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## The Balance Sheet Approach to Accurately Comparing Prosecution and Defense Resources

Introduction

As the Spangenberg Group conducts studies on indigent defense systems around the country, one of the questions frequently asked of us by both policy makers and funders is how to effectively compare the resources, caseloads and staffing of indigent defense with that of prosecution. We agree with these funders and policy makers that this comparison can serve an important role by putting into context available funding for two of the criminal justice system's five primary components. We also share their frustration over how to make accurate and reliable comparisons. In our experience, an accurate assessment of resources available to prosecution and defense is difficult to accomplish. This article will provide an introduction to how such a comparison can begin.

In 1996, while under contract with the Florida Public Defender's Association (FPDA) to conduct a comprehensive study of the state's public defender system, The Spangenberg Group used a "balance sheet" to reflect data on the various costs of both public defense and prosecution in Florida. Part of the appeal of the balance sheet approach is that it is a remarkably straightforward way to compare resources. To develop a balance sheet, simply create a document with two columns, one for public defense, the other for prosecution, and list every budgetary line item that relates to the costs of indigent defense in the left hand column across from a list of all prosecutorial resources in the right hand column.

With the assistance of state and local governments in Florida, we were able to create a balance sheet which shows individual budget appropriations and in-kind services for both indigent defense and the prosecution. This comparison revealed a significant gap in funding for public defense and prosecution. It is important to point out that this analysis did not suggest that prosecutorial resources were over-

funded; they may in fact have been under-funded. Our Florida balance sheet simply indicated that overall prosecutorial resources substantially exceeded those of indigent defense in Florida, even after adjusting for in-kind services and for the varying responsibilities of prosecution and defense.

This article will attempt to detail the process by which a balance sheet can be prepared and will highlight The Spangenberg Group's experience in this area in the last several years.

## Making an Accurate Comparison: Variables To Take Into Account

In order to make as accurate a comparison as possible, a number of fundamental differences in the operation of the prosecution and defense must be recognized. First, it is far easier to account for defense resources than prosecution resources because indigent defense funding is drawn primarily from state and local sources. While some federal funding is available to indigent defense programs, these monies are extremely limited. In contrast, prosecutors have a number of additional federal, state and local resources that are, for the most part, unavailable to the defense. In our experience, these resources are frequently omitted from comparisons of relative funding levels. For example, the prosecution typically has available: the services of advanced state and federal crime laboratories, psychiatric and other mental health professionals employed by state and local government; sophisticated investigative equipment used by law enforcement; and extensive data banks that identify and locate individuals with criminal histories. In addition, prosecution often has available hundreds of local law enforcement officials for case investigation and preparation. The costs for prosecutors' use of these important services are embedded in the budgets of other federal, state and local agencies, making their monetary value extremely difficult to quantify. In contrast, for defense counsel, the use of investigative, forensics, psychiatric, and other such services either comes out of an indigent defense operating budget or, in the case of a court-appointed attorney, through a motion to the presiding judge.

Second, when conducting a balance sheet analysis, one must account for the differing responsibilities of prosecution and defense. The prosecutor in most jurisdictions is responsible for screening all criminal cases brought by law enforcement agencies and private citizens. Many of these cases are never charged and thus there is no need for court-appointed counsel. In addition, in some jurisdictions prosecutors have responsibilities in civil cases that do not require appointment of counsel. On the other hand, while the prosecution typically assigns one case to a particular prosecutor, regardless of the number of defendants involved, when more than one defendant is involved in a particular case, usually a public defender and one or more conflict counsel must be appointed to represent the defendants.

Third, the way the prosecution and defense count cases must be taken into account when gauging comparative caseloads of the two entities. Frequently we find that prosecutors

and public defenders count cases differently, e.g., by indictment, by charge, by defendant, etc. Budget comparisons between criminal justice agencies simply cannot be accurately analyzed until the agencies are counting cases the same way. This is the cornerstone of any workload and budget comparison.

Fourth, when comparing staffing resources, it is imperative that full-time staff equivalents (FTEs) rather than actual staffing numbers be used to measure staff resources. For example, frequently in rural jurisdictions prosecutors are full-time while public defenders are part-time.

Fifth, and probably most difficult to quantify, the effect of court policies should be considered when making a comparison of resources. Allocation of judicial resources, court policies regarding setting of pre-trial and trial dates, and policies regarding the docketing, processing and scheduling of cases each affect the operation of both prosecution and defense.

With these key considerations in mind, it is possible to collect sufficient data to effectively justify a funding request, or fend off claims of being too generously funded.

## Case Study: Florida Public Defender Association

As stated above, in 1996, while under contract with the Florida Public Defender Association (FPDA), The Spangenberg Group used the balance sheet approach to analyze Florida's indigent defense and prosecution resources. In Florida, the state funds public defender salaries and personnel expenses while counties are responsible for office overhead and payment of conflict counsel. Certain counties also voluntarily fund additional attorney positions in a few of Florida's 20 circuit public defender offices. Prosecutorial resources in Florida also come from state and county funds; additionally, a number of federal agency resources are available to prosecutors in Florida.

One of the most significant problems we had in conducting this analysis was a lack of hard data with which we could compare indigent defense appointments and prosecutorial filings. A representative of the Florida Prosecuting Attorneys Association suggested that public defenders handle only 38% of the work of state attorneys. Our review of available public defender appointment data, from both the courts and public defender offices, indicated that Florida's public defenders handle a more significant percentage of the state's criminal cases. However, absent a common definition of a case shared by the adjudication component entities, we were unable to completely resolve these case counting discrepancies.

The Florida Prosecuting Attorneys Association also pointed out to us the following additional responsibilities of state attorneys in Florida: state attorneys spend time screening cases that are never filed; that state attorneys prosecute cases in which private, court-appointed attorneys provide defense representation; and state attorneys do other work which has no counterpart for indigent defense.

When we came to our comparison of resources between public defenders and prosecutors in Florida, we found prosecutors have access to the resources of thousands of local law enforcement officers to assist them in criminal investigations and case preparation. While we were not able to quantify these resources, as they are not part of the local prosecutor's state or local budget, it is clear that their equivalent value is substantial. By contrast, funds for criminal defense investigations are either built into the circuit public defender's budget or obtained on motion to the court. Furthermore, we found that Florida's prosecutors had other resources available to them, including: grants and donations; forfeiture funds; civil RICO funds;

Florida Department of Law Enforcement investigative time; federal FBI, DEA, and federal crime lab funds; and access to a variety of experts through state or federal agencies. Public defenders had no access to these resources.

The Florida balance sheet was prepared with the caveat that we were unable to obtain accurate funding figures for all sources of funding and assistance provided to prosecutors, but it provided a helpful starting point for considering the resources available to both prosecution and defense. Even with some information missing, the results of our analysis revealed a significant gap in funding, and the FPDA was able to use this information to more effectively make its case for additional state funding as FY 1997 funding appropriations were determined.

Case Study: King County, Washington

In October 1994, the King County Office of Public Defense (OPD) retained The Spangenberg Group to conduct an analytical review of a report comparing staffing resources and expenditures of the Prosecution Attorney's Office (PAO) and public defense attorneys in King County the report, prepared by Mr. Norm Maleng, Prosecuting Attorney of King County, concluded that a "... dramatic imbalance between prosecution and defense funding" existed in King County. In Mr. Maleng's report, the following differences between the King County PAO and the King County OPD were cited:

- The practice of assigning defenders to individual defendants and prosecutors to an individual case, which may consist of multiple defendants.
- Defenders represent only those who are found indigent while the PAO prosecutes all felony, misdemeanor and juvenile cases.
- The defenders employ full-time investigators, while the PAO relies on police agencies for most of their investigative work.
- Defender agencies pay rent for office space, while the PAO is provided rent-free space in the King County courthouse, juvenile court and district courts.
- The PAO budget includes funds for a civil division and a family support section, sections which find no counterparts in the public defender agencies.
- In the criminal division, the PAO must review cases presented by police agencies, and either file the case, request more information or decline to file the case. These functions find no counterpart in the public defender agencies.
- The total budget for public defenders includes contracts with the City of Seattle for representation in Seattle Municipal Court while the PAO does not provide the counterpart municipal prosecutorial services.
- Public defenders provide representation for respondents in dependency hearings, where the state is represented by the Attorney General's office.

Upon close examination of Mr. Maleng's report, The Spangenberg Group made the following findings which provide useful guidance for other entities considering preparing their own balance sheet. First, as with our Florida analysis, the two entities' case-counting systems were different, and neither had established a clear definition of a case. With no means to establish the numbers and types of cases handled by each entity, drawing conclusions about appropriate staffing and funding levels is far more difficult. Second, when comparing the budgets of the PAO and the OPD, one needs to account for as many resources as possible. For example, in Mr. Maleng's analysis, using the standard real estate market rate, some figure could have been placed on the value of the PAO's free rent. Finally, the inter-dependent nature of the three partners in the adjudication component of the criminal justice system - courts, prosecution and defense - must be recognized. The adjudication

component is comprised of three interdependent entities, whose policies and practices affect one another. The Spangenberg Group's analysis of Mr. Maleng's report concluded with two important points: first, that contrary to Mr. Maleng's claim, the OPD was proportionally under-funded in comparison with the PAO; and second, that the PAO was under-funded in comparison to prosecutors' offices of other, similarly sized counties.

