THE SPANGENBERG REPORT

Volume V, Issue 1
March 1999

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Addressing the Challenges of Representing Non-English Speaking Clients[1]

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The U.S. Census Bureau projects that in 2005, the U.S. population will be 53% non-Hispanic White, 15% Black, 24% Hispanic origin, nine percent Asian and Pacific Islander, and one percent American Indian, Eskimo, and Aleut.[2] These numbers reflect the continued diversification of the U.S. population, and signal the likelihood of increasingly more non-English-speaking users entering the court system. Due to language and cultural barriers, without assistance, non-English-speakers are potentially more vulnerable in the U.S. criminal justice system than are English speakers. Without a command of English, constitutionally guaranteed rights to counsel, to meaningfully confront witnesses and to trial can be denied due to an inability to comprehend and fully participate in court proceedings. Therefore, it is important for public defender offices to develop contingency plans to ensure equal access to justice for non-English speaking clients.

Currently, this may be easier to achieve at the federal level than at the state level. In the federal system, *United States ex rel Negrón* 434 F.2d 386 (2nd Cir. 1970) – a case where a Spanish speaking defendant's murder conviction was overturned due to the violation of the defendant's Sixth Amendment rights – led to the eventual passage of the Federal Court Interpreters Act of 1978 (Public Law 95-539).[3] The Court Interpreters Act created a mechanism to protect non-English-speaking defendants' rights in the courtroom, but concerns with interpreters' qualifications, role and conduct continue to surface.

At the state level, few states have statutes that provide for the right to an interpreter in court. The Final Report of the California Judicial Council Advisory Committee on Racial and Ethnic Bias in the Courts states: "Without qualified interpretation of courtroom proceedings, the trial is a 'babble of voices,' the defendant is unable to understand the nature of testimony against him or her, and counsel is unable to conduct effective examination." Many statewide task forces on racial and ethnic bias in the court systems echo the same concerns. Currently, few states have comprehensive statewide mechanisms to certify court interpreters' skills in a legal setting. Some states, such as Washington, California, and New Jersey, offer certification tests in several languages, and other states are in the process of developing certification procedures, however, according to the National Association of Judiciary Interpreters and Translators (NAJIT) many states remain with no certification process at all.

States that traditionally have had fewer non-English speaking residents are more likely to be ill-prepared for a sudden influx of a more diverse

population and the accompanying increased demand for multi-lingual court services. With budget limitations, many courts are unable to establish a state-of-the-art court interpreter program that addresses all the needs for each component of the criminal justice system in a short time-frame. For instance, in 1996, the Georgia Supreme Court created the "Registry of Foreign Languages Interpreters" as a measure to address the increased demand for interpreters in the courts.[4] Currently, however, there are no implementation requirements put in place and anyone who claims to be fluent in a foreign language and is interested in earning some extra money can be listed in the registry. The Georgia Supreme Court is slowly moving toward some version of standards that will involve certification as more funding becomes available.[5] In the meantime, registered interpreters, community and business leaders continue to be relied on to assist the courts.[6]

Court interpreters' assistance has been invaluable to non-English-speaking court-users, however, there are still factors that need to be examined to ensure that a non-English-speaking court user's right to equal justice is not jeopardized. Impartiality of court interpreters is a major issue of concern to attorneys who must rely on interpreters to accurately translate court proceedings and to communicate with their clients. Personal bias stemming from social and economic class differences and sub-cultural rivalry[7] may sometimes influence a court interpreter's ability to do an impartial job in the courtroom. Attorneys have little means of controlling court interpreters' conduct. Without knowledge of the language spoken, attorneys cannot tell whether interpreters have overstepped their authority and provided legal advice, or if they have provided advice that is not strictly impartial. As a result, in recent years, court interpreters' professional organizations have established codes of ethics and professional responsibilities to govern court interpreters' behavior.[8]

Qualification of interpreters presents another important issue of concern. Fluency in a foreign language by itself is not enough to provide effective services to non-English-speaking clients. According to NAJIT, familiarity with judicial terminology and procedures, formal legal language and colloquialisms, technical jargon of police officers and expert witnesses, cultural expressions, as well as interpersonal skills are attributes that interpreters should possess in order to do a competent job in the courtroom. These types of skills are difficult to test in a certification examination. Once certified, courts should provide orientation programs for interpreters and encourage them to pursue continuing education in the field.

Setting aside issues of impartiality and qualifications, a court interpreter's job description also varies from state to state. For instance, court interpreters are county employees in the 11th Judicial Circuit (Miami-Dade County) in Florida. They are assigned to two courtrooms and they often run between the courtrooms assisting judges and court-users. In addition to their duties within the courtroom, they also assist indigent defendants and their attorneys. Court interpreters accompany public defender staff to court, correctional facilities, crime scenes or wherever the investigation requires. In contrast, court interpreters in California's Los Angeles County only work in the courtroom and defenders are left to their own devices should they require further assistance.

Confronted with all these issues, what should public defender offices do to ensure that they are providing effective counsel and are protecting the rights of non-English-speaking clients? Is hiring multi-lingual staff an adequate response to the issue or should the offices hire their own in-house interpreters to assist in the cases? In order to design a program that best meets the needs of a public defender office, one should begin by evaluating the demographics of the program's jurisdiction, resources within the office, and additional resources which may be available to the office.

In a county with a very diverse population, the Miami-Dade County public defender office strives to create working teams that are evenly compromised of staff with and without foreign language skills. A working team is defined by the division to which team members are assigned and by the physical location of the staff. With 19 percent of the public defender office's professional staff – attorneys, investigators,

and social workers – and 50 percent of the clerical staff possessing foreign language skills, such teaming has been helpful and has been operating efficiently.[9] Under the teaming approach, staff who possess foreign language skills are not asked to take on additional work to assist others with translations or interpretation. The combination of a multi-lingual staff and access to a pool of qualified county-employed court interpreters has allowed the public defender office in Miami-Dade County to provide quality representation to non-English speaking clients.

Not all public defender offices have the cooperation from the courts and have access to court interpreters for their case preparation work. In order to address the situation, some offices hire in-house interpreters to assist in their work.

To meet the demand for Spanish-speaking staff, the New York Legal Aid Society (NYLAS) established the Spanish Training Program 15 years ago.[10] Currently the program works closely with the Society's Criminal Defense Division and with other divisions in NYLAS on an ad hoc basis.[11] The program consists of a staff of eight, who hold at least a masters degree in Spanish or a relevant field, such as linguistics or Latin American studies, are familiar with both English and Spanish language and culture, and possess basic teaching skills. In addition to translating court documents, correspondence between attorney-client and/or court-client, and performing tape transcription duties, the in-house interpreters are also actively involved with other aspects of case preparation. They accompany attorneys and investigators to courts, correctional facilities, and crime scenes; assist them with interviews with clients, witnesses and relatives; and help prepare defendants and witnesses for jury appearances and/or testimony in trial. The interpreters also teach basic Spanish language and culture to staff and attorneys so that they can meet and collect basic information from their clients.

Attorneys, investigators and social workers are required to make an appointment with the in-house interpreters when the assistance of the interpreters is required. It is impossible for the eight members of the Spanish Training Program to meet all of the demands for their assistance. On rare occasions when all in-house and contracted interpreters are unavailable, support staff within the office, who will be compensated for their extra work, are asked to assist with some of the interpretation and translation. It is reported that 95% of the staff in NYLAS always turn to the in-house interpreters for assistance with their cases, even if they are fluent in Spanish themselves.

Due to budgetary constraints, Spanish is the only language for which NYLAS currently staffs in-house interpreters, despite a need for a similar program for Asian languages. All other language needs are contracted out to an independent translation service firm, Legal Interpreter Services Inc., or to other pre-approved freelance interpreters. In FY 1998, NYLAS paid approximately $70,000 for these services.

In a program with a high demand for multi-lingual staff, the Legal Aid Society's in-house interpreters provide services in an efficient manner and grant greater peace of mind over the quality of work with non-English speaking clients. With interpreters trained to dedicate their duties specifically to assisting attorneys and investigators in translation and interpretation matters, bilingual attorneys, investigators or support staff can focus on their demanding work and not worry about being interrupted to assist colleagues with interpretation or translation in their cases. Of course, having in-house interpreters is only practical when a public defender office regularly serves a substantial population that speaks a particular foreign language. Offices serving non-English-speaking defendants on a sporadic basis should consider working closely with the courts to establish a pool of qualified court interpreters to whom defenders have access when preparing cases.

In addition to working with the courts to obtain qualified court interpreters, states that have only begun to see pockets of immigrants proliferate in recent years should look into other cost-effective resources that would provide some sort of temporary relief in assisting non-English-speaking clients. In Georgia

counties with cotton production or chicken processing plants, defenders are beginning to notice a need to develop some sort of mechanism to ensure that their non-English-speaking clients' constitutional rights are protected. Sometimes interpreters listed in the above-referenced "Index to the Registry of Foreign Languages Interpreters" might not be available on a moment's notice. In light of these new demands, the Georgia Indigent Defense Council (GIDC) recently began developing a Form Book in 18 languages.

The Form Book is a manual that a public defender can refer to when defending non-English-speaking clients. For now, the Form Book contains translations of the Council's standard affidavit of indigence, waiver of counsel, entry of guilty/nolo contendere pleas, and various cautionary instructions in French, German, Italian, Portugese and Spanish. When the need arises, additional forms may be translated. It is hoped that other languages, including Arabic, Chinese, Japanese, Korean, Russian, Thai and Vietnamese will be added in short order. The manual also includes reference materials, such as drafts of "Motion for an Order Granting Funds to Retain the Services of an Interpreter," to assist attorneys in their work. The Form Book also identifies national translation services such as AT&T Language Line® Services, among others, as a cost-effective resource for hearings of short durations.

While a manual cannot substitute for qualified in-person interpretation, it serves as a basic tool to assist defenders and courts. GIDC recommends that the use of the Form Book be used only when there is no available interpreter. However, the Form Book will be made available to indigent defense administrators, public defenders, judges, sheriffs and correctional facilities administrators.

There is no single answer to what might be the most effective and efficient way for public defender offices to assist non-English-speaking clients. In designing their programs to meet the demands from non-English speaking clients, a public defender office needs to assess the individual needs of the office.

