counsel for Policy for the Campaign for an Effective Crime Policy, also notes that three strikes law is still in a period of transition as states grapple with voter demands for crime solutions. Additionally, he points out that while three strikes laws do incapacitate habitual offenders for a long time, there is no hard evidence that three strikes laws have had a deterrent effect on the commission of crime.❖

California Legislature Passes $25 Up-Front Fee

In late August, California became the latest state to allow an up-front registration fee to be assessed upon indigent criminal defendants seeking court-appointed or public defender legal assistance. The $25 up-front fee will be assessed only in those counties which choose to adopt the measure. Additionally, all collection procedures, accounting measures and revenue distributions are left to the discretion of the board of supervisors within each county. The new law includes language which allows the fee to be waived in those cases where the defendant is unable to pay. The measure also holds the parents or guardians of minors in need of indigent defense services liable for the $25 registration payment.

Nationally, the assessment of such fees appears to be gaining favor as an alternative source of revenue for indigent defense. California joins Colorado, Connecticut, Florida, Kentucky, Massachusetts, New Jersey, New Mexico and South Carolina as states which have adopted similar up-front fee collection measures. Representatives from some of these states indicate that indigent defendants assessed a registration fee are more cooperative with their appointed attorneys because they feel that they have contributed something toward their own defense. Additionally, up-front registration fees are generally easier to collect than charges levied at the conclusion of the case, when a defendant may have to pay victim restitution, court fees and other assessments as well.

In California, public defenders throughout the state have varying expectations of the revenue the new law will generate. In Los Angeles County, proponents believe up to $5 million dollars could be added to indigent defense funding if the fee is collected from only half of the 500,000 individuals public defenders represent each year. The potential for such revenues led the Los Angeles County Public Defender to urge the board of supervisors to initiate procedures to adopt the legislation.

On the other hand, the public defender in Alameda County speculated that the new legislation will be less successful in increasing that county's indigent defense funding. California law already mandates recoupment of defense fees at the end of the legal proceedings, once a defendant's ability to pay has been established. As such, the $25 fee collected at the initial registration may decrease recoupment charges by $25 per client at the trial's completion for no net increase in indigent defense-related revenue. Despite this reservation, Alameda County has already adopted the legislation. The Alameda County Public Defender is anticipating that the county will collect new revenues from a target group of 3,000 defendants that currently do not contribute anything toward the cost of their own defense.

Finally, the San Francisco County Public Defender agreed that the new legislation should increase indigent defense funding and reports that initial steps have been taken to have the legislation adopted in San Francisco County. ❖

Iowa State Bar Indigent Defense Task Force Created

In response to the legislature's decision to create an interim study committee to review the delivery of indigent defense services in Iowa, the Iowa State Bar recently formed the Iowa State Bar Indigent Defense Task Force, chaired by attorneys Priscilla Forsyth and William Laurent. Indigent defense services in Iowa are now delivered through a patchwork system of contract, assigned counsel and public defender representation.

The task force, which has received the full support of the Iowa State Bar, held its first meeting on August 23. At that meeting, the task force formed the following subcommittees: 1) economic survey; 2) cost of prosecution/recoupment; 3) cost of the public defender system; 4) hourly court-appointed counsel rates in other jurisdictions; 5) historical development of criminal caseloads in Iowa, 1987-1995; 6) constitutional and legal ramifications; 7) eligibility standards for representation; and 8) compensation paid to other attorneys hired by the government. In October, the task force plans to conduct a survey of over 700 attorneys who regularly serve as court-appointed counsel, to determine average hourly overhead rate, qualifications of court-appointed counsel, and whether counsel will continue to take cases, despite the cut in compensation. After the subcommittees complete their assigned projects, the task force plans to make presentations to both the legislative study committee and the full legislature.

As of early October the legislature's interim study committee had not yet met.

In other, related legislative developments last session, the legislature adopted a uniform compensation rate of $45 per hour for court-appointed and contract trial counsel. The $45 figure represents a reduction for some counsel who received up to $65 per hour for representation of indigent defendants. Previously counties had discretion to pay court-appointed and contract counsel hourly rates ranging from $45 to $65 per hour. This modification to compensation rates was another impetus to the creation of the task force. At the same time, the Iowa Supreme Court is considering a consolidated challenge to the constitutionality of Iowa's statutory compensation rate for court-appointed counsel on direct appeal, which is currently set at $60 per hour with a $1,600 cap. Oral argument on the cases, Margaret Haessler v. Iowa District Court and David Hirsch v. Iowa District Court, took place in May, and as of early October, the supreme court has not yet issued its ruling. ❖

Vermont Bar Association Forms Study Committee to Determine Cost of Prosecuting and Defending Vermont's Criminal Defense Statutes

While a proposal to create a legislative study committee to determine the costs of prosecuting and defending Vermont's criminal statutes did not make it out of committee during last spring's legislative session, the Vermont Bar Association, a long-time supporter of adequate and balanced funding for both prosecution and defense, has taken this idea and run with it. The original proposal was made in response to chronic underfunding of both Vermont's State Attorney and Defender General. For example, in May 1996, the State Attorney was forced to institute a four-day statewide furlough due to insufficient funds. Additionally, since the start of a the new fiscal year in July, the Defender General has been unable to pay court-appointed counsel, except those counsel who work on cases for which life imprisonment is a potential penalty, because funds appropriated for FY 1997 court-appointed counsel fees were immediately spent on outstanding court-appointed bills from FY 1996. While the Defender General's annual appropriation (for both public defender and assigned counsel expenditures) increased by just 1.3%, from $4,609,914 in FY 1991 to $4,670,189 in FY 1995, its caseload has increased by 13.8% over this same time period.

In completing this important study, Bob Paolini, Executive Director of the Vermont Bar Association, will work closely with Defender General Robert Appel, State Attorney Executive Director Paul Hannan, and representatives from the Joint Fiscal Office as well as the Court Administrator's Office. In late July, on behalf of the ABA Bar Information Program, Bob Spangenberg and Catherine Schaefer of The Spangenberg Group met with members of the bar study committee to help them outline a plan for collecting and analyzing the information necessary to accurately determine all of the costs associated with the prosecution and defense of Vermont's criminal statutes. Upon completion, the study will be submitted to the state legislature when it convenes in January 1997.

