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Mental Health and Indigent Defense

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Increasingly over the last thirty years, researchers and practitioners have commented on the criminalization of the mentally ill. Studies suggest that more than 50% of prison and jail inmates have had some form of psychiatric disorder during their lifetimes.[1] Nearly 15% of them are estimated to have severe psychiatric disorders (schizophrenia, bipolar disorder, or major depression).[2] Substantially more have been sexually or physically abused during their lifetimes. While the vast majority of mentally ill people are not violent, it is now generally accepted that mental illness is a significant risk factor for involvement in the criminal justice system. The criminal justice system is coming to play a larger role in the management and care of the mentally ill, and this is increasingly spawning innovative responses by some defender programs.

Mental health issues pervade all aspects of indigent defense, from ascertaining culpability to argument at sentencing to developing a working relationship with the client, and increasingly, to seeking access to treatment. In addition, the use of experts and assessing the reliability of mental health assessments are becoming routine practices for many indigent defenders.

As the availability of services and access to them have declined for the poor in recent years, and as "quality of life" crimes are being prosecuted more aggressively, the involvement of people with mental illness in the criminal justice system can be expected to increase. On an average day, Los Angeles County Jail holds between 1,500 and 1,700 inmates with severe mental illness, most detained on minor charges. The National Alliance for the Mentally Ill (NAMI) says that on any given day there are roughly 210,000 people with severe mental illness in U.S. jails or prisons, compared with 70,000 in public psychiatric hospitals (approximately 30% of whom are forensic patients).

In a recent report, the Blue Ribbon Committee on Indigent Defense Services of the National Legal Aid and Defender Association examined the functioning and reform of indigent defender programs. Mental health issues and the necessity of working with social service and mental health professionals played an important part of the Committee's recommendations. The Committee recommended increased mental health training for lawyers, investigators, sentencing advocates and paralegals; training of non-legal staff to identify diversion programs and other community services and needs; and the promotion of the use of social service and other interdisciplinary resources. The Committee further advocated for systematic efforts to advance the partnership between law and social sciences, including developing special social service resources for defender offices and assigned counsel, increasing training, and developing skills and tools for better assessment of clients' mental health problems.

Mental Health and Client Advocacy

Some mental illnesses are difficult to recognize, both for the attorney and for the judge and/or jury. Working effectively for clients with mental illness requires being able to first identify mental illness and then to overcome both personal and trier of fact misperceptions about mental illness. Mentally ill clients can pose special problems for the defense team in developing a working relationship with the client, in receiving assistance in the preparation of a defense, in conforming behavior in court and during interviews, and in requiring special accommodation such that the client can understand the criminal justice process. Developing a relationship and challenging unreliable assumptions about mental illness are necessary pieces of effective representation and advocacy.

Mental illness most obviously affects all areas that relate to *mens rea* issues: the voluntariness and reliability of confessions, waivers of rights, competence to stand trial, level of culpability and guilty pleas. The client may have given a statement to the police which can be suppressed because of the underlying mental illness which rendered the waiver of counsel unconstitutional. Some statements may also be challenged because some people with mental illness mask that illness through attempts to please the questioner and through mirroring back to the questioner the language and facts presented. This can result in the client agreeing to statements made by investigating officers despite non-comprehension of the question and no independent knowledge of the underlying facts. This is often seen in people with mild mental retardation.

Even when a client is not incompetent to stand trial, mental illness must be assessed for culpability relating to the crime itself and the client's ability to plan and carry out an offense. Particularly in multiple defendant cases, questions should be raised concerning the client's mental capacity to plan a course of criminal conduct and carry it out, and to direct others during the course of that conduct. Alternatively, some clients will be unable to meaningfully understand the consequences of their actions as a result of mental illness.

The mentally ill client may be unable to assist in the preparation of his or her own defense (for instance, because of memory impairments or dissociative periods) or may require special accommodations to be able to understand. The same attempts to "please" interrogators may also be at play when the defense attorney interviews the client. Without an understanding of the behaviors associated with some mental illnesses, client inconsistencies in memory, affect, or comprehension may appear to be deception or resistance. Prior to devising an affirmative defense, a complete analysis of mental illness may offer the attorney a better perspective on the reliability of the defense.

Traditionally, evidence of mental illness has been presented at sentencing and mitigation phases of trials, and of course can have a compelling role at those times. Part of explaining the client's mental illness to the judge and jury is for sympathy, but it also can serve to change the decision-maker's impression of the client. A client taking psychoactive medication may appear stone-faced or uncaring or respond inappropriately during court, and defenders must take care to humanize the client and explain these behaviors for the judge and jury.

Further, people have biases and expectation about what mental illness "should" look like ("Is he drooling?") that the attorney must work to change, both to humanize the client and by way of explanation of the client's behavior. These same biases might be shared initially by un-trained defense team members.

Mental illness can have a unique role in juvenile cases as well, because the treatment and developmental issues are different for juveniles than for adults. Teenagers may express mental illness differently than adults and the opportunity for successful treatment protocols may also be different. In addition, juvenile transfer hearings in some jurisdictions offer a "pre-trial" opportunity to present a compelling case to keep youth out of adult court jurisdiction.

Mental illness can also play an important role in testimony, both of the client and in cross-examination. Prosecution witnesses may have mental illnesses which render their testimony suspect or which raise doubt about the source of their knowledge. Recognition of signs of mental illness and background investigation on

the mental status of witnesses can lead to critical information for cross-examination.

The prosecution may also use experts on issues that relate to mental illness (either directly or through non-expert lay witnesses such as police officers). Cross-examination of these witnesses on issues of mental status (their own or the client's) can help the decision-maker assess the strength and reliability of prosecution evidence.

Finally, integrating mental health consultants and experts into the defense team, as described below, can provide critical assistance to the team in devising strategy, deciphering prior or hostile assessments, and working with the client on a day to day basis.

Mental Health and Community

Increasingly, criminal clients are in need of social service treatment and referrals, and civil advocacy related to criminal charges. Mental health issues may be one way in which defender services can better build strong support within the community. As a result of the need to familiarize themselves with the mental health issues relating to their clients, indigent defenders are in a unique position to build links to the community. This includes links to social service agencies and advocacy groups, but also, as the example of Broward County shows (see accompanying article), it may include links within the criminal justice system that allow for the development of consensus approaches to certain types of cases.