Conclusion

An accurate comparison of workload and resources of prosecution and public defense is difficult to make, but we believe the balance sheet approach is a good start in this effort. To facilitate collecting caseload data for a balance sheet, in the short term, it is critical that prosecution and defense agree upon the same definition of a case. It is also critical - and far more difficult - to collect funding information, or at least acknowledge the existence of resources, from those sources that are less apparent, i.e., prosecutors' access to the FBI, DEA and federal crime labs. Finally, in achieving the goal of a balance sheet - to accurately compare prosecution and defense resources - we hope that prosecutorial and indigent defense organizations will recognize the interdependence of their functions within the criminal court adjudication component. We have found repeatedly that the policies and practices of each of the three entities - courts, prosecution and defense - clearly affect the funding and resources of the other two entities. We have found prosecution and public defense agencies are able to make significant gains when they work together to support each other's budget requests whenever possible, leaving their adversarial relationship in the courtroom. Encouragingly, we have seen substantial progress toward this goal in a number of jurisdictions in the last few years. ❖

## NEWS FROM AROUND THE NATION

### NACDL Amends Its Assigned Counsel Policies

On May 3, 1997, at the request of the National Association of Criminal Defense Lawyers' (NACDL) Indigent Defense Committee, NACDL's board of directors voted to amend the organization's assigned counsel policies, which were originally adopted on November 5, 1994. The two most notable amendments address the importance of continuity of counsel in court-appointed cases and the need for quality controls when the contracting model is adopted. First, the board included a provision calling for the use of vertical representation, by which the same lawyer represents a client from arraignment through trial, and, if necessary, sentencing. Second, the board adopted the following policy, which addresses contracting:

> 8. If contracts for services of defense counsel are a component of a jurisdiction's legal representation plan, such contracts should ensure quality legal representation. Contracts should not be awarded primarily on the basis of cost, and should include terms requiring contractors to maintain standards necessary to deliver quality representation and to comply with standards of professional responsibility, including: maximum caseloads; minimum levels of experience and ongoing training; reasonable compensation, including provision for additional compensation in the event of unforeseen extraordinary circumstances; and sufficient support services and expenses for investigative services, expert witnesses and other litigation expenses.

Footnotes to Policy 8 mention ABA Standards 5-3.1 and 5-3.3, along with NLADA's *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense* (1984).❖

### NLADA Board of Directors' Resolution Call for End to Death Penalty

Charging that "the inhumanity, arbitrariness and discrimination of the death penalty are not transient or curable but are inherent and irretrievable," on May 3, 1997, by unanimous vote, the board of directors of the

National Legal Aid and Defender Association (NLADA) adopted a resolution calling for the abolition of the death penalty. The resolution goes on to state: "the death penalty is and will inevitably be imposed on the basis of indefensible and invidious factors such as the subjective inclinations of the prosecutor, the defendant's income level, race and mental capacity, the victim's race and status, and the defense lawyer's competence and available resources."

NLADA's resolution goes beyond that of the ABA, which in February 1997 adopted a resolution calling for a moratorium on executions until the nation's death penalty system is changed to afford adequate due process.❖

**FY 1997-98 State Appropriation to Florida Public Defender Association Increases By 4.8%**

The Florida Public Defender Association (FPDA), a network of Florida's 20 elected circuit public defenders, fared well during the 1997 state legislative session, as their state appropriations for trial and appellate representation increased by 4.5% and 7.9%, respectively, for an overall budget increase of 4.8% or $5.5 million. The total FY 1998 state-appropriated budget for Florida's public defenders is $119.1 million.

In Florida, the state funds public defender salaries and personnel expenses while counties are responsible for office overhead and payment of conflict counsel. This session, however, the counties successfully lobbied the state legislature to appropriate $2.5 million to reimburse the counties for attorneys' fees in conflict cases, and $3.5 million to reimburse the counties for transcript fees. Florida's 20 circuit public defenders are also pleased by a new state budget transfer law which will provide greater flexibility in their state budgets, allowing the circuit public defenders to freely transfer funds from one line item to another. The Executive Director of the FPDA's coordination office attributes the FPDA's success to a recognition of the importance of adequately funding the indigent defense component of the criminal justice system, Florida's healthy economy and hard work on the part of the circuit public defenders, the coordination office and the FPDA's lobbyist.

Other legislative developments will also affect indigent defense in Florida. SB 1906, which contains some of the suggestions resulting from a study of public defenders completed by the staffs of the Committees on Judiciary, Governmental Reform and Oversight, and Criminal Justice, makes a number of small but significant changes to eligibility determination, indigency screening and Florida's application fee, which has only been in effect since January 1, 1997. In an effort to reduce the number of attorneys appointed to represent defendants charged with misdemeanors, under the bill, in each case in which the court determines that it will not sentence the defendant to imprisonment if convicted, the court must issue an "order of no imprisonment" and the court may not appoint the public defender to represent the defendant. The bill also encourages diversion over incarceration for certain misdemeanor and felony offenses; under the bill defendants may be eligible to participate in diversion programs.

SB 1906 also fine-tunes Florida's indigency screening program, which was overhauled during the 1996 legislative session. See Volume II, Issue 4 of *The Spangenberg Report* for a detailed summary of Florida's new indigency screening law, which went into effect on January 1, 1997. The modifications eliminate the "indigent but able to contribute" category of indigency, and specify that a defendant with an income at or below 250% of the federal poverty level is indigent and eligible for appointment of a public defender. Under the old law, a defendant with an income below 125% of the federal poverty level was classified as indigent, while a defendant with an income between 125% and 250% of the federal poverty level was classified as "indigent but able to contribute" and assessed a sliding scale fee for representation. According to the Executive Director of the FPDA coordination office, the Florida legislature decided to eliminate the "indigent but able" classification because of confusion associated with determining the appropriate fee. The bill also requires that the indigency affidavit contain a statement

affirming the defendant's obligation to notify the court or the indigency examiner of a change in financial circumstances.

The legislation addresses other kinks in the operation of Florida's indigent defense system, specifying that conflict attorneys, who in Florida sometimes contract with the county to handle conflict cases, may not subcontract their assignments to another attorney. It also requires that the statutorily-created circuit conflict committees, which establish a list of qualified conflict counsel, meet at least once a year. Finally, as incentive to the court clerks who are now responsible for overseeing collection of Florida's $40 up-front administrative fee, HB 1906 permits the clerks to retain two percent of the monthly fees they collect.❖

**Florida's Capital Collateral Representative (CCR) Split Into Three Independent Offices**

Under legislation signed into law in mid-June, Florida's beleaguered Capital Collateral Representative (CCR), a state-funded entity which represents indigent capital prisoners in state and federal post-conviction proceedings, will be split into three separate entities covering the northern, middle and southern regions of Florida. CCR was created as part of the judicial branch of government in 1985. In December 1996, the Florida Governor's Office, Senate, and House of Representatives by joint agreement created the McDonald Commission, chaired by former Florida Supreme Court Justice Parker Lee McDonald, to assess CCR's operation. In February 1997 the McDonald Commission presented its findings and recommendations to the Florida legislature; many of the commission's recommendations were incorporated into the legislation restructuring CCR.

HB 1091 provides that each of the three regional CCR's is to be headed by a regional counsel to be nominated by the Florida Supreme Court Nominating Commission and confirmed by the state senate. Each regional counsel will serve a three-year term (a reduction from the five-year term of the former Capital Collateral Representative). The legislation also specifies that the three offices are to function independently and operate as separate budget entities. Conflict cases within one office will be referred to one of the two other offices, where possible, and, as a last resort, to appointed private counsel who are not to be paid more than $100 per hour. The legislation also establishes new qualification standards for both assistant capital collateral counsel and appointed counsel. Both sets of attorneys must have participated in at least five felony jury trials, five felony appeals, five capital post-conviction proceedings or a combination of at least five such proceedings. The legislation provides that lawyers who do not have these qualifications may be employed as staff members but may not be assigned as sole counsel for any defendant.

In an attempt to more closely monitor the regional offices' activities, the new law also requires the regional counsels to file a quarterly report with the President of the Senate, the Speaker of the House and the newly-formed, six-member Commission on the Administration of Justice in Capital Cases. The Commission will be comprised of two members appointed by the Governor, two members appointed by the President of the Senate from the membership of the Senate and two members appointed by the Speaker of the House of Representatives from the membership of the House of Representatives. The reports must document the number of hours worked by investigators and attorneys in each case, and the amounts per case expended during the quarter in investigating and litigating the office's cases. In addition to reviewing the regional counsels' quarterly reports, the Commission on the Administration of Justice in Capital Cases is also charged to "review the administration of justice in capital cases, receive relevant public input, review the operation of the capital collateral regional counsel, and advise and make recommendations to the Governor, Legislature, and Supreme Court."