The Spangenberg Group and the Vermont Bar Association are interested in learning about other related studies conducted around the country. If such a study has been conducted in your state or county, please contact The Spangenberg Group. ❖

New Mexico Indigent Defense Task Force Reconvenes as the State's Legislative Season Nears

After a nine-month hiatus, the New Mexico State Bar Indigent Defense Task Force has re-convened to begin addressing a number of pressing issues before the legislative season commences in January 1977. Topics for the revitalized Task Force's first meeting, which was held October 8, 1996 included:

- state post-conviction representation, particularly in death penalty cases;
- creation of a conflict defender office in the state's most populous judicial district;
- creation of a contract process to hire private attorneys to represent misdemeanants in magistrate court;
- adoption of quality control standards; and
- creation of a district public defender office in a region currently served exclusively by contract attorneys.

There have been many changes to New Mexico's indigent defense system since the task force was formed in summer 1995. As outlined in Volume II, Issue 3 of *The Spangenberg Report*, the New Mexico State Public Defender Department received a $1 million supplemental to its FY 1996 budget in order to make up for a shortfall in funds to pay contract attorneys through the fiscal year. The Department was then appropriated an additional $4 million for FY 1997, for a net 25% increase over the FY 1996 budget of $15 million. The Department intended to use the increased funds to hire much-needed additional attorneys for its district defender offices and to increase the per-case rates paid to contract attorneys.

District defender offices are located in six of New Mexico's 13 judicial districts. Other staffed units which serve the Public Defender Department 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 defender offices or any of the statewide units cannot handle due to a conflict of interest.

The Public Defender Department is currently in the process of filling its 21 newly authorized FTE staff attorney positions. Unfortunately, it was not able to increase contractor payments and it is confronted with additional serious issues such as the need to implement a systematic approach to providing counsel in capital state post-conviction cases. Because of these and other issues confronting the Public Defender Department, there was clearly value in reviving the task force process.

The Public Defender Department experienced a change of leadership since the task force was first created. The new chief public defender, T. Glenn Ellington, was formerly a staff attorney with the Department's Santa Fe office, and his assistant chief public defender, Sheila Lewis, was formerly the Chief Appellate Defender. It was Mr. Ellington, along with New Mexico Supreme Court Justice Gene E. Franchini and Sarah Singleton, president of the State Bar of New Mexico, who revived the task force.

Justice Franchini chairs the task force and Ms. Singleton has been an instrumental supporter. Other

task force members include legislators, contract public defenders, sheriffs, executive and legislative branch budget analysts, a law professor, the planning director for the Department of Corrections, and a representative from the Governor's office. There is no question that the positive steps advanced in the last legislative session resulted, in part, from the efforts of the task force to educate members of the executive and legislative branches of the problems facing the Public Defender Department.

The Spangenberg Group will resume its efforts to assist the task force under a grant from the ABA's Bar Information Program. ❖

The Spangenberg Group Completes Review of NYLAS Juvenile Rights Division

In August 1996, The Spangenberg Group completed a report on behalf of the New York Legal Aid Society's Juvenile Rights Division. The comprehensive report, "An Overview of the Juvenile Rights Division," is being used by the organization to help implement constructive changes in its internal policies and practices, and in its interactive relationships with the other component parts of the Family Court system.

Due to its size, structure and training, the Juvenile Rights Division ("JRD") is recognized as a national leader in youth advocacy. The Division's more than 100 attorneys, or "law guardians," provide comprehensive representation to children who appear before the New York City Family Court in juvenile delinquency, Persons in Need of Supervision, neglect and abuse, termination of parental rights and extension of placement and other supplemental proceedings in the five boroughs of New York City.

The Spangenberg Group's report represents the first exhaustive review of the agency in the past 25 years, during which time dramatic changes have occurred in the family court system. The study was conducted at the request of Jane Spinak, who joined the organization as its Attorney-in-Charge in spring 1995.

This past summer Bob Spangenberg and Marea Beeman of The Spangenberg Group conducted more than 130 interviews with staff in JRD's trial, appellate, social work, training, special litigation and central administrative units and David Newhouse, The Spangenberg Group's computer analyst, evaluated the Division's case-tracking system. Staff and family court judges interviewed provided insight into the challenges facing the Juvenile Rights Division, and offered ideas on how the program can grow to provide more meaningful services to clients. These observations were incorporated into a series of short-term and long-term recommendations for improvement. In the coming months, JRD will begin addressing three areas highlighted in the report: continuity of representation, practice specialization and staff teaming. ❖

Class-Action Lawsuit Alleging Denial of Counsel Filed in Sumter County Georgia

In early September, Robert Toone and Stephen Bright of the Southern Center for Human Rights in Atlanta filed a federal Section 1983 class-action lawsuit against state and county officials in Sumter County, Georgia, alleging systemic denial of constitutional rights of indigent defendants charged with misdemeanor offenses in Sumter County State Court. The lawsuit, filed in the U.S. District Court for the Middle District of Georgia, alleges that the court fails to inform pro se defendants at arraignment of their right to counsel, except on printed waiver of rights forms that they are encouraged to sign when they plead guilty.

The complaint alleges that as a result of being denied legal representation, each year, hundreds of individuals appearing in the state court enter pleas and make other significant legal decisions without sufficient understanding of their constitutional rights, waive important rights, plead guilty to offenses that they did not commit, expose themselves to illegal sentences and suffer other injuries. This systemic violation of the right to assistance of counsel, plaintiffs claim, violates their rights under the Sixth and Fourteenth Amendments to the U.S. Constitution, as enforced through 42 U.S.C. §1983. In their prayer for relief, plaintiffs request that the court find the State Court's practice in violation of Argersinger v. Hamlin, 407 U.S. 25 (1972), and issue both preliminary and permanent injunctions requiring the county to establish a program to provide free legal representation for all indigent persons accused of a crime in the State Court of Sumter County. ❖

Class-Action Lawsuit Challenging Constitutionality of Public Defender System in Allegheny County (Pittsburgh) Pennsylvania Filed

In late September, another class-action lawsuit, this one on behalf of all indigent defendants, juveniles charged with delinquency and mental commitment patients who receive the services of the Allegheny County Public Defender Office, was filed by a team of civil rights and criminal defense attorneys that includes Robin Dahlberg of the American Civil Liberties Union, Vic Walczak of the Pennsylvania Civil Liberties Union, and Claudia Davidson and Jere Krakoff, attorneys in Pittsburgh. The lawsuit, filed in state court, alleges violations of the right to counsel and due process under both the U.S. and Pennsylvania State Constitutions.