It is generally agreed that fluency in a foreign language is tremendously helpful for public defender staff when working with non-English-speaking clients. However, using trained interpreters is another approach that has proven effective. Working with interpreters is not always easy – court proceedings can become difficult with numerous people talking simultaneously. It takes time, patience and tolerance to work with interpreters and non-English speaking clients. The National Center for State Courts (NCSC) has produced some articles on overcoming language barriers in courts and maintains a list of videos and other resources that interested parties can refer to for more information on this matter.[12] NCSC is also working with a consortium of eleven states to establish court interpretation tests and administrative standards, and to provide testing materials, necessary tools and guidance to implement certification programs. It is hoped that more states will join the consortium and work toward some sort of streamlined certification test that will produce a more uniform code of conduct for court interpreters.

Serving Multi-Lingual Clients: A Closer Look at the Approach of One Public Defender Office

In Los Angeles county, which covers 4,000 square miles, more than 200 distinct languages and dialects are spoken. In 1997, 37% of its population was non-Hispanic Caucasian, 41% Hispanic, 10% Black and 11% Asian and it is projected that in 2010, 52% of the county's population will be Hispanic, 9% Black, 12% Asian and 28% non-Hispanic Caucasian. It is a challenge for the public defender office to meet the needs and demands of such a diverse population, especially when the county's 100 court interpreters work only in the courtroom. In response to the increasing diversification of the population, the Los Angeles County Public Defender created an "Elimination of Bias Program" two years ago to map out strategies to meet the demands of a multi-lingual and multi-cultural community.

The "Elimination of Bias Program" is overseen by a board whose members represent different age, gender and ethnic groups from all levels of staff of the defender office. The board surveyed the office and planned a retreat that brought together human

relations and affirmative action groups, among others, to facilitate workshops for the public defender office staff. The consensus was that people in the office were frustrated by their inability to provide basic advice to their clients and/or their families due to language barriers. Investigators, in particular, were dissatisfied as they are often alone in the field with no one to turn to for assistance when unable to communicate with neighbors, relatives or witnesses.

Responding to this concern, an internal managerial working group is currently examining whether it is feasible to achieve the goal of running a public defender office where *all* of the staff are certified as multi-lingual. The county offers a salary enhancement of $80 per month for all county staff who pass the state certification test and are certified as bilingual.[13] While there is disagreement about the adequacy of that amount, it still serves as some incentive for staff to become qualified. Currently, 25% of the public defender staff is certified as bilingual and the office itself has two interpreters.[14] Michael Judge, the Los Angeles County Public Defender, encourages his staff to strengthen their language skills and to take the state certification test. In the meantime, the working group is grappling with technological, training, union and labor issues that will make its goal of 100 percent certified staff attainable.

One of the initiatives coming out of the working group is the creation of the "Bilingual Staff Project" last November. The group is currently exploring funding resources, training arrangements and possible partnerships with universities and/or language schools in the county area to bring language and cultural training to the staff in a cost-efficient manner. One example is the recent establishment of a liaison between the public defender office and the Mexican Consulate in Los Angeles. The consulate will provide cultural training covering customs, values, and generational issues to the public defender office so that its staff will have a better understanding of their clients' views and standpoint and enable them to deal with their clients in an appropriate manner. If the program runs well, the public defender office will approach other consulates to establish similar liaisons.

The public defender office, together with the county, is also exploring the use of video-conferencing technology to make interpreters more accessible to the courts and to the defendants, especially those who are incarcerated. If the initiative is successful, travel time for interpreters will be significantly reduced, thus improving efficiency and maximizing the use of limited resources.

Just as in many public defender offices, the Los Angeles office is limited by budgetary constrains. The office sought to overcome these limitations by turning to staff for innovative ideas that are both feasible and relatively inexpensive to address a pressing problem. The "Elimination of Bias Program" is in its early stages, so it is too soon to evaluate its success, but staff within the office are enthusiastic about making these programs work so that they can better serve their clients.

1. In this piece, the term "non-English-speaking clients" is used to denote those with limited English capability as well as those who know no English.

2. U.S. Bureau of the Census, *Population Profile of the United States*, September, 1998, p. 8

3. The Court Interpreter Act of 1978 mandates a certified interpreter be made available to any person involved in any criminal or civil case brought by the United States government who does not have the ability to comprehend the language of the proceedings or the charges and requires a federally certified interpreter be provided to any person involved in a judicial proceeding who is unable to aid in his or her own defense or be a witness in a proceeding because of limited communicative abilities.

4. For information, please refer to Georgia Supreme Court web site. http://www.doas.state.ga.us/courts/supreme

5. Interview with Holly Sparrow, Administrator of the Courts, Georgia.

6. Interview with Michael Shapiro, Georgia Indigent Defense Council.

7. Less commonly know institutionalized rivalries exist between Mainland Chinese and Taiwanese; Japanese and Koreans; Dominican Republic and Haitians.

8. National Association of Judiciary Interpreters and Translators (NAJIT), American Translators Association are a couple of these professional organizations. The National Center for State Courts also maintains a catalogue of publications and articles related to this topic.

9. Information from this office is obtained from interviews with Linda Barocas, Human Resources Director.

10. Information of NYLAS is provided from an interview with Ida Ramos, Director of Administration and, Nora Davila, Director of Spanish Training Program.

11. The Spanish Training Group used to assist NYLAS' Criminal Appeals Bureau until the division obtained its own interpreters. The group also works for the Juvenile Rights Division and the Prisoners Rights Division, but the majority of their work comes from the Criminal Defense Division.

12. For more information on the National Center for State Court Project, please refer to their web site or contact William Hewitt, Project Director of the Court Interpretation Program. (Http://www.ncsc.dni.us)

13. The county board is currently reviewing the $80 salary enhancement. One of the county board members would like to do away with the bonus. However, many certified bilingual staff feel that the bonus is too little to compensate for the extra translation or interpretation work that they put in assisting others.

14. The office is looking to increase the number of interpreters and has recently submitted a request to hire four more interpreters.❖

Comparable Pay for Comparable Work: Making the Case for Salary Parity Between Public Defenders and Prosecutors

Introduction

In our adversarial court system, unless a defendant represents himself or herself *pro se*, all criminal cases involve defense counsel, prosecution and court personnel. In the vast majority of criminal cases in the United States, defendants charged with criminal offenses are unable to afford to hire counsel, and are therefore represented by court-appointed counsel or public defenders. In the criminal case context, it is arguable that the government salaried lawyers working as public defenders, prosecutors or law clerks work on substantially the same cases, face similar stresses and require similar skills. This is particularly so for public defenders and prosecutors who must litigate, often on a daily basis, in court. However, there is often disparity in the salaries paid to these lawyers. When disparity exists, more often than not, it is public defenders who earn less than prosecutors. It is difficult to justify why pay scales should be significantly different for prosecutors and public defenders, and there are compelling reasons for public policy makers to equalize their pay.

Pay disparity leads to attorney turn-over

Last summer The Spangenberg Group conducted a study of the salaries for district attorneys and public defenders in New Mexico. Both are state-paid functions, but there was no salary parity between public defenders and district attorneys; district attorneys earned more in all classification levels. Further, at almost all classification levels, public defenders were paid less than law clerks and state administrative agency attorneys. The state public defender was experiencing very high attorney turnover rates: in Albuquerque, the state's largest district, the overall turnover rate was 35% between summer 1997 and summer 1998. Public defender management and staff attorneys told us the high turnover rate was due primarily to the poor salary.

Similarly, in Oklahoma, where the first three regional trial offices just opened in the past two years as part of the statewide Oklahoma Indigent Defense System (OIDS), public defenders currently earn between $10,000 and $20,000 less than do district attorneys in comparable positions. Since the new offices opened, OIDS has faced a continuing struggle with the defection of newly hired public defenders leaving to work at district attorney offices, due to the pay disparity .

High turnover has serious ramifications not just for defender agencies and their clients, but for the overall criminal justice system.

At the time we were reviewing the New Mexico public defender's salary problems, turnover was highest at the entry-level, where attorneys were earning an average of 14% less than their counterparts in the district attorney's office. This left the division of the Albuquerque office that handles misdemeanor cases in a near-crisis situation, because new attorneys had very little time to come up to speed before being assigned to large caseloads. It also left the office with little choice when positions opened up in the felony division: as felony attorneys left the agency, attorneys from the misdemeanor division who had relatively little experience were moved into those slots.

In addition to presenting a managerial nightmare, the lack of experienced attorneys can cause serious case-processing delays in the courts. Another serious issue is the quality of representation provided by newly-minted public defenders who haven't had time for adequate training. Further, in New Mexico, since the less-experienced attorneys were understandably

less efficient case-handlers, the Public Defender had to farm out non-conflict cases to contract attorneys, who are more costly than staff attorneys, just to keep up with the caseload.

The Kansas State Board of Indigents' Defense Services, which is also struggling with high attorney turnover, has recently experienced the greatest losses among attorneys who have been with the agency for two to four years - the point when the training invested in an attorney and her own experience make her extremely valuable to the agency as a capable case-handler. Besides affecting the overall productivity of the agency, the loss of experienced attorneys takes a toll on the morale of the remaining staff who, on one hand, hate to see their colleagues leave, and on the other hand, dread the prospect of absorbing the open caseloads they leave behind.

Simply put, it is not cost-effective to have large-scale turnover due to salary, and the drain of talent leaves public defender organizations less effective than if they maintained a balance of seasoned and less experienced attorneys.

The work of a public defender is fast paced and stressful. Attorneys juggle very high caseloads of clients who face a loss of liberty for significant periods of time. If a client is wrongly charged with crime, or is over-charged, this exacts a tremendous toll from that person's life, and public defenders carry large burdens in protecting the rights of their clients while also keeping cases moving expeditiously through the state's criminal justice system. There is no logical reason to pay public defenders on a salary scale that is significantly different from that paid to the other attorneys working in this system: namely, district attorneys and court clerks. Nevertheless, public defenders have been paid less, which over time can affect morale and performance. Many attorneys who accepted public defender positions out of their commitment to the work end up burning out, only to leave for other government jobs working as an assistant district attorney, a law clerk, or an administrative agency attorney. While it is natural to expect some attrition among attorneys who, for a variety of reasons, move on to different types of practice, it is frustrating and discouraging to see public defenders who would like to continue with their jobs, but can't afford to due to the salary.