Appointment of each capital collateral regional counsel is to occur no later than August 1, 1997, and each regional counsel is to assume office no later than

October 1, 1997. We will keep you updated on this transition.❖

**Final Report of the Illinois State Bar Association Committee on a Long-Term Solution for Funding Criminal Approved by the Criminal Justice Council**

At the Illinois State Bar Association's annual meeting in late June, the bar's Criminal Justice Council approved a final report issued by the Committee on a Long-Term Solution for Funding Criminal Appeals (the Committee). The Committee's next step will be to pursue approval from the bar's board of governors this summer. Then, if the board of governors approves the report, the Committee will set to work drafting legislation aimed at improving the compensation rates for appointed counsel who handle direct appeals in Illinois.

The Committee, a seven-member special committee of the bar's Criminal Justice Section Council, was formed in 1996 to address the problem of adequately funding Illinois' appellate indigent defense system. This funding shortage has resulted in serious delays in processing direct appeals, prompting the 1993 filing of *Green v. Washington*, a federal habeas class action lawsuit in the U.S. District Court for the Northern District of Illinois. See Volume II, Issue 3 and Volume III, Issue 2 of *The Spangenberg Report* for more detail on *Green v. Washington*.

Direct appeal cases in Illinois are handled primarily by the state-funded Office of the State Appellate Defender (OSAD), which has five district offices throughout the state. In the First District (Cook County/Chicago), the county funds a public defender program, the Cook County Public Defender, which handles most criminal trial cases and approximately two-thirds of the direct appeals in Cook County. For conflict cases, by statute, since 1975 appointed counsel have been paid $40 per hour for work on direct appeals, with maximum compensation not to exceed $1,500 per case in non-capital cases or $2,000 in capital cases. Both caps may be waived, however, the caps have not been increased in over 20 years.

The Committee's report details Senior Judge Milton's Shadur's February 1996 opinion in *Green*, in which he found that the backlog created by the failure to adequately fund the First District (Chicago) Office of the State Appellate Defender (OSAD) has resulted in "excessive and inordinate delays" which render the right to appeal a "meaningless ritual" in many cases. *U.S. ex rel. Green v. Washington, et al.*, 917 F. Supp. 1238 (1996). The Committee's report notes that in response to the *Green* opinion, various proposals have been made for resolving the delay in appellate review of indigent criminal cases. Among these proposals is the use of private attorneys, either on an appointed or pro bono basis, to reduce the backlog of cases.

In fact, during the 1996 state legislative session, the Illinois General Assembly appropriated funds for OSAD to contract with private attorneys to handle some of the backlogged cases. The rate of compensation was established at $40 per hour, with a maximum bid of $2,000 per case. The winning bids from the legislatively-mandated competitive bidding that followed OSAD's request for proposals to handle backlogged direct appeals ranged from $500 to $1,900 per case. The Committee's report acknowledges that the program has been partially successful in reducing the backlog. As of May 23, 1997, 557 briefs, *Anders* motions or motions to dismiss had been filed. However, the report points out, unexpected problems also developed, as 336 of the 811 cases originally assigned were returned to OSAD because the successful bidders were unable to file timely briefs.

Another response to *Green* was to expand Cook County's (the First District's) pro bono program to help eliminate the backlog.

In addition to documenting the problems facing Illinois' appellate indigent defense system and the solutions prompted by the *Green* case, the Committee's report also details the results of a survey it conducted to determine the following: the average hourly fees charged by Illinois attorneys who handle criminal appeals; the average amount of time these attorneys devote to criminal appeals of cases with varying record lengths; and average attorney overhead rates. Using these findings, the Committee concluded

its report with recommendations for increasing the hourly rate for work on direct criminal appeals. Using survey information on average hourly rates for private criminal appellate work and overhead rates, the authors suggest that the General Assembly raise the hourly compensation rate to either $60 or $75 per hour. The Committee also uses survey information on the average time spent preparing appellate briefs for cases of varying record lengths to project the effect of the proposed increase in hourly compensation rates.

In a related development, the Illinois General Assembly during the 1997 session approved a 4.5% increase in the OSAD FY 1998 budget. However, unlike last year, when additional funds were targeted for the expanded contracting program mentioned above, the FY 1998 appropriation permits a transfer of some funds from OSAD's contractual services line item to its personal services line item. As a result, the First District office will be able to increase its staff by approximately 30%, as it will go from 18.25 to 26.25 full-time equivalent attorneys. The First District office will also have approximately $200,000 available to pay contract attorneys to handle First District cases in FY 1998.

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

**Report Focuses on Alabama's Poorly Funded Indigent Defense System**

In mid-April, The Equal Justice Initiative of Alabama (EJI) released "A Report on Alabama's Indigent Defense System, Capital Cases," which discusses Alabama's inadequate compensation paid to attorneys representing indigent capital defendants and the deleterious effects resulting from the low pay.

The vast majority of indigent defendants in Alabama are represented by court-appointed attorneys; just a handful of jurisdictions have public defender offices or contract attorneys. The EJI report states that court-appointed attorneys representing indigent capital defendants in Alabama receive the worst pay for this type of work in the country: $20 per hour for all work out-of-court and $40 per hour for work in court. State statute caps compensation for out-of-court work at $1,000, or 50 hours of work. The report points out that capital case experts have estimated the minimum number of hours needed to prepare each phase of a capital case for trial at 500 hours. Alabama's compensation rates for court-appointed counsel have not been increased since they were established in 1981.

Most funding for Alabama's indigent defense costs comes from the Fair Trial Tax fund, which consists of revenue from a $7 tax assessed on all criminal and civil filings in circuit, district and municipal courts. Fair Trial Tax revenue is used to compensate defense lawyers representing indigent criminal defendants and to pay for expert professional services, such as investigators and psychiatric evaluations, necessary in these cases. The revenue also pays court reporter fees. The EJI report states that of the approximately $10.7 million spent from Alabama's Fair Trial Tax fund in FY 1995, $1 million went to court reporters. Historically the fund has failed to cover all of the expenses associated with indigent defense cases, even with the relatively low compensation paid to court-appointed lawyers, and the state legislature has had to appropriate supplemental funds to pay indigent defense costs on an annual basis.

The report notes that the funds available for indigent defense amount to a fraction of what is allocated for prosecution. Approximately $40 million was allocated for district attorneys in the state's 1996 budget, and that figure does not include the millions of dollars in local supplements to salaries and expenses for district attorneys, a $1.3 million state appropriation for support services provided through the Office of Prosecution Services, the untold hours of investigative assistance provided to prosecutors each year by local law enforcement agencies, or the medical and forensic services provided by state agencies.

Some of the "ripple effects" of the low rates of compensation provided to court-appointed attorneys in capital cases mentioned in the report include:

- Many attorneys who accept a capital case appointment refuse to do so ever again.

- There are serious concerns over the effectiveness of representation provided to capital defendants. The report cites a 1996 study which found that from opening statements to the return of the jury verdict, Alabama lawyers spend an average of only three hours trying the penalty phase of their capital cases.
- Attorneys who are willing to accept these low-paying yet highly demanding cases are often inexperienced and unprepared, and their incompetence can burden the entire criminal justice system with reversals, costly retrials and appellate delay.

The report offers three solutions to begin to correct the problems in the capital case system:

- Eliminate the $1,000 cap on compensation.
- Create a separate line item for capital case expenditures that is not dependant on funding from the Fair Trial Tax fund, and improve the rate of compensation for court-appointed counsel.
- Create a statewide capital public defender office that provides training and expert services to attorneys handling capital cases throughout the state.

A bill introduced in the 1997 legislative session proposing to raise the Fair Trial Tax fee, eliminate the per-case maximum and raise to $50 the hourly rate of compensation paid to court-appointed counsel failed to pass.❖

**Iowa Governor Vetoes Indigent Defense Reform Bill**

After receiving overwhelming support from both the Iowa House and Senate, a bill calling for a package of changes relating to indigent defense was vetoed in late May by Governor Terry Branstad, who in his veto message expressed concerns about the fiscal impact of the legislation. House File 662 was crafted from a series of proposed modifications to Iowa's indigent defense system recommended by the Indigent Defense Task Force of the Iowa State Bar Association after a year of study.

As discussed in Volume III, Issue 3 of *The Spangenberg Report,* the proposed reforms included:

- Creation of a $30 up-front assessment fee from all persons seeking appointment of counsel for representation in criminal cases.
- The elimination of jail time as a penalty for driving under suspension with imposition, instead, of a $350 fine.
- Revised indigency evaluation guidelines, intended to reduce the number of defendants who qualify for court-appointed counsel.
- Statutory language guaranteeing court-appointed attorneys who are not under contract with the Public Defender a minimum hourly compensation rate of $55, up from the current rate of $45 an hour. Non-contract attorneys handling A and B felonies would have been paid an hourly rate of $60, from the current rates of $55 and $50 an hour, respectively.