As chronicled in Volume II, Issue 3 of *The Spangenberg Report*, the Allegheny County Public Defender Office, a county-funded entity, was particularly hard-hit by a 27.5% budget cut last February, when many county department budgets were cut, as two of three county commissioners followed through on their campaign promise to reduce county property taxes by 25%. Over the course of the summer Bob Spangenberg and Catherine Schaefer of the Spangenberg Group completed a follow-up review of their August 1995 study of the Allegheny County Public Defender Office, which they conducted on behalf of the ABA Bar Information Program. ❖

Change of Guard at New York Legal Aid Society's Criminal Defense Division

After over eight years as Attorney-in-Charge of the New York Legal Aid Society's Criminal Defense Division (CDD), Bob Baum recently joined the Society's Federal Defender Office for the Southern District of New York. The new Attorney-in-Charge of CDD, Dennis Murphy, formerly a senior attorney with the Pima County (Tucson), Arizona Public Defender Office, brings to CDD a strong background in indigent defense practice as well as policy matters. Prior to joining the Pima County Public Defender Office, Dennis was in private practice, where he focused on criminal defense litigation in state and federal courts. From 1982 to 1985, Dennis was both an adjunct professor of Trial Advocacy at Georgetown University Law Center and Executive Director of the D.C. Law Students in Court. Before this, Dennis served as Chief of Indigent Defense Services of the Law Enforcement Assistance Administration (LEAA) of the U.S. Department of Justice. We wish both indigent defense leaders the best of luck in their new positions! ❖

The Spangenberg Group to Attend NLADA Annual Meeting in Las Vegas

Bob Spangenberg, Marea Beeman, Catherine Schaefer and David Carroll will all be attending the NLADA annual meeting in Las Vegas from November 10-14. Marea Beeman and Catherine Schaefer will be leading a training seminar entitled "Public Defenders of the 21st Century: Pro-Active Approaches to Becoming Positive Change Agents," with a panel of indigent defense leaders, while Bob Spangenberg will conduct a training session on the use of computer modeling by indigent defense programs.

We would enjoy meeting all of our subscribers and members of your organization and would be happy to schedule time to meet with you to discuss any problems, issues or innovative ideas you might have. Please call us in advance of the 10th, or look for us at the conference. ❖

NEWS FROM AROUND THE WORLD

The past few months have offered The Spangenberg Group the opportunity to learn about indigent defense systems around the globe as we hosted a series of informal meetings with representatives from China, Scotland, England and Wales. Because these forums present an excellent chance to assess the differing systems of indigent defense in practice the world over, we would like to share our experiences with readers of *The Spangenberg Report.*

China

In early September, The Spangenberg Group was visited by a group of three distinguished law professors from China University of Politics and Law in Beijing. All three were instrumental in drafting recent revisions to their country's Criminal Procedure Law. The main focus of the 1996 reforms, which go into effect on January 1, 1997, is to broaden China's right to counsel.

China first established its Criminal Procedure Law (CPL) in 1979. At that time, the court was required to appoint counsel only in criminal cases brought against individuals who were deaf, mute or a minor, regardless of means. The recent reforms expand this group to include blind persons and those defendants facing the death penalty. The revisions also include language which allows judges to consider "economic difficulties" in deciding whether to appoint counsel. The 1979 CPL provided that eligible defendants' notification of their right to counsel did not have to occur until seven days prior to the start of trial. Amendments made in 1983 made earlier access to counsel possible for those facing death penalty charges, but it was not until the 1996 revisions that the timing of a defense lawyer's involvement in other types of cases was addressed.

In our meeting the professors sought information on such issues as when the right to counsel attaches in criminal proceedings and ways in which counsel is provided to indigent criminal defendants in the United States.

England and Wales

Since early last spring, The Spangenberg Group has been in contact with the Lord Chancellor's Department of England and Wales as it works on re-designing the countries' criminal and civil legal services programs. The Lord Chancellor's role is roughly analogous to that of the U.S. Attorney General, but in addition to serving as the head of law enforcement in England and Wales, the Lord Chancellor also heads up the judiciary. The Lord Chancellor's Department is responsible for all funding and policy matters affecting legal aid. Currently, England and Wales provide criminal defense and civil indigent legal services through a nationally-funded private voucher system.

The most recent modification to England and Wales' indigent defense system was developed in 1988. At that time, the Legal Aid Board was established to oversee the delivery of five types of indigent services: civil legal aid, criminal legal aid, legal advice and assistance, assistance by way of representation (ABWOR), and duty solicitor schemes. Legal advice and assistance offers clients a wide range of services in civil and criminal cases while ABWOR provides legal representation beyond the first

appearance. Duty solicitor schemes provide 24-hour services to individuals being questioned at police stations. Under the 1988 changes, the courts of England and Wales retained the responsibility for granting legal aid in certain criminal proceedings.

After successfully completing an indigency questionnaire, and satisfying a merit test of reasonableness in civil matters, The Legal Aid Board offers applicants a certificate which they can then use to seek the services of the solicitor or barrister of their choice. The Legal Aid Board pays the attorney based upon the number of hours billed, the pre-determined rate of compensation and the type of services provided.

Recently, the Lord Chancellor's Department has undertaken the task of further reforming the delivery of civil and criminal services to indigents to address cost considerations, the expansion of issues for which legal representation is sought, the potential for system abuse and concerns over the quality of legal services under the current system. The cost of running the voucher system has doubled in the past five years alone. From 1984 to 1994, the cost of legal aid increased 400% to approximately $1.8 billion. Over the same ten year period, caseload increased 133% and inflation rose 70%. (England and Wales, with a 1991 population of 51.6 million, have an indigent defense cost per capita of approximately $35.17. Comparatively, the United States spent $2.76 per capita in 1986, the last year for which national figures were compiled.) With the potential for law firms to profit from indigent clients, some individuals have speculated that lawyer opportunism rather than the requirements of quality representation have been a factor in the increase in legal aid costs in England and Wales. Further, the provision of quality legal advice from lawyers once their services have been retained with the legal aid voucher also has become a concern.