A move toward salary comparability

Through both formal and informal procedures, more and more jurisdictions are adopting salary parity between public defenders and district attorneys. For example,

- Public defenders in Connecticut, by statute, are paid comparably to state's attorneys. Conn. Gen. Stat. Ann. (West) Vol. 23 §51-293 (h).
- In certain California counties, such as Orange County, public defenders and district attorneys are part of the same bargaining unions, and are paid the same salaries for comparable positions. Other counties, such as Los Angeles County, pay public defenders and district attorneys comparably, regardless of joint bargaining units.
- In Wyoming and Maricopa County (Phoenix) Arizona, public defenders and prosecutors are paid according to the same pay scale.
- In Tennessee, the state-funded public defenders and district attorneys have had salary parity since 1994. Prior to that time, according to the Tennessee District Public Defenders Conference, there was a serious problem with attorney retention, as new attorneys would start out with public defender programs, receive training and experience, and then leave for district attorney positions to earn higher salaries. Since the legislature enacted parity requirements, this drain of talent has subsided. Now the elected district chief defenders and district attorneys have comparable salaries and the assistant public defenders and assistant district attorneys have parity with one another, participating in the same 20-step personnel plan.

In the federal system, salary parity is an accepted practice between Chief Federal Public Defenders and U.S. Attorneys, and between the attorneys and

support staff working in their offices. The classification and compensation levels are essentially the same for both programs, in recognition of the fact that the primary responsibilities of the positions involved are of equal importance, and to eliminate the appearance that the defense function is less valued than the prosecution function by the government.

Overcoming disparity: marshal the facts!

For jurisdictions with imbalances in salary scales between district attorneys and public defenders, we recommend that defenders marshal the facts on salary incomparability and discuss them with policy makers. In New Mexico, the Chief Public Defender presented many of these points to the state's legislative and executive branches last fall, and, as of December 1998, public defenders and district attorneys in New Mexico are paid on comparable salary scales.❖

NEWS FROM AROUND THE NATION

Department of Justice Hosts National Symposium on Indigent Defense

In February 1999, over 250 individuals traveled from around the country to Washington, D.C. to attend and participate in the two-day National Symposium on Indigent Defense: Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations. The symposium was hosted by the U.S. Department of Justice, Office of Justice Programs and the Bureau of Justice Assistance. The majority of attendees were indigent defense practitioners, but also invited were judges, legislators, professors, prosecutors and others who, along with defenders, have been involved in collaborative approaches to improving the criminal justice system.

The symposium featured plenary presentations followed by workshop sessions focusing in greater detail on various topics. The Spangenberg Group worked with the Department of Justice to recommend speakers. Two highlights of the symposium were the opening plenary session and the keynote speech by Attorney General Reno.

Professor Charles Ogletree of Harvard University Law School was the moderator for the opening plenary which featured 10 panelists: Mayor Dennis Archer of Detroit; U.S. Circuit Judge for the11th Circuit, Rosemary Barkett; Maryland Public Defender Phyllis Hildreth; Washington College of Law Professor Angela Jordan Davis; Maryland state legislator Peter Franchot; Milwaukee District Attorney Michael McCann; Washington, D.C. Chief of Police Charles Ramsey; Victim Advocate Anne Seymour; La Bodega de la Familia Project Director Carol Shapiro; and Cook County Commissioner Bobbie Steele.

Professor Ogletree kicked off the discussion by presenting a hypothetical situation involving a fictional jurisdiction which was facing a growing crisis in its court system stemming from an increasing number of case filings and a corresponding increase in the number of trials. In the fictional jurisdiction, funding for indigent defense counsel had remained flat, producing a huge backlog of cases. Arrests had risen due to an increased number of patrol officers, while plea agreements had decreased because of a mandatory minimum sentencing policy and the implementation of "three strikes" legislation. The jail was seriously overcrowded due to the backlog of cases and new legislation that increased the number of juveniles charged as adults and thus housed in the adult jail. Professor Ogletree then asked participants various questions centering on what was the appropriate role for the institutions they represented to address this crisis.

Chief Ramsey remarked that zero tolerance crime policies, coupled with lower crime rates, add pressure to lock up more criminals, and can breed dysfunction in the justice system. Representative Franchot agreed, stating that the indigent defense funding crisis in his

state is a direct result of legislators' policies to add more police, judges and prosecutors without a corresponding increase in public defenders. He acknowledged that overall crime policies are enacted which will undoubtedly impact public defenders, and yet public defenders are rarely consulted during the policy development process.

Judge Barkett, formerly Chief Justice of the Florida Supreme Court, commented that from the judiciary's perspective, there is nothing fundamentally wrong with more policing and more prosecutions. But she said that the lack of resources to process defendants impacts the judiciary, and judges have a duty to guard defendants' constitutional rights to counsel, due process and speedy trials, and to see that sentences are commensurate.

Commissioner Steele stressed what she saw as three primary needs: 1) prevention, 2) a balance of funding among police, prosecutors, courts, and defenders, and 3) a willingness to share resources throughout the community. For example, she suggested that the justice department should become involved with schools, which, she believes, in the long run would keep jail populations down and criminal justice resources in check.

District Attorney McCann emphasized the need for civility among criminal justice system leaders, such as prosecutors, sheriffs, judges and public defenders. Without civil relationships, it becomes difficult to address crises, such as the one in the hypothetical, when they arise. Public defender Phyllis Hildreth expanded on this point, stating that policy is a peacetime activity built from relationships, and there must be continuous inter-agency dialogues to build those relationships.

Attorney General Reno's keynote speech focused on the collaborative approaches she undertook as District Attorney in Florida's Dade County with long-time Dade County Public Defender Bennet Brummer and retired Judge Gerald Wetherington to improve Dade County's criminal justice system. Mr. Brummer and Judge Wetherington were seated at the dais with the Attorney General and also commented on the former partnership During Ms. Reno's years as District Attorney, collaborative efforts produced, among other things, a non-adversarial, strictly voluntary, treatment-based drug court and created a county-wide criminal justice information system (CJIS), which greatly increased the ability of the public defender to produce statistical reports and saved on duplicative entry of data by multiple agencies. During this same period, the three worked together to create the Dade County Criminal Justice Council, which spearheads initiatives such as the drug court and the CJIS. Mr. Brummer and Judge Wetherington noted that despite numerous disagreements in the process of innovating these programs, the participants kept returning to a common goal: to achieve justice and to treat people fairly and with dignity.

Attorney General Reno also discussed current initiatives of the Department of Justice which support indigent defense, including: regular dialogue with indigent defense system representatives, a nationwide survey of indigent defense systems in the United States, expanded grant opportunities through BJA and support from the Attorney General herself at the state level and among bar presidents to encourage states to include indigent defense in their state plans for Byrne Grant funds. She also mentioned her focus on improved technology, increased assigned counsel rates, joint training between public defenders and prosecutors and support for indigent defense practice and performance standards.

In the other plenary and workshop sessions, a recurring theme was the need for indigent defense leaders to exert strong leadership skills not just within their program, but throughout the local criminal justice community. All participants agreed on the critical importance of indigent defense gaining a seat at the table to discuss key criminal justice system initiatives. Numerous participants recounted their approaches to gaining credibility and winning trust from other criminal justice system players. It was clear from the examples cited that achievement of this goal requires a pro-active and creative approach from defenders.

Without question, defenders often face an uphill battle when seeking to be considered and included as partners in their local criminal justice systems, but the payoff for clients and the overall functioning of the criminal justice system is well worth it. Symposium participants stressed that picking your battles is important: one of the issues on which many participants found they were able to effectively partner was jail overcrowding. Another was the treatment of defendants with mental health issues, and yet another was the area of forensics; i.e., ensuring that crime labs and medical examiners are required to meet minimum standards.

While numerous participants marveled at the opportunity to share coffee and pastries while learning about effective criminal justice system collaborations, all at the invitation of Department of Justice, no one seemed more pleased about the event than Nancy Gist, Director of the Bureau of Justice Assistance. Ms. Gist co-hosted the symposium with Assistant Attorney General, Office of Justice Programs, Laurie Robinson. Ms. Gist, formerly with the Massachusetts Committee for Public Counsel Services, remarked that one of her goals in coming to BJA was to open up the federal grant making process to defenders, something that is under way with the 1997 addition of the Open Solicitation Grant Program, and a 1998 competitive grant which offered funding to defender organizations for improving case management or providing training. She expressed her hope that this symposium would be the first of more to come. The Department of Justice is preparing a record of the proceedings, which will be widely available soon.❖

New York State Court of Appeals Reduces Assigned Counsel Fees in Capital Cases; Chief Justice Proposes Commission to Review Non-Capital Assigned Counsel Fees

On December 16, 1998, the Court of Appeals for the State of New York ordered that the compensation rates for assigned counsel in capital cases be reduced from $175/hour to $125/hour for lead counsel and $150/hour to $100/hour for associate counsel services rendered after the prosecution gives notice of intent to seek the death penalty. The court's order continues to allow "reasonably necessary additional legal assistance" to be procured at a rate of $40/hour, and paralegal assistance at $25/hour.

Additionally, the court newly approved an additional "tier" in the compensation rates to reflect a distinction between services rendered before and after the death penalty notice is given, and, therefore, that lead counsel be paid at $100/hour and associate counsel at $75/hour. The death penalty statute provides that the prosecution must notify the defendant of the intent to seek the death penalty within 120 days of arraignment.

New York death penalty attorneys were discouraged by the distinction in rates paid pre- and post-notice. Capital trial attorneys typically spend much of the 120-day pre-notice period engaged in concerted legal efforts to prevent the filing of the death penalty notice, as well as in preparing the case as though the death penalty could be imposed. In fact, one capital defender described the 120-day window as a critical and "incredibly intensive" period during which investigation and mitigation efforts are launched full-force.

Shortly after New York passed and implemented its death penalty law in 1996, the Court of Appeals approved uncapped, uniform capital counsel compensation rates for each of the state's four Judicial Departments of the Appellate Division. At that time, the Court of Appeals, in accordance with New York's Judiciary Law 35-b(5)(a), directed that the capital counsel fee schedule be "periodically updated." The Court of Appeals further announced that the first review of the fee schedule would commence in September 1997. On September 22, 1997, the Court of Appeals instructed screening panels from each Department to collect empirical data and documentation on their experiences with the fee schedule, including any effect the schedule had had on the Department's ability to secure available and competent capital counsel. Each Departmental Screening Panel also made proposed changes to the fee structure that are now reflected in the Court of Appeals' order. The court solicited and reviewed

public comment before issuing its order on December 16.