Indigent defense organizations can establish relationships with community based prevention and intervention programs (substance abuse programs, mental health programs, street law programs, housing improvement, job training). Working with community based social service agencies can offer numerous benefits both to the advocate community and to the client. Indigent defense staff who have had the opportunity to build relationships with community based organizations have uniformly expressed the increased morale and personal benefits they receive in addition to the case-specific benefits their clients receive.

Similarly, many diversion programs and alternative sentences require community involvement and support. Strong defender integration into the community can assist with education and outreach efforts necessary to expand such options, as well as concerning mental illness and its relation to criminal prosecution generally. At times, defender organizations may be able to coordinate pre-arrest intervention that mediates issues related to mental illness prior to a client's involvement in the system. For instance, behaviors stemming from particular mental illnesses which neighbors may at first perceive as requiring police involvement may be remedied short of arrest through intervention by credible community members (including defender staff).

Finally, better integration of mental health issues into the representation of indigents will allow for better advocacy on behalf of clients and the community. An increasingly large percentage of indigent clients have significant mental health problems, and these clients have few other advocates available once they enter the criminal justice system. As more and more mentally ill people are swept up into the criminal justice system, indigent defense agencies will have to continue to innovate their practices.❖

Serving Clients with Mental Illnesses: Three Innovative Programs

Indigent defense agencies are taking innovative approaches to working with mentally ill clients both out of necessity and as good advocates. Below are brief descriptions of three innovative programs that allow defender services to better serve mentally ill clients.

1) *Connecticut Public Defender*

In the early 1970s, Connecticut became the first state public defender to incorporate full-time social work services into their attorney staff. Each year since then, through use of federal grants and subsequent

state matching grants, the in-house social work staff has increased. Currently, the public defender program has social worker coverage for each of its 37 offices and every court in the state. In each grant proposal, the public defender has requested the hiring of a new social worker for each new attorney hired. While this has not always been funded, the office has been very successful in retaining social work positions when the state legislature is asked to continue positions after the grant period has ended.

Mary Hoban, the Connecticut public defender's Chief Social Worker, has been very successful in building strong relationships with the state's mental health agencies. Part of this cooperation has resulted in conducting joint training sessions for attorneys on mental health issues. These open training sessions supplement in-house training on specific mental issues, presented by the social work staff for attorneys.

In addition, Connecticut has begun an innovative mental health diversion project that aims to deal with the revolving door problem for people with mental illness, where they move repeatedly through the criminal justice and mental health systems. In cooperation with the state's mental health authority, a clinician and a public defender social worker in Hartford review the daily court docket before court convenes to see if there are people who are already under the care of the mental health authority. If so, these people are often diverted off the docket back to care. In some cases they will still face the criminal charges, but they will also have been identified and referred for mental health treatment.

The mission of the social workers in defender offices can at times be different from that of those hired by social service agencies or those hired by the court. The goal of public defender social workers is to enhance the legal representation by assisting in the identification of clients' needs, helping the attorney understand and interact with the client better, working in the development of case strategy, assisting in the development of less restrictive treatment and sentencing alternatives, and presenting expert testimony concerning the functioning of the client.

In addition, because the social workers are part of the defense team and assigned to specific courts, they can develop relationships with the court and prosecutors which enhance their credibility in making recommendations and providing evidence. In some instances, judges have suggested that a client be seen by the public defender's social work staff prior to going forward.

2) *Broward County, Florida: The Mental Health Court*

Broward County established the first of its kind Mental Health Court in 1997 in an attempt to divert the mentally ill who commit minor offenses to treatment. The Mental Health Court is one project of the on-going County Mental Health Task Force, a collaboration of the Judiciary, Public Defender's Office, State Attorney's Office, the Broward County Sheriff's Office and mental health providers. The Task Force was established in an attempt to solve issues affecting the mentally ill in the criminal justice system.

Doug Brawley, the Chief Assistant Public Defender for Broward, said that the Task Force has given him a chance to work with prosecutors and judges in a non-adversarial way on an issue that impacts them all. The Task Force participants have been able to accomplish their work based on a common-ground view that non-violent mentally ill offenders do not belong in jail; they need appropriate services and treatment. Brawley described his work with the Task Force as "rejuvenating" after 18 years as a trial attorney with the Public Defender Office.

Among the innovations the Task Force has implemented is the specialized court that adjudicates misdemeanor cases for the mentally ill. The goals of the Court are to create successful interactions between the Justice and Mental Health Systems; to ensure effective advocacy for mentally ill defendants; to determine the most effective, least restrictive treatment options; to monitor delivery of mental health services; to solicit participation of mental health consumers and family members in adjudication; and to divert mentally ill defendants to community based mental health services.

Referrals to the mental health court are made through an administrative order, and defendants charged with misdemeanor offenses (excluding driving

under the influence and domestic violence cases) may be eligible for referral. Following an arrest, the client is brought to a first appearance court at which time a request for referral can be made by the public defender, generally based on information contained in the police reports or observations. Cases that are referred from first appearance court are reviewed by the Mental Health Court judge to determine if they are appropriately before her. The Court helps find treatment programs and services for defendants. As in other specialized courts, the judge gets to know many of the defendants and brings an expertise in mental health law to the criminal setting.

Public defenders play a significant role in getting clients referred. While continuing to advocate for the client, public defenders are also now identifying which clients would benefit from a referral. The identification of mental illness is a new undertaking for many defenders, requiring new skills in recognizing manifestations of mental illness. It has also meant wider cooperation with clinicians at the first appearance court to assist in evaluating the client. The Public Defender's office also has a social worker on staff to assist counsel at the Court and uses doctoral students as interns to assist in identification of clients who would benefit from referral.

The introduction of the Mental Health Court necessitated additional in-house training for defenders as well as training for judges, police and probation officers and local attorneys. The training has included awareness about the criminalization of mental illness and has relied on mental health consumers to help raise awareness concerning the needs of the mentally ill in the criminal justice system.