In June 1996 the Lord Chancellor's office published a white paper entitled *Striking the Balance: The Future of Legal Aid in England and Wales*. The paper announced that "the changes to the legal aid scheme that the Government has decided to make are radical. Nothing less will do." The government of England and Wales has devised a plan whereby most legal aid services will now be provided through contract attorneys. The Legal Aid Board will begin to accept bids for service contracts from law firms and private attorneys in the near future. The contracts will be structured in two ways. The first approach will fix a price for providing a specified service over a particular time period. The second type of contract will be for a specified number of cases at an agreed upon price per case.

In an effort to gain perspective on criminal and civil legal aid in the United States and Canada, representatives from The Lord Chancellor's Department traveled to North America on a fact-finding trip which The Spangenberg Group helped facilitate. The three-week trip included visits to several states and Canadian provinces with large indigent defense contracting programs.

The Lord Chancellor's representatives' travels included meetings with the King County (Seattle), Washington Office of the Public Defender, which provides that county's indigent defense services through four private non-profit corporations; the Indigent Defense Services Division of the Oregon State Court Administrator's Office; and administrators of the contract programs for Oregon's 36 counties. Before arriving in Massachusetts, the representatives stopped in Winnipeg and Montreal. After visiting The Spangenberg Group and Massachusetts' Committee for Public Counsel Services, the group traveled to New York and Washington, D.C., for meetings at The New York Legal Aid Society, Neighborhood Defender Services of Harlem, Public Defender Service for the District of Columbia, and The National Legal Aid and Defender Association.

Scotland

In early September, The Spangenberg Group was visited by Michael Clancy, Deputy Secretary on Law Reform of The Law Society of Scotland. The Law Society is Scotland's equivalent of the American Bar Association. The meeting preceded Bob Spangenberg's address to The Law Society's conference on Scottish legal reform at the University of Edinburgh in late September. Entitled *Crime and Punishment Revisited*, after the Scottish Office legal

reform paper of the same name, the conference sought viewpoints on how the government's proposed reform to Scotland's indigent defense system will impact the Scottish legal system, the consumers of that system and the legal profession in general.

In Scotland, criminal, civil and legal aid advice services are administered through the Scottish Legal Aid Board (SLAB). As in England and Wales, the cost of legal aid in Scotland has risen steadily over the past several years. Criminal legal aid expenditures alone have tripled in the past ten years, bringing the total expenditure for legal aid services to approximately $200 million in 1995-96. To address this problem, the government has proposed a number of solutions, including instituting caps on compensation for legal services provided without prior approval of SLAB, allowing SLAB to contract with solicitors to perform a certain volume of work at a fixed price, and developing a pilot public defender program.

The Law Society of Scotland has publicly opposed both the proposed public defender pilot program and the contract initiative. The Law Society's objections are based upon quality concerns and the loss of freedom of choice of counsel. Instead, to offset the rising cost of indigent defense services, the Law Society favors imposing spending caps on legal services. In the Law Society's view, "the current system, when operated fairly and reasonably, is an effective means of providing representation."

Throughout The Spangenberg Group's involvement with representatives from the Lord Chancellor's Office and the Law Society we emphasized the hazards of moving toward a contract system based upon fixed price contracts. The representatives from the Lord Chancellor's Office, in their travels to North America, were able to visit contracting programs that provide quality representation and are not based upon low bid, low quality work. ❖

CASE NOTES

Washington Supreme Court Upholds State Three Strikes Law

In early August the Washington Supreme Court, in a trio of cases, upheld the constitutionality of the state's Persistent Offender Accountability Act or "three strikes" law. State v. Thorne, State v. Manussier, and State v. Rivers, 59 CrL 1515.

In Thorne, the case which addressed the most comprehensive range of arguments, the majority found that because of the "mandatory" application of the statute, prosecutors are not given discretion to apply the three strikes law, and thus, the separation of powers doctrine is not violated. The court also rejected a related separation of powers argument, stating that the legislature is vested with the power to determine penalties while judges do not hold the authority to use discretion in sentencing. The court dismissed both petitioner's vagueness and equal protection challenges, finding in regard to the latter argument that the statute passes the rational basis test. The court also rejected petitioner's claim that the statute violates both the state and federal constitutional prohibitions against cruel and unusual punishment. Analyzing the claim under the more protective state constitutional provision, the court concluded that the sentence was not disproportionate to defendant's first-degree murder and kidnaping convictions. The court additionally rejected petitioner's claim that federal due process requires that he be formally charged with being a persistent offender, reasoning that the three strikes law governs sentencing rather than defining a new crime. Finally, the majority rejected petitioner's claims that he was entitled to a jury trial at sentencing and that his prior convictions must be proven beyond a reasonable doubt. ❖

Second Circuit Rules 1996 Antiterrorism and Effective Death Penalty Act Not Retroactive for Non-capital Cases

In a per curium opinion issued in early July, the U.S. Court of Appeals for the Second Circuit ruled

that the 1996 Antiterrorism and Effective Death Penalty Act's revised standards for habeas corpus in non-capital cases do not apply retroactively to claims arising prior to the date the act became law. Boria v. Keane, 59 CrL 1393. In an earlier habeas corpus action (which was considered prior to the effective date of the new law), a Second Circuit panel determined that petitioner had been deprived of his Sixth Amendment right to effective assistance of counsel and struck down petitioner's state conviction. The court rejected the argument that the 1996 Antiterrorism and Effective Death Penalty Act should have retroactive effect. (Under this interpretation petitioner would be precluded from filing a subsequent habeas corpus petition.) The court's decision was based on both Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994), which held that new statutes are not to be applied retroactively, absent some clear signal from Congress, and the fact that while other portions of the Act are specifically crafted to operate retroactively (amendments to death penalty habeas corpus cases and representation in criminal fees cases), the Act is silent as to retroactivity in non-capital cases.