The Court of Appeals further announced that it would again review capital counsel fees one year from now to determine whether and to what extent the fee structure would need modification. Toward this end, the Court of Appeals instructed the Departmental Screening Panels to conduct another assessment of their experiences with both the original and revised fee structures before December 31, 1999.

With respect to non-capital assigned counsel compensation rates, the Chief Judge of the State of New York, along with the state bar, recently introduced a legislative initiative to create a commission to study New York's non-capital counsel fee structure. The study would involve an analysis of compensation levels in other jurisdictions, as well as the federal government. At the conclusion of its study, the Commission would be authorized to promulgate a new fee schedule for the non-capital assigned counsel as appropriate. Currently, the state compensates appointed trial counsel in non-capital cases at a $25 per hour rate for out-of-court services, and $40 per hour for in-court work. Appellate attorneys are compensated at a rate of $40 per hour, whether in- or out-of-court. For both trial and appellate work, there is a waivable per case maximum of $1,200 for cases in which one or more felonies is charged; the maximum is $800 for misdemeanor and family court cases.

The Chief Judge's proposal states that the commission would consist of twenty-two members (both lawyers and non-lawyers): some will be appointed by the Governor, (including nominees from the New York State Association of Counties), some by the Mayor of New York City, the President of the Senate, the Speaker of the Assembly, and the Chief Judge of the State. In considering modification to the existing non-capital counsel fee structure, the Commission would be required to take into account "the State's need for an adequate number of attorneys to serve as assigned counsel and law guardians; the needs of criminal defendants, and persons entitled to appointment of [...] assigned counsel or law guardians," as well as the fiscal ability of the state to fund the cost of these programs. The Commission's new proposed fee schedule would be promulgated by December 31, 1999, and the new rates would take effect on April 1, 2000. The Commission itself would expire on January 1, 2000.

In a December 2, 1998 letter to bar leaders across the state, New York State Bar Association President James C. Moore stated that,

> "Over a decade has passed since [non-capital] assigned counsel fees were last adjusted. Despite our advocacy efforts which have ranged from letters to personal visits with key legislators, action appears unlikely in the near future."...

Accompanying the letter was a copy of the proposed legislation from the Chief Judge. Moore encouraged the letter's recipients to begin discussions with members of the state Senate and Assembly regarding the commission and its objectives.

The proposed legislation also amends the County and Judiciary Laws to enable expedited review of claims for compensation and reimbursement to non-counsel providers of services such as investigators or experts. There previously did not exist a procedure by which affected interests could challenge a trial court's discretionary approval or denial of vouchers for payment. The bill also amends the County and Judiciary Laws to require that non-attorney services necessary to an indigent's criminal defense be procured from a government provider, unless the trial court finds that to do so would be "impracticable" or "inadequate."❖

<u>The West Virginia Legislature's Standing Committee on Government Operations Promotes Expanding Public Defender Corporations Throughout the State</u>

Prompted by a rise in indigent defense cases and inadequate funding of the West Virginia Public Defender Services (PDS), the Legislature's Standing Committee on Government Operations, Performance Evaluation and Review Division recently assessed, and published its findings on, PDS as the first step toward improving the state's provision of indigent defense services. The report concludes that the state should maximize the use of public defender corporations to cut the costs of defending indigent persons.

In West Virginia, all funds for indigent defense are provided in a general-fund appropriation. Since 1989, PDS has administered, coordinated and evaluated local indigent defense programs in the state's 31 judicial districts. PDS is statutorily required to provide training and technical assistance to indigent defense providers and operates an appellate division to represent indigent defendants in appeals in the state's supreme court. The Executive Director of PDS, appointed by the Governor with the consent of the Senate, is authorized to make grants to and contract with Public Defender Corporations in those judicial districts in which the chief judge and/or the majority of active local bar members have determined a need for a public defender office. By statute, all Public Defender Corporations must have a Board of Directors consisting of appointees by the local county commissioner, the county bar association and the Governor. Currently, 23 of West Virginia's 55 counties are served by 15 Public Defender Corporations. The remaining 32 counties rely solely on assigned counsel to provide representation to indigent defendants. (For additional information on West Virginia Public Defender Services, see *The Spangenberg Report*, Volume IV, Issue 3.)

The Standing Committee's report estimates that the state could potentially save between $2.2 million and $5.4 million by: (1) providing public defenders to circuit courts that do not have public defender corporations; (2) expanding existing public defender offices where caseload levels require heavier use of private attorneys; and, (3) creating multiple public defender corporations in large circuits to reduce conflicts of interest and to reduce caseload problems. The report highlights several reasons to support such conclusions. Since 1991, the public defender average cost-per-case has remained stable (actually decreasing 2.29% from $202.59 in 1991 to $197.95 in 1997) while assigned counsel average cost-per-case has increased more than 77% (from $307.80 to $545.82). The performance review team concluded that public defender corporations are more cost effective and efficient due to the fact that public defenders have more familiarity with indigent defense cases, are more specialized, and do not have to "re-invent the wheel" with each new case. In FY 1997, Public Defender Corporations handled over 58% of the cases statewide (38,299 of 66,034) yet accounted for only 33.5% of the total dollars earmarked to cases represented in the same year ($7,581,417 of $22,652,095).

The second major finding in the report is that PDS does not adequately monitor the quality of indigent defense services as required by statute. The report highlights the need for PDS to institute performance and workload standards. The Executive Director of PDS recognizes the need to assess the quality of indigent defense, but high caseloads and budget problems have forced him to dedicate all supplemental increases to the PDS budget toward hiring additional attorneys instead of dedicating funds to monitoring compliance and performance. The West Virginia Legislature appropriated the same amount of money ($14,210,905) for PDS in each of the last three fiscal years FY 1995 - FY 1997. At some point during each of those years, PDS depleted its resources and because of this, PDS has carried a certain level of debt from year to year. During this same time period PDS experienced a 33% increase in its annual caseload (up from 49,629 in FY1995 to 66,034 in FY1997). Subsequently, PDS's accrued liability has grown from year to year.

The Executive Director of PDS believes that the legislative oversight report has generated some interest in moving toward increased public defender corporations throughout the state and he has drafted a bill addressing this concern. The bill proposes, among other things, transferring the authority to activate local Public Defender Corporations from the chief judges and/or local bars to the PDS.❖

A South Dakota Indigent Defense Committee Recommends the Creation of a Statewide Public Defender System to Handle Serious Felony Cases and a Raise in Court-Appointed Counsel Rates

In the summer of 1997, the State Bar of South Dakota and the South Dakota Unified Judicial System formed a joint committee to study and make recommendations on cost containment of the criminal justice system in general, and in particular, indigent defense. The Indigent Defense Committee consists of representatives from the private bar, the Minnehaha County (Sioux Falls) public defender, a magistrate judge, a deputy state's attorney, a county commissioner, a presiding circuit court judge, a state representative, and a state senator, among others. In November 1998, the Committee presented its findings to the two organizations and recommended the following:

2. Raising the compensation for court-appointed counsel from $55 dollars per hour, both in-court and out-of-court, to $67 per hour;
3. Enacting legislation to enable state's attorneys to establish diversion programs for high-volume, non-violent criminal cases as a means of reducing court costs;
4. Enacting legislation to establish and fund a state-wide public defender's office to represent indigent defendants charged with crimes falling in the top four felony classifications. This office would serve all but the state's three largest counties which already have public defender systems; and,
5. Mandating the appointment of the new state-wide public defender, except in conflict cases.

At present, each of South Dakota's 67 counties organizes and funds its own indigent defense delivery system with the majority of counties using contract or assigned counsel systems. Additionally, counties may opt to participate in a "catastrophic case" indigent defense fund. The fund is administered by a committee appointed jointly by the Governor and the County Commission Agency. The fund acts as insurance for small counties against extraordinary costs for complex cases, such as a death-penalty case, that may be tried in their jurisdiction. Each county contributes annually to the fund and those counties with such catastrophic cases may apply to the commission for reimbursement up to 90% of all indigent defense costs above $25,000. Currently, 53 of South Dakota's 66 counties participate in the fund. South Dakota is one of only three states (Idaho and Pennsylvania are the others) that provide no financial relief to counties for indigent defense.

Based in part on the Indigent Defense Committee's report, the South Dakota Legislature considered a bill that would have created a statewide, state-funded indigent defense system to handle the most serious felony cases (rape, robbery, homicide). Despite the backing of the South Dakota Trial Lawyers Association, the statewide public defender bill was defeated in the House Judiciary Committee by a vote of 7-6.❖

Bureau of Justice Assistance Awards $150,000 Grant to Vermont's Office of the Defender General

By letter dated February 19, 1999, the Office of Justice Programs, Bureau of Justice Assistance of the United States Department of Justice awarded the State of Vermont's Office of the Defender General (ODG) a grant totaling $150,000 to develop and administer a new project entitled, "Identify, Assess and Accommodate Developmental Disabilities of Criminal Defendants." The project and the grant are authorized by Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3701, et. seq., as amended.

The Office of the Defender General submitted the project application in response to the FY98 Open Solicitation BJA Announcement in the Topic Area of Indigent Defense. The objective of the project is to further efforts to "increase the effective representation of and participation by persons with disabilities in the criminal and juvenile justice systems." The budget

period, which begins July 1, 1999 and continues through December 2000, will empower the ODG to establish a system to identify a client's special developmental disabilities and needs from his or her initial introduction into the criminal justice system. The project will require the Defender General first to establish protocols for identifying developmentally disabled clients; all attorneys in the ODG program will receive comprehensive training concerning these identification protocols and clients' mental health needs. Further, the grant will cover the cost of assembling a mental health team, which will assess clients identified by the attorneys and make recommendations concerning how best to accommodate the needs of these particular clients. The ODG plans to contract with a doctoral psychologist with experience in the criminal justice system as part of these efforts.

Mr. Robert Appel, who is the Defender General in Vermont, hopes that the program will ultimately ensure that "all clients receive what is their due, that is, a meaningful opportunity before the courts and the ability to understand the proceedings."❖

Georgia Supreme Court Supports Increased Compensation Rates for Court-Appointed Counsel

The Georgia Supreme Court recently approved increased compensation levels for private attorneys who accept court appointments to represent indigent criminal defendants in Georgia. The compensation rates are part of the Georgia Indigent Defense Council's (GIDC's) Guidelines for the Operation of Local Indigent Defense Programs, which describe how an indigent defense program should be established and operated. The vast majority of funding for indigent defense in Georgia is provided by the counties, but counties that comply with the indigent defense guidelines are eligible to apply for additional State funding, which is distributed through GIDC. Therefore, while it is not mandatory for counties to pay court-appointed counsel according to the recommendations in the Guidelines, counties cannot qualify for state funding if they do not do so, absent a waiver from GIDC.

