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The Spangenberg Group
1001 Watertown Street, West Newton, Massachusetts 02165
Telephone: (617) 969-3820; Fax: (617) 965-3966
E-Mail: TSG@spangenberggroup.com

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Legal Service for Poor Needs Renewed Vigilance

By Janet Reno

Imagine you are accused of a crime, but you have no money to pay for a lawyer and are forced to face a criminal prosecution without any legal help. Imagine how frightening and unfair the contest would be.

I was reminded of this issue the first day I became United States attorney general. As I walked into my new office, I passed under words inscribed above the entrance: "The United States wins its point whenever justice is done its citizens in the courts."

But is justice done when an accused cannot afford a lawyer to defend himself?

In 1963, an indigent man, who had been convicted of breaking into a Florida pool hall, filed a handwritten petition asking this question. He was concerned that the criminal justice system did not treat him, a poor man, as well as a rich man. Soon, nine Supreme Court justices were considering what the Constitution requires to provide justice for rich and poor alike.

Celebrating Anniversary

Today is the 35th anniversary of their answer. In *Gideon vs. Wainright*, the justices made it clear that every defendant has a constitutional right to a lawyer in all felony cases. The court reasoned that although defendants can choose, on their own, to defend themselves, they should not have to do so simply because they are poor. If they cannot afford a lawyer, they are entitled to one appointed by the court to ensure their rights are protected.

In the court's own words, "any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him . . . This seems to be an obvious truth."

What is less obvious is that the right to counsel is critical not only to the defendants and defense lawyers, but to all of us. The right to an attorney helps guarantee that any outcome, be it guilt or innocence, is just and definitive.

No prosecutor wants to prosecute someone whose defense counsel lacks the necessary skills and experience to put up a defense, and face the likelihood of having the conviction reversed on appeal. Certainly the prosecutor wants to secure a conviction, but not if it is based on a constitutional shortcut.

The Supreme Court has repeatedly emphasized that the right to counsel is a bedrock constitutional rule. In this sense, we all have a stake in vigilant protection of that right. That is because we all have a

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stake in our justice system's fundamental fairness and accuracy.

Since the *Gideon* case, our nation has invested significant resources to ensure indigent defendants get representation in the courtroom. But, unfortunately, the promise of *Gideon* is not completely fulfilled. Indigent defendants do not invariably receive effective assistance of counsel.

We all have heard the stories, no matter how infrequent, of a criminal defense attorney not adequately defending his or her client. Sometimes it is caused by a lack of resources. Sometimes it stems from the absence of a structure in the state to provide adequately for the indigent. But such failings inevitably erode the community's sense of justice and the aspiration of our system to equal justice under the law.

Review Defense Services

The Justice Department, for the first time in more than 10 years, has begun to document the state of indigent defense services.

We need to stress the importance of *Gideon.* I have opened a dialogue with judges, prosecutors and defense attorneys, and I urge every state to take this occasion to review its indigent legal-defense services and recommit itself to the promise of *Gideon.*

The Gideon decision is a testament to our system of justice in so many important ways. It reminds us that we have crafted a system that allows even the least powerful among us to bring about a fundamental change in the law. And it beckons us all to work to ensure that our justice system fully provides, in both fact and spirit, liberty and justice to all, rich and poor alike.

Janet Reno is the Attorney General of the United States. ❖

Federal Funding Opportunities for Indigent Defense: An Update on Byrne Formula Grant Funds

The availability of federal grant funds, most notably through the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, gives indigent defense programs the opportunity to initiate innovative projects that they would normally be unable to undertake within their limited state or local general fund appropriation. Projects such as the development of shared computer case tracking systems, or the hiring of mental health specialists to help develop alternative sentencing options for defendants are considered undreamed of luxuries by some indigent defense programs. However, indigent defense programs often find that projects undertaken with Byrne funds prove to substantially enhance overall program effectiveness, and therefore state or local funders willingly continue the funding once the federal grant funds lapse. We first discussed the Byrne program in the Fall 1995 issue of *The Spangenberg Report.* While the vast majority of Byrne funds available to states still go to prosecution and law enforcement agencies, increasingly more public defender programs are utilizing Byrne grants. This article provides a reminder to public defender programs of the availability of these federal grant funds, and describes the ways in which a number of indigent defense programs have put them to work.

Background of the Program

In 1988, Congress enacted the Anti-Drug Abuse Act to foster multi-jurisdictional and multi-State efforts to concentrate on serious offenders and drug-related crime. The Act created the Edward Byrne Memorial State and Local Law Enforcement Assistance Program to enable the United States Department of Justice, Bureau of Justice Assistance (BJA) to provide leadership and assistance to local communities to reduce and prevent violence and drug abuse. BJA makes Byrne program dollars available via two types of grant programs: discretionary and formula. In the smaller discretionary grant program, BJA awards grants directly to public and private agencies and non-profit organizations. Under the more substantially funded formula grant program, grant monies are awarded to each state apportioned on the basis of state population. The following chart from the Department indicates how funds were allocated among the states in 1997.

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Formula Grant Program Allocation of Funds

State	FY 1997 Allocation	% to be Passed Through to Local Jurisdiction	State	FY 1997 Allocation	% to be Passed Through to Local Jurisdiction
Alabama	$8,072,000	50.95%	Nevada	$3,699,000	62.01%
Alaska	$2,211,000	21.97%	New Hampshire	$3,086,000	51.46%
Arizona	$8,016,000	61.04%	New Jersey	$14,001,000	57.67%
Arkansas	$5,231,000	54.87%	New Mexico	$3,949,000	42.23%
California	$51,972,000	63.15%	New York	$30,367,000	63.29%
Colorado	$7,259,000	58.82%	North Carolina	$12,797,000	41.36%
Connecticut	$6,501,000	36.96%	North Dakota	$2,272,000	56.16%
Delaware	$2,394,000	26.87%	Ohio	$19,149,000	64.42%
District of Columbia	$2,132,000	100.00%	Oklahoma	$6,506,000	45.41%
Florida	$23,991,000	61.56%	Oregon	$6,286,000	46.98%
Georgia	$12,806,000	53.39%	Pennsylvania	$20,628,000	64.83%
Hawaii	$3,148,000	46.45%	Rhode Island	$2,832,000	41.76%
Idaho	$3,110,000	52.41%	South Carolina	$7,141,000	42.53%
Illinois	$20,240,000	64.51%	South Dakota	$2,413,000	47.16%
Indiana	$10,562,000	56.78%	Tennessee	$9,683,000	48.78%
Iowa	$5,806,000	40.79%	Texas	$31,311,000	65.60%
Kansas	$5,362,000	47.49%	Utah	$4,376,000	49.76%
Kentucky	$7,441,000	32.30%	Vermont	$2,181,000	25.11%
Louisiana	$8,215,000	51.92%	Virginia	$11,871,000	30.04%
Maine	$3,236,000	41.59%	Washington	$9,964,000	60.25%
Maryland	$9,340,000	44.47%	West Virginia	$4,178,000	47.93%
Massachusetts	$10,996,000	36.64%	Wisconsin	$9,469,000	61.98%
Michigan	$16,577,000	53.10%	Wyoming	$2,013,000	54.95%
Minnesota	$8,645,000	70.29%	Puerto Rico	$7,272,000	0.00%
Mississippi	$5,574,000	52.52%	Virgin Islands	$1,405,000	0.00%
Missouri	$9,791,000	58.22%	Guam	$1,456,000	0.00%
Montana	$2,640,000	58.56%	American Samoa & N. Mariana Islands	$1,387,000	0.00%
Nebraska	$3,871,000	60.36%			

This table was prepared by the U. S. Department of Justice, Bureau of Justice Assistance.