In a related case, later in July, the Second Circuit ruled that the one-year limitations period established by the Act should not be applied to a habeas petitioner who filed his petition before the Act was passed but after the new limitations period had run. Reyes v. Keane, 59 CrL 1456. ❖

Sixth Circuit Addresses Sixth Amendment Right to Speedy Appeal

Adopting the reasoning of the Second, Third and Tenth Circuits, the Sixth Circuit Court of Appeals recently held that a Sixth Amendment right to a speedy appeal exists, established that the right exists for both defendant-appellees and defendant-appellants, and adopted a modified version of the four-part Barker v. Wingo test for undue delay. U.S. v. Smith, 59 CrL 1532.

In 1991, defendant Smith was convicted in federal court of being a felon in possession of a firearm. The government sought imposition of the mandatory 15-year minimum sentence under the federal sentencing guidelines; however, at sentencing Smith challenged two of his prior convictions, and as a result was sentenced to 27 months in prison. In October 1991 the government appealed Smith's sentence, challenging the court's authority to use Smith's challenges of his prior convictions to reduce his sentence. In late 1992, the appeal was argued before a panel of the Sixth Circuit, but the decision was postponed until the Sixth Circuit issued its decision in U.S. v. McGlocklin, 8 F.3d 1037 (CA 6 1993), which considered the same issue. While the McGlocklin decision favored defendant, the panel considering defendant's appeal entered an incorrect order, and this complication was not resolved until September 1994. By this time, the U.S. Supreme Court had decided Custis v. U.S., 510 U.S. 913 (1994), which held that defendants generally cannot collaterally attack prior state convictions in sentencing proceedings under the federal sentencing guidelines at issue, overruling McGlocklin.

On September 1, 1994, the Sixth Circuit panel vacated defendant's conviction and resentenced him in accordance with Custis. By this time, defendant had already served his sentence and was on supervised release. On January 25, 1995, he was returned to custody, but on March 15, 1995, the district court ordered him released on the ground that the delay in adjudicating the government's appeal constituted denial of due process.

On appeal, the Sixth Circuit first determined that the Sixth Amendment right to a speedy trial extends to appeals, writing, "First, it makes sense to hold that the Due Process Clause embraces some minimum expectation of a reasonably timely appeal...An appeal that needlessly takes ten years to adjudicate is undoubtedly of little use to a defendant who has been wrongly incarcerated on a ten-year sentence." As other circuits have done, the court adopted a three-part modified version of the four-part Barker v. Wingo, 407 U.S. 514 (1972), analysis for evaluating delay in the trial context. Under the Wingo test, the following four factors are to be considered in determining whether trial delay is unconstitutional: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of the right to a speedy trial; and 4) prejudice to the defendant. The modified

appellate analysis adopted by the Sixth Circuit considered: 1) prevention of oppressive incarceration pending appeal; 2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeal; and 3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in the case of reversal and retrial, might be impaired. The court also went on to establish that this right applies to both defendant-appellant and defendant-appellees.

In defendant's case, the court accepted the government's reason for the delay (to allow resolution of the McGlocklin and Custis cases), holding that this was a "valid reason" which justified "appropriate delay." Additionally, the court noted that at no point during the lengthy proceedings did defendant object to the delay. ❖

New Jersey Supreme Court Holds That Capital Defendant May Not Waive Post-Conviction Review

A majority of the New Jersey Supreme Court recently held that a petitioner convicted of a capital crime may not waive post-conviction review of his conviction and death sentence. However, while expressing respect for the state's obligation to fairly and reliably administer the death penalty, the court crafted an expedited schedule for those petitioners who do not wish to pursue their right to state post-conviction review. State (New Jersey) v. Martini, 59 CrL 1384.

Petitioner Martini was convicted of murder and sentenced to death. After his conviction was affirmed by the New Jersey Supreme Court, Martini decided that he did not wish to pursue state post-conviction relief. The trial court denied the State Public Defender's request to pursue relief on Martini's behalf, and the State Public Defender appealed.

In reversing the trial court, the Supreme Court relied on a closely related decision where it held that the state's obligation to assure a reliable penalty determination justified a rule against a capital defendant's executing a knowing and voluntary waiver of his right to present mitigating evidence during the penalty phase of his trial. State v. Koedatich, 489 A.2d 659 (NJ SupCt 1984) and 548 A.2d 939 (NJ SupCt 1988). The court also found that there are some issues that are most appropriately raised on post-conviction relief (e.g., those cited by defense counsel: a defense based on undisclosed, confidential information; a new constitutional rule established by the U.S. Supreme Court after Martini's trial; and allegations that New Jersey's death penalty system may be systemically flawed). Returning to the policy concerns it expressed in Koedatich, the court stated that it is responsible for "ensur[ing] the integrity of death sentences in New Jersey." To this end, it held that a petitioner may not waive the right to post-conviction review.

However, the court also established a new, truncated procedure, "both in the interest of the defendant who wishes to conclude the appeal process as soon as possible, and in the interest of the public that seeks to know that justice is done." ❖

Suppression of Confession Appropriate Where Capital Defendant Waived Miranda Rights After Counsel Had Been Appointed Without Defendant's Knowledge

Once the Sixth Amendment right to counsel attaches, an ordinary waiver of Miranda rights will not suffice to validate a subsequent confession, and thus the inculpatory statements of a capital defendant, who had not requested appointment of counsel and was unaware that one had been appointed for her, must be suppressed, the Arkansas Supreme Court recently ruled. Bradford v. State (Arkansas), 59 CrL 1383.

Soon after defendant Bradford was arrested and charged with murder she signed a waiver of her rights under Miranda v. Arizona, 383 U.S. 436 (1966), and made two statements to the police regarding the charges. At Richardson's initial appearance, two days later, an affidavit of probable cause was executed, bail was set and, unbeknownst to Richardson, a public defender was appointed to represent her. Soon after the initial appearance, Richardson executed another waiver of her Miranda rights and gave police a more detailed account of her involvement in the murder. Bradford was convicted of capital murder.