The new minimum compensation rates set out in Guideline 2.6, Fees Paid to Lawyers Under a Panel Program, are $45.00 per hour for out of court work and $60.00 per hour for in court work. This is an increase from $35 per hour for out of court work and $45 per hour for work in court. GIDC discourages the setting of maximum fees which appointed attorneys may receive; however, if a county chooses to set maximum fees the maximums set for trials or similar situations must be at least as follows:

$1,000 (up from $500) for misdemeanors

$2,500 (up from $1,000) for non-capital felonies

$5,000 (up from $2,500) for capital felonies where the death penalty is not sought.❖

Georgia Supreme Court Finds No Constitutional Right to Counsel at State Post-Conviction Proceeding, Rejects Death Row Prisoner's Appeal

In a 4-3 decision, the Georgia Supreme Court refused to issue a certificate of probable cause for appeal to Exzavious Lee Gibson, a death row habeas corpus petitioner. *Gibson v. Turpin*, — S.E. 2d — , 1999 WL 79655 (Feb. 22, 1999). Justice P. Harris Hines wrote for the Supreme Court majority. Justices Carol W. Hunstein, George H. Carley and Hugh P. Thompson joined Hines' opinion. Presiding Justice Norman S. Fletcher wrote a dissent that Chief Justice Robert Benham and Justice Leah J. Sears joined.

Death-row petitioner Gibson filed for a writ of habeas corpus in December 1995 asserting, *inter alia*, ineffective assistance of counsel after having exhausted his avenues of direct appeal from a sentence of death received in 1990 for armed robbery and malice murder. See *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991), *cert. denied*, *Gibson v. Georgia*, 502 U.S. 1101 (1992). Because Gibson had been represented by the same attorney for both his trial and direct appeal efforts, this was his first opportunity to raise an ineffective assistance of counsel claim.

The majority opinion's denial of Gibson's application for certificate of probable cause to appeal

rested fundamentally upon its finding that there is "no federal or state constitutional right to appointed counsel in Georgia habeas corpus proceedings." The court held that while the constitutional right to petition for habeas corpus relief requires that an indigent death row petitioner be provided "meaningful access to the courts" in his habeas efforts, satisfaction of the constitutional mandate does not automatically point to the appointment of counsel. Citing *Bounds v. Smith*, 430 U.S. 817 (1977). Meaningful access, said the court, does not require the state to affirmatively assist inmates to uncover and litigate grievances, only that the state may not interfere with an inmate's right to raise claims. The majority further relied upon its previous decision in *State v. Davis*, 246 Ga. 200 (1980), in which it refused to find an exception to the *Bounds* rule for inmates facing execution, because "if meaningful access to the courts meant appointed counsel, all habeas corpus petitioners would be entitled to appointed counsel." The majority also cited the U.S. Supreme Court's decision in *Lewis v. Casey*, 116 S.Ct. 2174 (1996) for support that the U.S. Constitution does not require that states provide "permanent" appointed counsel so that inmates can litigate more effectively.

The court further opined that Gibson's true underlying reason for claiming that the failure to appoint habeas counsel denies him meaningful access to the courts is that "he is not intelligent and habeas corpus law is complex." The court similarly denied appointment of counsel on this basis, because the rationale does not distinguish between capital and non-capital habeas petitioners. The Georgia Supreme Court then stated that the "death is different" reason often used to justify increased procedural safeguards in capital cases is warranted: "The citizens of this state should be, must be, appalled at the prospect of executing an innocent person, or a murderer undeserving of the ultimate punishment." It went on, however, to state that

> "anyone familiar with the facts that underlie this petitioner's convictions and sentences, of what he did... knows that Exzavious Lee Gibson is neither innocent nor undeserving of the death penalty."

Under substantially the same reasoning as it applied in its meaningful access analysis of Gibson's claim, the majority of the court found that the lack of counsel at state habeas corpus does not offend notions of due process or "fundamental fairness." Citing *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1986).

Gibson's argument that he possesses a constitutional right to counsel at habeas corpus because it presented his first opportunity to raise a Sixth Amendment claim of ineffective assistance of counsel was rejected by the court as well. The court stated that, as with meaningful access, a constitutional right to habeas counsel would have to be applied to all habeas petitioners, not just those on death row. The court did not expound on the reasons why this was constitutionally infirm. Furthermore, said the court, finding a Sixth Amendment right to habeas counsel in order to litigate the Sixth Amendment claims of ineffective assistance of trial and appellate counsel would logically result in a new right to appointed counsel at each new level of litigation, e.g., a Sixth Amendment right to effective assistance of habeas counsel and so on.

Only Georgia and one other state in the nation fail to provide counsel at state post-conviction proceedings. Even so, the court dismissed what appears to be a nationwide consensus as simply legislative prerogative. The court admitted that "a law providing state-funded counsel to indigent death-row habeas petitioners...might be good policy," but drew the line between the legislative and judicial authority, stating that "the decision to create such a law rightfully belongs to the General Assembly."

The court then addressed Gibson's ineffectiveness claims and declined to find that the death-row prisoner's trial and appellate counsel performed below the standards set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Presiding Justice Fletcher, who wrote the dissenting opinion, stated that it was clear that the Georgia Constitution guarantees Gibson the right to seek a writ of habeas corpus. As such, the "question becomes whether meaningful access and fundamental fairness require appointment of counsel in a capital post-conviction proceeding that provides the first opportunity to raise a constitutional challenge to the conviction and sentence." This question, said Justice Fletcher, has been explicitly left open by the Supreme Court. Citing *Coleman v. Thomas,* 501 U.S. 722 (1991). The dissent dismissed the majority's reliance on *Murray v. Giarratano*, 492 U.S. 1 (1989) and *State v. Davis*, *supra*, because it felt that neither case directly addressed the issue before the court in *Gibson*.

Justice Fletcher also observed that the U.S. Supreme Court has acknowledged that "an attorney's assistance in capital post-conviction proceedings is 'crucial because of the complexity of...jurisprudence in this area'," and that "nearly half (46%) of all capital cases reviewed in federal habeas proceedings between 1976 and 1991 were found to have constitutional error." (citing *McFarland v. Scott*, 512 U.S. 849, 855, 1256 (Blackmun, J., dissenting) (1994)). The dissent further observed that the majority approach, which essentially establishes that a petitioner's first opportunity to challenge his death sentence on ineffectiveness of counsel grounds comes "only after the right to counsel has expired...[,][treads] heavily on the Sixth Amendment right to counsel, especially in light of the unusual importance of post-conviction proceedings in capital cases."

Justice Leah Sears, joining the dissent, observed that Georgia, with its 123 death-row inmates, and Wyoming, which only has one inmate facing execution, remain the only two states in the nation which do not require counsel in habeas proceedings. She wrote separately that "the majority today ... requires a condemned man, without counsel, to bring his claims for relief in an arcane process that he can not possibly understand in a court of law... This is an outcome that no just government should countenance."❖

CASE NOTES

Fourth Circuit Declares *Miranda* Overruled by 1968 Law

Just two years after *Miranda v. Arizona*, 384 U.S. 436 (1966) was decided, Congress enacted 18 USC 3501, which, said the U.S. Court of Appeals for the Fourth Circuit on February 8, 1999, permits the introduction of any confession that is shown to have been "voluntarily given" – a finding which may be established even in the absence of *Miranda* warnings. The Fourth Circuit held that this statute, which applies only to the admissibility of confessions in federal courts, effectively overruled the *Miranda* decision. *U.S. v. Dickerson*, 64 CrL 357 (February 17, 1999).

In *Dickerson*, the district court had suppressed the defendant's confession, which it found to have been obtained without first advising the defendant of his *Miranda* rights. The government sought reconsideration of the suppression hearing because of new evidence that would show compliance with *Miranda*'s requirements, and furthermore, that the defendant's confession was itself voluntary under Section 3501's guidelines. The Fourth Circuit agreed to hear the government's interlocutory appeal upon the district court's refusal to reconsider the issue.

Section 3501(a) states that a confession "shall be admissible in evidence if it is voluntarily given." Voluntariness is an issue for the trial court to decide; however, if the confession is admitted under 3501's standards, the jury will be allowed to hear relevant evidence regarding the issue of voluntariness. Section 3501(b) lists several factors to be considered by the trial court in making the voluntariness determination, and explicitly states that no single factor is conclusive of the voluntariness issue. The admonition of the defendant's rights is only one of these factors. Other factors include time elapsed between arrest and arraignment; whether the defendant knew of the nature of the offense for which he was being investigated; and whether counsel was, in fact, present during questioning and/or confession.

The majority of the Fourth Circuit found it "perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court." Moreover, in the final version of § 3501, Congress "did not completely abandon the central holding of *Miranda*, *i.e.,* the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination."

The Fourth Circuit acknowledged that a fundamental question is whether Congress has the authority to override *Miranda*'s irrebuttable presumption of involuntariness. *Miranda*'s warnings are not themselves a constitutional requirement, but merely "procedural safeguards." The decision invited Congress and the states to develop alternative ways of protecting the Fifth Amendment privilege. The Fourth Circuit observed that U.S. Supreme Court jurisprudence has long maintained the position that *Miranda* is a "prophylactic" measure, and the warnings are "not themselves rights protected by the Constitution." *Dickerson*, quoting *New York v. Quarles*, 467 U.S. 649, 654 (1984) and *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). As such, said the court, failure to give *Miranda* warnings does not by itself constitute a constitutional violation, and the rule created in *Miranda* can therefore be overridden by Congress. The court acknowledged, however, that providing *Miranda* warnings continues to be the "best way to guarantee a finding of voluntariness. Applying its holding to *Dickerson*'s case, the majority admitted the confession, finding that voluntariness had been established in the district court.