The Public Defender's Office indicated that prior to the creation of the Court, mentally ill people arrested for nothing more than the manifestations of their mental illness would "languish and deteriorate in jail for long periods of time" for crimes that the non-mentally ill would be held only overnight. This happened because of the increased difficulty in processing cases, the client's inability to assist in resolution of the case or to take advantage of early adjudication offers, or as a result of the exacerbated symptoms of mental illness induced by incarceration. The Mental Health Court, and the increased role of public defenders in seeking referrals to the Court, is seeking to divert mentally ill defendants to treatment. The Court currently handles two or three cases per day.

3) *Neighborhood Defender Service*

The Neighborhood Defender Service (NDS), based in New York City's Harlem community, is an example of how a team can be effectively put together to litigate and to improve defender-community interaction. NDS was founded in 1990 as a community based defender office in Harlem. The office is located in the Harlem community NDS serves, and this has encouraged neighborhood residents to come to the office and specifically request to be represented by the office. This results in earlier client contact and allows for more timely collection of information. A key part of the approach to community representation has permitted NDS to better recognize, screen and divert mentally ill clients.

NDS uses an holistic approach to serving clients, where each NDS client is represented by a team of social workers, investigators, support staff and attorneys. NDS's team approach means that all members of the team are equally familiar with the facts of the case and the issues. This has meant that when staff attorneys are in court, the other members of the team can answer questions from clients, and from clients' family members, and make referrals to necessary services. The team approach also promotes a sense that all team members – attorneys and non-attorneys alike – play a significant role in the representation of individual clients.

In part, NDS describes its holistic approach as meaning that the office deals with the whole host of problems that a client may face during the case and after: housing, addiction, mental health, education or social services needs. One of the innovations of NDS is that the office continues to work with clients in the

community after resolution of a case, which is likely to pay off in prevention of additional cases.

During the past year, NDS has reached an agreement with the Columbia University School of Social Work to have interested social work students placed at NDS. The students gain experience interacting with clients and in helping clients find appropriate community services. Zakiya Jones, M.S.W., the supervising social worker at NDS, said that these students help in the assessment and screening of clients for mental illness as well as other social service needs.

Staff training in the identification of mental illness is another key component of the holistic approach at NDS. Jones conducts in-house trainings for staff on mental health issues and in what to look for during initial client interviews. This has included training on types of mental illnesses, types of medications used to treat the mentally ill and signs and symptoms to look for during initial interviews. During an attorney's first interview with a client, attorneys ask questions about current or past history of mental illness. This routine screening has led to early identification of client needs, which has been crucial to NDS's success in seeking alternative sentences, treatment and diversion, and making referrals for services.

This early identification has produced notable successes. In one case, an NDS client who had not yet been indicted was referred within NDS for a psychosocial evaluation. He had become a client because of a sexual fetish allegation. The client appeared withdrawn, making no eye contact and crying during the interviews with his defense team. During the psychosocial evaluation, the client stated that he had a prior conviction for a similar offense but had never received treatment, and that he very much wanted help. That assessment indicated that the client had an obsessive-compulsive disorder as well as severe depression. NDS made referrals so that the client could receive appropriate services, including, a day program to learn to live with his illness, a private therapist, a support group for people with similar psychiatric illnesses, and to a clinic that works on anxiety disorders. The client now makes court appearances every three months to up-date the court on his progress and continued work. He has remained unindicted and continues to call NDS to keep them updated on his progress as well.

1. Teplin, LA. Psychiatric and substance abuse disorders among male urban jail detainees. American Journal of Public Health 84(2) 290, 1994; Teplin, LA, et al. Prevalence of psychiatric disorders among incarcerated women. Archives of General Psychiatry 53:505, 1996. Robins LN, et al. Lifetime prevalence of specific psychiatric disorders in three sites. Archives of General Psychiatry 41:949, 1984.

2. Lamb, HR and LE Weinberger. Persons with severe mental illness in jails and prisons: A review. Psychiatric Services 49(4) 483,1998. ❖

NEWS FROM AROUND THE NATION

Texas Governor Bush Vetoes Indigent Defense Reform Measures

Texas Governor and Presidential candidate, George Bush, vetoed a bill passed unanimously by the Texas legislature that would have changed the way in which indigent defendants have counsel appointed to represent them. Under pressure from Texas judges, who currently have the authority to appoint counsel without oversight, Bush vetoed the measure saying that it would have increased bureaucracy.

The bill would have shifted the authority to appoint counsel from local judges to an "appointing authority" supervised by the county commissioners. Among the other changes the bill would have brought about were requirements for the timely appointment of counsel to indigent pre-trial detainees; provision of more explicit information to indigent defendants on the process for obtaining assigned counsel; authorization for the commissioners courts of two or more counties to create a jointly funded regional public defender; and a requirement that all counties submit an annual report on indigent defense to the Texas Judicial Council's Office of Court Administration.

The provision of indigent defense services in Texas is predominantly a county responsibility, with each of the state's 254 counties responsible for selecting a delivery system (public defender, assigned counsel, contract attorney), establishing compensation rates for

appointed counsel, and appropriating funds. Unlike many other states with predominantly county-funded systems, there is no central entity, such as an indigent defense commission, that sets uniform policies for delivery of indigent defense services or that collects and analyzes information on indigent defense from the counties.

The vetoed bill would have taken steps toward eliminating some of the variation in practice among the counties and the lack of statewide data. One change would have required the legislative body in each county - the county commissioners court - to establish procedures to govern the provision of legal services to indigent defendants and to designate an appointing authority for the county. Once a court determined a defendant facing a misdemeanor or felony charge punishable by prison to be indigent, the appointing authority would have appointed either a public defender or private attorney to represent him or her. Assigned counsel would have been named on a public list and appointed in order unless the appointing authority provided written reason for appointing an attorney out of order.

Another key change would have required appointment of counsel within 20 days after an indigent defendant requests counsel if he or she is incarcerated pre-trial. Failure to appoint counsel in the 20-day period would have resulted in release of the defendant. If, under such circumstances, counsel was appointed after release, the defendant could then be returned to detention after he or she was provided an opportunity to confer with appointed counsel. Currently the criminal code requires appointment of counsel "as soon as possible," which in some counties can be as much as six months after indictment. In vetoing the measure, Bush claimed that this requirement would harm public safety.