On appeal the Arkansas Supreme Court considered the question of whether the municipal court's appointment of counsel at the probable cause hearing curtailed subsequent police investigation, despite the facts that neither Bradford nor the police were aware that counsel had been appointed and that Bradford had waived her Miranda rights before the final interrogation. The court's decision turned on its interpretation of Michigan v. Jackson, 475 U.S. 625 (1986), which "stand[s] for the proposition that once the Sixth Amendment right to counsel attaches and once the defendant requests counsel, an ordinary waiver of Miranda rights will not suffice to validate a subsequent confession." Relying on a footnote in Michigan ("In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request."), the court concluded that the same principle should apply to appointed counsel, and the fact that Bradford was unaware of the appointment is irrelevant. ❖

Michigan Supreme Court Similarly Rules Suppression of Confession Appropriate, Where Defendants Were Unaware That Counsel Had Been Hired

In a related decision, a plurality of the Michigan Supreme Court recently affirmed the trial court's suppression of confessions made by two defendants after their families had hired counsel but were prohibited by the police from notifying defendants that counsel had been retained. People (Michigan) v. Bender, 59 CrL 1426.

The two defendants, Bender and Zeigler, were arrested for a series of thefts. While in custody, both defendants' families hired counsel to represent them and, pursuant to the attorneys' instructions, attempted to inform the defendants that counsel had been retained and that they should not speak to police. However, the police prohibited both families' attempts to reach the defendants, instead requesting that they waive their Miranda rights and submit to questioning, which both defendants did.

In affirming the trial court's suppression of their confessions the Michigan Supreme Court considered Moran v. Burbine, 475 U.S. 412 (1986), in which the U.S. Supreme Court held that police need not inform a suspect that counsel has been retained and is waiting to contact him for the suspect to execute a valid waiver of his right to remain silent and to counsel under Miranda. The court declined to follow Moran and instead, referencing similar approaches in People v. McCauley, 645 N.E.2d 923 (Ill. SupCt. 1994) and State v. Reed, 627 A.2d 630 (NJ SupCt. 1994), established the following rule: "[I]n order for a defendant to fully comprehend the nature of the right being abandoned and the consequences of his decision to abandon it, he must first be informed that counsel, who could explain the consequences of a waiver decision, has been retained to represent him." The court also specified that the rule is not limited by requiring the attorney's physical presence at the police station. ❖

Attorney's Letter Created Offense-Specific, Not Blanket, Request to Have Counsel Present for Police Interrogation

An attorney's letter to the district attorney which stated that his client exercised his right to have counsel present during any contact with police applied only to interrogation regarding the specific offense for which counsel was hired, not to interrogation relating to separate and subsequent allegations, a majority of the en banc Pennsylvania Superior Court ruled. Commonwealth (Pennsylvania) v. Romine, 59 CrL 1539. The court, focusing on the section of the letter which stated "our client has exercised his right to have counsel present during any and all interrogations, statements and/or contact concerning *this case* unless specifically waived by his attorney [emphasis added]," found that the letter did not act to protect defendant for the incriminating statements he made to an undercover officer regarding a new crime. Referring to the U.S. Supreme Court's reasoning in McNeil v. Wisconsin, 501 U.S. 171 (1991), the majority found that the letter should be interpreted as an invocation of the defendant's Sixth Amendment right to counsel, not as a request for counsel in dealing with any and all custodial interrogation. ❖

Capital Defendant Denied Due Process When Trial Court Excluded Polygraph Test of State's Key Witness During Penalty Phase

A trial court's exclusion, during the penalty phase of a capital trial, of polygraph evidence that the key prosecution witness played a larger role in the murders than he admitted denied the defendant due process, the Ninth Circuit Court of Appeals recently ruled in a federal habeas corpus action. Rupe v. Wood, 59 CrL 1504.

While the state's witness claimed to have had discussions with the defendant prior to the bank robbery which resulted in two deaths, he denied any participation on the day of the robbery. Prior to trial, the witness underwent a polygraph test from which the polygraph examiner initially determined that the witness was untruthful during the examination, but later revised his opinion, stating that the test results were not entirely reliable because of the witness' nervousness, lack of sleep and hostility towards the police. The trial court refused to admit evidence of the witness' polygraph test during either the guilt or penalty phase of the trial.

In affirming the district court's ruling that this exclusion during the penalty phase denied defendant due process, the court of appeals relied upon Lockett v. Ohio, 438 U.S. 586 (1978), in which the United States Supreme Court stated, "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604. ❖

Florida Supreme Court Reverses Death Sentence For Prosecutorial Misconduct

A majority of the Florida Supreme Court recently reversed the death sentence of a defendant because of prosecutorial misconduct during the sentencing stage of trial. Cambell v. State, 59 CrL 1367. During cross-examination of a defense psychologist the prosecutor questioned the expert at length about whether he frequently testified for the defense in cases involving the killing of police officers. The victim in the case before the court was not a police officer. During closing arguments the prosecutor again mentioned the psychologist's history of testifying for the defense in cases involving the killing of police officers. The majority, noting that the victim in this case was not a police officer, wrote that although the state may point out the number of times an expert has testified for the defense on similar matters, the prosecutor's focus on cases in which he testified where the victim was a police officer was both irrelevant and prejudicial. The court also found prosecutorial misconduct in the prosecutor's advice to the jury that "the death penalty is a message sent to a number of members of our society who choose not to follow the law," as the court explicitly prohibited "message to the community arguments" in Bertolotti v. State, 476 So.2d 130 (Fla SupCt 1985). ❖

New York Court of Appeals Rules Prosecutorial Misconduct During Grand Jury Requires Indictment Be Dismissed

A district attorney's misconduct during a grand jury investigation was so serious that it was likely the defendant would suffer prejudice, and the indictment must be dismissed, the New York Court of Appeals recently ruled. People v. Huston, 59 CrL 1305.

Defendant was charged with the stabbing murder of his estranged wife and her mother. During the course of the grand jury proceeding, the district attorney, while admitting that the testimony would be inadmissible, called a hearsay witness regarding a potential witness' possible testimony. The hearsay witness' testimony was far more sensational and damaging than that of the potential witness, who eventually testified. Despite these developments, the district attorney used the first witness' hearsay testimony "as a platform to convey to the Grand Jury his personal belief in defendant's guilt. He repeatedly informed the Grand Jury that the version of events recounted by [the hearsay witness] was 'the truth.'" The grand jury charged the defendant with two counts of second-degree murder and he was convicted on both counts.

