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Imputed Disqualification: Do Ethics Screens Adequately Shield Public Defenders from Conflicts of Interest?

By Catherine L. Schaefer

Introduction

The creation of in-house conflict units within existing public defender programs is gaining favor by funding sources in some jurisdictions as a way to reduce court-appointed counsel fees traditionally associated with conflict and overload cases. For example, in the wake of Orange County, California's December 1994 bankruptcy filing, the county board of supervisors terminated the felony and misdemeanor contracts with private attorneys who had historically represented indigent defendants the public defender could not represent due to conflict of interest or case overload. In an effort to cut costs, the county board of supervisors eliminated these contracts and restructured the public defender's office into three segmented units so that it could represent codefendants previously served by the contractors.

More recently, during the 1996 state legislative session, the Florida legislature appropriated $236,000 for fiscal year 1996-1997 to Florida's Capital Collateral Representative (CCR), Florida's capital state post-conviction representation entity, "to operate a separate and distinct unit [of CCR] to handle conflict cases [which funds] shall be used solely for that purpose." The need for such a unit arose primarily from the demise of the Volunteer Lawyer's Resource Center of Florida, which had been providing representation to approximately 40 defendants who had conflicts with CCR before federal funds supporting the Resource Center were terminated. In May 1996, Mike Minerva, the Capital Collateral Representative, submitted to the Florida Bar Professional Ethics Committee a request for an ethics opinion on the propriety of CCR operating such a unit. Soon after asking for an opinion from the ethics committee, Mr. Minerva requested technical assistance on this matter from The Spangenberg Group, through the ABA Post Conviction Death Penalty Representation Project.

The Spangenberg Group researched the issue of imputed disqualification and the propriety of ethics screens, and prepared a memorandum documenting our findings. This memorandum was submitted to the Florida Bar Professional Ethics Committee, which ruled in mid-September that it did not have sufficient factual information on which to base an advisory opinion. However, in late September, the Capital Post-Conviction Committee of the Florida Supreme Court issued an order setting up an alternative, separate mechanism for assigning counsel to represent those defendants with whom CCR has a conflict.

Because the issue of imputed disqualification and the propriety of ethics screens has such broad-ranging relevance for indigent defense programs around the country, we have used the memorandum prepared for CCR on behalf of the ABA Post Conviction Death

Penalty Representation Project as a starting point for sharing the information we collected with readers of *The Spangenberg Report*.

Background

As of July 1993, 35 states[1] (including Florida) and the District of Columbia had adopted some form of the ABA Model Rules of Professional Conduct.[2] Rule 1.10, as last amended in 1989 (in model form) provides as follows:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.
>
> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> > (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
> >
> > (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
>
> (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.[3]

The American Law Institute has also taken a position on imputed disqualification, and has recognized that when adequate safeguards are in place, in both private offices and public defender offices, imputed disqualification need not occur. Section 203(d)(iv) of the *Restatement of the Law Governing Lawyers*, which pertains to imputed disqualification of public defender offices specifically, states:

> *Public-defender offices*. In a public defender office, conflict of interest questions commonly arise when the interests of two or more defendants so conflict that lawyers in a private-practice defense firm office could not represent both or all the defendants (see §210). Where defenders in the same office discuss cases and have access to each other's files, §203(3) imputes their conflicts to each other. In the absence of such access, however, public defenders who are subject to a common supervisory structure within an organization ordinarily should be treated as independent for purposes of §203(3). The lawyers provide legal services, not to the public defender office, but to individual defendants. Ordinarily, the office would have no reason to give one defendant more vigorous representation than other defendants whose interests are in conflict. Thus, while individual defendants should be represented by separate members of the defender's office, the representation of each defendant should not be imputed to other lawyers in an office where effective measures prevent communication of confidential client information between lawyers employed on behalf of individual defendants.[4]

The Comment to this section states:

> *Comment d(iv). Public-defender offices*. A concern about over-disqualification in multiple-defendant cases and cases involving prosecution witnesses has led some courts not to impute conflicts within defender offices. See, e.g., People v. Robinson, 402 N.E.2d 157 (Ill. 1980) (because defender's office is not a law firm, and owing to desire to make defender representation available to all indigent defendants, separate defenders from same office may represent co-defendants in same case); State v. Bell, 447 A.2d 525 (N.J. 1982) (multiple representation by separate lawyers from same public defender's

office not per se prejudicial); People v. Wilkins, 268 N.E.2d 756 (N.Y. 1971) (where public defender represented defendant and, unknown to lawyer, other defenders represented both defendant and complaining witness in unrelated matter, no basis for finding unfair trial because defender organization organized with multiple offices and little communication among lawyers so that no basis for finding confidences shared from one case to other). The decisions can also be understood as instances of courts refusing to vacate convictions on imputation grounds in the absence of demonstrated prejudice to the accused.

Compare, e.g., Rodriguez v. State, 628 P.2d 950 (Ariz. 1981) (public defender's office had previously represented person who might have to be called as rebuttal witness in the case; defender's office treated as single firm and permitted to withdraw because might have to use secrets of the witness in course of representing current client); Allen v. District Court, 519 P.2d 351 (Colo. 1974) (public defender's office treated as a single firm so that it could withdraw from representing person in one case who would be prosecution witness in case against another client represented by defender). But see, e.g., Commonwealth v. Westbrook, 400 A.2d 160 (Pa. 1979) (defender office of Philadelphia treated as law firm and thus defendant denied due process where his brother was advised by lawyer in same office not to make statement).[5]

In contrast, Nancy Shaw, Federal Defender for the District of Alaska, and author of Chapter 16 of the ABA Criminal Justice Section's *Ethical Problems Facing the Criminal Defense Lawyer; Practical Answers to Tough Questions*, "Representing Codefendants Out of the Same Office," states as follows:

> It is doubtful that a busy defender office can construct an effective "ethics wall," or a cross-hatch of such barriers that will reliably insulate the activities of one defense team from the other. The administrative difficulties are formidable, and the disruptions of the office culture predictable. Of greater concern is the inability of an office hospitable to codefendants to encourage the confidence of its clients. In short, lawyers would be wise to follow the position advocated by the ABA Standards for Criminal Justice. That is, that the potential for conflict is "so grave" that defense counsel should decline to act for codefendants unless it is "clear" that no conflict will develop and the clients consent to multiple representation on the record.[6]

Threshold Issue: Is A Public Defender Organization a Law Firm?

The first question which must be addressed in regard to the propriety of ethical screens is whether a public defender organization is a law firm for purposes of imputed disqualification. If the answer to this question is yes, the rules of imputed disqualification apply. If the rules of imputed disqualification apply, the second question, whether an ethical screen can satisfy these rules, must be answered.

In 1978, the ABA issued Informal Opinion No. 1418, which states that a public defender office constitutes a law firm under Model Rule 1.10. Many states have followed this opinion. *See*, South Carolina Ethics Opinion 92-21 (7/92) (a public defender may not ordinarily represent more than one co-defendant; the disqualification is imputed to other public defenders in the office); *Commonwealth v. Green*, 530 A.2d 1011 (Pa. 1988) (county public defender's office is a single law firm); *McCall v. District Court*, 783 P.2d 1223 (rule of imputed disqualification of attorney applies to both private law firms and public law firms); *Kirkland v. State*, 617 So.2d 781 (Fla.App.4 Dist. 1993) (the public defender's office is the functional equivalent to a law firm); *State v. Stenger*, 754 P.2d 136 (Wa. 1988); *Okeanai v. Superior Court*, 871 P.2d 727 (Az. App. 1993); *State v. Dillman*, 591 N.E.2d 849 (OhioApp.1990); *Townsend v. State*, 533 N.E.2d 1215, 1231 (Ind. 1989).

However, courts in other states have refused to adopt a per se rule that public defender offices should be treated as law firms for purposes of imputed disqualification. *See State v. McNeal*, 593 So.2d 729

(La.App. 4 Cir. 1992) (fact that attorneys representing clients with conflicting interests are employees of the same indigent defender board [Louisiana's equivalent of a public defender organization] does not in itself provide grounds for imputed disqualification); *People v. Hanson*, 652 N.E.2d 824 (Ill.App.5 Dist. 1995) (individual attorneys who comprise staff of public defender's office are not subject to per se rule that one attorney's conflict is imputed to all others in that office); *Graves v. State*, 619 A.2d (Md.App. 1993) (public defender's office is not per se same as private law firm for conflict of interest purposes); *People v. Wilkins*, 268 N.E.2d 756 (N.Y. 1971) (although for purpose of disqualification of counsel, knowledge of one member of law firm will be imputed by inference to all members of that law firm, such rule does not apply to large public defense organization such as legal aid society); *State v. Humphrey*, 739 P.2d 918 (Ut. 1990); *Shaw v. State*, 766 S.W.2d 676, 670 (Mo. 1989).

Case Law Regarding Ethical Screens

While courts are divided over the question of whether the rule of imputed disqualification applies to public defender offices, courts which have considered the implementation of ethical screens in public defender offices (to satisfy the rules of imputed disqualification) share the American Law Institute's position. Our research revealed that all courts which have considered the question of imputed disqualification in cases of conflict have ruled in favor of public defenders' representation of co-defendants or other defendants with conflicting interests, so long as adequate ethical screens are in place.

Arkansas

Relying on the comment to Rule 1.10, the Supreme Court of Arkansas found that two attorneys who worked in separate divisions of the public defender's office were not prohibited from representing co-defendants in a robbery and murder case. *Childress v. State*, 907 S.W.2d 718 (Ark. 1995). In this case, one of the attorneys worked part-time in the civil commitment division of the public defender office and had no access to any other files or information about criminal appeals. This attorney represented one of the co-defendants in her private practice and was not paid by the public defender's office for this work. The Arkansas Supreme Court affirmed the trial court's finding that there was no conflict in the public defenders' representation of the co-defendants based upon these facts and the comment to Rule 1.10 which states: "Lawyers employed in the same unit of a legal services organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other should depend on ... the specific facts of the situation." *Childress v. State*, 907 S.W.2d 718, 725-726.

California

Recently, in California, the Court of Appeal, First District, considered the question of representation of co-defendants when formal ethical screens were in place, and ruled that such an arrangement is appropriate. *People v. Christian*, 48 Cal.Rptr.2d 867 (Cal.App. 1 Dist. 1996). Co-defendants in *Christian* were represented by public defenders from the Contra Costa Public Defender's Office (PD) and the Alternate Defender's Office (ADO) respectively. Because both the PD and the ADO are under the supervision of the same Public Defender, Charles James, one of the defendants made a motion for substitute counsel, which the trial court denied. On appeal, the California Court of Appeals for the First District affirmed.