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The United States Department of Justice, through BJA, seeks to stimulate partnerships and address various unmet needs in the delivery of criminal justice services. In 1997, to fulfill its mandate of working in partnership with local governments to improve the criminal justice system, BJA dispersed appropriations of $500 million for Byrne Formula Grants and $60 million for Byrne Discretionary Grants throughout the states. Both discretionary and formula grant funds may be used by public defender programs that submit proposals which fit into one or more legislatively authorized purpose areas.

In the FY 1998 application cycle, applicants could seek funds under 26 authorized purpose areas. The most relevant area for indigent defense in FY 1998 was purpose area 10, "Improving the operational effectiveness of the court process by expanding prosecutorial, defender and judicial resources and implementing court delay reduction programs." The types of projects BJA envisioned by this purpose area were:

- Differentiated/Expedited Case Management
- Fast Track Prosecution/Fast Track Defense
- Drug Courts
- Court Unification
- Pretrial Services Delivery
- Video Arraignment/Pre-Sentence Telecommunications.

Other likely areas for indigent defense programs in FY 1998 included purpose area 15A, which concerns development of programs to improve drug control technology, such as referral to treatment or monitoring of drug-dependant offenders, and purpose area 20, which supports development of alternatives to detention for non-violent offenders. Within the 26 stated purpose areas, there is sufficient flexibility for creative public defender programs to propose projects that meet their needs while also meeting the Department's purpose area requirements.

A state is only eligible to receive funds under the Block Grants Program if it creates a state Advisory Board that includes "representatives of groups with a recognized interest in criminal justice." Public defenders are absolutely eligible to sit on their state boards to influence and debate priorities for local funding, as are prosecutors, police, court officials and members of non-profit organizations from educational or religious communities. Unfortunately, a voice for indigent defense is not always included at the state advisory group table. States approach formation of their boards in different ways; in some the membership of the advisory group is established by statute, and membership reflects the key criminal justice constituencies, including indigent defense. In other states, public defenders have been denied the ability to participate on the boards. The indigent defense leadership in each state should assure that their state advisory group contains a member who will represent the interest of the defense community.

How Are Defender Programs Utilizing Grant Funds?

Defender programs are utilizing Byrne grants in many different ways, ranging from the addition of staff attorneys to handle a particular type of case, e.g., drug cases, to the purchase and installation of sophisticated video-conferencing equipment. To illustrate the range of possibilities, the experiences of several programs are discussed briefly below.

- *Illinois*

The Director of the Office of the State Appellate Defender in Illinois, Ted Gottfried, has received over $300,000 for appellate backlog reduction and public defender training. One grant has enabled Gottfried to hire a lawyer for each of his five offices to handle violent crime appeals. Another grant funds four "very experienced" private lawyers to assist with the backlog of violent crime appeals. The Illinois Public Defender Association lobbied the legislature to balance state board membership on the Illinois Criminal Justice Information Authority to include defenders, however, the legislature failed to pass this initiative. Exclusion from the state authority has not prevented Gottfried from obtaining substantial federal funding for expansion of defender resources in Illinois.

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- *Ohio*

Despite the deliberate inclusion of *defense* in legislative purpose area number 10, the Ohio Governor's Office of Criminal Justice Services, which administers federal grant dollars, originally would not permit public defenders to participate in the application process. During a legislative hearing on the Public Defender's budget, defenders were asked why they did not have Byrne dollars. After defenders explained they had been excluded from the application process, the situation was corrected and they were allowed to become Byrne grant recipients.

John Alge, Deputy Director of Administration for the Ohio Public Defender Commission, wrote the original application for what resulted in more than $500,000 provided over four years to create a much-needed public defender case management system. Initially, the Byrne funds were used to purchase computers, printers, and software, and to provide intensive training for all public defenders to become fully computer literate. In a second initiative, Byrne funds enabled the director and an assistant to evaluate the appointed-counsel systems used in a number of counties and to recommend their replacement with full-time public defender offices. The bench appreciated the relief from the difficulties in finding attorneys who were willing and qualified to represent indigent persons accused of crimes in these counties.

- *Minnesota*

Richard Sherman, Chief Administrator for the Board of Public Defense in Minnesota, has secured over $1 million dollars for various programs in the past seven years. The Board qualified for a waiver of the typical four-year limit on Byrne grants. Sherman says that public defenders should be aware that they do not neatly fit into the predominant police and-prosecutor mold of the Byrne grants, however, defenders should be "pro-active and simply decide what they need, and then make the Byrne formula fit them." The Board of Public Defense has made use of Byrne grants in diverse areas, and plans to continue seeking funds in additional program areas.

When Minnesota defenders decided they needed social worker assistance in assessing clients' current status or future needs, they wrote a successful grant for "Alternative Sentencing Advocates" to fund salaries of dispositional advisors, or social workers, assigned to each defender. Sherman reports that the input of such experts, particularly for clients with substance-abuse problems and especially before a decision to plead guilty is made, has been invaluable. Minnesota public defenders have also used Byrne funds to sponsor significant training of professional staff. Public defenders invite prosecutors to participate in their Byrne grant-funded trial advocacy programs while role-playing a trial for an entire week. Currently, the Minnesota Board of Public Defense is seeking funding for law students or paralegals to conduct initial information gathering at Native American reservations and in the prisons.

- *Rhode Island*

Steve Nugent, Chief Public Defender for Rhode Island, sits on the Governor's Justice Commission, which administers disbursement of Byrne grants for the state. The Public Defender's Office has received over $1 million in Byrne funds over the past four years. One grant funded an attorney, a secretary and an investigator to work in more rural counties concentrating on representing defendants in state proceedings for dependency, neglect, and termination of parental rights. Another grant funded attorney and social worker positions in Providence to represent eligible defendants who can be diverted out of the criminal justice system and into treatment facilities for substance abuse or a past history of victim abuse.

- *Nebraska*

In Nebraska, Jim Mowbray, Chief Counsel for the Commission on Public Advocacy, which provides assistance to defenders in the representation of capital cases, administers a Byrne grant specifically focusing on defendants charged with violent felonies and drug offenses. (See, *The Spangenberg Report*, Volume I, Issue 4, May, 1995 and Volume II, Issue I, Summer,

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1995 for more background on the Commission.) The Nebraska defender community has received almost $400,000 in Byrne funds for attorney and paralegal positions for drug and violent felony cases, as well as for travel, training, and operating expenses. Mowbray was able to convince the Nebraska Commission on Law Enforcement and Criminal Justice that using Byrne grant funds to hire additional prosecutors, absent funds to hire defenders, would result in an imbalance of resources in the criminal justice system. While not a member of the Criminal Justice Commission, Mowbray was able to convince many members of the sound rationale of balancing funding for prosecution with funding for defense. He further pointed out that federal funds used to hire in-house attorneys saved the counties considerable dollars by obviating the necessity of contract lawyers. Mowbray reports it was helpful that the Commission invited defenders to attend seminars that taught applicants how to navigate the technical aspects of the Byrne application process.