On appeal, the court was particularly troubled by the district attorney's actions, finding that "[t]he prosecutor's comments usurped the function of the grand jury, which is the exclusive judge of the facts." Additionally, the court found that the district attorney failed to honor his responsibilities "not only to secure indictments but also to see that justice is done." As a result, the court ordered that the indictment be dismissed, without prejudice, writing, "In rare cases such as this where irregularities in presenting the case to the grand jury rise to the level of impairing those proceedings and creating the risk of prejudice, the indictment cannot be permitted to stand even though it is supported by legally sufficient evidence." ❖

Defendant's Concession of Elements of a Crime Can Serve to Prohibit Introduction of Prior Bad Acts

In an en banc decision, a majority of the U.S. Court of Appeals for the District of Columbia held that the unequivocal offer of a defendant to concede two elements of a crime, combined with an explicit jury instruction that the Government no longer needs to prove either element, gives the Government everything it must show with respect to these two elements, and does so without risk that the jury will use the evidence to show the defendant's propensity to commit the alleged crime, or for other impermissible purposes. U.S. v. Crowder, 59 CrL 1349. Crowder, in which two related cases were consolidated for the court's consideration of this issue, involved two defendants charged with drug distribution who were each willing to concede that a person who possessed drugs under the circumstances alleged by the government would have had knowledge of the nature of the substances and intent to distribute. Since the only remaining element of this crime is possession, defendants argued that their concessions should have prevented the district court from admitting evidence of other instances of drug dealing under Fed.R.Ev. 404(b). The Court of Appeals agreed.

The first sentence of Rule 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, the second sentence provides that such evidence may be introduced "for other purposes," such as showing "knowledge" and "intent." Following the First, Second, Eighth and Eleventh Circuits' approach, the court ruled that "a defendant's offer to concede knowledge and intent combined with an explicit jury instruction that the Government no longer needs to prove either element gives the Government everything the evidence could show with respect to those two elements, doing so without risk that the jury will use the evidence for impermissible purposes." The court explained that this approach comports with both the plain language and the purpose of Rule 404(b), to protect defendants from the possibility that the jury will use bad acts evidence to persuade the jury on matters of the defendant's character. The court also pointed out that while character is certainly relevant, there is a danger, under Rule 403, that the prejudicial effect of introducing bad acts evidence to show character might outweigh the probative value of such evidence.

Finally, the court provided that "[i]n order to protect defendants from the prejudicial effects of bad acts evidence without also weakening the government's ability to prove its case, the conceded elements must be completely removed from the trial. A defendant's offer to concede, therefore, must be unequivocal: the concession's language must be unambiguous and the defendant may not undermine the offer by later challenging the conceded element."❖

Second Circuit Clarifies Appropriate Standard For Federal Juvenile Transfer Decisions

The Second Circuit Court of Appeals recently clarified the standard for making transfer decisions to adult court in federal juvenile cases. U.S. v. Nelson, 59 CrL 1403.

Defendant Nelson was charged with murder and was acquitted of state murder charges (for which he was tried as an adult). Subsequently, in 1994, he was charged with juvenile delinquency in federal court. This was the Second Circuit's second review of Nelson's transfer in the federal matter. Following the first remand, which resulted from the district court's use of a "glimmer of hope" standard, the district court

employed two alternative standards: 1) that there be a "reasonable probability" of rehabilitation; or 2) that rehabilitation be "likely." The court opted to use the second of these standards, and found, after considering extensive psychological testimony and other evidence, that because Nelson was not likely to be rehabilitated within the juvenile system he should be transferred to adult court. Nelson appealed.

In affirming, the court of appeals held that the district court's application of a likelihood standard to evaluate Nelson's rehabilitative potential was proper, as it strikes the appropriate balance between protecting society and encouraging rehabilitation. The court also rejected defendant's argument that the "likelihood" standard impermissibly shifts the burden of proof, explaining that only when the government proves that rehabilitation is not likely may the motion to transfer be granted. ❖

Separate Probable Cause Hearings Required for Juvenile Detention and Transfer, Illinois Court of Appeals Rules

Rejecting the state's argument that a finding of probable cause at the juvenile detention hearing should be applicable to later probable cause hearings for transfer to adult court, the Illinois Appellate Court, First District, recently found that the purposes of the two hearings are so different and unique that due process and the notion of fundamental fairness require separate determinations of probable cause. In re RL, 59 CrL 1331. Further, the court found that the transcript of the detention hearing may not be considered at the transfer hearing unless the juvenile has stipulated or does not object to its admission.

In reaching its decision that there must be two separate probable cause determinations the court relied on the plain language of the statutes, particularly on that of the transfer statute, which requires that the judge assigned to the transfer motion must "hear" and "determine" whether probable cause exists. The court also cited concerns for fundamental fairness.

As to the second issue, whether the transcript of the detention hearing may be used at the later transfer hearing, the court expressed similar concerns for fairness, particularly because of the differing natures of the two hearings. While a detention hearing is provisional in nature, the court pointed out, a transfer hearing could have a lasting and permanent effect upon the child, if the transfer were ordered. ❖

Iowa Supreme Court Rules Parents Not Entitled to Participate in Juvenile Delinquency Proceedings

Parents' rights to be notified of and be present at the crucial stages of a delinquency proceeding adequately protect their interest; no additional right to participate in the proceedings exists, the Iowa Supreme Court recently decided. In re A.H. (J.H.), 59 CrL 1341. The court pointed out that in contrast to statutory provisions regarding Child in Need of Supervision cases, the provisions relating to delinquency mention only the juvenile's right to counsel. The court reasoned that a parent's interest in delinquency matters is less direct than when termination of parental rights or custody is at issue. The court also identified potential for disagreement, possibly even adversarial positions, between parent and child when a child is charged with delinquency. ❖

Connecticut Supreme Court Establishes That Batson Objection May Be Raised Any Time Before Jury Is Sworn

A party may raise a Batson equal protection objection to the use of a peremptory challenge so long as the claim is brought to the attention of the trial court before the jury has been sworn, a majority of the Connecticut Supreme Court recently ruled. State v. Robinson, 59 CrL 1285. The defendant in this case raised a Batson claim after the second of two black venirepersons was peremptorily challenged by the state. The trial court found the Batson challenge regarding the second black juror to be meritless and did not hold a hearing on the striking of the first black juror.