Despite the fact that Charles James supervises both offices and his name appears at the top of pleadings from both the PD and the ADO, the court found no conflict in the PD's and ADO's representation of co-defendants. The court recognized that conflict rules clearly apply to both private and public sector attorneys, but distinguished the practices of the two because public sector attorneys do not share the financial incentive that drives private attorneys. *People v. Christian*, 48 Cal.Rptr.2d 867, 874. The court also expressed concern for increasing public expenditures for legal representation because of disqualifications based on conflict of interest. *Id*. The court also found that while the Public Defender is nominally in charge of both offices, this responsibility

is strictly administrative; the Public Defender is not involved in any way in the day-to-day operation of the ADO, he may not initiate any promotional or disciplinary actions, and his role is limited to reviewing and acting upon the recommendations of the ADO supervising attorney. *Id*. at 875. Further, the court found that the two offices are physically separate, have no access to each other's files and adhere to a well-known policy of keeping all legal activities completely separate. *Id*.

The Court of Appeal also found persuasive the following facts: the PD and ADO are nonprofit organizations, with a single source of clients in a single type of legal proceeding, and their attorneys practice only in a specific area of law. *Id*. at 876. The PD and the ADO are funded by the county, not by clients, thus eliminating any financial incentive to favor one client over the other. *Id*. Further, neither the PD nor the ADO solicits clients, nor do they accept referrals from the public. *Id*. Relying on the comment to Rule 1.10, cited above, the Court of Appeal found that the PD and ADO do not constitute a single "firm" in that they present themselves to the public as separate entities with separate offices, phone numbers, letterhead, pleading paper, and distinct business cards. *Id*. The court also found that the offices keep separate files, none of which are cross-accessible, and each office has its own support staff and keeps separate computers, as well as copying and facsimile machines. *Id*. Finally, the Court of Appeal found that supervision of ADO attorneys is the responsibility of the ADO supervising attorney, not the Public Defender, and neither office consults with the other on general litigation strategy or the handling of individual cases. *Id*.

In reaching its decision, the Court of Appeal did not address California Attorney General Formal Opinion No. CV 75/278 (1976), which concluded that "where a public defender cannot represent a criminal defendant because of a conflict of interest, none of his deputies may represent such defendant even though they are part of a separate division of the office established for that purpose."

Illinois

In its consideration of the Illinois Office of State Appellate Defender's (OSAD's) request to appoint counsel to handle the post-conviction stage of cases for which OSAD's fifth district attorneys had handled the direct appeal and in which ineffectiveness of appellate counsel was being alleged, the Appellate Court of Illinois, Fifth District, found that no conflict existed so long as OSAD attorneys from different OSAD offices handled these cases. *People v. Black*, 507 N.E.2d 1237 (Ill.App. 5 Dist. 1987). In the four separate appeals the court considered, OSAD claimed the existence of a conflict of interest precluded it from providing effective representation. OSAD requested leave to withdraw from these cases and further requested appointment of counsel outside the agency. The State contested OSAD's claim and suggested that if a district office of OSAD is confronted by an actual conflict of interest in any of these appeals, the appropriate remedy would be to transfer the appeal to another district office rather than appoint outside counsel at public expense. The court agreed with the State's position.

The court found that a conflict within OSAD's fifth district office did in fact exist because that office only employed eleven attorneys working in close proximity. *Id*. at 1240. However, the court held that in the event of such a conflict, one possible remedy is to transfer the case to a different district office within OSAD. The court concluded this remedy would satisfy imputed disqualification concerns without adding to the expense of handling such cases. ("Such a transfer would not burden counties with additional costs of providing substitute counsel...") *Id*.

Maryland

In 1993, the Court of Special Appeals of Maryland considered the issue of whether, for conflict of interest purposes, the Public Defender's Office is to be held to the same standards as a private law firm. *Graves v. State*, 619 A.2d 123 (Md.App. 1993). The court refused to adopt a *per se* rule that a public defender's office is the same as a private law firm for conflict of interest purposes, and instead adopted the following test for determining when a conflict of interest will impute disqualification:

> [T]hat attorneys employed by a public defender who are required to "practice their profession side by side, literally and figuratively" are members of a "firm" for purposes of the rule ... [W]here the practice of each attorney is so separate from the other's that the interchange of confidential information can be avoided or where it is possible to create such a separation, there need be no relationship between them analogous to that of a law firm and there would be no inherent ethical bar to their representation of antagonistic interests ...

New Jersey

In *State v. Bell* the Supreme Court of New Jersey considered the question of whether the same potential for conflict of interest exists when the attorneys representing the co-defendants are associates in a public defender's office as it does in a private firm. The Supreme Court ruled that the same potential does not exist and that multiple representation by public defenders does not in itself give rise to a presumption of prejudice. 446 A.2d 525, 527 (N.J. 1982). The court held that assignment of the defense of co-defendants to outside counsel shall be the norm, but pointed out that even this approach has inherent limitations because both public defenders and court-appointed counsel rely on a common investigative staff. *Id*. at 530-531. The next preferable course is assignment to a deputy public defender from an adjoining county. *Id*. Finally, the court held, if the only resort to provide counsel to an indigent defendant is within the local office, there must be guidelines in place to guarantee confidentiality and restrict access to individual files. *Id*.

New York

The United States District Court for the Southern District of New York considered the use of an ethics screen in a conspiracy and bribery case where, on the eve of trial, the government revealed that the cooperating witness whom the government intended to use at trial was formerly represented by another member of defense counsel's office. *U.S. v. Lech*, 895 F.Supp. 586 (S.D.N.Y. 1995). The court found that the defense counsel's conflict of interest was only potential, not actual, and that precluding the witness from testifying was an unwarranted sanction. *U.S. v. Lech*, 895 F.Supp. 586, 590-591. The court went on to state that it had no reason to disbelieve the two federal defenders' testimony that none of defendant's confidences were revealed to the other federal defender, and that an effective "Chinese Wall" could and would be maintained between them. *Id*. at 591.

Additionally, in a 1971 decision the New York Court of Appeals held that for purpose of disqualification of counsel, the rule that knowledge of one member of a law firm will be imputed by inference to all members of that law firm does not apply to large public defense organizations like the New York Legal Aid Society. *People v. Wilkins*, 268 N.E.2d 756 (N.Y. 1971).

State Bar Ethics Opinions

In contrast to the courts, bar association ethics committees which have considered the question of whether ethics screens can be used to satisfy the rules of imputed disqualification in public defender organizations have decided that ethics screens are not an appropriate method for annulling imputed disqualification caused by conflicts of interest.

In 1993, the Arizona State Bar considered whether a public defender office may ethically administer two divisions of one office where the separate divisions represent clients with conflicting interests, if safeguards are established to prevent dissemination of confidential information between the divisions and the Public Defender. In Formal Opinion No. 93-06, a response to a request from Maricopa County (Phoenix) Public Defender Dean Trebesch, the Arizona State Bar Ethics Committee opined that Arizona Ethical Rules 1.7 and 1.10 prohibit such an arrangement. Referring to a prior opinion in which it found that a public defender's office should be considered a firm for purposes of Ethics Rule 1.10[7], the committee reasoned that "Once the Public Defender's Office is deemed a firm, then it is clear that the imputed disqualification provision of ER 1.10(a) would preclude the type of conflicts representation proposed in this inquiry.[8]" The committee also

explained that the rationale of ER 1.10(a) is the "fear that confidential communications will be used against one of the clients." While the committee recognized that the Maricopa County Public Defender's proposal included substantial efforts to avoid any dissemination of confidential information between the two separate divisions, it concluded that "when both divisions are subject to the same management structure, it is clearly possible that confidential information from each division will be communicated to those in supervisory positions.[9]" Finally, the committee expressed concern about the appearance of a conflict of interest, writing that clients could not be expected to know about the extensive screening process that would separate the two divisions, and that "for all practical purposes, clients in direct conflict would assume that each was represented by the Public Defender.[10]"

In addition, in Formal Opinion E-90-6 (September 24, 1990), the Wisconsin State Bar Committee on Professional Ethics concluded that the State Public Defender Office, which had proposed to set up a conflicts division organized separately from its main trial division, was precluded from doing so by ER 1.7 and 1.10(a) of the Rules of Professional Conduct unless the clients waived the disqualification in writing after consultation.

Conclusion

There is no easy answer to the question of whether ethics screens can - and should - be used to satisfy the rules of imputed disqualification. On the one hand, it is true that public defenders do not share the financial incentive to represent numerous clients that characterizes private law firms. It is also true that public defenders who practice criminal law every day may be most familiar with criminal practice, and can possibly be more effective advocates, particularly in death penalty and other complex cases. Finally, it may be true that an ethics screen provides the most cost-efficient way to provide representation to indigent defendants with conflicting interests.

On the other hand, unless ethics screens are virtually flawless, there is a real danger that confidences may be revealed inappropriately. Other dangers include the following: 1) that the conflicts unit could be insufficiently funded; 2) that the conflicts unit could lack control over hiring, firing, promotion and discipline of its personnel; 3) that files might not be transmitted on a timely basis to the conflicts unit; 4) that case management and referral decisions might be made by the main office; and 5) that there might be a perception that the conflicts unit was a "second best" office. For those jurisdictions that choose to employ ethics screens to satisfy the rules of imputed disqualification, it is imperative that every effort be made to safeguard against these dangers.

Endnotes

1. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Maryland, Michigan, Oklahoma, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, Wisconsin and Wyoming.

2. ABA/BNA Lawyers' Manual on Professional Conduct, No. 182, 51:2002-2003 (7/28/93).

3. ABA Model Rule of Professional Conduct 1.10 (1989).

4. American Law Institute, *Restatement of the Law Governing Lawyers*, Section 203(d)(iv), pp.595-596, March 1996 Proposed Final Draft No. 1. (The American Law Institute (ALI) has been working on a revised *Restatement* since at least 1988. The quoted section was approved by ALI's membership at its May 1996 annual meeting. According to ALI's reference librarian, when all sections of the revised *Restatement* are approved, Section 203 will be included in the revised *Restatement* in substantially the same form as cited above; there is a slight possibility that minor grammatical changes might be made to the text of Section 203.)