- *Delaware*

Finally, in Delaware, Byrne funds have been used to create the only statewide video-conferencing system that we are aware of, which is utilized by local Attorney General and public defender offices that are linked with local police departments and courtrooms. The project expedites warrant processing, bail hearings, arraignments, evidentiary hearings and pro se motions filed by inmates, and reduces police transportation costs and time. It is estimated that the average cost of transporting one detainee from a detention facility to court is $76; therefore, if fully utilized, the video-conferencing system will eventually pay for itself. The Public Defender plays a prominent role with the Delaware Criminal Justice Council, which is the entity responsible for allocating federal funds throughout the state's criminal justice system.

The above examples illustrate the range of uses for Byrne funds, and reinforce the importance of active participation—if not full membership—within the state body responsible for allocating Byrne grant dollars. Application deadlines for Byrne funds vary among the states, but any public defender office or other interested party can obtain an application for grant funds at any time from the Department of Justice Response Center by calling (800) 421-6770 or (202) 307-1480. ❖

New Federal Grant Opportunities for Representation of Juveniles Charged with Delinquency

In its 1997 legislative session, the U.S. Congress appropriated $250 million for the new Juvenile Accountability Incentive Block Grant (JAIBG), which was created to assist states and localities to fight juvenile crime. The Department of Justice Office of Juvenile Justice and Delinquency Prevention (OJJDP), which administers the grant, will begin distributing funds this spring, and indigent defense programs should not hesitate to apply for a share of the grant. Among the 11 authorized areas in which applicants may receive funds under the JAIBG is Purpose Area 3, "hiring additional juvenile judges, probation officers, and *court-appointed defenders*, and funding pre-trial services for juveniles to ensure the smooth and expeditious administration of the juvenile justice system." The deadline to apply for FY 1998 funds is June 30, 1998.

Like the Edward Byrne Memorial State and Local Law Enforcement Assistance Program, JAIBG funds are distributed on a formula basis to states based on the number of residents under the age of 18. The total amounts distributed to states in FY 1998 range from $22.5 million in California to $1.4 million in Wyoming. Units of local government are to receive 75% of the amount provided to the states. State eligibility is contingent on certification by the Governor that the state is actively considering, or will consider within one year from the date of certification, legislation, policies or practices that, if enacted, would qualify the state for a grant under Section 18 of H.R. 3, which provided the genesis for the JAIBG. According to Department of Justice guidelines issued December 30, 1997, "active consideration" of reforms includes consideration by any one of the three

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branches of government up to three years previously, or a promise to consider changes within the upcoming year.

Another requirement is that states develop a coordinated plan for reducing juvenile crime through a juvenile crime enforcement coalition, which consists of law enforcement, social service agencies, schools and business representatives.

There is little reason for indigent defense programs to sit on the sidelines while law enforcement, prosecution, and court programs benefit from the JAIBG. As the attitude toward the treatment of violent juvenile offenders becomes increasingly strict, the stakes for accused youthful offenders increase proportionally, thereby bolstering the need for competent and adequate juvenile defenders. There is strong reason to believe that the JAIBG, like other federal block grants, will not be limited to a one-year grant cycle.

At this early stage of the program, states are still in the process of identifying their individual Designated State Agencies, which are responsible for applying for, receiving and administering JAIBG funds. However, interested applicants should not wait to obtain the FY 1998 Juvenile Accountability Incentive Block Grants Program Guidance Manual, which can be accessed at www.ncjrs.org/ojjdp/jaibg. Technical assistance on the application process is available from OJJDP's State Relations and Assistance Division (SRAD), and the Guidance Manual provides a listing of the SRAD contacts. For other information, contact OJJDP at (202) 307-0703.❖

NEWS FROM AROUND THE NATION

NACDL Releases Report Critical of Low-Bid Contracting

In October 1997, the National Association of Criminal Defense Lawyers (NACDL) issued "Low-Bid Criminal Defense Contracting: Justice in Retreat," which reports on the pitfalls of low-bid contracting for indigent defense services. Low-bid contracting occurs when one or more attorneys agree to represent all or a portion of a jurisdictions for a low fixed price. The report is highly critical of low-bid contracting, a relatively new mechanism for providing indigent defense services, and calls upon state and local bar associations, trial and appellate courts and every member of the legal profession to address the many problems caused by low-bid contracting.

Among those flaws identified are the following:

- The primary goal of fixed-price contracting is not quality representation but cost limitation.
- Typically, over time, costs rise while quality of representation diminishes because the most qualified and experienced practitioners quickly drop out of the system and are replaced by inexperienced recent law graduates and marginally competent attorneys, with little or no supervision and training.
- Many contracts require the contracting attorney to pay substitute counsel when a conflict of interest arises, creating a disincentive for the contractor to acknowledge a conflict and seek to withdraw.
- Fixed-price contracts discourage the use of investigators, forensic specialists, expert witnesses and other requisite assistance because contractors often must pay for these services out of their own pockets or forgo them altogether.
- When contractors' duties are part-time, conflicts invariably arise between the efforts required for contract cases and efforts on behalf of fee paying clients.

The report notes that through specifically-tailored standards, guidelines and policies, NACDL, NLADA and the ABA have each opposed low-bid contracting. The most recent edition of the ABA Standards for Criminal Justice, Chapter 5, Providing Defense Services, issued in 1992, was expanded to include provisions designed to assure that when jurisdictions opt to use a contract model for providing indigent defense services, they employ appropriate safeguards

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to assure quality representation. The report also points out that while these standards and guidelines may not be binding upon a jurisdiction which contracts for defense services, ethical codes are binding upon contracting attorneys, and may also be in jeopardy. For example, the Commentary to Model Rule 1.3 states: "[I]t is improper for defense counsel to accept so much work that the quality of representation or counsel's professionalism is in any way diminished for that reason." The report points out that any defense attorney - whether contractor or not - whose excessive caseload makes compliance with this rule impossible risks disciplinary action. While disciplinary action is highly unusual, it has occurred, the report points out, in at least two jurisdictions.

The report concludes with a call to members of the legal profession to "take responsibility for this escalating crisis and, with all deliberate speed, strive to correct the injustices to those who can least afford to do anything about it."

Copies of the report are available through NACDL's website: www.criminaljustice.org.❖

U.S. Attorney General Reno's Focus on Indigent Defense Continues

U.S. Attorney General Janet Reno's interest in addressing the problems confronting indigent defense providers continues. Volume IV, Issue 1 (November 1997) of *The Spangenberg Report* details the steps taken by Attorney General Reno in 1997, including her dialogue with the National Association of Criminal Defense Lawyers (NACDL), the National Legal Aid and Defender Association (NLADA), and the American Bar Association (ABA); her August 1997 speech at the American Bar Association; and her convening of an indigent defense focus group in September 1997.

In early 1998, Attorney General Reno demonstrated her ongoing commitment to improving indigent defense services. On January 27, the Attorney General and other senior Department of Justice officials met with eight prominent criminal defense representatives: NACDL President Jerry Lefcourt; NACDL Immediate Past President Judy Clarke; Steve Bright of the Southern Center for Human Rights; Federal Defender and President of the Federal Defender's Association Roland Dahlin; members of the ABA Standing Committee on Legal Aid and Indigent Defense; ABA Bar Information Program Chair and Public Defender of Lancaster County, Nebraska Dennis Keefe; Federal Death Penalty Resource Counsel David Bruck; NACDL Indigent Defense Counsel Paul Petterson; and Scott Wallace, Director of NLADA's Defender Services Division. Among the topics discussed at this meeting were:

1. Assuring that indigent defense programs obtain a fair share of the federal program dollars earmarked for Edward J. Byrne Memorial Grants, Violence Against Women Act monies, and other federal funds available to criminal justice system components;
2. Profiling examples of successful working relationships involving the courts, prosecution and defense which lead to a more effective and efficient criminal justice system; and
3. Educating indigent defense leaders on the importance of working with other criminal justice leaders to further the administration of justice and help indigent defense at the same time.