Additionally, the bill required the magistrate to provide explicit oral and written information to indigent defendants on how to secure a court-appointed lawyer.

The Texas Code of Criminal Procedure currently requires counties to adopt fee schedules with fixed rates, minimum and maximum hourly rates, and daily rates for various types of services performed. The bill would have modified the Code to remove the responsibility for voucher payment from the court and place it with the county auditor, who would also be required to establish a procedure for resolving disputes over voucher payments.

Finally, the amended Code would have required each county auditor to prepare annual reports setting forth the county's attorney fee schedule; the amount of time spent on each case; the amounts requested and paid in attorney's fees and litigation costs; the total amount expended by the county to provide indigent defense services; and an analysis of that amount. The reports were to be sent to the Office of Court Administration of the Texas Judicial Council for publication.❖

A Bill to Establish a Capital Case Trust Fund, A Supreme Court Special Committee to Study the Death Penalty, and A Bill to Create a State Task Force to Study Public Defender Caseloads and Salaries Point to Changes for Indigent Defense Services in Illinois

Recent national media coverage on innocence and the death penalty and prosecutorial misconduct in serious cases has contributed to a series of actions in Illinois that may spell big changes on how indigent defense services are provided in the state at the trial level. Since the death penalty was reinstated in Illinois in 1977, eleven inmates have been released from death row because of post-trial discovery of evidence that exonerated the defendant or cast serious doubt about his guilt. This, in part, led the Chicago Tribune to run a five-part series in January, 1999 reporting on habitual prosecutorial misconduct in homicide cases in Illinois, including the suppression of evidence favorable to the defendant and knowingly using false evidence.

Senate Bill 574, establishing a capital litigation trust fund to assist counties in the prosecution and defense of capital cases, passed both houses of the Illinois General Assembly in May. If signed by the

Governor, this will be the first instance in which any state moneys will be dedicated to indigent defense at the trial level in Illinois. Currently, the majority of Illinois' 102 counties have county-funded trial public defender offices (by statute, counties with populations of 35,000 or more must have public defender offices). The balance use either contract defenders or assigned counsel. In conflict cases, the circuit court judge appoints counsel and sets the compensation rate. The state funds the Office of State Appellate Defender, which has five regional offices throughout the state and handles all direct appeals, except for approximately 65% of those direct appeals filed in Cook County (Chicago). These cases are handled by the county-funded Cook County Public Defender.

Senate Bill 574 directs the Cook County Public Defender to appear before the General Assembly each year to request money to be appropriated to the fund to cover expenses for investigators, experts, forensic witnesses and mitigation witnesses required by public defenders handling capital cases in Cook County. The Cook County Public Defender will also request funds to cover litigation expenses and fees for court-appointed counsel appointed to capital cases in the county. Additionally, the bill calls for the State Appellate Defender to appear each year before the legislature to request appropriations to cover similar expenses for public defenders and private appointed counsel in counties outside of Cook County. Under Senate Bill 574, private counsel appointed to represent an indigent client charged with a capital crime will be paid at a rate not to exceed $125/hour with no cap. The courts will remain responsible to certify to the Treasurer that the expenses are reasonable and necessary under the proposed legislation.

Prosecutors' access to the trust fund will operate in much the same way with the State's Attorney and State's Attorney Appellate Prosecutor making annual requests for funds to cover district attorneys' capital litigation expenses (e.g., experts or forensic witnesses). The State Treasurer will transfer the appropriated moneys as block grants to each entity to be held in separate dedicated accounts. Though the sponsors of the bill envision that $20 million will be appropriated to the Trust Fund in its first full fiscal year of funding, slightly under $9 million has been appropriated for half a year beginning in January 2000. Approximately $6.3 million of this has been earmarked for defense.

The bill currently has the backing of a broad range of sponsors, including: the State Treasurer; the Illinois State Bar Association; the Attorney General; the Cook County Public Defender; the Cook County State's Attorney; the State Appellate Defender; and, the State's Attorney's Appellate Prosecutor.

If the bill is made law, funds from the program can be used starting at arraignment for all cases of first degree murder with death-qualifying circumstances, but no further trust funds can be used if the State's Attorney declares in open court that she will not seek the death penalty. Moreover, Senate Bill 574 requires courts to appoint counsel qualified to handle indigent defendant capital cases, as deemed by the Illinois Supreme Court.

The question of attorney qualification is already being considered by a recently appointed Supreme Court committee consisting of one Appellate Judge and 16 trial judges from across the state. In April, the Illinois Supreme Court appointed the committee to study and report on a wide range of death penalty issues, including: ensuring that only competent and experienced defense attorneys are appointed to represent indigent defendants; the need to expand pre-trial disclosures by prosecutors; and, providing suspects with sufficient investigatory and scientific expertise to mount a vigorous defense.

Finally, another bill has passed both houses of the legislature that is expected to help indigent defense in Illinois if signed by the Governor. Senate Bill 27 will create the Task Force on Professional Practice in the Illinois Justice System, a 19-member committee with members appointed by the Governor, the Senate, the House, the Supreme Court, the State Bar, the Attorney General, public defender offices, district attorney offices, and others. Recognizing that "[i]n order for the State to protect its moral and ethical integrity, the State must ensure a justice system that is staffed by attorneys trained and prepared to render competent representation," the bill calls for the Task Force to study issues affecting the development of

professionalism of attorneys, both defenders and prosecutors, in the criminal justice system, including: appropriate levels of caseloads; adequate salary structures; annual training needs; and, technological needs. The Task Force bill exerts no fiscal impact on the state and is expected to pass. The Task Force will be chaired and staffed by the Illinois State Bar Association and it has the bar's support.❖

Tennessee Judge, Prosecutor, and Defender Case-Weighting Study Determines that District Public Defenders' Workload Exceeds National Standards and Recommends Funding for 56 New Defender Positions Statewide

Faced with the continual challenge of allocating sufficient resources to courts, prosecutors and public defenders in the face of ever-rising caseloads in 1998, the Tennessee General Assembly mandated the Comptroller of the Treasury to oversee a comparative workload study of the three criminal justice functions and to provide the state with the means to accurately identify, analyze and compare workloads, resource allocations, and staffing needs throughout the state. Toward that end, The Spangenberg Group (TSG), National Center for State Courts (NCSC), and the American Prosecutors Research Institute (APRI) were selected to conduct the three separate case-weighting studies and each organization presented their findings to the legislature in May 1999. The Spangenberg Group's report, *The Tennessee Public Defender Case-Weighting Study*, concluded that Tennessee public defenders are currently carrying, on average, a misdemeanor caseload more than twice as large as the recommended national standards. The report recommends that the state expenditure for indigent defense services be increased to accommodate the hiring of 56 additional attorneys (up from 250 to 306, an 18.3% increase).