5. American Law Institute, *Restatement of the Law Governing Lawyers*, Comment, Section 203(d)(iv), p.604, March 1996 Proposed Final Draft No. 1.

6. Rodney Uphoff, Editor, Chapter 16, "Representing Codefendants Out of the Same Office," by Nancy Shaw, *Ethical Problems Facing the Criminal Defense Lawyer; Practical Answers to Tough Questions*, ABA Criminal Justice Section, 1995.

7. Arizona State Bar Ethics Commission Opinion 89-08.

8. Arizona State Bar Ethics Commission Opinion 93-06, p.4.

9. Arizona State Bar Ethics Commission Opinion 93-06, p.5.

10. Arizona State Bar Ethics Commission Opinion 93-06, p.6.

Effectively Obtaining Funds for Expert Help

by Edward C. Monahan
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Two truths, one based in case law and the other based on the peculiar nature of some defense counsel, regarding funds for experts are self-evident. First, indigent criminal defendants are entitled to funds to hire defense experts when reasonably necessary to their defense. Second, public defenders too often do a poor job of persuasively asking for the necessary funds, and therefore many indigents do not obtain the help of experts they are constitutionally entitled to receive.

Ten Factors of the Threshold Showing

There is a common sense, effective way to make threshold showings which persuade judges to authorize the necessary funds. That persuasive evidentiary showing, most usually made *ex parte*, has the following ten components:

1. Type of the resource;
2. Nature and stage of assistance;
3. Who will provide the help, qualifications of that person, costs of their help;
4. Reasonableness of both the rates and total cost;
5. Factual basis for the resources *in this case*, including the theory of the case and relevant themes;
6. Counsel's observations, knowledge, in-sights about this case and this defendant;
7. Legal bases for expert *in this case*;
8. Legal reasons for *defense* resources;
9. Inadequacy or unavailability of state resources;
10. Evidentiary documentation.

Standards of Practice

These have been the components of the national practice of successfully obtaining funds for experts for some time. *See*, *e.g.*, Edward C. Monahan, "Obtaining Funds for Experts in Indigent Cases," *The Champion*,

Vol. 13, No. 7 (August 1989) at 10; Nancy Hollander & Lauren M. Baldwin, *Expert Testimony in Criminal Trials*, *The Champion*, Vol. 15, No. 10 (Dec. 1991) at 12; Paul C. Giannelli, *The Constitutional Right to Defense Experts*, *Public Defender Report*, Vol. 16, No. 3 (1993); Nancy Hollander & Barbara E. Bergman, *Every Trial Criminal Defense Resource Book* (1995) §46:8.

NLADA's *Performance Guidelines for Criminal Defense Representation* (1995) Guideline 4.1(b)(7) addresses the need for expert assistance: "Counsel should secure the assistance of experts where it is necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case."

The ABA Standards for Criminal Justice *Providing Defense Services* Standard 5-1.4. Supporting Services, requires that defenders have the necessary resources for quality representation: "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense preparation in every phase of the process...."

The ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989), Guideline 8.1 Supporting Services also addresses the necessity for supporting services: "The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative, expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase."

Successful requests for funds for experts require making this threshold showing more specifically, more explicitly, more *thematically*. The necessity for an expert to effectively communicate the client's *story* is the focus of the showing to the judge.

Resource Manual Available

The Kentucky Department of Public Advocacy has developed a *Funds for Experts and Resources Manual* to provide litigators a practical aid to making persuasive requests for funds for resources. The Manual has collected cases which hold it is necessary to provide funds for experts in the following areas:

1. drug and alcohol;
2. statisticians;
3. firearms and gunshot wounds;
4. pathologists;
5. DNA.

Additionally, one chapter of the Manual details how to persuasively present the 10 threshold showing factors thematically with practical examples. Other chapters present the law and strategies for: demonstrating the need for having a defense expert since a neutral expert is inadequate; making the request *ex parte*; obtaining funds for a consulting expert; showing the ineffectiveness in failing to ask for funds for resources; detailing what national benchmarks require; and, obtaining funds when an indigent is represented by retained counsel.

Sample motions, orders, affidavits and supporting documents are included to demonstrate pragmatic ways to meet the threshold showing requirements.

The Manual is available from the Kentucky Department of Public Advocacy at the address below for $29.00, including postage and handling. Alternatively, it can be obtained on WP 5.1 diskette for $59.00. It is updated annually with the addition of 5 new chapters. Make your check payable to the *Kentucky State Treasurer*.

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CRIMINAL JUSTICE STUDIES

Illegal Drug Use, Juvenile Offenders, and Prison Expansions Increasingly Impact the Criminal Justice System Despite Overall Drop in Crime

The influx of drug-related cases into the nation's courts, the rapidly expanding costs of incarceration, and the projected 10% increase in the country's juvenile population over the next five years are all cited as signs of trouble for the United States' criminal justice system in the American Bar Association Criminal Justice Section's third annual report, *The State of Criminal Justice*. The recently published report collects and synthesizes 1990-1995 data from the various divisions of the U.S. Department of Justice, including the Federal Bureau of Investigation, the Bureau of Justice Statistics and the National Institute of Justice, as well as other research organizations.

On the positive side, the report cites recent surveys that show the number of index offenses (murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft and arson) known by police to have occurred in 1994 decreased to pre-1990 levels and that overall drug use dropped 5% between 1990 and 1995. In addition, serious property crimes continued a gradual but persistent downward trend between 1990 and 1994 and, except for aggravated assaults, violent crimes have decreased slightly over the same period. The rate of victimization, measuring the number of reported and unreported crimes per 1,000 people age 12 or older, remained relatively stable between 1992 and 1994.

On the negative side, drug use by juveniles increased approximately 30% during the same period that overall drug use declined, while the number of people arrested on drug charges increased 20%. The ABA report says that the average percentage of male arrestees in selected urban areas who tested positive for drug use grew from 59% in 1990 to 65% in 1993, while the average percentage for female arrestees testing positive jumped from 63% to 75% during the same period. According to the report, the imminent increase in the nation's juvenile population, the age group most prone to crime and drug use, together with the correlation between drug-users and those who commit crimes suggest that, "the coming decade will see substantial increases in crime and drug use by juveniles."

Already, the annual number of cases filed in many courts exceeds the number of cases courts are able to dispose of. With the projected increase in the number of juvenile cases, the criminal justice system will face additional challenges, according to the report. Such a prediction comes at a time when increasing numbers of convicted drug offenders are sentenced to correctional institutions. *The State of Criminal Justice* reports that between 1990 and 1993, the number of prisoners incarcerated for drug offenses grew 31%, while the number of adults arrested for drug offenses grew by only 4% over the same period. Even with combined state appropriations for corrections in FY 1996 reaching $20.7 billion, prison populations have continued to exceed prison capacity. Between 1990 and 1994, the capacity of state prisons increased approximately 30% while the number of state prisoners grew 35%.

The report states that corrections expenditures are expected to continue to increase as prison officials address a changing prison demography. Not only are more and more juveniles sentenced to adult facilities, but, between 1990 and 1994, state prisons also saw a 43% increase in the number of prisoners over the age of 55 and a 48% increase in those over the age of 75. During this same period, the number of female prisoners grew at a rate faster then male inmates (47% to 36%). Moreover, 70% of these women had a child under the age of 18. Additionally, at the close of 1994, the incidence of AIDS was over seven times greater inside prisons than in the non-incarcerated U.S. population. All of these changes have increased the need for improved protection for juvenile and elderly inmates, institutional child-care programs and more advanced health care services. Given these changing demographics, funding requirements for correctional facilities rose nearly 35% between 1990 and 1996, to over $20 billion. The report concludes that state spending for corrections is increasing faster than any other major area of state expenditures.❖

Number of Reported Crimes in the U.S. Decreases for a Fourth Consecutive Year

In 1995, the number of reported crimes was down 1% from 1994, while the reported crime rate (number of reported crimes per 100,000 people) dropped 2%, according to the Federal Bureau of Investigation's annual report, *Crime in the United States (1995)*. The statistics reflect the number of murders, forcible rapes, robberies, aggravated assaults, burglaries, larcenies, motor vehicle thefts and acts of arson reported to 16,000 law enforcement agencies, covering 95% of the nation's population, regardless of whether the crimes resulted in arrests and prosecutions.

The 1995 decrease in the number of reported crimes represents the fourth consecutive annual decline. However, a comparison with 1986 figures shows a 5% increase in the number of crimes committed over the last 10-year period. Still, the 13.9 million criminal offenses reported in 1995 translate to 5,278 offenses per 100,000 people in the country, a rate 4% lower than in 1986.

Last year, the number of reported violent crimes, which include murders, forcible rapes, robberies and aggravated assaults, decreased 3% from 1994 levels. With just under 1.8 million reported violent offenses, the total number of violent crimes in 1995 was 6% below 1991 figures. In addition, aggravated assault and forcible rape rates fell to their lowest levels since 1989. In the eight U.S. cities with populations of more than one million people (New York, Los Angeles, Chicago, Houston, Philadelphia, San Diego, Detroit and Dallas), the number of violent crimes reported fell by 8% over 1994 levels, a full five percentage points below the national average.

These statistics are based on a crime index of selected violent and property offenses reported to the FBI's Uniform Crime Reporting Program in Washington, D.C. ❖

Prison and Jail Populations Escalate to All-Time High

At the close of 1995, the United States was locking up one out of every 167 residents and the nation's prison and jail population soared to 1,585,400, with nearly 30% of the nation's total incarcerated population housed in California, Texas and New York, according to *Prison and Jail Inmates, 1995*, an annual report by the U.S. Department of Justice's Bureau of Justice Statistics (BJS). The statistics reflect the total number of inmates held in state, federal and District of Columbia prisons as well as local jails throughout the country.

In 1995, prison and jail populations grew 7.3% faster than in 1994. While the number of people held in local jails increased 4.2% over the prior twelve months, the state and federal prison population increased 8.7% over the same period. During 1995, prison populations in 14 states increased by at least 10% over 1994 levels, with North Carolina (24.2%), Mississippi (19%), Idaho (18.4%) and Wyoming (15.4%) experiencing the highest rates of prison population growth. Only three states (Maine, New Hampshire, and Rhode Island) and the District of Columbia had a decrease in their prison populations.