Attorney General Reno made clear that the January meeting was the first of what will be quarterly meetings with indigent defense leaders. It is most encouraging that the nation's chief law enforcement officer has taken such an active interest in working to improve the nation's indigent defense programs. We will keep you posted on developments that flow from these meetings. ❖

Kentucky Department of Public Advocacy Receives Significant Budget Increase

The Kentucky Department of Public Advocacy (DPA) emerged from its recently completed biennium budget cycle with significantly increased funding, receiving a 26% increase in general funds over the FY98 budget for FY 1999-FY 2000. These additional

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funds will go toward fulfilling the three principal goals set out in the DPA's Plan 1998-2000: 1) improved juvenile representation and a reduction in high caseloads; 2) increased funding for the public defender programs in Louisville (Jefferson County) and Lexington (Fayette County) in order to reduce caseloads and provide salary parity; and 3) improved representation in capital cases.

In early February, Public Advocate Erwin W. Lewis appeared before the Budget Review Subcommittee of the House Appropriations and Revenue Committee, armed with a report prepared by The Spangenberg Group on behalf of the Bar Information Program of the American Bar Association. Based on site-visits to six locations and analysis of defender date, the Spangenberg report endorsed DPA's three goals, concluding that "the quality of indigent defense services will be improved throughout the Commonwealth" if the requested funding were approved. The report went on to warn, however, that "the magnitude of problems confronting DPA is profound, warranting longer-term, more significant changes . . . "

Public Advocate Lewis observed: "The Spangenberg report confirms that the right to counsel is seriously at risk in Kentucky. DPA is funded at the trial level at the lowest cost-per-case in the nation. Caseloads are too high for our urban defenders and many of our rural defenders. Juvenile representation is at the crisis stage. Capital cases put immense pressure on our public defenders. There are too many counties served by private lawyers functioning as public defenders, lawyers who are working virtually pro bono. There are now substantially more counties being served by full-time prosecutors than full-time defenders."

Based in large part on the Public Advocate's focused efforts, the governor restored funding in his budget proposal for DPA's Capital Post-Conviction Branch as well as for its Juvenile Post-Dispositional Branch. The legislature took favorable action on DPA's proposals to improve juvenile representation by increasing the number of full-time defender offices, and on the agency's request for increased funding ($500,000 out of $600,000 sought) for Louisville and Lexington. ❖

Mississippi Receives a New, Statewide, State Funded Indigent Defense System

On April 21, 1998, the Governor of Mississippi signed into law the Mississippi Statewide Public Defender Act of 1998, which calls for the creation of a statewide commission on indigent defense, the position of Executive Director, and the office of District Defender in all circuit districts to provide Mississippi with a statewide, state-funded system which provides representation to indigent defendants in all proceedings of felony cases. This was the fifth consecutive year in which a bill calling for a statewide public defender system has been introduced in the Mississippi legislature. With passage of the Mississippi Statewide Public Defender Act of 1998, the number of states in the country where no state funds are provided for indigent defense services drops to just three (Idaho, Pennsylvania, and South Dakota).

As reported in previous editions of *The Spangenberg Report*, currently in Mississippi, all funds for indigent defense are provided by the counties, which may select their own type of indigent defense delivery system. Most counties, to contain expenditures, use a part-time contract public defender model, which employs a number of private attorneys working under contract with the county to provide representation to an unlimited number of indigent defendants each year and often without investigatory, expert witness or support staff assistance. The Public Defender Act replaces this system with a full-time, statewide, state-funded felony case public defender system which is modeled on Mississippi's existing District Attorney system. Counties may elect to supplement the funds of the System to assume their continuing responsibility to provide counsel to indigents in misdemeanor and juvenile delinquency cases.

The Public Defender Commission of the State of Mississippi will consist of nine members; the

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Governor, Lieutenant Governor, Speaker of the House of Representatives, Chief Justice of the Supreme Court of Mississippi, Conference of Circuit Judges of the State of Mississippi, Conference of County Court Judges of the State of Mississippi, President of the Mississippi Bar, President of the Magnolia Bar and the President of the Public Defenders Association will each appoint one Commission member. The Chairmen of the Senate Judiciary Committee and House of Representatives Judiciary B Committee, or their designees, will serve as legislative liaisons and non-voting members. Selection and appointment of Commission members must be finalized by January 1, 1999. No active prosecutor may serve on the Commission.

Primary responsibilities of the Commission will be to appoint an Executive Director of the Statewide Public Defender System, and to establish, implement and enforce policies and standards for a comprehensive and effective public defender system throughout the state of Mississippi. The Commission may delegate to the Executive Director, in whole or in part, its duties; these duties are, among other things, to:

- Appoint a District Defender in each of the state's circuit court districts;
- Supervise the Conflicts Division, which will develop procedures for identifying conflicts of interest at the earliest stages and will monitor and assess all questions regarding conflicts of interest which arise;
- Supervise the Appellate Division;
- Develop standards for determining who qualifies as an indigent person;
- Establish caseload standards;
- Establish qualification and performance standards for all attorneys working for the statewide system, whether as full-time staff attorneys, assistant state defenders, assistant district defenders, part-time contract defenders or specially appointed defenders;
- Establish optimal standards for paralegals, investigators and other support personnel;
- Re-assign conflict or overload cases from one district office to another;
- Maintain lists of attorneys willing and able to accept appointments to individual cases, including capital cases;
- Provide CLE and training seminars for staff in the Statewide Public Defender System;
- Compile and maintain a law library and brief bank and compile and disseminate statutes, court opinions, legal research and articles and other information to district defenders and private attorneys participating in the Statewide Public Defender System;
- Assume all budgeting and reporting responsibilities for the System.

The Act explicitly establishes a mechanism to appoint and compensate competent counsel in state post-conviction proceedings, closing a gap left by the state's absence of a right to counsel in state post-conviction cases, which severely impacted capital defendants following the closing of the Mississippi Resource Center.

For more background on the steps leading to the enactment of a statewide public defender act in Mississippi see Vol. III, Issues 2 and 3, of *The Spangenberg Report*. ❖

<u>Vera Institute of Justice's National Defender Leadership Project Begins Executive Seminars in July</u>

The Vera Institute of Justice, through its U.S. Department of Justice Bureau of Justice Assistance-funded National Defender Leadership Project (NDLP), will begin signing up defender organization managers for its Executive Seminar series in the coming weeks. The Executive Seminar is one part of a four-component, 18-month long program designed to strengthen the external management skills of executive-level indigent defense program managers. (See Vol. IV, Issue I of *The Spangenberg Report* for a full description of the NDLP.)

The Executive Seminar will bring together defender managers from throughout the country to a residential facility just outside of New York City for

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six days of intensive training guided by management experts, communications consultants, and other public defender managers. The seminar will allow participants to share their individual experiences, discuss pressing issues faced by their offices and evaluate the overall state of indigent defense in interactive sessions limited to 36 participants. Because enrollment is limited, defender managers must apply to attend. The Seminar will be offered three times over the next year: July 7-12, 1998; September 8-13, 1998; and in February 1999. Letters explaining the program are being sent to defender program executives; these individuals are encouraged to bring a partner to the Seminar -- either another manager or a senior attorney likely to enter management -- to better reinforce and implement the lessons learned during the sessions.