Iowa has a mixed system for delivering indigent defense services, consisting of the Iowa State Public Defender, attorneys working under contract with the Public Defender, and court-appointed attorneys who are not employed by or under contract with the Public Defender. State funds pay for all indigent defense expenses in Iowa. The Public Defender currently has authority to set rates of compensation both for attorneys it contracts with as well as court-appointed attorneys. In FY 1996, the public defender handled approximately 68% of all indigent defense cases, while contract defenders handled 14% and court-appointed attorneys handled 18%.

The Bar argued that the measures proposed in HF 662, taken together, would achieve a reduction in the number of indigent cases and generate revenue to offset the increased expenditure resulting from the new compensation rates. The Governor reasoned the increased payments to attorneys would add $2.2 million to $3.7 million to indigent defense costs each year, as attorneys currently under contract with the Public Defender would likely terminate their contracts in order to become eligible for higher rates of payment available to court-appointed counsel.

The Governor dismissed the Bar's argument that current rates paid to court-appointed counsel are inadequate after reviewing a 1994 survey compiled by The Spangenberg Group which showed Iowa ranked fourteenth among the 50 states in compensation to court-appointed attorneys. When Bar members launched an intensive effort to update the survey, the Governor discounted the results, which showed Iowa slipping in rank. The Spangenberg Group will release an update of the survey, which we prepare on behalf of The American Bar Association Bar Information Program, shortly. ❖

**Municipal Public Defender Bill Passes New Jersey Legislature: Funding to Come Through Application Fee Revenue**

A bill requiring each of New Jersey's 537 municipal courts to employ at least one salaried municipal public defender was passed by both houses of the New Jersey legislature in May and is currently waiting Governor Christine Todd Whitman's signature. Although supporters of the bill have requested a public signing, as of this writing, the governor has given no indication when, or if, the bill will be signed into law.

As reported in Volume III, Issue 3 of *The Spangenberg Report*, New Jersey has a state-funded public defender system which is responsible for all indictable offenses in New Jersey's thirteen county-based superior courts, but no state monies are used to fund indigent defense representation at the municipal level. In New Jersey, municipal courts have jurisdiction over non-indictable felonies, misdemeanors, DWI/DUI cases and traffic violations. Presently, only 383 of New Jersey's 537 municipal courts employ a municipal public defender. The remaining 154 municipal courts require involuntary pro bono services of private bar members to represent indigent defendants in municipal court.

Most of the municipalities now employing one or more public defenders have passed ordinances, pursuant to N.J.S.A. 2B:12-28(b), allowing for a waivable $50 application fee to be assessed on defendants at the time of their application for representation by a municipal public defender. Senate Bill 1886 provides a funding mechanism to help those municipalities currently relying on pro bono counsel pay for a salaried municipal defender. When first introduced, Senate Bill 1886 proposed that municipalities be allowed to raise the current $50 indigent defense application fee to $100. In the course of the legislative process, the bill was amended to allow municipalities to raise the waivable application fee to as high as $200, payable over a four-month period.

This amendment was made to allay concerns of some of the smaller municipalities that the costs of providing a municipal public defender would deplete their budgets. The amended bill also addresses the concerns of opponents of the increased application fee, who suspected that municipalities could use the opportunity to increase the fees to make money at the expense of indigent defendants. As amended, funds collected through the application fee will be deposited in a dedicated fund to be used exclusively to meet all costs incurred in providing indigent defense services at the municipal court level, including the cost of expert investigation and testimony. If at the end of the fiscal year a municipality's dedicated fund exceeds the previous year's expenditures for a municipal public defender by more than 25%, the excess amount must be forwarded to the statewide Victims of Crime Compensation Board (VCCB) which allows victims of crime to seek counseling and medical help at no charge.❖

## CRIMINAL JUSTICE SYSTEM STUDIES

**Study Questions Cost Effectiveness of Mandatory Minimum Sentences in Cocaine Offenses**

A new study by the Drug Policy Research Center of the Rand Corporation determines that mandatory minimum sentences given to defendants convicted of cocaine-related offenses are not as cost effective as standard arrest, prosecution and sentencing practices nor are they as cost effective as treating addicted offenders. Using mathematical models, *Mandatory*

*Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* measures the cost effectiveness of achieving national drug and crime control goals by utilizing mandatory minimum sentences for cocaine offenders. The authors conclude that mandatory minimum sentences "are not justifiable on the basis of cost-effectiveness at reducing cocaine consumption, cocaine expenditures or drug-related crime."

The detailed report analyzes the likely changes in total cocaine consumption over time when an additional one million dollars is invested to deal with a representative sample of drug dealers in one of three ways: enforcing longer sentences by extending to federal mandatory minimum lengths the sentences of convicted dealers; utilizing conventional enforcement (arrest, confiscate the assets of, prosecute and incarcerate more dealers for discretionary prison terms); or treating heavy cocaine users. The authors focused on cocaine because they consider it the most problematic drug in the United States.

The researchers concluded that an additional $1 million spent on longer sentences for convicted drug dealers would reduce the nation's total annual consumption of cocaine - estimated to be between 276 and 321 tons - by less than 29 pounds a year. The same $1 million spent on conventional enforcement would reduce annual cocaine consumption by nearly 60 pounds. Investment of an additional $1 million in treating heavy cocaine users would reduce consumption by as much as 220 pounds.

The report reasons that the potential for higher prison sentences makes drug dealing a riskier business. To compensate for their increased risk, drug dealers increase the price of cocaine, thereby driving down consumption. However, the study found that mandatory minimums reduce cocaine consumption less per million taxpayer dollars spent than does spending the same amount on enforcement under the old, discretionary sentencing practices. A principal reason for this finding is the high cost of incarceration.

The cost to imprison a convicted felon runs between $20,000 and $30,000 a year. The Rand report estimates that a mix of residential and outpatient treatment would cost as little as $1,740 a year per person while residential treatment would cost between $8,000 and $16,000 a year.

The report acknowledges the intuitive appeal of longer sentences for serious crimes but it questions mandatory minimum sentences' effect on the desired diminution of crime related to cocaine use. It points out that removing a drug dealer from the street doesn't necessarily assure that further crimes will not occur, as a jailed dealer is often replaced by another dealer if demand continues. ❖

## U.S. Jail and Prison Populations Continued to Rise in 1996

At midyear 1996, the nation's prison and jail populations continued to rise, posting a 5.3% overall increase in the 12 month period from July 1, 1995 to June 30, 1996. Although this rate of growth is down from 1990, when the average annual increase in the nation's incarcerated population was 7.7%, the total number of inmates, 1,630,940, is the highest in the nation's history, and four states had growth rates of more than 14% (Montana, Nebraska, North Carolina and Oregon). The statistics are reported in *Prison and Jail Inmates at Midyear 1996*, a biannual bulletin prepared by the U.S. Department of Justice's Bureau of Justice Statistics (BJS). We reported on BJS's 1995 results in Volume III, Issue 2 of *The Spangenberg Report*.

According to the bulletin, in 1996 jails experienced their lowest occupancy rates in 12 years, perhaps owing to the boom in new prison construction in recent years. At mid-year, jails were operating at 8% below their rated capacity. This reverses a trend whereby jails in many states were burdened with state-sentenced inmates who could not be housed in overcrowded state prisons. Still, the national jail rate has nearly doubled on a per capita basis since 1985, with the number of jail inmates per 100,000 rising from 108 to 196.

Federal and state prison population growth out paced jail population growth, with annual increases of 9.5%, 8.1% and 6.9%, respectively. In mid-year

1996, an estimated 93,167 inmates were housed in federal prisons, while state prisons held an estimated 1,019,281 inmates and jails housed an estimated 518,492 people. Jails are defined in the report as locally-operated correctional facilities that confine people before or after adjudication.

Relative to the number of U.S. residents, the rate of jail and prison incarceration combined was 615 inmates per 100,000 U.S. residents in 1996; up from 461 per 100,000 in 1990. One in every 163 U.S. residents was incarcerated in 1996.

Among the states, Texas, Louisiana and Oklahoma had the highest rates of prison incarceration to population while Utah, Nebraska and Rhode Island had the lowest rates of prison incarceration to population. The District of Columbia held 1,444 sentenced prisoners to 100,000 residents at midyear 1996, the highest of any U.S. jurisdiction surveyed, but its growth rate of incarcerated inmates fell from the previous year by 6.9%. In 1996, the number of women incarcerated in federal or state prisons increased more than the number of men under jurisdiction of state and federal prisons (6.4% for women compared to 5.2% for men). At midyear 1996 women accounted for 6.3% of all prisoners nationwide, up from 5.7% in 1990 and up from 4.1% in 1980.