The BJS bulletin also compares 1995 incarceration numbers with those of 1985. During this ten-year period, the nation's incarcerated population exploded, increasing by 113%. At the close of 1985, one out of every 320 United States citizens was incarcerated; this incarceration rate has nearly doubled in the ensuing ten years. Over the past decade, BJS reports, "correctional authorities have found beds for nearly 841,200 additional inmates or the equivalent of almost 1,618 inmates per week."

Additionally, despite increased prison and jail construction over the past ten years, *Prison and Jail Inmates, 1995* reports that prison overcrowding continues to pose problems for correctional institutions. By the close of 1995, the federal prison system was operating at 26% above capacity while state prisons were operating at 114% of their capacity. A total of 32,739 state prisoners were held in local jails and other facilities in 1995 because of the over-crowding situation in state prisons. Eight states (Louisiana, New Jersey, Virginia, Mississippi, Tennessee, Colorado, Massachusetts and Arkansas) held more than 10% of their prison populations in local jails, with Louisiana housing 27% of its prison population in local facilities. ❖

NEWS FROM AROUND THE NATION

Texas Court of Criminal Appeals Conscripts 48 Attorneys to Take Capital State Habeas Cases

Tension surrounding the administration of a newly created right to counsel in capital state post-conviction cases in Texas has escalated in recent months, resulting in delays in the appointment of counsel to handle state post-conviction cases. The implications of this delay are further complicated by the new federal habeas law. As documented in Volume II, Issue 3 of *The Spangenberg Report*, during its 1994-1995 biennial legislative session, the Texas State Legislature created a right to counsel in capital state post-conviction cases and appropriated $2.0 million for the FY 1996-1997 biennium to compensate court-appointed counsel and pay for expenses. By statute, the Texas Court of Criminal Appeals, Texas' highest criminal court, is to oversee the administration of this right to counsel. The statute took effect on September 1, 1995. However, for at least a year after the new law went into effect, despite numerous requests for counsel by Texas' death row inmates, the court made very few appointments because of challenges to the state statute's constitutionality and the criminal bar's dissatisfaction with both the $7,500 presumptive cap on attorneys' fees and the lengthy questionnaire applicants for court appointment were required to complete.

The delay of the Court of Criminal Appeals in appointing counsel threatens both future appropriations for administration of the state law and death row inmates' ability to pursue federal habeas relief under the federal 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA). The Texas State Legislature is scheduled to convene in mid-January; during this biennial session the legislature will appropriate funds to carry out Texas' state post-conviction law in FY 1998 - 1999. Despite widespread criticism of the $2.0 million appropriation for FY 1996 - 1997, the court's slow pace in assigning counsel under the new state law may make it more difficult to persuade the legislature that an appropriation significantly larger than $2.0 million is necessary for the upcoming biennium. Additionally, a number of practitioners have expressed concerns that because of stringent filing deadlines, the court's delay in appointing counsel to represent eligible capital state post-conviction petitioners threatens petitioners' right to pursue federal habeas under new federal law.

Prompted by both of these concerns, in late November 1996, over a year after state legislation went into effect, the Court of Criminal Appeals appointed 48 private attorneys to represent death row inmates in state post-conviction proceedings. While the court's criteria in selecting the 48 appointed attorneys is not entirely clear, most attorneys are Texas Board Certified Specialists and/or appear on local administrative lists of counsel competent to handle capital state post-conviction cases.

The Court of Criminal Appeals' process for making its recent round of appointments has drawn criticism from members of the private bar who feel that the court's appointment process amounts to conscription. A number of appointed attorneys have filed motions to withdraw because they are not qualified, while one attorney, a prosecutor, clearly has a conflict of interest. After considerable criticism from Texas' criminal bar, the Court of Criminal Appeals has decided to rescind the $7,500 presumptive cap it originally set for these cases, and, as an incentive to the recently court-appointed counsel, has pointed to payments of $10,000 to $20,000 on a few cases as examples of how flexible it will be in terms of compensation.

Of the 441 inmates on Texas' death row, approximately 179 need state habeas counsel to handle post-conviction writs, according to published reports. Of those, 127 are pursuing direct appeal, while the other 52 have resolved their direct appeal and have moved on to state habeas.

As mentioned above, the delay in finding willing and able counsel to handle these cases at state post-conviction may have even more serious ramifications because of the strict filing deadlines for federal habeas relief under the AEDPA. Under the AEDPA, some lawyers fear that prisoners who have exhausted their state court appeals have only one year from the date of

affirmation of their sentences, or until April 24, 1997, whichever comes first, to file a federal habeas petition. The statute of limitations is tolled by the filing of a state habeas petition, which under the state statute, must typically occur 180 days after the direct appeal is resolved. However, under *McFarland v. Scott*, 114 S.Ct. 2568 (1994), the filing of a request for federal habeas counsel prior to exhaustion of state remedies may toll the federal habeas statute of limitations.

In early December, just two weeks after the 48 appointments were made, the Texas Criminal Defense Lawyers Association (TCDLA) met to address the problems created by the Court of Criminal Appeals' actions. In conjunction with the National Association of Criminal Defense Lawyers (NACDL), TCDLA agreed to sponsor training sessions to help counsel prepare to handle these complex cases. Additionally, in letters to Chief Judge John McCormick of the Court of Criminal Appeals, both John Botsford, TCDLA President, and Judy Clarke, NACDL President, urged the court to appoint co-counsel in each capital state post-conviction case.

We will keep you updated on developments in Texas in future issues of *The Spangenberg Report*. ❖

New York City Issues Second RFP For New Indigent Defense Organizations

In early November, 1996, the City of New York took additional steps to expand the number of providers of indigent defense services in the City as it issued its second Request for Proposals (RFP) for bids from organizations established to provide representation to indigent criminal defendants in trial and appellate cases that otherwise would have been assigned to The Legal Aid Society. The RFP seeks bidders to accept 12,500 criminal trial cases in New York County, 10,000 criminal trial cases in the Bronx, all of the work which would be assigned to the Legal Aid Society's Richmond County (Staten Island) office and 200 indigent appellant cases in the First Department of the Appellate Division of the Supreme Court of the State of New York.

After issuing an RFP in 1995 for trial work handled by each of The Legal Aid Society's criminal trial offices (New York County [Manhattan], the Bronx, Richmond County, Queens County and Kings County [Brooklyn]) and appellate work in both the First and Second Departments of the Appellate Division, two-year contracts were signed in Summer 1996 with organizations to handle appeals in the Second Department and trials in Queens and Kings counties only. (See Volume II, Issue 2 and Volume II, Issue 3 of *The Spangenberg Report* for details on last year's RFP process and on the winning contract organizations.)

After the first RFP was issued in 1995, The Legal Aid Society waged a broad-based educational campaign involving members of the bar, political leaders and members of the public to document support for the Society's high quality work and its importance to the community. As part of the campaign, The Spangenberg Group conducted a detailed workload analysis to project the level of funding and staffing that would be necessary to fulfill the contracts' requirements if the City were to contract with multiple, smaller organizations which provided services at the same level of quality as the Society. The City awarded three of the seven possible contracts to organizations founded primarily by former Legal Aid Society staff. The new RFP seeks additional organizations for the remaining four contract areas, which are currently handled by The Legal Aid Society.

The specifications for the latest RFP are substantially the same as those in last year's issuance, with minor modifications. For example, this year the RFP specifies that attorneys working with a contractor are expected to devote at least 35 hours per week to the contract work, even if they devote up to 20% of their time to private practice.

The RFP states that, because a "principal purpose" of the City's solicitation is to provide alternatives to the primary defender, any proposal submitted by The Legal Aid Society would be deemed not responsive. Proposals were due December 20, 1996, and the projected date for contractor selection is January 24, 1997. The projected contractor start date is July 1, 1997.

Look for an update on the situation in the next issue of *The Spangenberg Report*.

Connecticut Superior Court Denies Motion to Dismiss Class Action Challenging State's Public Defender System and Certifies Class

In late October, Connecticut Superior Court Judge Douglas S. Lavine denied the state's motion to dismiss *Rivera v. Rowland*, a class action complaint filed against Connecticut Governor John Rowland, the Public Defender Services Commission and its members by the Connecticut Civil Liberties Union (CCLU) in January 1995. The lawsuit, which alleges unconstitutional deficiencies in Connecticut's indigent defense system due to high caseloads and insufficient funding, was filed on behalf of a class of plaintiffs consisting of all indigent persons who are or will be represented by public defenders or special public defenders (court-appointed counsel) in the geographic area (G.A.) courts (which handle misdemeanor cases and most non-violent felonies), judicial district (J.D.) courts (which handle serious felony cases), juvenile courts and in criminal habeas proceedings. Plaintiffs seek declaratory and injunctive relief, as well as costs and attorneys' fees under 42 U.S.C. §1988.

During the summer of 1994, The Spangenberg Group, under contract with the CCLU, conducted a study of Connecticut's statewide public defender system. The results of this study formed the basis for many of the factual allegations made in the complaint. Additionally, based on the knowledge and information acquired over the course of this study, at the request of the CCLU, Bob Spangenberg provided an affidavit in opposition to defendants' motion to dismiss.

While defendants filed their motion to dismiss in April 1995, the judge originally assigned to the case realized that he had a conflict of interest only after oral argument had taken place. Judge Lavine was not assigned to take over the case until last summer.

In a 22-page opinion denying the state's motion to dismiss, Judge Lavine rejected defendants' argument that the doctrine of sovereign immunity prohibits plaintiffs' claim, finding that plaintiffs had raised "significant constitutional claims in the[ir] complaint, the determination of which is manifestly in the public interest." After addressing defendants' additional arguments that the named defendants are unable to afford the requested relief, that the separation of

powers doctrine prevents the court from ordering the injunctive relief requested, and that the complaint fails to adequately allege "injury-in-fact" or "actual harm," Judge Lavine also found insufficient merit in defendants' three-pronged claim that the complaint is non-justiciable.