The court of appeals affirmed, but on appeal the Connecticut Supreme Court reversed, looking first to Batson v. Kentucky, 476 U.S. 79 (1986), in which the U.S. Supreme Court held that although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason related to the outcome of the case, the Equal Protection Clause prohibits the prosecutor from challenging potential jurors on the basis of their race. The court also considered Connecticut's unique voir dire procedure, which creates the possibility that a defendant may not have sufficient information to raise a Batson challenge until late in the process. Connecticut's procedures "require a comparison of the characteristics, the voir dire questions and the voir dire responses of the challenged venireperson with those of the venirepersons who were not challenged, and require knowledge of the state's use of all its peremptory challenges." To ensure consistency in the application of the new rule, the court went on to explain, it decided to adopt the clear cut-off point of the time that the jury is sworn in. ❖

Evidence of Battered Women's Syndrome Relevant to Both Reasonableness and Subjective Existence of Need To Defend

The California Supreme Court recently expanded the role of the battered women's defense, ruling that evidence of battered women's syndrome is generally relevant to the reasonableness of the need to defend as well as the subjective existence of the defendant's belief in the need to defend, and may be considered by the jury for both purposes. State v. Humphrey, 59 CrL 1528.

Defendant Humphrey was tried for the murder of her husband and convicted of voluntary manslaughter. At trial Humphrey claimed that the killing was in self-defense and presented expert testimony regarding battered women's syndrome ("BWS") and the expert's opinion that Humphrey suffered from BWS to an extreme degree. The trial court's jury instructions set the following standards: an actual and reasonable belief that the killing was necessary was an absolute defense; and an actual but unreasonable belief that the killing was necessary was a defense to murder but not to voluntary manslaughter. The court also instructed the jury that while it could consider BWS evidence in determining whether Humphrey held a subjective belief that self-defense was necessary, it could not consider the BWS evidence in the context of the objective reasonableness requirement of self-defense.

Relying on its prior decision in People v. Ochoa, 6 Cal.4th 1199 (Calif SupCt 1993), the California Supreme Court reversed Humphrey's conviction, finding that the trial court had too narrowly defined the use of the BWS evidence. In Ochoa, where the defendant was convicted of vehicular homicide while

intoxicated, the Court ruled that the requisite "gross negligence" charge is determined by the "objective" test of "whether a reasonable person in the defendant's position would have been aware of the risks involved." Applying the Ochoa standard to this case, the court concluded, "Although the ultimate test of reasonableness is objective, in determining whether a reasonable person in defendant's position would have believed in the need to defend, the jury must consider all of the relevant circumstances in which defendant found herself." The court noted that in addition to using BWS evidence to determine whether defendant held a subjective belief that self-defense was necessary, this evidence can and should also be used by the jury to assist them in assessing the circumstances in which Humphrey found herself at the time of the killing. ❖

In California, Challenge to Prior Conviction Remains Viable Despite Custis

The U.S. Supreme Court's decision in Custis v. U.S., 14 S.Ct.1732 (1994), does not operate to preclude pretrial challenges to the validity of a prior conviction that the state will use for sentencing enhancement, a majority of the California Court of Appeal, Second District, recently ruled. People v. Soto, 59 CrL 1371. Instead, the court followed the California Supreme Court's decisions in People v. Sumstine, 36 Cal.3d 909 (Calif SupCt 1984), and a later, post-Custis decision in a capital case, People v. Horton, 11 Cal.4th 1068 (1995), which established and reaffirmed, respectively, California's accepted practice of permitting such collateral attacks. In Soto, a non-capital case, the majority explained that Horton supports its position that Custis extends only to federal criminal procedure and does not establish a dramatic change in substantive constitutional law. Thus, the court concluded, until the California Supreme Court establishes otherwise, Sumstine is to be treated as good law. ❖

Uncounseled Misdemeanor Resulting in Suspended Sentence May Be Used For Enhancement

Because it does not qualify as a "term of imprisonment," a suspended sentence resulting from an uncounseled misdemeanor charge may be used for sentencing enhancement at a later date under Scott v. Illinois, 440 U.S. 367 (1979), and U.S. v. Nichols, 55 CrL 2136 (1995), the Virginia Supreme Court ruled in June. Griswold v. Commonwealth, 59 CrL 1295. Defendant, charged with DUI, had two prior DUI convictions. In neither of the prior cases did defendant have the assistance of counsel. For the first, he received a suspended sentence. For the second, because of the first conviction, he was required to serve 48 hours of a 180-day jail sentence. The Virginia Supreme Court found that the U.S. Supreme Court made it clear in the more recent Nichols decision that there is no constitutional right to counsel in a misdemeanor case unless the conviction results in "actual imprisonment." Thus, the first conviction, which resulted in a suspended sentence, was not invalid for purposes of sentencing enhancement, unlike the second conviction. ❖

Waiver of Right to Counsel While Judge Reinstructs Jury Must Be Knowing and Intelligent, Maryland Court of Appeals Rules

A defendant's agreement to proceed in the absence of counsel while the judge later reinstructed the jury, was "tantamount to a waiver of the right to counsel and therefore requires an intelligent and knowing waiver inquiry," the Maryland Court of Appeals recently held. State v. Wischhusen, 59 CrL 1295. While the court did not find any constitutional inadequacy in this case, it concluded, after reviewing U.S. Supreme Court and state law on the right to counsel, "there is little support for distinguishing between waiving the presence of defense counsel at a critical stage of the proceeding and waiving the right to assistance of counsel." ❖

Arrestee's Statutory Right to Communicate With Counsel Not Satisfied if Telephone Conversation is Audiotaped, Ohio Supreme Holds

Ohio police's audiotaping of an arrestee while she spoke to her attorney on the telephone violated her state statutory right to "communicate with an attorney" and "to consult with [the attorney]

privately," the Ohio Supreme Court held in June. Dobbins v. Ohio Bureau of Motor Vehicles, 59 CrL 1292. While in custody after being arrested for DUI, defendant telephoned her attorney, but claimed that she felt unable to freely communicate because she was told that the police would audiotape her conversation. After the conversation, defendant refused to take a breathalyser test, and as a result, under Ohio's implied consent law, her license was suspended. On appeal, the Ohio Supreme Court found that the police had violated the state's statutory guarantee. However, the court upheld her license suspension, explaining that the right violated was statutory not constitutional in nature, and therefore the violation of this right did not change the status of her refusal from a "true" refusal under Ohio's implied consent law. ❖

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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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