For more information about the NDLP contact Project Director Kirsten Levingston at (212) 334-1300. ❖

Modest Increases to Court-Appointed Counsel Compensation Rates Pass in Virginia

The Virginia state legislature recently passed a widely supported legislative proposal to increase what are the lowest caps on compensation paid to court-appointed counsel handling felony cases in the country, although, due largely to tax reform legislation enacted during the same session, the proposal was passed in a significantly scaled back form. The legislation for the rate increases was spearheaded by the Virginia Ad Hoc Committee on Court-Appointed Counsel Fees, and had support from the state supreme court, numerous legislators, the Virginia Trial Lawyers Association, and other justice system groups.

Currently, court-appointed counsel in Virginia receive a maximum of $575 per charge in felony cases where the defendant is facing a sentence of 20 years or more. In the 1997 legislative session, this rate was increased to $735 as of July 1, 1998. The maximum payment per charge in felony cases where the defendant is facing a sentence of less than 20 years is $265. The Ad Hoc Committee recommended and the Supreme Court included in its budget request an increase in the cap on serious felonies to $1,500 and a 30% increase in the less serious felony case rate. The Spangenberg Group, through the ABA Bar Information Program, provided comparison information to the Ad Hoc Committee this past fall as members debated what was an appropriate compensation level to request. The enacted legislation allows for an increase from $265 to $305 per charge for Class II through VI felonies and from $735 to $845 per charge for Class II felonies. In 1999, the $845 Class II felony cap will increase to $882 and the cap on lesser felonies will go up to $318. The increases reflect a 15% increase over the current rates in 1998 and a 20% increase in 1999. There was no increase in compensation rates for misdemeanor or juvenile case representation, which are currently capped at $132 and $100, respectively. ❖

Census Shows Increase in the Number of Correctional Facilities and Inmates Through Mid-Year 1995

The number of correctional facilities throughout the United States continued to rise through mid-year 1995, according to the U.S. Department of Justice's Bureau of Justice Statistics' recently released executive summary, *Census of State and Federal Correctional Facilities, 1995*. This survey of all Federal and State adult correctional facilities included prisons; boot camps; prison farms; prison hospitals; centers for reception, classification, or alcohol/drug treatment; and community-based institutions such as halfway houses and work release centers. The census did not include jails, local or regional detention institutions, or private facilities not solely housing State or Federal inmates.

The Bureau of Justice Statistics found that between 1990 (the last year such a census had been conducted) and 1995, there was an increase of 17% in the number of State and Federal correctional facilities in operation. During that time period, the number of State facilities had increased from 1,207 to 1,375; and

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the number of correctional facilities operated by the Federal government had grown to 125 from the 1990 total of 80. Accompanying this expansion in the number of State and Federal correctional facilities came a 43% increase in the number of inmates, up to 1,023,572 in 1995 from the 1990 total of 715,572. Inmate expansion resulted from the addition of new facilities as well as from the rated capacity increases of existing facilities during the five year period.

As the number of correctional facilities and their inhabitants changed between 1990 and 1995, so too did the characteristics of their staff. Correctional facilities increased their number of employees from a total of 264,201 to 347,320. Of the 1995 total, 321,941 worked for State governments, and 25,379 were employed by the Federal Bureau of Prisons. During these five years, women increasingly constituted a significant portion of the staff, as their numbers rose 60% between 1990 and 1995. The number of non-white employees also rose, as the ranks of African-American staff increased by 33% and the number of Hispanic workers grew by 57%, reaching a total of over 86,000 black or Hispanic correctional staff. ❖

CASE NOTES

Granting Ex Parte Motion for Appointment of Defense Expert Is Consistent with *Ake V. Oklahoma*, Says Texas Court of Criminal Appeals

A majority of the Texas Court of Criminal Appeals has held in *Williams v. State of Texas,* (62 CRL 1105, November 5, 1997), that denying an indigent defendant the opportunity to make a motion for the appointment of an expert to assist in his defense in an ex parte showing controverts the concern in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that indigent defendants have "meaningful access to justice," and undermines the work product doctrine. Williams, a death sentenced defendant, argued that by being denied an ex parte hearing, he was forced to reveal to the prosecution his reasons for requesting an expert witness requiring disclosure of his defense theory. The court reasoned: "[I]f an indigent is not entitled to an ex parte hearing on his *Ake* motion, he is forced to choose between either forgoing the appointment of an expert or disclosing to the state in some detail his defensive theories or theories about weaknesses in the state's case. This is contrary to *Ake*'s concern that an indigent defendant who is entitled to expert assistance have 'meaningful access to justice,' and undermines the work product doctrine."

The court clarified that because the defendant, in the guilt phase of the trial, did not raise a legal defense predicated upon his mental condition, there was no harm from the state learning about the information in an open proceeding. As to the punishment phase, however, the court could not conclude beyond a reasonable doubt that the premature disclosure did not contribute to the death sentence. Relying on *Ake* and its own precedents, the Texas court held that an indigent defendant is entitled, upon proper request, to make his *Ake* motion ex parte.❖

Investigator's Remarks During an Interrogation Admissible, Though Led Accused to Believe a Confession Would Help Him

The Texas Court of Criminal Appeals has held that its statutory rule of per se inadmissibility regarding statements made during pre-interrogation interviews has a narrow application. The Texas rule requires that to be admissible, a statement of an accused made during a custodial interrogation must show that the suspect was warned "that any statement he makes may be used against him at his trial." In *Creager v. State of Texas,* (62 Cr.L. 1003, October 1, 1997), a district attorney's investigator with a warrant arrested *Creager,* at his workplace, for sexually assaulting a child. The investigator read *Creager* the proper warnings, then obtained a written waiver of Creager's right to remain silent. The defendant challenged the confession based on improper persuasion by the investigator.

In *Gipson v. State*, 819 S.W. 2d 898 (Tex. Ct.App., Dallas 1991), affirmed, 844 S.W. 2d 738

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(Tex. Ct.Crim. App., 1992), the appellate court was troubled by an investigator's encouragement that defendant plea bargain the case. The *Gipson* court affirmed that it could be improper to warn an accused that his confession might be used "for him or on his behalf." In *Creager,* however, the court clarified that the per se rule of inadmissibility "is for a misstatement of the statutory warning given before interrogation, not for remarks made during interrogation." The court further clarified that it is for the trial court to determine whether, under the totality of circumstances, the confession was voluntary. ❖

Public Defender Assigned to Incarcerated Defendant Need Not Be Consulted Following Waiver of Counsel

A majority of the Connecticut Supreme Court in *State of Connecticut v. Piorkowski*, (61 CRL 1551, September 24, 1997), has determined that a defendant may waive the right to counsel without counsel being present. After counsel was appointed to represent him, defendant invited a detective to visit him in his jail cell. The detective consulted a prosecutor to ascertain if the visit would be proper. After signing a waiver of rights form, the defendant made an incriminating statement.