The case took another step forward in early November, when Judge Lavine granted plaintiffs' motion for class certification. The parties are currently engaged in discovery. ❖

Invoking Statutory Provision for "Extraordinary Circumstances," New York Trial Court Orders Enhanced Compensation for Assigned Counsel

In a thoroughly researched, 24-page ruling, a trial judge in New York County's First Department Criminal Term recently awarded assigned counsel compensation in excess of statutory maximum rates -- $75 per hour for in-court time and $40 per hour for out-of-court time -- for work performed on a complicated case where defendant was charged with four separate indictments as well as with a violation of probation on a prior case based on these four new charges. *People v. Brisman*, 6984/94, 1372/95, 6596/94, 11792/94 and 264/94. Under state law, Section 18-B, Article 722-b, the maximum compensation for court-appointed counsel is $40/$25 per hour, up to $1,200, for work performed in/out of court, except in the instance of "extraordinary circumstances." Section 18-B also provides that counties are responsible for assigned counsel fees.

According to published reports, prior to 1995, judges in New York County regularly invoked the "extraordinary circumstances" provision to award compensation exceeding the statutory rates and/or cap. However, in December 1994, after learning that approximately $700,000 in enhanced fees had been awarded by judges in New York County during 1994, Mayor Giuliani and Justice Francis T. Murphy, Presiding Judge of the Appellate Division, sought to restrict the award of enhanced fees. Since 1995, no enhanced fees had been awarded in New York County.

Thus, the trial court's decision in *Brisman* carried with it broad political as well as practical ramifications. After highlighting the very complicated nature of the case handled by assigned counsel and reviewing the adoption and legislative history of Section 722-b, the court turned to the competing policy concerns involved in awarding the higher compensation rate. The court addressed each of the following issues:

> 1) the expenditure of precious municipal funds at a time of fiscal difficulties for our City;
>
> 2) the public perception, albeit erroneous and misguided, that judges are more concerned with protecting defendants' rights than they are about the general public;
>
> 3) the need to assure adequate and effective representation for criminal defendants in those cases which, by their nature, make extraordinary demands on assigned counsel;
>
> 4) the need to assure that the compensation is fair and equitable, taking into account the well-established quasi pro bono nature of the 18-B [court-appointed counsel] program;
>
> 5) the assertion that an appearance of impropriety may be created in situations in which attorneys are perceived as less zealous advocates for their clients to avoid alienating a judge with the power to increase fees; and
>
> 6) the allegation that the fact that some judges have granted enhanced compensation to attorneys has resulted in pressure from attorneys on other judges to follow suit.

Weighing each of these factors, the court concluded that, given the complexity of the case, the state statute's legislative history, and the court's interest in carrying out "its essential function of the assurance of justice and due process..," enhanced compensation was appropriate. ❖

Federal District Court Permits Amendment to Illinois Appellate Delay Class Action Habeas Petition, to Add §1983 Claim

Over three years after the original petition was filed, in mid-November, Senior Judge Milton Shadur of the U.S. District Court for the Northern District of Illinois granted petitioners' motion to amend their federal habeas class action petition, which alleges unconstitutional delay in the processing of direct appeals by the Office of State Appellate Defender (OSAD) in Illinois' First District (Chicago), to include a claim for declaratory relief under 42 U.S.C. §1983.

We last reported on *Green v. Washington*, now *Green v. Peters*, in Volume II, Issue 3 of *The Spangenberg Report*. The article documented Judge Shadur's February 1996 decision in that case, which followed a lengthy hearing in September and October 1995. In the February 1996 ruling Judge Shadur found in petitioners' favor, but he refrained from fashioning a remedy, in the hope that Illinois' state legislature and/or First District Appellate Court, which has jurisdiction over the direct appeals at issue, would address the problem.

In fact, during its 1995-1996 legislative session the state legislature did address OSAD's statewide backlog problem, appropriating limited funds for OSAD to contract with private attorneys to handle 816 direct appeals statewide (of these, 335 are from the First District). Legislation authorizing this attempt to remedy OSAD's statewide backlog problem specified that private attorneys were to bid on the cases, and receive $40 per hour, up to $2,000 per case. The legislation also directed the State Appellate Defender to contract with the "lowest responsible bidders." Over the course of the summer the bids of 67 attorneys, who bid on "bundles" of one, five, ten or 20 cases, were accepted. Some attorneys who were awarded the cases bid as low as $850 per case.

In mid-October, Locke Bowman and Kathy Banar of the MacArthur Justice Center and Randolph Stone of the Mandel Legal Aid Clinic of the University of Chicago Law School, attorneys for petitioners, filed a motion for a supplemental petition and complaint to include the Section 1983 claim. Following a hearing on the motion in November, Judge Shadur granted petitioners' motion, permitting them to add the Section 1983 claim, which seeks both declaratory and injunctive relief. A status conference is scheduled for late December. We will keep you up to date on the latest news regarding this important case. ❖

Statewide Public Defender System Bill Introduced in Mississippi Legislature

For the fourth consecutive year, a bill that would significantly alter the way Mississippi provides indigent defense representation has been introduced in the state legislature. Mississippi, one of only four states (including South Dakota, Idaho and Utah) which pays for indigent defense services solely through county funds, has been cited for providing poor compensation to attorneys who handle indigent defense cases. A recent survey conducted by The Spangenberg Group reveals that in FY 1996, Mississippi's expenditures for indigent defense were among the lowest in the nation: an average of $2.70 per capita and $128.89 per indigent defense case.

Only three of Mississippi's 82 counties currently have full-time public defender offices. The majority of counties rely on contract part-time public defenders to provide indigent defense services. Mississippi's counties seldom provide these public defenders with office space, expenses or support staff, and the part-time contract public defenders do not have ready access to investigators or other experts. Most of Mississippi's contract public defenders work on fixed price contracts under which they must accept an unspecified number of cases in the given contract period.

Mississippi also has no right to compensation for counsel representing indigents in state post-conviction proceedings. As a result, Mississippi's indigent prisoners must rely on volunteer counsel to handle their cases. The situation has had a particularly serious impact on Mississippi's death row population. Last fall, one unrepresented capital state post-conviction petitioner was nearly executed without counsel to pursue his state post-conviction appeal. Fortunately, in the final hours before the execution, a volunteer attorney, contacted in the middle of the

night, was able to obtain a stay of execution for the prisoner.

The proposed legislation, if enacted, would create a nine-member Public Defender Commission "to establish, implement and enforce policies and standards for a comprehensive and effective public defender system throughout the State of Mississippi." The bill provides that the commission will have the power to determine statewide indigency standards, to implement and enforce policies for "the appointment, compensation and payment of reasonable litigation expenses of competent counsel in state-post conviction proceedings brought by indigent prisoners," and to determine which counties require full-time district defender offices to represent indigent clients in felony cases. The main goal of the bill is to create a state-funded judicial district public defender system similar to the existing judicial district-based district attorney system.

The statewide public defender bill is the result of efforts by an ad-hoc committee that has worked to address problems with Mississippi's indigent defense services. The committee is composed of public defenders, private bar attorneys and Justice James Robertson, a former Justice of the Mississippi Supreme Court. Although similar bills were defeated in each of the past three years, members of the ad-hoc committee are optimistic that the bill will be passed this year. Each year's bill has progressed further and further along in the legislative process, with last year's bill making it as far as the appropriations committee after passing the judiciary committees in both houses of the legislature. As now drafted, this year's bill does not request a specific dollar appropriation. Members of the ad-hoc committee believe that once the Public Defender Commission is established, funding will follow. The new bill, we are informed, already has the support of the Mississippi Association of Supervisors, the Mississippi State Bar, the Mississippi Economic Council, and the majority of Circuit Court Judges.

In October, Bob Spangenberg and David Carroll traveled to Mississippi on behalf of the American Bar Association's Bar Information Program to help the ad-hoc committee develop strategies to garner support for the bill. The Spangenberg Group has been actively involved in improving Mississippi's indigent defense system since 1994, when, at the request of the Mississippi Bar Association's Criminal Justice Task Force, it conducted a statewide study of Mississippi's indigent defense services and provided recommendations on how to improve the quality of indigent defense. On the most recent trip, The Spangenberg Group provided the ad-hoc committee with caseload and expenditure data on Mississippi's counties for FY 1996 as well as comparative data from states with comparable populations. This information will be used over the course of the legislative session to document the need for a statewide Public Defender Commission in Mississippi.❖

Florida Senate Committees Review State Public Defender System

In early December, the Florida Senate Committees on Criminal Justice, Judiciary, and Governmental Reform and Oversight issued their review of the state's public defender system, *How to Promote Cost-Efficiencies In the Public Defender System Through Legislation*. Florida's public defender offices handle felonies, misdemeanors and appeals for indigent defendants as well as juvenile delinquency and mental commitment matters. By statute, each of Florida's 20 judicial circuits has one public defender who is elected to a four-year term. Also by statute, funding for indigent defense in Florida is largely the responsibility of the state, which pays for salaries and other related expenses for public defenders and their staffs. Counties must pay for overhead costs and the cost of court-appointed counsel in conflict cases. The Senate report, prepared at the request of the state legislature, provides information on how Florida's public defender system compares with other states' indigent defense systems, considers whether Florida's current system is sufficient to provide effective assistance of counsel in an economical manner, and explores whether legislative changes can improve Florida's public defender system and promote cost efficiencies.

After a comprehensive review of how indigent defense services are provided and paid for in Florida, the report offers various suggestions regarding

organizational, processing and policy options. Among the legislative options presented are the following. First, transferring responsibility for representing indigent defendants charged with misdemeanors from the public defender to private, court-appointed counsel. Second, improving initial indigency screening procedures and implementing a routine redetermination procedure in certain cases. Third, in misdemeanor cases, urging judges to declare on the record, at first appearance, that no jail time will be imposed at sentencing, which will eliminate the state's obligation to provide counsel. Fourth, decriminalizing certain less serious misdemeanor offenses, again to eliminate the state's obligation to provide counsel. And, finally, expanding alternative sentencing programs for low-level offenses.

The Senate Committees' report was issued just eight months after publication of a comprehensive report prepared by The Spangenberg Group on behalf of the Florida Public Defender Association (FPDA). The FPDA was created to promote and develop Florida's public defender system; its Board of Directors is comprised of the 20 elected public defenders, along with two assistant public defender staff representatives, one investigative staff representative and one administrative staff representative. The Spangenberg Group's report, *A Study of the Florida Public Defender System: A Blueprint for Action as it Enters the 21st Century* (April 1996), written after a 16-month study of Florida's public defender system, identifies the primary issues and problems affecting the state's public defender system and recommends approaches for addressing the identified issues. This report, along with other reports, charts and articles produced by The Spangenberg Group, provided extensive background material for the authors of the Senate Committees' report.