D.C. Circuit Finds No Constitutional Right to Interpreters for Non-English Speaking Prisoners at Housing, Disciplinary Hearings or in Seeking Medical Care

In *Franklin v. District of Columbia*, 64 CrL 288 (January 20, 1999), the U.S. Court of Appeals for the District of Columbia Circuit refused to find that prisoners with poor English are entitled to interpreters in all hearings regarding their housing and classifications. Furthermore, prisoners' rights are not violated if they are required to rely on other inmates or individuals outside the prison health care system when communicating with health care providers. The decision came as the result of a lawsuit by Spanish-speaking prisoners against city prison officials. The district court granted injunctive relief ordering the provision of office interpreters at all hearings and health care visits. It further agreed with the prisoners that the failure to provide translators at these hearings violated their due process rights. With respect to translators at medical care visits, the district court held that not providing interpreter services not only amounted to a violation of prisoners' Eighth Amendment protections, but also due process guarantees of confidentiality of medical information.

The D.C. Circuit disagreed with the district court's holding and vacated the judgment. The circuit court first held that the prisoners' claims relating to discipline, housing, and security classifications are controlled by *Sandin v. Connor*, 515 U.S. 472 (1995), which the district court failed to apply. Under *Sandin*, a prisoner has a due process right only if he faces a threat of restraint that "imposes atypical and significant hardship" beyond "the ordinary incidents of prison life." 515 U.S. at 484. The D.C. Circuit advised that with respect to disciplinary hearings, the proper way to conduct a *Sandin* inquiry is to consider each prisoner and the discipline at issue to determine whether the threat of restraint is sufficiently atypical and harsh. The district court failed to consider any of the prisoners' sentences, nor the changes they were facing in their conditions of imprisonment. The D.C. Circuit stated further that changes in location and classification, in the absence of some extraordinary situation, are "commonplace judgments" which do not implicate any due process liberty interests.

With respect to parole hearings, an intervening change in the law rendered most of the plaintiffs' claims moot. Under the new law, the D.C. Board of Parole is no longer responsible for conducting parole hearings. The other plaintiffs whose claims were not

made moot by the change could not establish standing to satisfy the D.C. Circuit.

Turning to the medical care issue, the D.C. Circuit declined to find that prison officials inflicted cruel and unusual punishment on the prisoners by failing to provide them with interpreters when they sought medical care. The court stated that the prisoners must first prove that the prison authorities acted with "deliberate indifference" to their needs. The court further found that the existence of a policy regarding meeting the needs of non-English speaking prisoners – even if the District had not enforced the policy perfectly – militated against a finding that the District was deliberately indifferent to the plaintiffs' medical needs. The D.C. Circuit was satisfied that the District had made good-faith efforts to assist its Spanish-speaking prisoners in getting medical treatment. Furthermore, the court found no evidence of intentional deprivation of medical care.

The D.C. Circuit also rejected the plaintiffs' last contention that the unavailability of translators forced them to disclose medical information in violation of their constitutional rights. The court was unpersuaded that any provision in the U.S. Constitution demands absolute medical confidentiality, and the prisoners failed to allege that they were entitled to choose not to disclose their medical condition to correctional employees.

Eighth Circuit Permits Use of Uncharged and Unconvicted Acts in Decision to Transfer Juvenile to Adult Court

In *U.S. v. Juvenile LWO*, 64 CrL 116 (November 18, 1998), the U.S. Court of Appeals for the Eighth Circuit stated that uncharged or unconvicted "bad acts" could not be considered part of a juvenile's prior "record" for purposes of deciding whether to transfer the juvenile to adult court under 18 USC 5032. Even so, such acts could be taken into consideration in assessing other factors under Section 5032, including the juvenile's age, social background, prior delinquency record, present intellectual development and psychological maturity, past treatment efforts and their effectiveness, and the availability of other programs to treat the juvenile's behavioral problems. Fundamentally, a court is authorized to order transfer if doing so is in the "interest of justice."

The district court in the present case ordered the defendant transferred to adult court on several shooting-related offenses after considering evidence of two other assaults, one of which was not charged, and one which was pending in a tribal court. The district court asserted that these other incidents were part of the juvenile's "prior delinquency record."

The Eighth Circuit disagreed, referring to a decision from the District of Columbia Circuit, *In re Sealed Case*, 893 F.2d 363 (1990), which held that the plain language of the statute forbids consideration of uncharged or unadjudicated conduct from being considered under the "prior delinquency record" factor in Section 5032. Both the Eighth Circuit and the D.C. Circuit in *Sealed Case* believed, however, that the statute does not prohibit consideration of unadjudicated acts when considering other 5032 factors such as the defendant's age and social background, present maturity, and responses to past treatment efforts. The Eighth Circuit stated further that the plain language of the statute is broad enough to encompass "evidence regarding almost any action, criminal or otherwise, the juvenile has taken." The court concluded that the district courts have discretionary authority to consider uncharged or unconvicted offenses under these factors within Section 5032, and must identify the appropriate factor and the reasons for believing that the evidence is relevant to its transfer decision.

Third Circuit Says Failure to Appoint Counsel for Evidentiary Hearing at Post-Conviction Not Subject to Harmless Error Analysis

The U.S. Court of Appeals for the Third Circuit held on January 22, 1999, that when a court fails to appoint counsel to an indigent defendant during an evidentiary hearing held in connection with a motion for post-conviction relief under 28 USC 2255, the error will not be subject to harmless error analysis. *U.S. v. Iasiello*, 64 CrL 332 (February 3, 1999).

The Third Circuit pointed specifically to Rule 8(c) governing Section 2255, which mandates appointment

of counsel when an evidentiary hearing is required for an indigent defendant. The government, although conceding that the defendant was entitled to appointed counsel, argued that counsel's presence would not have changed the outcome of the hearing. The Third Circuit disagreed, siding with the Fifth Circuit's position that a Rule 8(c) violation creates a presumption of prejudice. See *U.S. v. Vasquez*, 7 F.3d 81 (1993).

California Federal Court Confirms Prior Ruling that State Still Falls Short of Opt-In Requirements Under AEDPA

On December 24, 1998, Judge Thelton E. Henderson of the U.S. District Court for the Northern District of California confirmed that California's system for providing representation to indigent capital defendants did not satisfy the "opt-in" provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Ashmus v. Calderon*, 64 CrL 313 (January 27, 1999). *Ashmus* was originally the lead petitioner in a class action suit litigating the opt-in issue, in which Judge Henderson had initially held that California's scheme for appointment of counsel for indigent petitioners failed to satisfy the AEDPA's opt-in provisions. *Ashmus v. Calderon*, 935 F.Supp. 1048 (1996). Following the U.S. Supreme Court's February 23, 1999 ruling that a class suit was not the appropriate vehicle to address the issue, *Calderon v. Ashmus,* 118 S.Ct. 1694 (1998), *Ashmus* filed the instant habeas petition.

Chapter 154 of the AEDPA allows states to take advantage of favorable deadlines and expedited treatment for capital habeas corpus petitions, so long as the state meets certain requirements regarding the indigent defendant's access to appointed counsel. The court held that in order to apply Chapter 154's expedited review provisions retroactively, "California must show that qualifying procedures were in place when the capital defendant would have been entitled to the benefits prescribed by these procedures." The court further said that the state bears the burden of providing its strict, not just substantial, compliance with the terms of the opt-in provisions. California has what the AEDPA considers to be a "unitary review procedure" because it merges direct and collateral review. As such, it must demonstrate "by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings" and that this rule or statute provide competency standards for appointment of counsel.

Judge Henderson stated that California did not even establish a policy regarding the funding and appointment of appellate counsel to capital indigent defendants in collateral proceedings until 1989. Even after the 1989 policies, however, the court refused to find that the unitary review scheme satisfies the opt-in provisions. Specifically, the court found that the state's huge backlog in the appointment of counsel in death penalty cases fails to meet Chapter 154's standard that the state appoint counsel immediately upon a determination of indigency. Moreover, California's mechanism for the offer and appointment of counsel, because it was included only within the "Internal Operating Practice and Procedure" of the court system, was not sufficiently mandatory so as to meet Chapter 154 standards.

The court also observed that under the 1989 policies, no funds are provided for appellate counsel to investigate facts to support a collateral challenge unless some facts are already known to the counsel which would point to the existence of the claim. Judge Henderson stated that "it is imminently reasonable – indeed, a requirement of competent habeas representation – to diligently investigate the possible presence of meritorious habeas claims during direct appeal regardless of whether any 'triggering fact' initially justifies the inquiry." As such, the court found that California's procedures for compensation and payment of counsel do not qualify under Chapter 154.

Finally, the court adopted its original analysis concerning the state's contention that the competency

standards set out in Section 20 of the Standards of Judicial Administration Recommended by the Judicial Counsel, when combined with court rules advising the courts to consider Section 20 standards in appointing counsel. The state had argued that the combination of Section 20 and the court rules fulfill AEDPA's Section 2265(a)'s requirement that a "rule of court or statute must provide standards of competency for the appointment of counsel." The court pointed out that Section 20 is not a "rule of court or statute," it does not impose mandatory qualifications standards, and it also does not require counsel to have any habeas experience. Judge Henderson added an additional point, stating that Congress never intended the term "rule of court" to mean general advisory standards like those in Section 20. The court observed that California's Court Rules themselves even distinguish between a "rule of court" and standards as in Section 20; and, further, even the court rules' mandate to "consider" non-mandatory recommendations does not qualify as a rule of court.

California has recently made several significant changes in its capital-counsel scheme which came subsequent to the *Ashmus* petition. Among these include the adoption of Rule of Court 76.6, which establishes qualifications standards for counsel in death penalty appeals and habeas representation.

Arizona Court Resists Ninth Circuit Willingness to Accept Counsel's *Anders* Brief Containing Counsel's Specification of Meritless Appeals Grounds

In *State v. Clark*, 64 CrL 346 (February 10, 1999), the Arizona Court of Appeals, Division One, held that an indigent appellate defendant's interests are better served by appointed counsel if counsel's brief does not contain those appeals grounds that counsel considers meritless pursuant to *Anders v. California*, 386 U.S. 738 (1967). This holding is not consistent with the Ninth Circuit's position in light of its recent holding in *Robbins v. Smith*, 152 F.3d 1062 (CA 9 1997).