Background: Indigent Defense in Tennessee

Indigent defense representation in Tennessee is provided by publicly elected district public defenders and is funded primarily by the state. The Tennessee District Public Defenders Conference, a statewide system of elected public defenders from the state's 31 judicial districts and a central administrative office of the Executive Director, oversees the delivery of indigent defense services throughout the state. Davidson County (Nashville) and Shelby County (Memphis) are served by local public defender offices. Although the public defender offices in Davidson and Shelby counties are members of the conference, the majority of funding for these two offices comes from the counties, not the state.

The Public Defender Conference is a relatively young organization. With the exception of Shelby and Davidson counties, indigent defense representation in Tennessee prior to 1989 was provided primarily by court-appointed counsel, with funds provided by the state. From 1986 to 1989, the legislature funded a pilot project, which placed public defender offices in seven districts. This led to the creation of the statewide conference in 1989.

The Conference has had its share of ups and downs during its 10-year existence. In its first three years of operation, it faced a series of budget shortfalls which led to overburdened public defenders. The most dramatic point came in November 1991, when the Knox County Public Defender requested, by motion, that the four General Sessions court judges suspend further case appointments to it. Assignments to the Knox County Public Defender were temporarily suspended, but the court's solution to handling the overflow sparked outcry within the bar. The court issued notice to every bar member in the county that he or she, without exception, would be expected to take an appointment to a criminal case to help distribute the overflow of cases. Similar, but less dramatic, events have peppered the Conference's first decade.

Since its creation, the Conference has struggled with inadequate staffing. The Tennessee General Assembly has relied on several different mechanisms for determining the number of district public defenders that are needed, but staffing determinations have never

been based on caseload or workload of public defenders. When the Conference was first created, a statutory provision required that public defender offices receive half the number of state-funded staff attorney positions that were allocated to the district attorney offices in their respective districts. This ratio was subsequently modified so that public defenders were to receive attorney positions equivalent to 75% of those provided to the district attorneys. The district attorneys successfully lobbied for yet another change to this staffing scheme, with the result that public defenders are now only entitled to 75% of any *locally* funded positions provided to district attorneys. Very few counties provide funds to district attorneys, so very few public defenders receive any local assistance, either.

In 1994, a second type of statutory provision was created to serve as a stop-gap measure until a comprehensive case-weighting study was completed for prosecutors and defenders. T.C.A. §16-2-519 states there should be one Assistant District Attorney for every 20,000 people in each judicial district. In the first year this provision was in effect, District Attorneys received half of the additional attorneys they required under this formula. A year later, T.C.A. §8-14-202 was created which calls for one district public defender for every 26,675 people in the district; roughly 75% of the district attorney formula. The General Assembly, however, has never funded any positions required by this provision. Under this formula, in May 1998, the District Public Defenders Conference would have been entitled to approximately 20 additional attorney positions.

After years of debate between the General Assembly and the Conference over how to determine the number of attorneys needed to adequately handle the indigent defense caseload, in 1997 the General Assembly announced it would not provide any further attorney positions to the Conference until a case-weighting study was conducted.

Case-Weighting Studies and Workload Standards

The purpose of a workload study is to produce an empirical method of measuring the amount of work required to be performed by public defenders on the various types of cases they handle. The method also accounts for the non-case related work which is essential to the functioning of any public defender program. This method of determining public defender staffing needs, because it considers the projected public defender caseload for the coming fiscal year, is more meaningful and accurate than relying simply on less relevant indicators, such as population or district attorney staffing.

The case-weighting method such as the one used in the Tennessee study is one in which detailed time records are kept by public defender attorneys, over a given period of time, typically ranging from seven to 13 weeks. The time records provide a means by which caseload (the number of cases a lawyer handles) can be translated to workload (the amount of effort, measured in units of time, for the lawyer to complete work on the caseload). In the broadest context, weights can be given to the total annual caseload of an office to compare to the next year's anticipated volume of cases.

Assuming that time records are kept of attorney time expended in each case, the translation of projected caseload into projected workload can be accomplished with some assurance of precision and determine caseload standards by which to gauge when caseloads may be considered excessive and therefore threaten the constitutionally guaranteed right to effective assistance of counsel. Workload standards represent the average number of cases that a single attorney can be expected to handle during the course of one year.

In the past ten years, the adoption of standards and guidelines has been one of the most notable developments in the delivery of indigent defense services. Several national organizations, states, and local jurisdictions have adopted standards pertaining to indigent defense in a number of different areas, including workload standards. The only national workload standards currently in existence were established by the National Advisory Commission on Criminal Justice Standards and Goals in 1973. Based on estimates by professionals working in the field, these standards suggest that the caseloads of public defenders should not exceed 150 felony cases, or 400

misdemeanors, or 200 juvenile delinquency cases or 25 appeals in any one year. These workload standards represent the *maximum* annual number of cases a single attorney should carry if that attorney handled only that type of case. Since that time, a number of states have adopted similar caseload standards.

Tennessee Case-Weighting Study Results

The study revealed that Tennessee public defenders are currently handling 850 misdemeanors, or more than twice the nationally recommended number of misdemeanor cases, per year. Additionally, of the total hours the sample public defenders worked during the time study, 91.52% was spent on case-related activities. Excluding time away from work, the attorneys participating in the survey worked, on average, seven hours and 52 minutes per day. Approximately seven hours and 19 minutes, or 93% of the average day worked, was spent on case-related activities. Tennessee public defenders are paid to work a 7.5 hour day. Based on this figure, approximately 97.55% of a public defender's paid work day is dedicated to case-related work.