The Senate Committees' report contains many ideas and suggestions with which we agree. However, we are greatly concerned about a number of ideas, including adopting an "HMO" approach to providing indigent defense services in Florida and using court-appointed counsel, rather than public defenders, to handle all indigent misdemeanor cases.

While the Florida state legislative organizational session has already begun, the substantive session does not commence until mid-March. At this time, it is unclear how the Senate Committees' report will be used. ❖

Florida Public Defender Association Names New General Counsel

The Florida Public Defender Association (FPDA) recently created a new position, General Counsel to the Association, and named former state legislator Robert DeWitt Trammell to the post. Mr. Trammell should provide substantial support to the 20 elected public defenders who comprise the FPDA, as they will now have a single person to assume many of the legislative liaison responsibilities that were formerly allocated to various public defenders.

Mr. Trammel, who recently completed 10 years as a member of the Florida House of Representatives, is well prepared for the FPDA General Counsel role. As a representative, Mr. Trammell served as Chair of the House Judiciary Committee and as a member of the House Sub-Committee on Criminal Justice. Prior to his legislative career, Mr. Trammell was an assistant public defender in the 14th Judicial District of Florida.

The General Counsel position was created by the FPDA following the recommendation of The Spangenberg Group in its April 1996 report, *A Study of the Florida Public Defender System: A Blueprint as it Enters the 21st Century*. The agenda for the General Counsel will be approved by the 20 elected public defenders, which will prepare the General Counsel to respond swiftly as a primary spokesperson to policy questions concerning the FPDA. The General Counsel role should also put public defenders on more equal footing with the State's Attorneys, who have relied on a General Counsel to advocate on their behalf for years. ❖

NACDL Adopts Assigned Counsel Policies

On November 5, 1996, the NACDL Board of Directors adopted the following general policies on assigned counsel systems, "to provide aspirational context and direction to NACDL endeavors and to

explicitly endorse standards promulgated by the American Bar Association, the National Legal Aid & Defender Association, and other groups:"

1. The goal of systems providing assigned counsel must be to provide quality representation equivalent to that provided by skilled, knowledgeable and conscientious counsel hired by paying clients, rather than the lower "reasonably effective assistance" standard of *Strickland v. Washington*.

2. Assigned counsel systems must include substantial participation by the private bar, in order to assure the continued interest of the bar in the welfare of the criminal justice system.

3. Assigned counsel systems should be administered by and funded through an agency independent from the judiciary.

4. Assigned counsel should be paid a fee comparable to that which an average lawyer would receive from a paying client for performing similar services.

5. Private bar participation must be voluntary; counsel must meet specific qualification standards.

6. Ordinarily, assignments should be made in an orderly, sequential way to avoid patronage and its appearance. The roster should be periodically revised to recertify assigned counsel and ensure quality representation. Specific criteria for removal should be adopted in conjunction with qualification standards.

7. Should an attorney be removed, the attorney shall have the opportunity to be heard by a removal committee, to be represented by counsel, and an opportunity to appeal to the administrator, whose decision shall be final. Procedures shall be established for consideration of a removed attorney's application for reinstatement, including an opportunity to demonstrate that the deficiencies which led to removal will not be repeated.

According to NACDL's press release, "These goals pursue basic constitutional principles: the right of indigents to counsel appointed by the court and paid by the government; the right to fair compensation when property, including services, is taken for public use; and the right to procedural due process (notice, hearing, review) when property and liberty interests are at stake."

To obtain a copy of NACDL's Assigned Counsel Policies, contact Paul Petterson, Indigent Defense Director, NACDL, 1627 K Street NW, Washington, DC 20006, (202) 872-8688. ❖

CASE NOTES

U.S. Supreme Court Rules State Must Provide Impoverished Mother, Whose Parental Rights Had Been Terminated in Civil Proceeding, With Trial Transcript for Appeal

On December 16, 1996, a majority of the U.S. Supreme Court ruled that a state may not deny a parent, because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain as a parent. *M.L.B. v. S.L.J.*, No. 95-853. Justice Ginsburg authored the decision, in which Justices Stevens, O'Connor, Souter and Breyer joined. Justice Kennedy filed an opinion concurring in the judgment, while Justices Rehnquist, Thomas and Scalia filed dissenting opinions.

In terminating M.L.B.'s parental rights to her two minor children, the Mississippi Chancery Court, relying on the governing Mississippi statute, stated, without elaboration, that S.L.J., the natural father, and his second wife, who initiated the proceeding, had met their burden of proof by "clear and convincing evidence." M.L.B. filed a timely appeal, and while she paid the $100 filing fee, she was unable to pay the $2,352.36 associated with obtaining the trial transcript. Mississippi grants civil litigants a right to

appeal, but conditions that right on prepayment of costs. M.L.B. sought leave to appeal in forma pauperis, and the Supreme Court of Mississippi denied her application, finding that "[t]he right to proceed in forma pauperis in civil cases exists only at the trial level."

Writing for the majority, Justice Ginsburg considered the question of whether Mississippi may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees. Justice Ginsburg reasoned that the three cases most analogous to M.L.B.'s situation are *Griffin v. Illinois*, 351 U.S. 12 (1956), (in which the Court held that once a state creates a right to direct appeal, both due process and equal protection guarantees of the Fourteenth Amendment require the state to provide trial transcripts to indigent appellants); *Meyer v. Chicago*, 404 U.S. 189 (1971), (in which the Court held that an indigent defendant, whether convicted of a felony or conduct only "quasi criminal in nature" [i.e., an ordinance violation] cannot be denied a record of sufficient completeness to permit appellate consideration of his claim); and *Boddie v. Connecticut*, 401 U.S. 371 (1971), (in which the Court held that the state could not deny a divorce to a married couple based on their inability to pay approximately $60 in court costs).

The Court noted that both procedurally and substantively, the trial transcript is crucial to appellate review of M.L.B.'s case, writing, "Only a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment." More importantly, the Court was persuaded that the gravity of the deprivation, to be "decreed, forevermore, a stranger to [one's] children," together with the fact that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' (citing *Boddie v. Connecticut*, 401 U.S. 371, 376)," warranted reversal of the Mississippi Supreme Court decision.

In Per Curium Opinion, U.S. Supreme Court Remands Georgia Death Penalty Case

On December 16, 1996, in a per curium opinion, the U.S. Supreme Court reversed and remanded a death penalty case which the Georgia Supreme Court, mistaken in the proper standard of review for dismissal of a juror, affirmed. *Greene v. Georgia*, 60 CrL 3111. Petitioner was convicted of capital murder and sentenced to death. At trial, over petitioner's objection, the court dismissed for cause five jurors who expressed concern over the death penalty. The Georgia Supreme Court affirmed, relying upon *Wainwright v. Witt*, 469 U.S. 412 (1985), as "controlling authority" for the rule that appellate courts must defer to trial courts' findings regarding juror bias. Under *Witt*, a case arising on federal habeas, deference to state court findings is mandated by 28 U.S.C. §2254(d).

On appeal to the U.S. Supreme Court, the Court ruled that the Georgia Supreme Court misinterpreted *Witt* as governing the standard of review of trial court findings by the Georgia Supreme Court. The Court found that while the Georgia Supreme Court is free to adopt the *Witt* standard it is not "'controlling authority' as to the standard of review to be applied by state appellate courts reviewing trial courts' rulings on jury selection."

Fourth Circuit Grants Habeas Relief to Indigent Petitioner Denied Free Trial Transcript on Direct Appeal

Reversing a district court decision, in late October the U.S. Court of Appeals for the Fourth Circuit granted relief to a habeas petitioner who had been denied a free trial transcript on direct appeal because, though indigent, petitioner was represented by pro bono counsel rather than by the public defender. *Miller v. Smith* (U.S. Court of Appeals for the Fourth Circuit, No. 95-7521, October 29, 1996).

Following his conviction for felony murder in state court, Miller tried to obtain his trial transcript to perfect his direct appeal. As an indigent appellant, Miller sought the transcript at state expense. However, because he was represented by pro bono counsel rather than by the state public defender, a state judge denied his request, ruling that Maryland Rules 1-325(b) and 8-505 require an indigent to be represented by the state public defender's office in order to receive trial transcripts at state expense. The court ruled that Miller failed to meet the rules' requirements because he refused to accept public defender representation, and because his counsel refused to seek designation as assigned counsel so that he could represent Miller under the supervision of the public defender's office.

On appeal to the Maryland Court of Special Appeals, Miller argued that the trial court's refusal to grant his request violated his Fourteenth Amendment equal protection and due process rights, as well as his Sixth Amendment right to counsel. The appellate court reversed, but on statutory grounds.

However, the Maryland Court of Appeals granted certiorari and reversed, holding that the Maryland Rules neither required the provision of a free transcript nor violated his constitutional rights, explaining that the rules place the public defender in the position of "gatekeeper" of state resources allocated for indigent defense. The court also determined that Miller's federal constitutional rights had not been violated because he had not been "completely denied the appellate process." Finally, the Maryland Court of Appeals rejected Miller's Sixth Amendment challenge, reasoning that because a criminal appellant has no absolute or automatic right to choice of counsel, the state public defender may require defendants to "avail [them]sel[ves]" of the representation of the public defender in order to obtain a free transcript. On federal habeas appeal, the district court affirmed.

On appeal to the Fourth Circuit, the court found that Miller had been denied both his Sixth Amendment right to counsel and his Fourteenth Amendment rights to equal protection and due process, agreeing with Miller that the lower courts' decisions unconstitutionally denied him his constitutional rights to a free transcript for appeal and counsel of choice. The court stated: "... for the State of Maryland to refuse a transcript (which would be supplied to a public defender) amounts clearly and simply to partial yet substantial denial of the assistance which is guaranteed by the Sixth Amendment. It signifies a

denial of fairness and equality." The court also pointed out the absurdity of the state's requirement that Miller be represented by the public defender when he only required a limited service, stating: "Instead of encouraging outside legal representation with the potential to conserve state assets, the rule only guarantees the expenditure of more governmental resources."