The BJS bulletin reports that an estimated 48.8% of the adults under supervision of jail authorities had been convicted on their current charge; the rest, presumably, were awaiting adjudication. The number of persons held in local jail facilities increased 2.3% between July 1, 1995 and June 28, 1996, but this increase was down from the 4.2% rate from the previous 12-month period. The characteristics of individuals detained at jails changed little from the previous year. White, non-Hispanics comprised 42% of the jail population, while Blacks comprised 41% and Hispanics comprised 16% of the jail population mid-year 1996. Along gender lines the jail population was 89% male and 11% female, a ratio which has remained fairly consistent over recent years.❖

**Race and Gender Impact One's Lifetime Likelihood of Going to State or Federal Prison**

Although an estimated one out of every 20 persons in the United States will be confined in a state or federal prison during his or her lifetime, the likelihood of being incarcerated in a prison increases significantly if one is male and/or black, according to *Lifetime Likelihood of Going to State or Federal Prison*, a new report published by the U.S. Department of Justice's Bureau of Justice Statistics (BJS).

Men are more than eight times more likely than women to be incarcerated in prison at least once during their lifetime, with an estimated one out of every 11 males in the country expected to serve a prison sentence, compared to only one out of every 91 U.S. women. Race is even more of a determinant factor in predicting whether a person will likely spend time in prison. For instance, although women have an overall lower lifetime chance of incarceration than do men, black women (3.6%) have nearly the same chance as white men (4.4%) of serving time in prison. Black women are more than twice as likely as Hispanic women (1.5%) and seven times more likely then white women (0.5%) to spend time in a prison. If current incarceration levels continue, a black male now has a greater than 1 in 4 chance (28.5%) of going to prison during his lifetime. The chance of a Hispanic male being incarcerated is only slightly better (1 in 6, or 16%), while a white male has a 1 in 23 chance (4.4%) of serving time.❖

**State Court Felony Convictions Decrease for the First Time Since 1988**

State courts convicted 872,217 adults of a felony in 1994, a 2.4% decrease from the number of state felony convictions in 1992 (893,630), according to *Felony Sentences in State Courts, 1994*, a new study by the U.S. Department of Justice's Bureau of Justice Statistics (BJS). In 1994, drug offenses (trafficking and possession) accounted for 31.4% of all state felony convictions, while 18.9% of convictions were for violent offenses (murder, rape, robbery and

aggravated assault). Property offenses comprised the single largest category of state felony convictions (31.6%), while the remaining convictions were for weapons offenses (3.6%) and various non-violent offenses (14.6%).

Although felony convictions in 1994 dropped since 1992, felony convictions are up approximately 31% since 1988 (667,366). The BJS study concludes that despite this increase in caseload, state courts are actually processing cases at a faster rate then they did in 1988. On average, a typical convicted felon was sentenced seven months after being arrested in 1988. In 1994, it took just under 6.5 months. Although *Felony Sentences in State Courts, 1994* does not indicate a specific reason for the faster case processing time, the report does conclude that the reduction in case processing time is not due to an increase in guilty pleas. In 1988, 91% of felony convictions were a result of guilty pleas. By 1994, that figure had dropped to 89%. ❖

## NEW PUBLICATIONS

### Article Available on Public Defender Application Fee Programs

The Spangenberg Group recently completed an update of its 1994 article, "Public Defender Application/Registration Fees," which was prepared on behalf of the American Bar Association Bar Information Program. Application fees are typically nominal, fixed sums, ranging from $10 to $200, which are assessed at the time a defendant applies for court-appointed counsel. The concept of recovering some portion of the cost of providing counsel to indigent defendants is not a new one; many states have long had laws that authorize recoupment, whereby defendants are ordered by the court at the time of sentencing to make payments for the representation that has been provided. Application fees, paid up-front at the start of a case, are a more recent phenomenon.

The updated article discusses the arguments for and against public defender application fees and discusses the programs currently used in 11 states and one county. This is twice the number of jurisdictions discussed in the 1994 version, signifying the growing interest in this alternative revenue collection mechanism.

To receive a copy of the article, please call The Spangenberg Group.❖

## CASE NOTES

### U.S. Supreme Court Holds Once A Guilty Plea Has Been Accepted By Court, Federal Defendant May Not Withdraw Absent Showing of "Fair and Just" Reason

In late May, a unanimous U.S. Supreme Court ruled that once a federal defendant has pleaded guilty and the district court has accepted the plea but deferred decision on whether to accept the plea agreement, the defendant may not withdraw the plea without showing a "fair and just" reason as required by Fed. R. Crim. P. 32(e). *U.S. v. Hyde*, 61 CrL 2132. The court's decision settled a conflict between decisions of the U.S. Courts of Appeal for the Fourth, Seventh and Ninth Circuits.

Under Rule 32(e) of the Federal Rules of Criminal Procedure, a district court may allow a defendant to withdraw his guilty plea before he is sentenced "if the defendant shows any fair and just reason." Defendant Hyde was indicted by a federal grand jury on eight counts of mail fraud, wire fraud and other fraud-related crimes. On the day his case was to go to trial, he decided to plead guilty to four of the charges. That afternoon, the parties appeared before the district court judge, who, pursuant to Fed. R. Crim. P. 11, addressed Hyde in court and established that: Hyde understood the consequences of pleading guilty, his plea was voluntary, and he was aware of the possible sentence which might result from the plea. Under the plea agreement the Government agreed to move to dismiss four counts, but it did not agree to recommend a particular sentence, and did not agree that a specific sentence was the appropriate disposition. The court accepted the plea, but deferred acceptance of the plea

agreement as well as sentencing until it reviewed the pre-sentence report.

One month later, before sentencing and the district court's decision about whether to accept the plea agreement, Hyde filed a motion to withdraw his guilty plea, alleging that he had pleaded guilty under duress from the Government and that his admissions in the district court had been false. After holding an evidentiary hearing, the district court concluded that the evidence did not support Hyde's claim and that he had not met the standard of Rule 32(e). On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that Hyde had an absolute right to withdraw his guilty plea before the district court accepted the plea agreement.

Justice Rehnquist, writing for the unanimous court, began his analysis by looking to sections (c), (d) and (e) of Rule 11, which address guilty pleas, and determined that the district court in accepting Hyde's plea had followed the procedures established in each of these sections. He then turned to Rule 32(e)'s "fair and just" reason requirement and concluded that the Ninth Circuit's position that the defendant can withdraw his plea "for any reason or for no reason" not only is "contradicted by the very language of the Rules, it also debases the judicial proceeding at which a defendant pleads and the court accepts his plea." The court also pointed out that if the Ninth Circuit's holding were correct, Rule 32(e) would serve virtually no purpose.❖

**Oklahoma Court of Criminal Appeals Clarifies Appropriate Content of Victim Impact Statements at Capital Case Sentencing**

Oklahoma's Court of Criminal Appeals recently considered two cases which challenged the content of victim impact statements made at sentencing in two capital cases, and a majority ruled that under Oklahoma's legislation, which provides for the admission of victim impact evidence in sentencing considerations, the statement may not contain hearsay, must be prepared by the individual making the statement, and must address the effects of the instant crime. *Conover v. State (Oklahoma)*, 60 CrL 1507 and *Ledbetter v. State (Oklahoma)*, 60 CrL 1507.

Following the U.S. Supreme Court's decision in *Payne v. Tennessee*, 111 S.Ct. 2597 (1991), in which the court found that victim impact evidence is constitutional so long as it is not "so unduly prejudicial that it renders the trial fundamentally unfair," the Oklahoma state legislature in 1992 passed victim impact legislation. Under 22 O.S. Supp. 1992, Section 984(1), "'Victim impact statements' means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the witness's opinion of a recommended sentence."

In reviewing the victim impact evidence presented in the two unrelated cases, the court was particularly troubled by the statement, made in both cases, that the victim was "butchered like an animal," finding that such a statement has no place in a victim impact statement, and characterizing the statement as "emotionally charged personal opinions which are more prejudicial than probative." The court went on to state: "The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." The court found nothing improper in opinions given by three witnesses in the *Conover* case that the death penalty was appropriate, writing that this is the type of evidence contemplated by the statute. The court also indicated that the victim him- or herself should prepare the statement, without substantial contributions from the prosecutor or others. ❖

**Effective Assistance of Counsel Denied When No Attorney Represents the Interests of the Accused at All Appropriate Stages of the Proceeding**

In early March, the Utah Court of Appeals found defendants' Sixth Amendment right to effective assistance of counsel had been violated because no attorney had assumed responsibility for each defendant's case, though three attorneys from the same office were assigned to represent the co-defendants. *State (Utah) v. Classon*, 61 CrL 1005. Defendants James and Daniel Classon were charged with aggravated sexual assault, and were appointed counsel from Legal Defenders Inc. From the initiation of their case through conviction, three attorneys from Legal Defenders were in contact with the defendants: Musselman, an experienced criminal lawyer; Hatch, who had tried a number of misdemeanor cases but only one felony case; and Allredge, who had only recently been hired and had little, if any, trial experience. Even before the cases went to trial there was confusion over the role to be played by each attorney, and that confusion only intensified at the trial, where Hatch assumed the role of lead attorney only after Musselman did not appear after the second day, and Allredge, who had not participated in planning trial strategy and was merely observing the trial, was ordered by the trial court to sit at counsel's table.