The court decided that the state would not expand the Sixth Amendment right to counsel, which has been interpreted as permitting an interrogator to seek a waiver from a formally charged defendant who initiates the contact. The court reasoned: "[W]e always have recognized that the right to counsel is a personal right . . . It logically follows that, once counsel is appointed, the defendant does not lose his personal right to initiate contact with the police without the presence of counsel." The defendant, however, argued that as a matter of public policy under the Rules of Professional Conduct, "authorities" should not be communicating with defendants who are represented by counsel. The court replied that the state's attorney did not attempt either to contact the defendant or supervise the police in their communication with the defendant, but was limited to answering the detective's questions. In failing to recognize an agency relationship between the prosecutor and the detective, the court stated: "If we were to rule that the police acted as agents in this case because they sought advice from the state's attorney, we would discourage the police from seeking such advice regarding the propriety of their conduct in the future. We decline to do so." ❖

Juvenile's Immunized Statements May be Used to Impeach after Transfer to Adult Court

A divided California Supreme Court has refused to extend protections for otherwise immunized statements made by juveniles during fitness hearings upon transfer to adult court to later impeachment purposes. The majority declared: "[N]othing in the state Constitution or our judicial decisions protects juveniles from impeachment if their voluntary trial testimony is inconsistent with the substantively immunized statements they make to their probation officers before [or during] their fitness hearings." The dissenting justices pointed out that such statements are not "voluntary," and, therefore, should not be available for impeachment. *People of California v. Macias* (61 CRL 1565, September 24, 1997). Statements made by the juvenile during a fitness hearing or to a probation officer evaluating the juvenile in preparation for a fitness hearing continue to be unavailable to the prosecution for its case-in-chief. ❖

Supervised Release Not an Option for Federal Judges When Sentencing a Juvenile Whose Probation Is Revoked

The U.S. Court of Appeals for the Fifth Circuit has decided that the federal Juvenile Delinquency Act limits the sentencing options available for adjudicated delinquents and they do not include supervised release. In *U.S. v. Sealed Defendants*, (61 Crl 1565, September 24, 1997), the government argued that once parole is revoked, a juvenile is subject to the same sentencing procedures as adults. The court reasoned, however, that as a juvenile, misconduct is

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considered neither a misdemeanor nor a felony. Under the statute permitting supervised release, the conviction must be based on a felony or misdemeanor. Revocation of parole does not create a misdemeanor or felony necessary to apply the supervised release statute. ❖

Less Culpable Defendant Cannot Receive Death Sentence If More Culpable Co-Defendant Was Sentenced to Life Imprisonment

In reversing a death sentence in *Hazen v. State of Florida*, (62 CRL 1016, October 1, 1997), and noting concern for "proportionality," a majority of the Florida Supreme Court has held that a sentence imposing the death penalty is precluded for a less culpable co-defendant if the more culpable co-defendant received a sentence of life imprisonment. Defendant was a follower in a plan involving burglary, sexual assault, and murder. The other co-defendants were the triggerman and a non-triggerman who plead guilty and testified against the other two. Citing Florida decisions which have protected serious "equal justice" concerns under the Eighth Amendment, the *Hazen* court affirmed that a non-triggerman is prohibited from receiving a death sentence when the triggerman was sentenced to life imprisonment. ❖

Ninth Circuit Rules That Departure from Strict Requirement of *Anders* Impermissibly Overrides Supreme Court Precedents

The U.S. Court of Appeals for the Ninth Circuit in *Robbins v. Smith*, (62 CRL 1050, October 15, 1997), has ruled that a brief that merely summarizes the trial record and fails to present any possible grounds for appeal fails to meet the standards of *Anders v. California*, 386 U.S. 738 (1967), and constitutes clear grounds for federal habeas corpus relief.

Responding to the state's argument that *Anders* would allow the non-existence of arguable issues to be inferred from counsel's failure to raise any, relying, in part, on the California Supreme Court's previous interpretation of *Anders* in *People v. Wende*, 600 P. 2d 1071 (1979), the court found that the U.S. Supreme Court plainly requires "active and vigorous appellate representation." Relying on *Wende*, the state argued that (1) the non-existence of arguable issues should have been inferred from counsel's failure to raise any, and (2) despite this inference, it was not incumbent on counsel to withdraw because he had not "disabled himself from effectively representing" Robbins by describing his case as frivolous. See *Wende*, 600 P.2d at 1075.

The *Robbins* court responded: "Accepting the State's contention, that the state court decision in *Wende* allows a departure from the strict requirement of *Anders*, would override Supreme Court precedent. Our obligation in this habeas action is to determine whether appellate counsel met his obligations under the United States Supreme Court's requirements set forth in *Anders* and its progeny." Appellate counsel appointed to represent indigents do not comply with *Anders* by simply summarizing the facts of the case and then requesting the state appellate court to itself review the record for arguable issues. ❖

Washington Supreme Court Reaffirms Duty of Appellate Courts to Independently Review the Entire Record Before Deciding an *Anders* Motion

The Washington Supreme Court has found that the federal court ruling in *U.S. v. Wagner*, 103 F. 3d 551 (CA 7, 1996), concluding that the requirement that a reviewing court examine the record for appellate issues not identified by counsel is relieved if the court determines that counsel's *Anders* brief appears to be adequate, is insufficient to meet the standard created in *Anders v. California*, 386 U.S. 738 (1967). While the Seventh Circuit was concerned that a more careful interpretation of *Anders* could provide convictions of indigents more scrutiny than that afforded to non-indigent persons, the Washington Supreme Court in *Washington v. Hairston*, (62 CRL 1214, December 3, 1997), decided that the *Wagner* court missed the point of *Anders*. The *Hairston* court reaffirmed: "Pursuant to *Anders* it is the responsibility of the court to ensure the appeal is in fact frivolous prior to withdrawal of counsel and dismissal of the action. This legal determination cannot be delegated to counsel." The

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Hairston court also stated that *Wagner* was not in accord with *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429 (1988), and *Penson v. Ohio*, 488 U.S. 75 (1988). ❖

Florida Supreme Court Declares That Death Row Inmate Has a Due Process Right to Mental Competence Determination Before Proceeding in State Post-conviction Requests

In *Carter v. State of Florida* (62 CRL 1188, November 26, 1997), a majority of the Florida Supreme Court has discovered that the state rules of procedure do not as yet address competency determinations in state post-conviction proceedings. The court recognized that it is a firmly settled principle of due process that if a person whose mental condition is such that he or she lacks the capacity to understand the nature and purpose of the proceedings and to consult with counsel may not be tried. The *Carter* court held that until the rules are amended to include post-conviction proceedings, those applicable to mental competency to assist counsel in trial proceedings are to be followed. The court observed that "[u]nless a death-row inmate is able to assist counsel by relaying information crucial to determinations of issues, the right to collateral counsel, as well as the post-conviction proceedings themselves would be meaningless." ❖

Massachusetts Sex Offender Registration Law Found to Have Due Process Flaw

For persons classified as low-risk sex offenders under the Sex Offender Act, the Massachusetts Supreme Judicial Court has drawn a line between the public's interest in ensuring local law enforcement have information about convicted sex offenders and public disclosure upon request. In *Doe v. Attorney General*, (62 CrLR 1193, December 3, 1997), the court held that an offender is entitled to a hearing and a determination as to whether he must register and, if so, whether sex offender information concerning him should be available on request. While the court did not reach the plaintiff's federal procedural due process claim, it found that he has "a liberty and privacy interest protected by the Constitution of the Commonwealth that entitles him to procedural due process." Noting that information on request presents a threat to "the reputation of the offender and stigmatizes him as a currently dangerous sex offender," the court found it "contrary to the principle of fundamental fairness that underlies the concept of due process of law to deny the plaintiff a hearing at which the evidence might show that he is not a threat to children and other vulnerable persons whom the act seeks to protect and that disclosure is not needed when balanced against the public need to which the sex offender act responded." ❖

Eighth Amendment Violated by Judge's Refusal to Clarify Jury Instructions in Capital Case

During jury deliberations which were locked in an eleven to one vote for death, the jury asked the judge to clarify which, if any, of eight circumstances they enumerated could be mitigating factors. Neither the prosecutor nor defense objected to the jury's request. The judge, however, told counsel: "[A]nything I say at this particular time will be coercive," and he refused to "interpret the evidence" for them. He told the jury to go back and read the instructions he had already given to them. In *McDowell v. Calderon*, (62 CRL 1242, November 24, 1997), the jury imposed the death penalty. In finding the California trial judge's failure to clear up the confusion violated the Eighth Amendment, the U.S. Court of Appeals for the Ninth Circuit stated: "Given the Eighth Amendment rules mandated by the Supreme Court, the jury's legal disorientation is of constitutional concern." Relying, in part, on *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the court affirmed that a judge may not communicate that mitigating evidence is to be disregarded, nor essentially excluded because jurors could not give it the appropriate weight.