For further information on this subject see "Funds for Resources for Indigent Defendants Represented by Retained Counsel," by Edward C. Monahan and James J. Clark, *The Champion*, December 1996, pg. 16. ❖

Federal District Court Prohibits Federal Prosecution of Charges Because of Due Process Violation

A Massachusetts U.S. District Court judge recently dismissed a federal firearms indictment, filed just days before the expiration of the statute of limitations and long after defendant had been tried in state court, reasoning that in the aggregate, concerns about pre-indictment delay, double jeopardy and selective prosecution violated due process. *U.S. v. Stokes*, 60 CrL 1213. In August 1992, Stokes was tried in state court on one count of first degree murder, two counts of assault and battery with a dangerous weapon and one count of unlawfully carrying a firearm, for charges related to a murder and shooting incident which occurred on December 6, 1990. He was acquitted of the murder charge, convicted of the other charges and sentenced to 23½ to 25 years of imprisonment.

Nearly five years after the incident, on December 5, 1995, the U.S. Attorney's office filed a federal grand jury indictment for the unlawful possession of a firearm by a felon. This indictment was filed the day before the statute of limitations on the charge was to expire. Under the federal sentencing guidelines, if proven by a preponderance of the evidence that Stokes committed the murder for which the state jury acquitted him, he would be sentenced to life without possibility of parole.

Stokes moved for a dismissal of the indictment on three due process grounds: pre-indictment delay, double jeopardy and selective prosecution. While the court did not find that any of these individual claims violated Stokes' due process rights, the court found that Stokes' case gives rise to four factors implicating constitutional due process concerns. First, the substantial delay between the date of the offense and the date of the filing of the federal indictment. Second, the disparity in sentencing for Stokes' state court conviction on the firearms offense -- four and a half to five years -- and the potential life without parole sentence under the federal charge. Third, "in effect, a successive prosecution for the offense of murder for which the defendant has already been acquitted by a jury, but is now to be tried for that same offense under the less rigorous standard of proof of 'by a preponderance of the evidence.'" Fourth, "a form of actual 'selective' prosecution, in that the prosecutorial decision is the product of unfettered discretion guided by no standard other than the prosecutor's disagreement with the state jury's verdict of acquittal on the murder charge." The aggregate effect of these four concerns, the court found, violates the Due Process Clause of the Fourteenth Amendment. ❖

Seventh Circuit Finds Brady Satisfied By Government's Provision of Audiotape Transcripts of Only Those Portions It Intends to Use

Reversing a district court decision, the U.S. Court of Appeals for the Seventh Circuit recently held that the government's constitutional obligation under *Brady* was satisfied by turning over 65 hours of audiotapes, along with a transcript of the four hours of the tapes the government intended to use at trial. *U.S. v. Parks*, 60 CrL 1210. Thirty-nine defendants were indicted for charges arising from a 25-year narcotics conspiracy. Hoover, the alleged leader of the conspiracy, though incarcerated since 1973, continued to run the business from prison, and, pursuant to court authorization, the government tape recorded conversations between Hoover and his visitors. While a total of 65 hours of tapes were made, because of recording deficiencies and problems understanding the conversations, the government determined that only four hours of the tapes were valuable in its prosecution of the conspiracy.

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the government turned over all 65 hours of the

audiotape and a transcript of the four-hour portion it intended to present at trial. Defendants claimed that the entire 65-hour tape should have been transcribed under *Brady*, and the district court agreed. In reversing, the court of appeals affirmed defendants' right to meaningful access to the tapes. However, it found that defendants' possession of the audiotapes in the same format as the government has them, along with transcripts of the four-hour portion that the government seeks to play at trial, suffices. The court cited *U.S. v. Zavala*, 839 F.2d 523 (CA 9 1988), and *U.S. v. Gee*, 695 F.2d 1165 (CA 9 1983), two Ninth Circuit decisions where that court concluded that the law under *Brady* does not place the burden of transcribing all of the tapes on the government when only a portion of the tapes are relevant. The court also found that any information that defendants seek in regard to the information contained on the tapes is available to them through the exercise of due diligence. ❖

Sentencing Enhancement Law, Effective When Crime Committed, But Repealed Prior to Sentencing, Not Applicable to Defendant's Case

Reversing a lower court decision, the Montana Supreme Court ruled in late December that a dangerous offender sentencing enhancement statute, in effect when defendant committed his crime but repealed before defendant was sentenced, does not apply to him. *State (Montana) v. Wilson*, 60 CrL 1223. The intermediate court relied on *State v. Finley*, 915 P.2d 208 (Mont SupCt 1996), a recent Montana Supreme Court decision which held that the version of an amended statute that was in effect at the time of defendant's offense controls.

On appeal, the Supreme Court first clarified its holding in *Finley*, stating that the rule applies "when the law, although amended, is still in effect at sentencing." The court next turned to a more difficult issue: Montana's saving statute, MCA Section 1-1-205, and MCA Section 1-2-209, a statute that provides that "[n]o law contained in any of the statutes of Montana is retroactive unless expressly so declared." Following the precedent of the California Supreme Court in *In re Estrada*, 408 P.2d 948 (1966), the court emphasized that the legislature's repeal of the dangerous offender statute reflects its view that defendant's crime is appropriately punished less severely. The court also found that Montana's savings statute applies only to the repeal of a law creating a criminal offense, not the repeal of sentencing provisions. ❖

Statutory Amendment Lowering Burden of Proof To Be Given Retroactive Effect, Pennsylvania Superior Court Rules

A recent Pennsylvania statute which reduces the requisite burden of proof for a defendant to be found to be incompetent to stand trial should be given retroactive effect, the Pennsylvania Superior Court (intermediate appellate court) decided in mid-October. *Commonwealth (Pennsylvania) v. Tizer*, 60 CrL 1103. Until earlier this year, Oklahoma and Pennsylvania were two of just four states to require clear and convincing evidence to prove insanity. This past summer, in *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996), the U.S. Supreme Court struck down Oklahoma's law as unconstitutional and the Pennsylvania legislature responded by amending Pennsylvania's required standard of proof to conform with *Cooper*.

In holding that the legislature's actions should be given retroactive effect, the Superior Court applied the analysis set forth in *Stovall v. Denno*, 388 U.S. 293 (1967). The court determined that application of this new standard of proof will enhance the reliability of trials, that the administrative burdens of applying the statute are limited, and that, given the U.S. Supreme Court's decision in *Cooper*, as well as the fact that only two states other than Pennsylvania and Oklahoma apply this heightened standard of proof, the legislature's action was appropriate. ❖

Defendant Entitled to DNA Expert of His Own, Despite Earlier Expert's Report Which Was Submitted to Both Prosecution and Defense

A trial court erred in denying defendant's motion for an expert on the ground that one court-appointed DNA expert, who submitted her report to both the

prosecution and defense, was "defendant's expert," a majority of the Texas Court of Criminal Appeals recently ruled. *Taylor v. State (Texas)*, 60 CrL 1106. While the majority agreed that *Ake v. Oklahoma*, 470 U.S. 68 (1985), does not require that defendant "be furnished with a testifying expert who would unequivocally support an exculpatory theory of the defense," it also found that under *Ake*, a defendant is entitled to at least one expert upon a showing that the expert can provide assistance that is likely to be a significant factor at trial.

The court rejected the intermediate court's finding that the original court-appointed expert was "defendant's expert" because she provided her inculpatory scientific conclusions to both parties. In fact, the court noted, following the receipt of her report, the prosecution retained this witness for its case-in-chief, and had used the expert's "powerful" testimony against Taylor. If the expert had been Taylor's expert, the court reasoned, then her conclusions would have been defense counsel's work-product and would never have been provided to the prosecution. In conclusion, the majority stated that the type of expert contemplated in *Ake* can testify in support of the defense or provide defense counsel with the means to challenge the prosecution, or both. The court-appointed expert in Taylor's case did neither, the majority found, in violation of *Ake*. ❖

District Court Should Have Allowed Defense Expert in Child Sex Abuse Case to Testify As To "Suggestive Atmosphere" of Childrens' Questioning

In mid-November a majority of the U.S. Court of Appeals for the Eighth Circuit found that a district court committed reversible error for denying defendants' motion to allow their psychological expert to testify as to the conditions of questioning of the alleged victims of sexual abuse and to allow their expert to examine the children himself. *U.S. v. Rouse*, 60 CrL 1211.

Four defendants were convicted of aggravated sexual abuse of five children under the age of 12 years on an Indian Reservation, in violation of 18 U.S.C. 2241(c). At trial, defendants sought to admit the testimony of its clinical psychologist expert regarding the "practice of suggestibility" used to obtain the childrens' testimony. Defendants' expert would have testified about the unrecorded interviews of the children by social workers, FBI and tribal officers, the U.S. Attorney's Office and others, which took place over a period of six months preceding the trial, while the children were living in foster homes. At no time during this pre-trial period was defendants' expert permitted to question the children himself.

The trial court rejected defendants' expert testimony as being an improper subject of expert testimony, not reliable or relevant under Fed.R.Ev. 104(a), and confusing and misleading to the jury under Fed.R.Ev. 403. In reversing the trial court, the Eight Circuit turned first to *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), which set forth a four-part test for the admission of scientific evidence. Under *Daubert*, a theory or technique is admissible if it: 1) can be and has been tested; 2) has been subjected to peer review; 3) has a known or potential rate of error (when a technique is scientific); and 4) has been generally accepted by the scientific community. The court found that the defense fulfilled the requirements of *Daubert*, and that the expert's testimony would have assisted the jury, holding: "...defendants suffered substantial prejudice by the nature of the case against them without the opportunity to indeed show the possible falsification in testimony had occurred because of the nature of the government's investigation. Given their lack of access to the children and the amount of suggestive interviewing done to support the prosecution, we believe the defendants were entitled to an independent psychological examination." ❖

New York Court of Appeals Rules Trial Court's Interference With Attorney-Client Relationship Requires Reversal of Conviction

A trial court judge who prohibited second chair counsel from cross-examining her witness or sitting at counsel's table interfered with an existing attorney-client relationship, and defendant's conviction must be reversed, a majority of the New York Court of Appeals recently ruled. *People (New York) v.*

Knowles, 60 CrL 1143. Defendant Knowles, charged with drug possession based on a "buy and bust," was represented by co-counsel from The Legal Aid Society. Prior to the commencement of trial, Jones, defense counsel of record, requested that Glover be allowed to cross-examine the arresting officer, as she was prepared to do so. Jones also explained to the court that Knowles had developed a relationship with both attorneys and wished to have Glover conduct this cross-examination, and that Glover wanted to improve her litigation skills. Finally, Jones assured the court that only one attorney would conduct the cross-examination of the arresting officer. The court denied Jones' request, stating that Jones alone had appeared at pretrial hearings, that the case was "very simple and straightforward," and that The Legal Aid Society almost always has just one attorney trying a case where there is just one defendant.