On appeal, the court rejected defendants' claims that their Sixth Amendment right to counsel had been violated by counsel's representation. However, the court declined to end its analysis here, focusing instead on *Strickland's* emphasis on the importance of "fundamental fairness" of the adversarial process. The court highlighted the U.S. Supreme Court's reference in *Strickland* to a number of duties, which, if not adhered to, may result in ineffectiveness of counsel: avoiding conflicts of interest; consulting with the defendant on important decisions and keeping the defendant informed of important developments in the course of the prosecution; and investigating the client's case. The court also focused on the following language from *Strickland*: "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough...The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." 466 U.S. 668, 685 (1984). The court concluded: "We hold that under the Sixth Amendment, a defendant is denied the effective assistance of counsel when, as in this case, a lawyer is requested, but no lawyer accepts responsibility for preparation and defense of the case. This is not to say that more than one lawyer may not fulfill this responsibility simultaneously, or sequentially. However, when no single lawyer, or group of lawyers, undertakes to represent the interests of the accused at all appropriate stages of the proceedings, that failure constitutes the denial of the constitutionally protected right to the effective assistance of counsel."❖

**Sixth Amendment Violated When Prosecutor's Disparaging Remarks About Defendant's Counsel Lead to His Firing**

In another twist on when the right to counsel may be jeopardized, the U.S. Court of Appeals for the Ninth Circuit held in mid-April that disparagement of counsel in front of a defendant violates the Sixth Amendment if it causes the defendant to retain different counsel. *U.S. v. Amlani*, 61 CrL 1094. Defendant Amlani, convicted of wire fraud and conspiracy, appealed, claiming that he was deprived of his right to counsel because the prosecutor repeatedly belittled the trial counsel Amlani originally selected, and that these remarks caused Amlani to hire a new, less competent attorney. The district court did not hold an evidentiary hearing on Amlani's claim, and on appeal, the Ninth Circuit remanded for an evidentiary hearing to determine whether the government in fact disparaged Amlani's original counsel in his presence and whether this disparagement, if it occurred, caused Amlani to retain different counsel for his defense. If both questions are answered affirmatively, the court concluded, then Amlani's conviction should be vacated, though the government may seek a new trial.

The court began its analysis of this issue of first impression by dismissing as non-determinative the fact that Amlani's original counsel may have been present when the prosecutor was making disparaging

comments. Rather, the court wrote, the focus of the inquiry must be on prejudice caused by these acts. While acknowledging the U.S. Supreme Court's words in *Wheat v. U.S.*, 486 U.S. 153, 159 (1988): "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be defended by the lawyer whom he prefers," the court held that "the right is not so limited, however, that the availability of adequate replacement counsel allows the government effectively to veto defendant's choice of counsel by intentionally undermining his confidence in the attorney-client relationship through disparagement."

The court also held that Amlani need not make a showing that his replacement counsel was inadequate in order to establish prejudice, as "a change in defense counsel caused by the prosecution's misconduct itself establishes the requisite prejudice to vacate his conviction." The court distinguished this case from its prior holding in *U.S. v. Lopez*, 765 F. Supp. 1443, 1456 (N.D. Cal. 1991), rev'd on other grounds, 4 F. 3d 1455, 1463 (9th Cir. 1993). In *Lopez*, the district court refused to dismiss an indictment based on the Sixth Amendment because the defendant could obtain adequate representation by replacement counsel, but it did dismiss the indictment under its supervisory powers. Here, the court pointed out, the dismissal revolved on an ethical violation, not a Sixth Amendment violation. Additionally, the consequences of court's remedy in *Lopez* were more extreme: dismissing an indictment as opposed to vacating a conviction with the possibility of a retrial.

Finally, the court concluded that the appropriate remedy for the alleged disparagement is to remand the case for an evidentiary hearing where the district court is to determine two questions: 1) whether the government in fact disparaged Amlani's original counsel in his presence; and 2) whether the disparagement, if it occurred, caused Amlani to retain new counsel. If both questions are answered affirmatively, the district court is to vacate the conviction, though the government may seek a new trial.❖

**No Right To Counsel in Civil Child Abuse Proceedings, North Carolina Supreme Court Holds**

Reversing the lower court of appeals, the North Carolina Supreme Court held in mid-April that the Sixth Amendment right to counsel does not attach upon the initiation of a civil child abuse proceeding. *State (North Carolina) v. Adams*, 61 CrL 1111. Therefore, the court determined, a mother who was represented in relation to a civil child abuse proceeding could be questioned by police in the absence of counsel.

As we reported in Volume II, Issue 4 of *The Spangenberg Report*, the case involved a mother who, pursuant to North Carolina statutory law, was represented by counsel in connection with civil child abuse proceedings. While the lower court ruling was based upon the mutual obligations of the social services department and law enforcement agencies to inform each other of evidence of abuse, citing *Kirby v. Illinois*, 406 U.S. 682 (1972), the North Carolina Supreme Court arrived at the opposite conclusion when it considered *Kirby*. The court held that under *Kirby*, only when criminal proceedings have been initiated against a defendant does the Sixth Amendment right to counsel attach, and in this case the state was not committed to prosecute the defendant when the department of social services filed the civil petition. ❖

**Prosecutorial Misconduct Leads District Court To Grant Habeas Relief to Capital Petitioner**

In late April, the U.S. District Court for the Eastern District of Pennsylvania granted habeas corpus relief to a habeas petitioner, sentenced to death, on the basis of prosecutorial misconduct labeled by the court as so egregious under the Fourteenth Amendment as to bar retrial. *Lambert v. Blackwell*, 61 CrL 1153. Petitioner was convicted of first degree murder and sentenced to death, and the district court, reviewing the evidence presented at, and omitted from, the trial, concluded that "virtually all" of the evidence used to convict petitioner "was either perjured, altered, or

fabricated." The court found that the petitioner proved by clear and convincing evidence over 25 instances of prosecutorial misconduct, including knowingly presenting the perjured testimony of a person who confessed to being the actual murderer. The court also cited the police witnesses who both destroyed and fabricated crucial evidence, and determined that at least six witnesses, including the trial court judge, may have perjured themselves before the district court. The court found that the prosecutors' investigators and other state agents intimidated witnesses in both the state trial and federal habeas proceedings; this intimidation included an unauthorized meeting with a defense medical expert who was persuaded to change his testimony which would have otherwise supported the habeas petitioner. Finally, the court cited numerous violations of *Brady v. Maryland*, 373 U.S. 83 (1963), in the prosecutions' failure to turn over to petitioner's trial counsel exculpatory evidence.

The 25 constitutional violations during the trial, together with the misconduct that occurred in the district court during the habeas proceedings, led the court to conclude that petitioner had met the "actual innocence" standards of both the pre- and post-1996 federal habeas statutes, and that habeas relief should be granted. Citing *U.S. v. Russell*, 411 U.S. 423, 431-32 (1973), the court stated that the corruption of the state trial constituted "a situation in which the conduct of law enforcement agents is so outrageous that due process principles...absolutely bar the government from invoking judicial processes to obtain a conviction." ❖

**Sixth Circuit Holds Handwriting Analysis Testimony Is Not Subject to *Daubert* Scientific Evidence Analysis**

A majority of the U.S. Court of Appeals for the Sixth Circuit recently held that handwriting analysis, while a field of expertise admissible under Fed.R.Ev. 702, is not subject to the analysis of scientific evidence set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The court also held that a state sentence of home detention is not a "sentence of imprisonment" under Section 4A1.1(a) of the federal Sentencing Guidelines, and thus that section's provisions for sentencing enhancement do not apply. *U.S. v. Jones,* 60 CrL 1527.

Jones appealed her conviction and sentence in connection with credit card fraud. In making its case, the Government relied on the testimony of an expert forensic document analyst who had analyzed the signatures on the credit card application, a post-office registration form and two motel registration forms, along with Jones' handwriting, and concluded that the signatures were hers. On appeal, Jones argued that admission of the expert's testimony was improper because the court failed to meet the standards for admissibility under Fed.R.Ev. 702 as set forth in *Daubert*. She also argued that the district court improperly enhanced her sentence on the basis of a prior conviction for which she was sentenced to home detention. The majority rejected Jones' first argument, but accepted her second.