Judge Michael D. Ryan, in the January 19, 1999 decision, stated that Anders poses a fundamental conflict between compliance with the Constitution's guarantees to the defendant and the appellate attorney's ethical obligations. In essence, said the court, counsel's *Anders* brief may ultimately be a brief against his or her own client. The states are responsible for establishing the proper ethical rules for attorneys within the U..S. Constitution's guarantees of the rights to counsel, equal protection, and due process. Within this authority, Arizona's procedures for filing *Anders* briefs is sufficient. Specifically, Arizona permits counsel to file a brief detailing the factual and procedural history of the case. Counsel submits the brief to both the court and the defendant so that the defendant may file his own brief if he wishes. The court reviews the record for arguable issues, upon which the court will instruct counsel to brief the issue further. Counsel can withdraw under *Anders* once the court determines that counsel has conscientiously reviewed the record, the court itself has reviewed the record, and no reversible error has been suggested.

This procedure, said Judge Ryan, is constitutionally adequate to protect the indigent defendant's rights to counsel, equal protection and due process, while still preserving the attorney-client relationship. Specifically, the brief required by the Arizona procedure ensures that at least one, and possibly four, lawyers will scrutinize the record for possible error. Additionally, the defendant may still seek post-conviction relief if he is not satisfied that counsel provided effective assistance on appeal.

Indiana Permits Ineffectiveness Claims to be Raised for First Time in Post-Conviction Petition, Regardless of Whether Defendant Could Have Raised Issue Earlier

The Indiana Supreme Court recently announced that ineffectiveness claims could be raised for the first time in post-conviction proceedings, even when the claims might be resolved on the face of the trial record. *Woods v. State*, 64 CrL 216 (December 16, 1998). The decision came in an effort to clarify the state's rule concerning whether an ineffectiveness claim is waived if not initially raised on direct appeal. Allowing ineffective assistance claims at post-conviction, said the court, was the best approach

because the complicated nature of these claims made a strict rule requiring certain claims to be raised on direct appeal or lost forever too difficult to apply.

The defendant in *Woods* did not raise a claim of ineffective assistance of counsel on his direct appeal, which was then treated as a waiver of the issue in his petition for post-conviction relief. Justice Theodore Boehm stated that the Indiana Supreme Court's failure to fully resolve the issue was partially due to the complex nature of the ineffective assistance of counsel claims. Justice Boehm observed that ineffectiveness claims often take on many varied forms, and that three main categories of ineffectiveness claims can be identified. There are claims which can be decided on the trial record alone; others require some additional development of the record, e.g., to assess attorney performance or to determine prejudice. Finally, some claims are a "hybrid"of issues arising out of the record, but whose evaluation requires some further evidentiary development to rebut the presumption of attorney competence. Given these possibilities, the court refused to adopt an inflexible rule, choosing instead to allow ineffectiveness claims to be raised for the first time at post-conviction, regardless of whether the claim rests solely or only in part upon the existing trial record. The defendant would still retain the option of litigating an ineffectiveness claim on his direct appeal.

Even given its flexible approach, the court acknowledged that many defendants will generally not choose to raise an ineffective assistance claim on direct appeal. This is because doing so will preclude collateral review of the claim, and the defendant will not be permitted to divide his specific allegations between proceedings. The court stated that "[a]s a practical matter, this rule will likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal."

In reaching its decision, the Indiana Supreme Court declined to adopt the state's approach, which would require the defendant to bring all ineffectiveness claims on direct appeal or not at all. The court stated that many cases will involve trial records which cannot sustain the claim, or where the basis of the claim is not apparent from the record. Moreover, the federal habeas corpus experience advises against this harsh approach. Particularly because a state court's finding of waiver generally precludes a federal court from hearing the defendant's claim, "procedural fairness" demands that waiver not be implied unless the defendant has had a meaningful opportunity to litigate the claim.

New York Court of Appeals Invalidates Portion of State Death Penalty Law Which Makes Eligibility for Death Contingent Upon Exercise of Right to Jury Trial

On December 22, 1998, the New York Court of Appeals struck down provisions CPL 220.10[5][3] and 220.30[3][b][viii] of the state's 1995 death penalty statute, because they forbid a defendant from entering a guilty plea to first-degree murder, except where a non-capital sentence has been agreed upon. *Hynes v. Tomei*, 64 CrL 270 (January 13, 1999). The statute generally permits the prosecution to file a notice of intent to seek the death penalty for a defendant charged with first-degree murder. Where the case goes to the jury, the possible punishments include the death penalty or life imprisonment without parole. The court's main objection was that the force of these two provisions created a situation where a first-degree murder defendant could ensure a maximum sentence of life in prison by pleading guilty, but where a defendant who invokes his right to a jury trial continues to be exposed to the possibility of a death sentence.

In reaching its holding, the court relied on the U.S. Supreme Court's decision in *U.S. v. Jackson*, 390 U.S. 570 (1968). *Jackson* invalidated a federal kidnaping law which had allowed the death penalty to be imposed only upon jury recommendation; in essence, a defendant who was convicted under the statute by guilty plea was not death eligible. The *Jackson* opinion observed that the statute's language encouraged guilty pleas and jury waivers, and therefore impermissibly burdened defendants' rights to

a jury trial and against self-incrimination. Whatever rationale supports limiting imposition of the death penalty to cases in which the jury recommends death, said the *Jackson* Court, the purpose of such a rule could not outweigh the resulting chilling effect on a defendant's exercise of his or her constitutional rights.

Chief Judge Judith S. Kaye found that the New York death penalty statute was much like the federal kidnaping statute in that it explicitly provides for the death penalty only upon a jury verdict. Thus, only those defendants who choose to exercise their Fifth and Sixth Amendment rights expose themselves to the possibility of death. The court refused to characterize the New York statute as a "codification" of permissible plea bargaining; the point, said Chief Judge Kaye, is simply that statutes may not "needlessly" encourage guilty pleas by unduly burdening constitutional rights. The court also distinguished *Corbitt v. New Jersey*, 439 U.S. 121 (1978), in which the U.S. Supreme Court allowed a statute which offered the defendant the option of escaping the most serious punishment possible by pleading guilty. The reason for this is that the *Corbitt* statute offered only the possibility of avoiding the maximum punishment, but the New York statute *mandates* a lesser sentence for those who plead guilty, while setting aside the death penalty for those who exercise their constitutional right to a jury trial.

With only the offending provisions removed, the capital punishment statute as a whole was saved – a result the court believed would have been preferred by the legislature. Without the stricken portions of the statute, the death penalty law now forbids a defendant to plead guilty to first-degree murder while a notice of intent to seek the death penalty is pending. The court acknowledged that this would restrict prosecutors and defendants both, and perhaps even present "fewer opportunities to avoid the possibility of the death penalty." Nonetheless, the court believed that pleas remained a viable possibility where a notice of intent to seek death is not at issue, and that the defendant continued to have the option of persuading the prosecution to permit a plea to a lesser offense.

Tennessee Constitutional Due Process Requires Defendant's Waiver Before Trial by Non-Lawyer Judge for Offense Punishable by Incarceration

The Tennessee Supreme Court held on October 12, 1998, that the state constitution's due process guarantee forbids a non-lawyer or lay judge from presiding over a trial involving an offense punishable by incarceration. *White House, Tenn. v. Whitley*, 64 CrL 88 (November 4, 1998). A defendant may, however, waive the right to be tried by a lawyer-judge.

Relying in part upon its own decision in *Anglin v. Mitchell*, 596 S.W.2d 779 (1980) (holding that due process bars non-lawyer judges from presiding over juvenile proceedings where the juvenile might be incarcerated or otherwise restrained), the state supreme court observed that "[s]ince our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise is a denial of due process." The majority also noted that "the increased complexity of criminal law and criminal procedure has greatly enhanced the probability that a layperson judge will be unable to deal effectively with the complexities inherent in a criminal trial."

The Tennessee Supreme Court, while confirming that the approximately 100 non-lawyer judges in the state may continue holding office and exercising their duties, made the observation that the historical reasons for allowing non-lawyer judges to try criminal cases in Tennessee (e.g., few dense population centers, poor transportation and communication technologies) were no longer compelling. Justice Janice Holder dissented, stating that the court should have deferred to the legislature's finding that some courts need not be presided over by licensed attorneys.

Texas Court of Criminal Appeals Rejects View that Federal Constitution Sets "Floor" of Protections Below Which States May Not Fall; Finds No Warrant Requirement in State Constitution's Search and Seizure Provision

In *Hulit v. State*, 64 CrL 265 (January 13, 1999), the Texas Court of Criminal Appeals rejected a defendant's claim that his search was unconstitutional because it was not supported by a warrant and did not fall within any of the recognized warrant exceptions. In so holding, the court stated that the provision of the Texas Constitution which deals with searches and seizures, Article I, Section 9, does not impose a general warrant requirement as does the Fourth Amendment to the United States Constitution.

The police in *Hulit* had been responding to an ambulance call that a person was possibly suffering a heart attack in a vehicle. Upon finding the defendant unconscious and slumped over the steering wheel, the police asked him to step out of his car and subsequently uncovered evidence that resulted in the defendant's third conviction for drunk driving. The defendant unsuccessfully moved to suppress this evidence. On appeal, the defendant argued that the state constitution's search and seizure provision did not recognize a community caretaking exception to the warrant requirement.

The majority opinion, written by Judge Paul Womack, stated that Article I, Section 9 contains two separate and independent clauses: one which requires "reasonable" searches and seizures, and one which requires that warrants be particularized and supported by probable cause. Judge Womack emphasized that the independence of these two clauses means that a search and seizure does not require a warrant in order to be reasonable. The Fourth Amendment's warrant requirement existed only to prevent abuses of British general warrants in colonial times, and, therefore, the U.S. Supreme Court's decisions which state that the Fourth Amendment intended to impose a warrant requirement generally "are not well founded in historical fact."

The majority remarked that "[t]here are so many exceptions to the warrant requirement that most searches and seizures are conducted without warrants and justified under one of the exception. Such a model not only makes a mockery of the supposed requirement, it interferes with a more fine-tuned assessment of the competing interests at stake." The court then announced that Texas' approach would be one that merely evaluates the reasonableness of a search or seizure under the totality of the circumstances. Applying this rule, the court found that the defendant's objection to his search and seizure was not persuasive.

The dissent argued that the Supremacy Clause of the U.S. Constitution forbade the state from providing any less protection to its citizens than does the federal government. The majority disagreed, stating that

> "Because of the Supremacy Clause[...], a defendant who is entitled to claim the protection of a federal provision may receive a greater protection from that floor than the greatest protection that the ceiling of the Texas Constitution would give him. But that does not mean that the Texas Constitution has no ceilings that are lower than those of the federal Constitution."