Jones then moved, in the alternative, for the court's permission to permit Glover to sit at the counsel table. Although two attorneys appeared for the prosecution and sat at the prosecution's table for the hearing, the court denied Jones' request, commenting that the primary reason for Glover's involvement in the case was that she was African-American, as was the defendant.

The Court of Appeals found that the trial judge's refusal to allow Glover to participate in Knowles' trial "can only be characterized as arbitrary and an abuse of discretion, since there was no rational reason to support the ruling." The court stressed that its decision did not turn on whether the defendant has a constitutional right to be represented by two attorneys, but rather whether the court interfered with an existing attorney-client relationship. The court held that "in exercising its discretion to manage the courtroom, the court's interference with the defendant's established relationship with counsel must be justified by overriding concerns of fairness or efficiency - regardless of whether counsel is assigned or retained and regardless of whether the defendant is represented by more than one attorney." ❖

Representation of Co-Defendants Presumptively Prejudicial Where Counsel Fails To Comply With Conflict of Interest Rule

In late September, the Kentucky Supreme Court established a bright-line rule for determining whether conflicts of interest prejudice representation of joint defendants: noncompliance with RCr 8.30, Kentucky's relevant rule, is presumptively prejudicial. *Peyton v. Commonwealth (Kentucky)*, 60 CrL 1047. In cases of joint representation of co-defendants, RCr 8.30 requires that defendants be given notice of the potential conflict of interest before the court and that waiver of the potential conflict be entered on the record by each defendant.

Defendant Peyton was convicted of drug trafficking and other offenses after she and her housemate, Knott, were arrested. Both Peyton and Knott were represented by the same counsel, without any of the requirements of RCr 8.30 being followed. At trial, Peyton took the stand and claimed she was innocent, while Knott did not testify; Peyton was convicted and Knott was acquitted. On appeal, Peyton argued she was prejudiced by counsel's joint representation of both defendants in that counsel was unable to exonerate her at the expense of Knott.

In holding that failure to comply with RCr 8.30 is presumptively prejudicial, the Kentucky Supreme Court overruled an earlier decision, *Commonwealth v. Holder*, 705 S.W.2d 907 (Ky SupCt 1986), under which the appellate court was first required to determine that the trial court had failed to comply with RCr 8.30, and then had to determine whether there existed a real conflict of interest between the defendants that "could well have prejudiced the dispositions of their cases..." ❖

District of Columbia's Juvenile Curfew Law Violates Fifth Amendment

The U.S. District Court for the District of Columbia recently struck down the District of Columbia's 1995 Juvenile Curfew Act as violative of minors' Fifth Amendment rights to equal protection and freedom of movement, as well as parents' Fifth Amendment due process rights to exercise parental control over their

children. *Hutchins v. District of Columbia*, 60 CrL 1154. The curfew law, which was based on a similar law in Dallas, Texas, prohibited, during the academic year, all juveniles under the age of 17 from public places after 11:00 p.m. on week nights, and after 12:00 a.m. on weekends.

The court found that because the law limits individuals' ability to freely move about, it involves a fundamental right, and that, under *Belotti v. Baird*, 443 U.S. 622 (1979), this characterization as a fundamental right applies to juveniles as well as to adults and thus is subject to the strict scrutiny standard. The court found that while the District had satisfied the first prong of the strict scrutiny review, it failed to satisfy the second prong. The law, the court found, was designed to promote a compelling government interest in reducing juvenile crime and protecting juveniles and other persons from victimization. However, the court was not satisfied with the evidence presented by the District to show the nexus between the curfew law and juvenile crime in the District of Columbia. While the District presented numerous national and state studies and reports addressing the issue of juvenile crime, none of the District's evidence addressed the specific juvenile population implicated by the curfew law. In striking down the law, the court was also troubled by the District's adoption of Dallas' juvenile curfew law, which survived review by the Fifth Circuit in *Qutb v. Strauss*, 11 F.3d 488 (CA 5 1993), because it was done without any inquiry into the propriety of the application of Dallas' law to the District. ❖

Trial Court Prohibited From Enhancing Assigned Counsel Fee Set By Tennessee Supreme Court

The Tennessee Supreme Court recently approved the state's refusal to pay assigned counsel in a capital case at the enhanced rate set by the trial court judge, stating that a trial judge has no authority to award compensation in excess of the rates set by Tennessee Supreme Court rule. *Petition of Gant (State (Tennessee) v. Matthews*, 60 CrL 1080. A state statutory provision requires that counsel in a death penalty case be compensated at a "reasonable" rate. Following a hearing on the issue of compensation, the trial judge in a capital case awarded petitioner Gant compensation of $100 per hour, despite a Tennessee Supreme Court rule setting compensation for assigned counsel in felony cases at $40/$50 per hour, in- and out-of court. In rejecting the trial judge's determination that $100 per hour is reasonable compensation, the court wrote that, pursuant to its statutory authority to promulgate rules governing compensation of appointed counsel, it had already determined that $40/$50 per hour constitutes reasonable compensation for court-appointed work in Tennessee. ❖

Federal District Court in Iowa Finds PLRA Prohibition Against Numerous In Forma Pauperis Civil Actions Unconstitutional

The U.S. District Court for the Southern District of Iowa recently found unconstitutional a provision of the Prison Litigation Reform Act (PLRA), P.L. 104-134, which prohibits an inmate from filing in forma pauperis civil actions while incarcerated, if, while incarcerated or detained, the inmate had three or more actions or appeals dismissed because they were frivolous, malicious or failed to state a claim upon which relief could be granted. *Lyon v. Vande Krol*, 60 CrL 1042. The provision, 28 U.S.C. 1915(g), failed the court's strict scrutiny test and thus violated the Fifth Amendment's equal protection clause. The court reasoned that even if Congress has a compelling interest in deterring inmates from filing frivolous lawsuits, §1915(g) of the statute would preclude only indigent inmates from filing numerous civil actions. Thus, the court concluded, "§1915(g) is not necessary or narrowly tailored to achieve a compelling government interest..." It also found that stopping all law suits by impoverished inmates, frivolous or not, might ban "many other important and arguably meritorious constitutional claims by only those inmates." ❖

Habeas Claim Filed Before AEDPA Effective Date Not Subject To Its Filing Deadlines or Certificate of Appealability Requirements

Following the Second, Seventh and Eleventh Circuits, the U.S. Court of Appeals for the Tenth Circuit decided in early November that a habeas petitioner who filed a notice of appeal prior to the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA) is not subject to that law's one-year statute of limitations or its requirement of a certificate of appealability for consideration by a circuit court of appeal. *U.S. v. Lopez*, 60 CrL 1178. While petitioner's claim was filed prior to the AEDPA's effective date, no briefs were filed until after that date. Still, the court found, that under *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994), retroactive application of the AEDPA would attach new legal consequences to the filing, which was completed before the AEDPA's enactment, such application is prohibited. The court also found that *Landsgraf* prohibits imposing on petitioner the AEDPA's new requirements for obtaining appellate review, again because these new legal consequences, which went into effect after the notice of appeal was filed, are prohibited. ❖

Fifth Circuit Finds AEDPA's New Standard Retroactive, But Refuses To Classify Texas as Opt-In State

Expanding on an earlier decision, the U.S. Court of Appeals for the Fifth Circuit held in late October that the Antiterrorism and Effective Death Penalty Act's (AEDPA) new standards of review apply to pending cases. *Mata v. Johnson*, 60 CrL 1178. Previously, in *Drinkard v. Johnson*, 60 CrL 1085 (CA 5 1996), the court determined that the AEDPA's new standard for mixed questions of law and fact, because procedural in nature, should be retroactive under *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994). In *Mata*, the court expanded its holding in *Drinkard*, writing, "We see no basis for divorcing the remainder of the §2254 amendments all of which involve standards of review - from the *Drinkard* application of *Landsgraf*."

The court also rejected the claim that Texas is an opt-in state for purposes of expedited processing of capital cases through federal habeas corpus proceedings. In order to satisfy opt-in requirements, a state must: 1) establish by statute or rule a mechanism for appointment of counsel for post-conviction proceedings for all capital prisoners; 2) ensure that appointed counsel are competent; 3) pay appointed counsel reasonable litigation expenses; and 4) offer counsel to all capital prisoners seeking post-conviction relief. While the court found that Texas has satisfied the AEDPA's requirements of establishing a mechanism to compensate and pay reasonable expenses of competent counsel, it found that neither the statute nor the state court of criminal appeals had met the requirements of 28 U.S.C. 2261(b) in regard to the standards of competency for counsel. The court found that the Texas Court of Criminal Appeals' questionnaires, used to evaluate counsel on a case-by-case basis, did not satisfy the AEDPA's opt-in requirements. ❖

Florida, Too, Fails To Meet AEDPA's Opt-In Requirements

As in Texas (above), Maryland, Virginia and Ohio (see *Booth v. Maryland*, 60 CrL 1104, *Satcher v. Netherland*, 60 CrL 1104 and *Hamblin v. Anderson*, 60 CrL 1197, respectively), the U.S. District Court for the Northern District of Florida also found that Florida fails to meet the Antiterrorism and Effective Death Penalty Act's (AEDPA) requirements for opt-in status which would permit the state to take advantage of the new law's expedited processing schedule for federal habeas capital cases. In late August, the court granted a preliminary injunction prohibiting Florida from proceeding as an opt-in state in *Hill v. Butterworth*, 59 CrL 1469.

The court found Florida's scheme for providing state post-conviction representation to death row inmates deficient in a number of respects. First, the court found that while the Capital Collateral Representative (CCR) was established to handle Florida's capital state post-conviction cases, CCR is too short-staffed to handle every eligible petitioner's case, as required by

the statute. Second, the court found the state's competency standards for CCR attorneys - that they be members in good standing of the state bar with at least two years experience in the practice of criminal law - insufficient. At the time of the preliminary injunction hearing, over 40 eligible petitioners were without counsel, and CCR was unable to assume any of these cases. The court also pointed to the loss of the recently defunded federal death penalty resource center, the Volunteer Lawyers' Resource Center, which had provided support and assistance to volunteer attorneys handling conflict cases, as a contributing factor to Florida's inability to provide counsel to every petitioner who requests it. ❖

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