Fed.R.Ev. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." While the *Daubert* analysis clearly applies to expert testimony regarding scientific evidence, the majority

found, it "...does not create a new framework for analyzing proffered expert testimony based on 'technical, or other specialized knowledge,'" the type of testimony offered by the forensic document analyst. The majority went on to state: "If that [*Daubert's*] framework were to be extended outside the scientific realm, many types of relevant and reliable expert testimony - that derived substantially from practical experience - would be excluded. Such a result would turn *Daubert*, a case intended to relax the admissibility requirements for expert scientific evidence, on its head."

The majority, however, agreed with Jones' challenge to the district court's enhancement of her sentence under Section 4A1.1(a) of the federal Sentencing Guidelines. The district court's basis for the enhancement was her prior sentence of home detention, but the guidelines require prior "imprisonment" in order to assess criminal history points, and home detention does not qualify, the majority found. ❖

**Florida Supreme Court Reverses Death Penalty Case, Holding Trial Court Incorrectly Admitted DNA Evidence**

The Florida Supreme Court in mid-April reversed and remanded the case of an appellant who had been sentenced to death, ruling that the trial court had improperly admitted DNA evidence that was obtained using the Polymerase Chain Reaction (PCR) method of DNA typing. *Murray v. State (Florida)*, 61 CrL 1118. The Supreme Court found that the trial court failed to follow the three-step analysis for admission of DNA expert testimony it established in *Ramirez v. State*, 651 So.2d 1164 (Fla SupCt 1995). Under *Ramirez*, the trial court must determine: 1) whether the expert testimony would assist the jury in understanding the evidence or in deciding a fact in issue; 2) whether the testimony is based on a scientific principle which has gained general acceptance in that particular community; and 3) whether the expert witness is sufficiently qualified to render an opinion on the subject. If these three questions are answered affirmatively, under *Ramirez*, a Florida trial court may allow the expert to testify at trial, and the jury can assess the expert's credibility.

In this case, the trial court, instead of conducting the *Ramirez* inquiry, permitted the DNA evidence to be admitted at trial, reasoning that the scientific principles underlying the DNA evidence should be evaluated by the jury "as a matter of weight." Reviewing the case de novo, the Florida Supreme Court found that the trial court's admission of the DNA evidence fell short of the *Ramirez* standard in three respects. First, because the expert did not explain how he performed the DNA tests or the basis of his statistical conclusions, the testimony did not assist the jury in understanding the evidence. Second, the court ruled, PCR DNA methodology has not "gained general acceptance." Third, the state's expert was not sufficiently qualified to render an opinion on the DNA test, as the test was conducted at a laboratory that was not his own, and he was unfamiliar with the bases for the scientific calculations. ❖

**Washington Supreme Court Upholds Recoupment Statute for Indigent Defendants Represented on Direct Appeal**

A majority of the Washington Supreme Court recently rejected several claims made by two indigent defendants who were represented by appointed counsel on appeal of their convictions. The defendants, whose cases were consolidated, claimed that costs imposed in connection with their appellate representation under a new state statute violated their state and federal constitutional rights. *State (Washington) v. Blank*, Supreme Court of Washington, No. 63839-0 (February 2, 1997). The majority found that the statute in question met constitutional requirements relating to recoupment of costs and attorneys' fees assessed in connection with representation of indigent criminal defendants. RCW 10.73.160, which became effective on July 23, 1995, provides for recoupment of appellate costs from a convicted defendant. RCW 10.73.160(4) provides: "If payments will impose manifest hardship on the

defendant or the defendant's immediate family, the court may remit all or part of the amount due, or modify the method of payment under RCW 10.01.170."

Defendants challenged as violative of their rights to equal protection and effective assistance of counsel the statute's failure to follow the rule the court established in *State v. Curry*, 829 P.2d 116 (Wash SupCt 1992): before an order of recoupment can be entered, the court must consider defendant's ability to pay, defendant's financial circumstances, and whether there is no likelihood indigency will end. The majority, acknowledging that the statute does not specifically require each of these considerations, stated that the statute's lack of these express requirements do not render the statute unconstitutional so long as these procedural safeguards are followed in practice.

The court then went on to hold that before enforced collection or any sanction is imposed for nonpayment, the court must conduct an inquiry into ability to pay: "We agree...that it is not fundamentally unfair to impose a repayment obligation without notice and opportunity to be heard prior to the decision to appeal, provided that before enforced payment or sanctions for nonpayment may be imposed, there is an opportunity to be heard regarding ability to pay."

The court also considered defendants' claim that the statute was improperly given retroactive effect because the direct appeals were pending before the statute went into effect. The court, however, rejected this claim as well, finding that the statute was in effect at the time it was invoked - after defendants' convictions were affirmed: "Accordingly, we conclude that the precipitating event for application of the statute is termination of the appeal and affirmance of a defendant's conviction, despite the fact that this event had its origin in a situation existing prior to enactment of the statute, i.e., taking an appeal at public expense." Three justices dissented, stating that the majority wrongly identified the "precipitating event" and that the statute was improperly being given retroactive effect. ❖

**California Court of Appeal, First District, Finds Revived Statute Violates Ex Post Facto Law**

The California Court of Appeal, First District, recently found that a California statute which had expired but which was later revived cannot be used to prosecute a defendant who could have been prosecuted under the original statute. *People (California) v. Bunn*, 60 CrL 1536. Defendant Bunn was charged with several counts of child molestation which occurred in 1980. While Penal Code Section 801 has long been expired, the state based its filing under Section 801 upon recently-revised Section 803(g), which was passed to "revive" a cause of action barred by Section 800 or 801. In striking down the charge, the court found that this application of Section 803(g) violates the Ex Post Facto Clause. As directed by the U.S. Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988), the court considered whether Section 803(g) operates to deprive Bunn of a defense that was available to him at the time the acts described in the complaint were committed, and concluded that as this defense would have been available in 1980, the Ex Post Facto Clause was violated and Bunn had a complete defense to the charges.

In dicta, the court also distinguished between a legislative enactment which extends the life of an unexpired statute of limitations and a legislative act which revives a statute. Whereas the former legislative act provides offenders with notice that the offense continues to be punishable, the latter act, following a period when the law was no longer effective, recriminalizes acts which, though once illegal, had been made legal. ❖

**Fifth Circuit Majority Finds No Right To Effective Assistance of Counsel Because No Right to Counsel on Discretionary Review**

A majority of the U.S. Court of Appeals for the Fifth Circuit recently rejected a federal habeas claim filed under the 1996 AEDPA, reasoning that because no constitutional right to counsel exists for discretionary proceedings on direct appeal, petitioner

was not entitled to effective assistance of counsel at this proceeding. *Blankenship v. Johnson*, 60 CrL 1513. In 1988, petitioner Blankenship was convicted of aggravated robbery, sentenced to ten years in prison and released pending the outcome of his direct appeal, which was handled by Michael Lantrip, his court-appointed attorney. On direct appeal, Lantrip successfully argued that the indictment filed against Blankenship was fatally deficient, and the appellate court reversed his conviction. Soon after oral argument on the direct appeal was completed, Lantrip was elected county attorney, but he failed to withdraw from defendant's case or notify defendant of his new position. When the state pursued discretionary review of the appellate court's reversal to the Texas Court of Criminal Appeals, the state's petition was served on Lantrip, who was still Blankenship's attorney of record. Lantrip neither responded to the petition nor notified Blankenship of these developments, and the Court of Criminal Appeals reversed the appellate court. Blankenship did not learn of the state's appeal until the police arrested him in April 1990.

After exhausting his state court remedies, Blankenship filed for federal habeas relief, which the district court denied. On appeal to the Fifth Circuit, the majority began its review of Blankenship's case by considering whether he was entitled to counsel for the state's appeal to the Texas Court of Criminal Appeals, an issue of first impression. Under 28 USC § 2254(d)(1), "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States..." Because there is no "clearly established" U.S. Supreme Court law regarding the right to counsel for state-requested discretionary review, the court looked to *Ross v. Moffitt*, 417 U.S. 600 (1974), where petitioner was represented by counsel in the state court of appeals but was denied appointed counsel to pursue discretionary review in the state supreme court. In *Moffitt*, the U.S. Supreme Court held that petitioner was not entitled to appointed counsel to pursue further review. The majority reasoned that Blankenship, like Moffitt, had one full appeal in which he was represented by competent counsel, and that "The *Moffitt* opinion can reasonably be read to say that is all he is entitled to, regardless of which side is seeking the discretionary review." The court concluded by stating: "Considering the issue from the point of view of the Court of Criminal Appeals at the time it decided Blankenship's case, and giving that court the deference the AEDPA requires, we cannot say that, in the words of *Anderson v. Creighton*, 'the unlawfulness [of the court's ruling was] apparent.'"