Based on these figures, TSG calculated that the Conference would need to employ 306 attorneys to handle the workload for the coming year, an increase of 56 from its current attorney level of 250. By comparison, the National Center for State Courts determined that there were 11 too many judges in the state, while the American Prosecutors Research Institute calculated the need for an additional 126 assistant district attorneys statewide.

For more information on case-weighting studies, please contact The Spangenberg Group at (617) 969-3820 or TSG@spangenberggroup.com.❖

The Kentucky Blue Ribbon Group on Public Defense in the 21st Century Recommends an Additional $11.7 Million Be Appropriated to Meet The Department of Public Advocacy's Funding Needs

Recognizing that indigent defense is a necessary function of government, and an essential and co-equal partner in the criminal justice system, and recognizing that the Kentucky public defender system cannot play its necessary role for courts, clients, and the public in the criminal justice system without a significant increase in funding, a Blue Ribbon Group, consisting of more than 20 distinguished members representing all three branches of government, the bar and key officials of criminal justice agencies across the state, recommended that an additional $11.7 million be appropriated for the Department of Public Advocacy (DPA) in FY 2001. In its May 1999 report, *Analysis of Indigent Defense in Kentucky: Bringing the Department of Public Advocacy into the 21st Century*, the Blue Ribbon Group justified the increased expenditure by documenting the effects that years of chronic under-funding has had on the DPA. The Department of Public Advocacy currently ranks at, or near, the bottom of public defender agencies nationwide in indigent defense cost-per-capita, cost-per-case, and public defender salaries for attorneys at all experience levels. The increase, if approved, will raise the DPA's appropriation by more than 50%, up to over $30 Million.

The Department of Public Advocacy is a statewide entity which is responsible for overseeing the delivery of indigent defense services in Kentucky's 120 counties. By statute, the state is responsible for funding indigent defense in Kentucky with the expectation that the counties may contribute local funds to augment the state appropriation. The original goal of the DPA was to have regional public defender offices providing indigent defense representation in all parts of the state. The under-funding of the DPA has limited this goal, thus regional offices operate in only 73 of the state's 120 counties. In 47 counties, representation is provided by attorneys who are under contract with the DPA. The Department of Public Advocacy also contracts yearly with independent, non-profit county public defender offices in the urban counties of Jefferson (Louisville) and Fayette (Lexington). Unlike most of the rest of the state, the two counties provide substantial funds to supplement state funds for the two offices. A 12-member Public

Advocacy Commission assists the DPA with budgetary and certain supervisory responsibilities, and conducts public education about the purpose of the public advocacy system.

Kentucky's Public Advocate Erwin W. Lewis spearheaded the formation of the Blue Ribbon Commission in 1998 to develop a strategy for the improvement of indigent defense services after several previous efforts to study and document the effects of the chronic under-funding of the Department of Public Advocacy resulted in relatively little official response. To assist the Group in its mission, the DPA contracted with The Spangenberg Group to assist the members by providing detailed information from other states regarding many of the issues that were placed on the table by the Blue Ribbon Group. The Spangenberg Group was retained on this project through a federal Edward G. Byrne Memorial grant awarded to DPA by the Kentucky Justice Cabinet.

Results of the state-by-state comparisons show that Kentucky ranks among the worst in the nation in several key indigent defense categories. For instance, the starting salary for a public defenders in Kentucky is the lowest among the states surveyed - $23,388 per year. The stark disparities in pay between Kentucky public defenders and public defenders from other states continue as attorneys gain more experience and assume greater responsibilities. Public defenders in Kentucky also carry caseloads that far exceed national caseload standards. High caseloads and low pay take an immediate toll on attorney morale and performance, calling into question the level of advocacy provided on behalf of clients. The Blue Ribbon Group's report notes that high employee turnover, and its accompanying perpetual state of hiring and training, has become a fact of life in several of the DPA offices.

The Blue Ribbon Group also studied and reported on the ways in which Kentucky has attempted to deal with the under-funding of indigent defense services through relying on various alternative revenue sources such as administrative fees, assessments and recoupment in order to avoid providing a greater general fund appropriation to the DPA. Currently the DPA receives supplemental funding from a $50.00 administrative fee assessed on all indigent persons who are assigned a public defender or court-appointed attorney. It also receives 25% of the $200 service fee assessed against all individuals convicted of drunk driving. Additionally, counties are required to assess 12.5 cents per capita to contribute toward a fund established to pay for expert witnesses and other necessary costs associated with providing indigent defense services. Recoupment collections ordered by the court are returned to the county in which they were ordered to help offset this county assessment.

The percentage of alternative revenue funds Kentucky raises and dedicates to indigent defense was found by the Blue Ribbon Group to rank among the highest in the nation. In FY 1998, 15.2% of all funds in Kentucky for indigent defense came from these alternative revenue sources. The report states that though the effort is laudatory, it is important to recognize that supplemental alternative revenue is not a replacement for adequate general funding. Indigent populations by definition do not have adequate funds to self-finance government provided services, and there will always be a percentage of indigent defendants who simply cannot afford to pay administrative fees or other court costs. Though Kentucky has achieved an impressive rate of alternative revenue collection, the Blue Ribbon Group cautions that the state must be realistic in recognizing that this source of funds is strictly limited.

Finally, the report by the Blue Ribbon Group alerts the state to what they believe the consequences will be if the DPA's level of funding is not increased to that recommended by the Commission. The Report states that without substantial additional funding, there is a likely risk that the Commonwealth of Kentucky could not adequately defend a statewide systemic lawsuit due to the inadequate resources and overwhelming caseload. Other likely consequences of continued under-funding of the DPA identified by the Blue Ribbon Group include:

- The goal of a statewide full-time public defender system will remain unrealized and a large number of counties will continue to be served by part-time contract attorneys unable to assist the judges in

keeping the docket moving and not providing required counsel to some juvenile delinquents and misdemeanors.
- An even larger number of lawyers and support staff will leave the program and seek other employment due to the woefully inadequate salaries available.
- Full-time public defender caseload will increase to the breaking point, particularly in cities such as Louisville.
- DPA will not be able to provide representation to all indigent defendants in the state and will have to develop policies regarding courts that they cannot serve.
- Cases will have to be retried because of the inadequacy of counsel or the lack of counsel completely.
- The community will be frustrated, as well as all of the criminal justice agencies because the public defender cannot perform their required tasks adequately.❖

Alabama Raises Court-Appointed Counsel Compensation Rates

A bill raising the rates paid to court-appointed counsel in Alabama from $40 to $50 per hour in-court time and from $20 to $30 per hour out-of-court time went into effect June 10, 1999 after the Governor took no action on the legislation. On October 1, 2000, a second round of increases will go into effect raising in-court payment to $60 per hour and out-of court payment to $40 per hour.