In recognizing that a jury may need ongoing guidance when determining such a weighty decision as whether to impose the death penalty, the court held that the judge's duty to instruct the jury continues

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until a verdict is reached and returned. The *McDowell* court reasoned: "To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions." ❖

Tennessee Supreme Court Includes All Cases in Which a Death Penalty Hearing was Held When Conducting Statutorily Mandated Proportionality Review of Death Sentence

A survey of the 20 states which apply proportionality review to death sentences reflects conflicts among those states regarding the pool of cases to be used in the comparison universe. In deciding that a judge should apply the "precedent-seeking approach" when conducting statutorily required proportionality review of a death sentence, the majority of the Tennessee Supreme Court rejected the "frequency approach," which examines statistics on the occurrence of particular factors in death penalty cases. *Tennessee v. Bland* (62 CRL 1320, January 14, 1998).

The precedent-seeking approach compared the instant case to "other cases in which defendant was convicted of the same or similar offenses by examining the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating factors involved," the court explained. Factors to be compared would be criminal history, age, race, gender, capacity for rehabilitation, manner of death, motivation, premeditation and the injury to non-decedent victims. In applying this standard for review in the instant case, the court found that the death sentence was not disproportionately imposed where the defendant chased a wounded robbery victim and shot him as the victim lay hiding underneath an automobile. Dissenting opinions found the sentence was disproportionate, in part, because cases in which the state chose not to seek the death penalty, or no hearing was held, should have been included in the pool of cases for comparison.❖

U.S. District Court for DC Rejects Use of Proffered Plea Agreements Seeking Waiver by Defendant of All Future and Unknown Collateral and Appellate Rights

Finding that a defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge, the U.S. District Court for the District of Columbia has concluded that it will not accept guilty plea agreements which include overly broad waivers in *U.S. v. Raynor*, 62 CRL 1367 (February 4, 1998). Under the plea agreement proffered in *Raynor*, which purported to waive the right to appeal and to challenge a sentence in a collateral attack, the defendants would not have the right to ask the court of appeals to correct any illegal or unconstitutional ramifications of later sentencing errors. Characterizing such plea agreements as nothing more than "a one-sided contract of adhesion," the court disapproved of a Department of Justice memo that "jealously guarded its own appellate rights," while seeking to force defendants to relinquish theirs.

Noting that "the court's obligation under Fed. R. Crim. P. 11 is to assure that a plea is voluntary," the *Raynor* court also found it "inherently unfair" for the government to unilaterally seek to undermine the statutory balance which gives defense, as well as the prosecution, rights to appellate review. The court stated: "The very purpose for the Sentencing Guidelines was to assure more uniformity in criminal sentencing... [i]t will insulate from appellate review erroneous factual findings, interpretations and applications of the [Sentencing] Guidelines by trial judges and thus, ultimately, it will undermine uniformity." ❖

ABA Gains More Time for Debate on DOJ Efforts to Exempt Federal Lawyers from ABA Model Rule Prohibiting Ex Parte Communications with Represented Persons

The 1994 DOJ regulation exempting federal lawyers from state adaptations of the ABA Model Rule 4.2 (prohibiting ex parte communications with

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represented persons), recently invalidated in *U.S. O'Keefe v. McDonnell Douglas Corp.*, 62 CRL 1305 (CA 8 1998), is still open for debate. (62 CRL 1387, February 4, 1998). At its January meeting, the Conference of Chief Justices granted the American Bar Association's request to extend the time for public comment to June 1, 1998, with a vote likely to be held in August, 1998. The Conference has drafted a proposal, (62 CRL 2043), which is an alternative to the ABA's standard on contacts with those persons represented by counsel. (See 62 CRL 1323). Comment on the proposed model rule should be sent by June 1 to Edward O'Connell, Senior Counsel, National Center for State Courts or call (703) 841-0200. ❖

Colorado Court-Appointed Attorneys Must Comply with Rules of Professional Conduct Governing Imputed Disqualification Based on Conflicts

The Colorado Supreme Court has recently ruled that the ethical rule of imputed disqualification applies with equal force to court-appointed attorneys from law firms whose members have variously represented witnesses or co-defendants in criminal matters prior to forming their firm. In *Peters v. District Court for Arapahoe County*,(62 CRL 1422, February 18, 1998), attorneys with pre-existing criminal practices formed a law firm. A conflict arose when it became apparent that one attorney had previously represented a person claimed to be the real killer in a murder case where the other lawyer had been appointed to represent the named defendant. The same attorney represented a witness whose testimony would be used by the state against the murder defendant. Despite testimony from the attorneys that they had not revealed their clients' secrets upon forming their firm, the murder defendant chose not to waive the right to conflict-free counsel.

Disagreeing with the trial court conclusion that there was no need for disqualification, the Colorado Supreme Court reaffirmed the fundamental principle that "when an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm." The principle of imputed disqualification contained in the Rules of Profession conduct requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest. The court explained that the treatment of lawyers in a firm as one attorney is based on the presumption that they have access to confidential information about each other's clients, and that the creation of an "ethical wall" will not necessarily prevent the disqualification of all members of a firm. The court also noted that the lawyers' financial and professional responsibilities to members of their firm must be recognized and acknowledged. ❖

Defendant's Statements Made to Psychiatrist are Constitutionally Protected, Thus May Not Be Used at Trial to Impeach Defendant

In reversing both the trial court and court of appeals, the South Carolina Supreme Court has ruled that statements made by a defendant accused of criminal sexual conduct to a psychiatrist for purposes of an evaluation for a sex offender treatment program in preparation for a plea bargain negotiation may not be used at trial by the prosecution for impeachment purposes. *South Carolina v. Thompson* (62 CRL 1349, January 28, 1998). The court assumed that the defendant chose not to testify at his trial because of the trial court decision. The court held that allowing such use of communications protected by the attorney-client privilege violated the defendant's rights protected by the Fifth, Sixth, and Fourteenth Amendments. While the trial court did rule that such statements could not be used by the prosecution in its case-in-chief, the psychiatrist could be subpoenaed by the state to impeach the defendant if he testified.

The court also disagreed with the decision to affirm by the court of appeals, which found that defendant had impliedly waived his right to confidentiality protected by the attorney-client

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privilege. The court, citing Maryland authority, affirmed: "In criminal cases, communications made by a defendant to an expert in order to equip that expert with the necessary information to provide the defendant's attorney with the tools to aid him in giving his client proper legal advice are within the scope of the attorney-client privilege."