Dissenting, Justice Parker argued that the majority misplaced its reliance upon *Moffitt*, that Blankenship had a right to counsel under the Sixth Amendment for the state-initiated discretionary review, and that to deny an indigent defendant counsel at this stage deprives him of equal protection and due process. ❖

**Ninth and Tenth Circuits Interpret AEDPA As Permitting District Court Judge to Issue Certificate of Appealability**

The U.S. Court of Appeal for the Ninth and Tenth Circuits, joining the Fifth, Sixth and Eleventh Circuits, recently resolved a conflict in amendments made by the 1996 AEDPA to the U.S. Code and the Federal Rules of Appellate Procedure, concluding that a federal district court judge may issue a certificate of appealability for an unsuccessful federal habeas petitioner. *U.S. v. Asrar* and *Houchin v. Zavaras*, 60 CrL 1520. In both cases, the courts considered the conflict between two provisions of the AEDPA. Under 28 USC § 2253(c), an appeal may not be taken to a circuit court of appeals from the final order in a habeas corpus petition or from the final order "[u]nless a circuit justice or judge issues a certificate of appealability." However, Fed.R.App.P. 22(b), which

was also amended by the AEDPA, provides that a "district or circuit judge" may issue the certificate. Both courts determined that the district court judge retains the authority to issue the certificate of appealability. ❖

**Ninth Circuit Approves Habeas Petitioner's Request for Expert and Investigative Funds Which Would Likely Be Used to Exhaust State Remedies**

Relying on *McFarland v. Scott*, 512 U.S. 849 (1994), the U.S. Court of Appeals for the Ninth Circuit recently held that investigative and expert funds can be provided to a federal habeas capital petitioner under 21 USC § 848(q)(9) even though the federal habeas petition was dismissed and the funds will be used to investigate claims that have not been exhausted in state court. *Calderon v. U.S. District Court for the Eastern District of California*, 60 CrL 1541. ❖

**Indiana Court of Appeals Rules State Constitution Prohibits Juveniles From Being Incarcerated With Adults**

In mid-May, the Indiana Court of Appeals held that juveniles may not be incarcerated with adult prisoners under Article IX, Section 2 of the Indiana Constitution. *Ratliff v. Cohn*, 61 CrL 1198. This unique state constitutional provision states that the legislature "shall provide institutions for the correction and reformation of juvenile offenders." In reviewing the history of the Indiana Constitution, the court stated that constitutional debates make clear that the intent of the constitutional framers was to create a ban on incarcerating juveniles with adults. The Indiana Court of Appeals, without altering the result, later modified its opinion in *Ratliff*, acknowledging the Indiana Supreme Court's decision in *Hunter v. State*, 676 N.E.2d 14 (1986), in which the court created an exception to the Indiana Constitution's statutory provision for juveniles 16 and older who had committed certain offenses. *Ratliff v. Cohn*, 61 CrL 1222. ❖

**Connecticut Supreme Court Upholds Transfer Statute for Juveniles Charged with Murder**

In early May, the Connecticut Supreme Court upheld the constitutionality of Conn. Gen. St. § 46(b)-127, which provides that juvenile courts must transfer to the adult criminal docket all cases in which there has been a finding of probable cause that a statutorily-defined child aged 14 to 16 has committed murder. *State (Connecticut) v. Morales*, 61 CrL 1198. Under the statute, a child originally charged with manslaughter can qualify for juvenile treatment, but a child charged with murder who pleads guilty to a lesser offense retains his adult status. Morales, who was charged with murder and convicted of manslaughter at trial, challenged the statute on equal protection grounds. The court held that despite the conviction on the lesser manslaughter charge, Morales retains his adult status, reasoning that the legislature did not intend to treat juveniles convicted of lesser charges differently from those who plead to lesser charges, and that adoption of defendant's position would be a disincentive to plead guilty to lesser offenses. ❖

**Utah Court of Appeals Upholds Transfer Statute for Juveniles**

The Utah Court of Appeals also recently upheld the constitutionality of Utah Code Ann. Section 78-3a-602(3)(b), which creates a presumption that a juvenile charged with any of certain violent felonies will be tried as an adult unless the juvenile can prove by clear and convincing evidence the following three retention factors: that he had not previously been adjudicated delinquent for a felony involving a dangerous weapon, that he was less culpable than any others involved in the offense, and that the offense was not violent, aggressive or premeditated. *A.B. v. State (Utah)*, 61 CrL 1083.

The juvenile's equal protection challenge was based on a claim that the statute's legislative history revealed that juveniles' amenability to rehabilitation was to be the basis for transfer decisions, but the statute's requirements for retaining juvenile status are not reasonably related to this goal. Looking to the plain statutory language, however, the court noted that rehabilitation is not a consideration. The court also stated that the legislature's views about the propensity for juveniles to be rehabilitated have changed, and found the statute's retention factors to be reasonably related to the statute's legitimate goal of transferring violent juvenile offenders to the adult criminal justice system. The court also rejected the juvenile's claims that the statute requires juveniles to testify in violation of their state and federal privileges against self incrimination and that the second retention factor's requirement of a showing of a "lesser degree of culpability" was void for vagueness.

## TRANSITIONS

In recent months, a number of notable personnel changes have taken place in indigent defense organizations around the country. Michael Minerva, formerly Florida's Capital Collateral Representative (CCR, discussed above), resigned in late April, after serving as the CCR for nearly five years. On July 1, Mr. Minerva returned to the second Judicial Circuit Public Defender office in Tallahassee, where he worked prior to CCR, and where he will concentrate on felony trial cases.

In early June, Scott Wallace was named the director of the National Legal Aid and Defender Association's (NLADA) Division of Defender Legal Services. Mr. Wallace, who has been acting director since December 1996, has also been NLADA's special counsel for governmental relations since 1994. Prior to joining NLADA, Mr. Wallace was counsel to the U.S. Senate Judiciary Subcommittee on Juvenile Justice, general counsel to the Senate Committee on Veteran's Affairs, and legislative director of the National Association of Criminal Defense Lawyers.

Finally, in early May, New York Legal Aid Society Executive Director and Attorney-in-Charge Danny Greenberg named Sue Wycoff as Attorney-in-Charge of the Society's Criminal Appeals Bureau, culminating a nationwide search. Ms. Wycoff assumed her new role in early June, leaving her position as Chief of the Capital Post Conviction Division for the Oklahoma Indigent Defense System in Norman, Oklahoma.

Ms. Wycoff's background in diverse legal settings, as both lawyer and administrator, will serve her well as head of a division with more than 150 employees, including lawyer and support staff. The Criminal Appeals Bureau is the largest provider of legal representation to indigent defendants who have been convicted of crimes in New York City, representing clients before the Appellate Division of the Supreme Court, the Appellate Term, the New York Court of Appeals, and occasionally in federal court.

Before joining the Oklahoma Indigent Defense System as Chief of the Capital Post Conviction Division in 1994, Ms. Wycoff worked for eight years with the Attorney General of Oklahoma, serving as Deputy Chief of the Federal and Torts Division and as Senior Assistant Attorney General. Ms. Wycoff's professional background includes work as a staff attorney for the Oklahoma Indian Legal Services and as staff counsel for the U.S. Court of Appeals for the Eleventh Circuit. She also worked as a staff attorney for Legal Aid of Western Oklahoma, where she specialized in housing matters before joining the program's public defender division. ❖

## JOB OPENINGS

We are pleased to print job openings submitted to *The Spangenberg Report*.

### New York Legal Aid Society Criminal Defense Division Seeks Bureau Chief

The Manhattan office of The Legal Aid Society of New York's Criminal Defense Division (CDD), which handles criminal trial cases, has an immediate opening for an Attorney-in-Charge. The office provides

representation of clients from arraignment through disposition and provides assistance in related proceedings, such as parole and probation revocation, sentencing and post-conviction advocacy. The office has 132 attorneys, 10 attorney supervisors, 12 investigators, 14 social workers and 93 other support staff. In addition to training and supervision responsibilities, the Attorney-in-Charge must also act as spokesperson with government entities, the criminal court system and other branches of The Legal Aid Society.

Applicants should possess at least 10 years experience in criminal litigation; knowledge of New York practice is preferred. Prior supervisory, managerial and administrative experience is required, as is a background in public interest law and a demonstrated commitment to advocacy on behalf of indigent defendants. A resume and cover letter should be mailed or faxed to Dennis R. Murphy, Attorney-in-Charge, Criminal Defense Division, The Legal Aid Society, 90 Church Street, 15th Floor, New York, NY 10007, or 212-577-7964, no later than August 1, 1997. Women, people of color, gay men and lesbians, and people with disabilities are encouraged to apply.

**NLADA Seeks Director of Project on the Future of Legal Services**

The National Legal Aid and Defender Association (NLADA) is now accepting applications for the director of the Project on the Future of Legal Services, which works to improve the delivery of civil legal assistance to low-income clients. Applicants must have five or more years experience in the delivery of civil legal services, and must be an active member in good standing in the highest court in at least one state. NLADA is an AA/EOE; minorities, women, the elderly and disabled are encouraged to apply. Intended applicants should call NLADA at (202) 452-0620 to receive the complete job description before applying.❖

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

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