Judge Sharon Keller, in her concurrence, explained further that this case was not about the Fourth Amendment. Judge Keller believed that the dissenters were confused about "two distinct concepts: (1) the possession of fewer rights by a state's citizenry than the United States Constitution confers, and (2) the recognition that a state constitutional provision confers less protection than a counterpart federal constitutional provision." According to the concurrence, only the first situation poses Supremacy Clause problems.

Trial Courts Obliged to Investigate Indigent Defendant's Request for Substitution of Appointed Counsel; Reversal Required if Actual Conflict Existed and Counsel Should Have Been Replaced, Says Utah Court of Appeals

In *State v. Vessey*, 64 CrL 122 (November 18, 1998), the Utah Court of Appeals found that the trial court erred by failing to inquire into the indigent defendant's motion for substitution of counsel. The defendant's motion asserted that his appointed attorney had refused to prepare for trial, and that they were irreconcilably at odds. On appeal, the state conceded that the trial court abused its discretion in denying the defendant's request without any investigation into his allegations, but argued that reversal was unwarranted in the absence of a showing that counsel's performance was constitutionally ineffective.

Judge Judith M. Billings acknowledged the state's argument as one method in which courts approach the matter, but pointed out that other courts have held that a failure to investigate the basis of a motion for substitute counsel is reversible error per se. The court agreed with the latter approach to the extent that the failure to investigate constitutes error per se. Judge Billings would not mandate reversal as a matter of law, however, choosing instead to require reversal only if the reviewing court finds (1) that an actual conflict existed between counsel and the defendant, and (2) that the conflict was serious enough to have warranted substitution of counsel. The reviewing court should not have to find constitutional ineffectiveness in order to justify reversal.

This "middle ground" approach, said Judge Billings, would reduce the likelihood of a post-conviction claim of ineffective assistance of counsel, and the requirement of a pre-trial inquiry would create a record for appeal. Further, the "per se error" approach would encourage trial courts to undertake pre-trial inquiry into defendants' motion for substitute counsel with the appropriate timeliness and attention.

California Court of Appeals Finds Counsel Ineffective for Failure to Challenge Unlawful Arrest

On November 10, 1998, the California Court of Appeals for the First District held that defense counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to challenge the defendant's arrest for conduct which is not a crime under California law. *People v. Denison*, 64 CrL 155 (December 2, 1998). The court's decision came after a re-hearing of its previous dismissal of the defendant's direct appeal. *See* 63 CrL 186 (April 1998).

The defendant in *Denison* was driving a vehicle in which the passenger was a probationer subject to warrantless searches. The police had specifically stopped the defendant's car for the purpose of conducting the probation search of the passenger, which did not require a warrant or probable cause. The search of the car produced a bag containing Valium, but no prescription. Both men were arrested upon this discovery, although simple possession of Valium without a prescription is not prohibited under California law. The resultant search of the defendant further uncovered illegal narcotics.

Initially, the court rejected the defendant's appeal on the grounds that (1) the police did not need independent justification to make the initial stop because the defendant's passenger was subject to a probation search condition; and, (2) at the time, the police had a reasonable basis for believing that the bag containing the Valium was under the passenger's control and was therefore a legitimate object of the probation search. Although the court held fast to its earlier findings, it agreed that the defendant should prevail in his ineffectiveness claim given his attorney's failure to challenge the validity of the Valium arrest.

The prosecution's argument relied on the fact that possession of Valium without a prescription is clearly a federal offense, and *Gates v. Superior Court*, 193 Cal.App.3d 205 (Calif CtApp 1987) suggests that local police could enforce federal statutes in certain circumstances. The court disagreed, stating that no federal involvement existed whatsoever, nor did the police mention the violation of federal law at the time of arrest. Moreover, the case does not involve an offense punishable only under federal law. The court observed that California's own extensive narcotics

statutory scheme has been modified time and time again to become more consistent with the federal scheme, but that despite this effort to emulate federal law, the California Legislature "intentionally omitted Valium from its simple possession statute..., which demonstrates that our legislature intended law enforcement officers not make arrests for simple possession of Valium in California."

Granting the defendant relief, the court further found that defense counsel's failure to raise this issue did, in fact, prejudice the defendant in satisfaction of *Strickland*'s second prong for ineffectiveness.❖

JOB OPENINGS

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

NLADA Seeks Senior Manager for National Defender Clearinghouse

The National Legal Aid and Defender Association (NLADA) is looking for a public defender manager to administer the National Defender Clearinghouse. The Clearinghouse, an office of NLADA, designs and provides training, publications and technical assistance for managers of public defender programs. Potential candidates should possess seven years public defender experience, including at least three years as chief executive or manager of an indigent defense program or association. The salary will be $65,000 + DOE. Interested individuals should contact NLADA at 1625 K Street, #800, Washington, D.C. 20006.❖

NEW PUBLICATIONS FROM THE SPANGENBERG GROUP

Over the past few months, we have received many inquiries for past TSG reports on various topics, including: capital case representation, court-appointed counsel fees, and state-by-state indigent defense system comparisons. In an effort to keep our subscribers up to date on our latest publications as well as the scope of services The Spangenberg Group can provide, each issue of *The Spangenberg Report* will now present a brief synopsis of our latest reports and projects.

The Spangenberg Group Publishes Reports on Pierce County (Tacoma), Washington Indigency Screening and Cost Recovery Practices, and Jail Over-Crowding Policies

In the past four months, The Spangenberg Group completed two reports on behalf of Pierce County (Tacoma), Washington. In June 1998, Pierce County contracted with The Spangenberg Group to evaluate the county's indigency screening and cost recovery practices. In Pierce County, indigency screenings are conducted by Pre-Trial Services (PTS), a unit of the Sheriff's Department, while the responsibility of cost-recovery is shared by PTS, the courts, the county Office of Budget and Finance, and the state Department of Corrections.

In the final November 1998 report, "An Assessment of the Pierce County, Washington Indigency Screening & Cost Recovery Program," the term "cost recovery" is defined as an effort to recover all or a portion of the cost of court-appointed counsel through: (1) an up-front administrative fee that criminal defendants are asked to contribute during the indigency screening process; (2) a promissory note signed by a defendant or the parent/guardian of a juvenile defendant prior to sentencing; and (3) a court-ordered cost imposed at the time of sentencing called "recoupment."

The Spangenberg Group found that Pierce County's cost recovery program was a money-losing proposition, most significantly because of the lack of a unified, comprehensive collection process.

Additionally, many systemic concerns were found to affect the indigency screening and cost recovery program, including: Pierce County's jail is operating under a federal court order due to overcrowding; the number of defendants held in-custody prior to arraignment in the county is very high; and, the PTS unit is housed under the auspices of the Sheriff's Department.

The report makes a series of recommendations to improve Pierce County's indigency screening and cost recovery practices, including: move Pre-Trial Services to another department other than the Sheriff's Department; expand PTS responsibilities to include a broader array of pre-trial duties; create an up-front administrative fee; and, address other systemic issues in the Pierce County criminal justice system from a system-wide perspective.

Based in part on this final recommendation, Pierce County again retained The Spangenberg Group to study criminal justice system policies and practices that impact the number of persons held in the Pierce County jail. The project was devised as a short-term planning study to identify issues that should be considered in a major evaluation planned for 1999. Our report, "Jail Issues Planning Study: Pierce County, Washington," was presented to the Pierce County Council in January 1999, and offers insights on how to begin to address the jail-overcrowding situation.

For copies of the Pierce County reports, please call or e-mail us.❖

NEW PUBLICATIONS

Incarceration Rates Among African-Americans Continue to Rise

A recent analysis of U.S. Department of Justice statistics, released by the National Center on Institutions and Alternatives (NCIA), has determined that, by the year 2000, there will be one million African-American adults in prison. The data show that approximately one in ten African-American men will be behind bars at the turn of the millennium. These figures have far-reaching social consequences, not just for the individuals in prison and the people they leave behind, but the justice system as a whole. On a societal scale, this huge number of African Americans in jail raises questions about the justice system and whether there are inequities within it.

Placement in prison ensures a separation from mainstream society. Incarceration can mean the loss of voting rights, the disintegration of families and communities, and decreased chances of finding a decent job. Nine states have exercised their constitutional discretion to strip convicted felons of the right to vote; currently in those states 25% of all black men cannot vote due to this rule. These men have lost the basic right of American citizens. Adults in prison are unable to care for their children, contribute to the support of their families, or take part in any sort of community life. As a result, they become further and further removed from the society which sets the rules and governs the very system which sentences them to prison, and it becomes easier for those outside the prison system to generalize about those within it.

The NCIA study found that many more black than white Americans have been sent to prison since the 1950s, when Caucasians comprised about 65% of all state and federal inmates, and African-Americans made up 35%. Today it is Caucasians who constitute 35% of the prison population. Explanations regarding this disproportionate incarceration rate differ. Some experts point to the lack of opportunity provided to black Americans growing up in poor areas. Commenting in *The Boston Globe* on the NCIA findings, Robert Woodson, Sr., president of the National Center for Neighborhood Enterprises, a non-profit organization which works with low-income black communities, noted, "The reason young men engage in criminal behavior is not just for money, it is

to make a name for themselves, to have some expression of worth, even if that expression is self-destructive."

Others believe that bias within the criminal justice system is responsible for this shift in prison demographics. A 1998 University of Georgia study found that African-Americans received sentences an average of six months longer than whites for the same crime, even despite sentencing guidelines which were designed in part to eradicate racial bias in sentence proceedings. In his book "No Equal Justice", Georgetown University Law professor David Cole noted that varying sentences for drug use also highlight a racial difference within the criminal justice system. He pointed out that more African-Americans are convicted of crack cocaine offenses than powder cocaine offenses, while more Caucasians have been convicted of powder cocaine offenses. Although both forms of the same drug, crack cocaine offenses carry mandatory sentences approximately 100 times harsher than those for powder cocaine offenses.

The increased focus on punishment for drug offenses, as well as the lack of opportunities available to black Americans and the trend of white authority figures to view African-Americans as suspects, may lie behind the disproportionate numbers of blacks in United States prisons. When the number of African-Americans in prison reaches 2000, it will be a testament not only to the loss of these potentially productive members of society, but also the changing face of the criminal justice system.❖

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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:

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