Disagreeing with the state's argument that the defendant could not have expected the information to be confidential as it was created in preparation for public plea negotiations, the *Thompson* court reasoned: "The psychiatrist interviewed Thompson privately and elicited remarks in order to diagnose Thompson's mental condition. The psychiatrist's ability to make an accurate recommendation hinged on Thompson's willingness to talk freely . . . Without confidentiality, accurate diagnosis is compromised." The court held that the fact that the defendant knew his attorney intended to use the psychiatrist's recommendation to negotiate a plea agreement does not overcome this presumption. The *Thompson* court also found the state's argument that such communications are only protected if created to prepare for a defense was too narrow an interpretation of the scope of the attorney-client privilege. ❖

State's Pursuit of the Death Penalty Following Successful Appeal of Conviction for Which Death Penalty Not Originally Sought Gives Rise to Rebuttable Presumption of Prosecutorial Vindictiveness Prohibited by the Due Process Clause

A majority of the Tennessee Supreme Court in *Tennessee v. Phipps* (62 CRL 1352, January 28, 1998), in applying the test enunciated in *North Carolina v. Pearce*, 395 U.S. 711 (1969), has held that the state's decision to pursue the death penalty after defendant successfully appealed his murder conviction for which the death penalty was not originally sought, creates a rebuttable presumption that the decision is unconstitutionally motivated by prosecutorial vindictiveness. In *Pearce*, the U.S. Supreme Court held that the Due Process Clause prohibits increased sentences motivated by a vindictive desire to punish a defendant for exercising a constitutional or statutory right, such as the right to appeal. To prevent such vindictiveness, the court created a rebuttable presumption that arises when a defendant receives an increased sentence following a successful appeal. In reviewing its decision in *U.S. v. Goodwin*, 457 U.S. 368 (1974), which identified circumstances to be considered such as the timing of the prosecutor's action, the *Phipps* court held that once the presumption has been raised the burden shifts to the state to rebut it by clear and convincing evidence that demonstrates there was a legitimate purpose motivating the prosecutor's decision. On remand, the *Phipps* court instructed the trial court that to overcome the presumption, the state must proffer fact specific, legitimate, on-the-record explanations for its conduct that dispel the appearance of vindictiveness. ❖

TRANSITIONS

Barbara Brink Is Head of Alaska Public Defender Agency

Appointed by Governor Tony Knowles and confirmed by the Alaska legislature in 1997, Barbara Brink is now the Director of the Alaska Public Defender Agency in Anchorage, Alaska. After graduating from the Hastings College of the Law, University of California in 1981, Ms. Brink clerked for the Supreme Court of the State of Alaska for one year. She then joined the Public Defender's office beginning her service as an appellate lawyer, and subsequently handled every type of case at every level including felony, misdemeanor, delinquency and involuntary civil commitments. Ms. Brink became the Deputy Public Defender in 1988, and Acting Director in 1996, prior to her appointment in 1997. She now administers a state agency of 13 offices with 108 employees who provide legal services in over 17,000 cases per year. ❖

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Oklahoma Indigent Defense System Gets New Executive Director

In November, 1997, the Board of Directors of the Oklahoma Indigent Defense System (OIDS) announced its selection of James D. Bednar as the agency's new Executive Director. Bednar brings extensive legal and administrative experience to the post. As Assistant Attorney General, Bednar served as legal advisor to several multi-county grand juries in Oklahoma. Other government positions held by Bednar include Assistant U.S. Attorney, Assistant District Attorney, District Judge, Deputy Treasurer and most recently Director of Special Audits and Investigations for the State Auditor & Inspector.

As Executive Director of OIDS, Bednar will oversee a statewide agency responsible for providing legal services to indigent defendants in criminal cases. OIDS was created by the state legislature in 1991 and currently has 116 full-time employees in five locations statewide. ❖

Rhode Island Has New Chief Public Defender

Nominated by Governor Lincoln Almond to finish the term of the late Richard M. Casparian, Chief Public Defender of Rhode Island for many years, Steve Nugent has continued as an interim Chief and expects to be confirmed by the General Assembly by June, 1998. Mr. Nugent graduated from Brown University, and received his JD from Boston University, where he also achieved an LLM in Taxation. Admitted to the Rhode Island bar in 1973, and after clerking for the Rhode Island Supreme Court, he began his legal career as a prosecutor, becoming Chief of the White Collar Crime Unit in the Rhode Island Department of the Attorney General. He later joined his father and brother in a criminal defense practice where he distinguished himself in cases ranging from "murders to misdemeanors." He also established an active civil rights litigation practice which created precedents in the areas of employment discrimination and battered-woman-syndrome. ❖

New York Legal Aid Society Director of Government and Community Relations Elected Judge of Civil Court of New York

In December, 1997, Rolando T. Acosta, formerly the Director of Government and Community Relations for The New York Legal Aid Society, was sworn in as a judge of the Civil Court of New York City. Acosta's previous positions at the Society include Attorney-in-Charge of the Civil Division's Brooklyn Neighborhood Office, and staff attorney and Supervising Attorney in the Bronx Neighborhood Office. His background also includes serving for three years as Commissioner of Human Rights for the City of New York. ❖

JOB OPENINGS

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

Indiana Public Defender Council Seeks Staff Attorney

A state agency seeks an experienced criminal defense lawyer to produce manuals, publications, a monthly newsletter, and to provide information in electronic format to practitioners. Ideal candidates will have excellent written and oral communication skills, and be computer proficient. Candidates must be able to work in a multi-disciplinary teams approach and to manage long and short term projects simultaneously. Prefer knowledge of Indiana criminal law, procedure, and evidence. Salary ranges from $33,000 depending upon experience and qualifications, with attractive state agency benefits plan. Please send a summary of qualifications and a writing sample to:

Indiana Public Defender Council
309 West Washington Street, Suite 401
Indianapolis, IN 46204
Attention: Staff Attorney Position ❖

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Counsel/Training Director

The National Legal Aid and Defender Association, Defender Legal Services seeks public defender with significant experience designing and running defender training events to direct association's defender training agenda, to provide technical assistance to indigent defenders in the field, and to produce standards, reports, practice manuals and articles for the association's periodicals. AA/EEO. Salary $50,000+ DOE. Call (202) 452-0620, ext. 11 to receive full job announcement. ❖

The Spangenberg Group Seeks Research Staff

The Spangenberg Group is looking for two attorneys to join our staff. Senior Research Associate candidates should be out of law school for 3-5 years and possess litigation experience. Research Associate candidates should be 1-2 years out of law school. Both positions require outstanding writing and organizational skills, and the ability to manage multiple projects. Experience in the areas of criminal and constitutional law a plus. With a focus on improving indigent defense programs in the U.S. and abroad, The Spangenberg Group conducts research and provides consultative services, technical assistance, and litigation support services. Ability to travel a must. Salary commensurate with experience. Please send resumes to:

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1001 Watertown Street
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We welcome your comments on this issue and any suggestions for future articles. *The Spangenberg Report* is written and produced by members of The Spangenberg Group:

Robert L. Spangenberg, President
Marea L. Beeman, Vice President
Catherine L. Schaefer, Senior Research Associate
David J. Carroll, Research Associate
Elizabeth A. Dever, Research Assistant
Dorothy Chan, Research Assistant
David J. Newhouse, Computer Analyst
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