House Bill 53 also raised the per case caps on the total amount an attorney can bill. Instead of the current $1,000 per case maximum for all types of cases, the bill created a scale formula based on the severity of the case. Court-appointed attorneys can now bill up to $3,500 for Class A felonies, and up to $2,500 and $1,500 for Class B and Class C felonies respectively. For juvenile cases, attorneys can bill up to $2000.

The law also changed billing in capital offense cases or a charge which carries a possible sentence of life without parole, the total per case cap was removed.

Regardless of these established limits, HB 53 also grants the court, upon a showing of good cause, to approve attorney fees in excess of maximum amounts allowed.

In addition, HB 53 raised the fee schedules in appellate cases from $40 to $50 per hour, with an increase to $60 per hour effective October 1, 2000. The cap on payment for appellate cases was raised from $1,000 to $2,000 per case.

The provision of indigent defense services in Alabama varies from county to county. While three of the state's 67 counties operate public defender offices, the rest rely upon either appointed counsel or contract attorneys. Funding for indigent defense in Alabama comes from the Fair Trial Tax Fund, which is comprised of fees which are added to the filing fee in civil cases, and costs in criminal cases. The Fair Trial Tax Fund is designed to reimburse counties for all indigent representation. If revenues from the Fair Trial Tax Fund are insufficient to cover the counties' costs, the state provides funds to cover the deficit. In recent years, this deficit has grown, and the state has been required to contribute greater amounts to cover indigent defense funding shortfalls.❖

Vermont Governor Initially Blocks Office of Defender General from Accepting U.S. Department of Justice Grant -- Only to Rescind His Decision after Increased Media Pressure

In February 1999, the Office of the Defender General was awarded an $150,000 grant by the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance to identify, assess and accommodate developmental disabilities of criminal defendants (For more information on the project, See *The Spangenberg Report* Volume 5, Issue 1). In early

May, Defender General Robert Appel learned that Governor Howard Dean was not going to allow the Defender General to accept the federal funds because, he claimed, the defender general's office was not the appropriate agency to deal with mental disabilities and because Dean's administration did not want to set a precedent where the state was expected to pick up the expense of the program once the grant ended after 18 months.

Shortly thereafter, Appel began an intensive educational campaign that brought media attention to bear on the Governor's decision. To begin with, the grant was awarded to increase the effective representation of and participation by persons with mental handicaps in the criminal justice system. As such, the Defender General intended to contract with professionals experienced in the field of mental health in order to help the office identify defendants who are developmentally disabled. No other agency could do so, it was argued, and maintain confidentiality and attorney-client privileges.

Secondly, it was pointed out that the state of Vermont currently accepts millions of federal grant dollars every year, including not less than $6 million in discretionary grants for various criminal justice agencies. When challenged by the media, the Dean Administration could not give an example of any other federal funding being denied because of the "fear of setting a precedent" for state funding. Since one of the specified goals of the program is to help to reduce recidivism and decrease litigation by reducing the number of probation violation complaints, post-conviction challenges, motions to withdraw, and appeals, it was argued that the program may save the state far in excess of the $150,000. This alone may warrant the state appropriating funds to continue the project after the first 18 months.

To resolve the issue, the legislature introduced language into the appropriations bill saying that the Office of the Defender General could accept amounts up to $150,000 without the Governor's approval. In early June, Governor Dean signed the appropriations bill, effectively approving the federal funds to the Defender General.❖

Seven Indigent Defense Organizations Awarded Department of Justice, Bureau of Justice Assistance Grants to Improve Access to Technology

In an effort to help indigent defense agencies both improve case management practices and build the capacity to access technology, The U.S. Department of Justice, Bureau of Justice Assistance (BJA) awarded seven grants of up to $80,000 per award to public defender offices in Arizona, Florida, Georgia, New York, South Dakota, Tennessee, and Texas. The BJA grant program, "Emerging Issues in Indigent Defense Management Technology," was developed to address the needs of indigent defense practitioners as raised in meetings between the U.S. Department of Justice and representatives of the indigent defense community. The focus group expressed the need for training and technical assistance amongst indigent defense providers and identified increasing caseloads and the use of advanced scientific evidentiary aids by the state without like resources for the defense as factors diminishing the quality of representation and services provided to indigent defendants.

In announcing the awards, BJA Director Nancy Gist stated, "The indigent defense community has long been under served. Indigent defense offices across the country lack the tools that could help them better serve those they are asked to defend. We hope by making [these] grants .....we can help indigent defense providers overcome the many obstacles they face."

The following indigent defense programs were awarded grants:

- The Navajo County Public Defender (Arizona) received a $34,000 award to help create a case management system and to help modernize the office. A percentage of the grant will be used to purchase basic office technology, such as a fax machine, telephone equipment, and audio-visual devices.
- The Office of the Public Defender, 16th Judicial District (Key West, FL) was awarded $79,000 to automate its case management system and purchase video conferencing equipment to improve its communication between circuit court

offices and other entities within the criminal justice system.

- An $80,000 award was granted to The Middle Judicial Circuit of Tripartite (Lyons, Georgia) to be used to create an early intervention case management system. The grant will allow the office to add staff to collect information prior to trials that will help the public defenders better serve the defendants assigned to them.
- The New York Legal Aid Society (New York, NY) created its computerized case management system over 15 years ago. The Legal Aid Society will use its $80,000 BJA grant to upgrade the case-tracking system for its Criminal Appeals Bureau.
- The Rosebud Sioux Tribe Public Defender's Office (South Dakota) will use new funds from the Justice Department to purchase a computer, laser printer, fax machine and other necessary office equipment to help them serve their clients. The office was awarded $12,000.
- A $79,000 award was made to the Tennessee District Public Defenders Conference. The Conference consists of the elected public defenders from the state's 31 judicial districts and oversees the delivery of indigent defense services throughout the state. The grant money will be used to purchase multimedia equipment for in-court presentations that will be shared by public defenders across the state.
- The El Paso County Public Defender Office (Texas) will use its $50,000 grant to hold weekend seminars on DNA evidence and genetic testing.❖

Fulton County, Georgia Settles Suit on Right to Counsel

The Fulton County, Georgia Board of Supervisors has entered into a consent agreement with a certified plaintiff's class, led by Sam Stinson, that will require substantial improvements to the provision of counsel to non-homicide indigent detainees and to the provision of defender services in the county.

The suit, initially brought in 1994 by *pro se* plaintiff Sam Stinson, alleged that Fulton County (home of Atlanta) knowingly under-funded its indigent defense programs and, as a result, that indigent individuals who rely on the program for representation are denied access to counsel during critical stages of the prosecution, specifically, the period between a finding of probable cause in municipal court and the filing of an indictment when the defendant is held in jail on bond. On June 13, 1996, the U.S. District Court for the Northern District of Georgia certified the class as "all persons charged with non-homicide felony offenses within Fulton County who are not released on bond but who, instead, are incarcerated at the Fulton County Jail, and who, during the period up to, but not including, indictment or arraignment, are denied access to counsel."

W. Bruce Malloy, of Malloy and Jenkins, who, along with Robert E. Toone of the Southern Center for Human Rights, were appointed by Federal District Judge J. Ernest Tidwell to assist Stinson, said the agreement provides "the maximum relief we could get."

"It's about ensuring continuous and effective legal representation of indigent people in Fulton County jail before they are indicted," said Toone.

Specifically, the agreement requires substantive reforms to the manner in which indigent defense services are provided in Fulton County. First, the county agreed to maintain and adequately fund the Pre-Trial Services Program, which is responsible for intake of felony cases bound over to the Fulton County Superior Court. In response to the *Stinson* case, the County has already increased the funding for this program from 6 employees in 1998 to 36 once fully staffed. The increased staffing will allow for individuals charged with non-homicide felonies to be interviewed as they are booked into jail, and to effectuate earlier bond hearings and release. Under the county's current system, a public defender appears at a probable cause hearing for a defendant, but if the defendant is held over and fails to make bond, he will have virtually no contact with lawyers during the

months waiting to be indicted. A public defender is not appointed until indictment occurs and the case is assigned to a Superior Court judge and subsequently to the public defender assigned to that judge's courtroom.

Second, Fulton County has agreed to provide the Fulton County Public Defender and the Fulton County Conflict Defender with a level of resources sufficient to ensure that all indigent defendants who are not released on bond shall receive consultation within two business days.

Third, Fulton County agreed to make good-faith efforts to reduce the Public Defender and Conflict Defender's case-loads over the next three years from the 1998 average of 200 non-homicide felony cases per attorney to an average of not greater than 175 by the end of three years. This is to be accomplished by hiring 20 additional attorneys over that period.

Fourth, the Pre-Trial Services staff shall assign the Public Defender or Conflict Defender Offices when appropriate and immediately inform the defendant of the assignment. The assigned office will be notified immediately in writing, and shall thereafter assign an attorney to handle the case and notify the defendant of the assignment.

Finally, the agreement also requires that Fulton County provide necessary personnel, physical facilities, equipment and supplies necessary to perform the obligations contained in the agreement. ❖

Louisiana Legislature Passes a Bill to Provide Counsel in Death Penalty Direct Appeals and Post-Conviction Relief Cases; Governor Foster Expected to Sign

In June, both chambers of the Louisiana Legislature passed House Bill 2035 which provides for the appointment of counsel in direct appeals and post-conviction relief cases in those capital cases in which trial counsel was provided to an indigent defendant and in which the jury imposed a death sentence. Louisiana Governor Mike Foster supported the measure and is expected to sign the bill into law. Though no appropriation has, of yet, been attached to the bill, the Chief Executive Officer of the Louisiana Indigent Defense Assistance Board (LIDB), Jelpi Picou, Jr., expects his organization to receive an additional $1.3 million dollars in state appropriations to institute a method of providing counsel in such cases.

Louisiana's parishes are currently obligated to cover the majority of costs associated with indigent defense, though the LIDB provides state monies for trial-level representation to parishes which comply with LIDB qualification and performance guidelines. Through its Expert Witness/Testing Fund, LIDB also makes monies available for experts and investigators. Additionally, the LIDB oversees selection and compensation of counsel in conflict and overload situations. Finally, the LIDB contracts with a number of private attorneys to provide back-up and consultation to attorneys handling capital cases, and recently established a statewide appellate project. The statewide appellate project is now handling approximately 95% of all direct appeal cases in its 41 districts.

Under House Bill 2035, LIDB would also be directed to adopt rules to provide counsel to represent capital indigent defendants on direct appeal to the Supreme Court of Louisiana and to seek post-conviction relief if appropriate in state court. If the bill is signed into law, LIDB would also be directed to oversee the provision of reasonable services, including investigative, expert, and other services for such cases. The bill would also allow appointed counsel to accept appointments from federal court to represent their indigent clients on post-conviction relief petitions in federal court, so long as no state-appropriated funds are expended on the federal court representation. Finally, the proposed bill would also allow local indigent defender boards to contract for the defense of individuals in capital cases at trial, and for appeals and post-conviction representation in non-capital cases and in capital cases where the defendant was sentenced to life imprisonment.❖

New Ethical Standards in Place for Federal Prosecutors

The U.S. Department of Justice issued revised ethical standards for federal prosecutors on April 20,

1999. The new standards represent the Department's interpretation of the Citizens Protection Act signed into law by President Clinton on October 21, 1998 that amended 28 U.S.C. 530B.

The Citizens Protection Act was sponsored by the now retired Republican Congressman Joseph McDade, who was acquitted in 1996 of federal bribery charges. McDade said that the Act was an attempt to curb rampant abuse by over-aggressive prosecutors. McDade was quoted by the Detroit News as saying in reference to federal prosecutors: "Their mantra used to be, 'Let justice be done.' Now it's, 'Winning is everything.'"

The law's intent was to stop federal prosecutors from communicating with defense witnesses without the permission from their attorney or the judge in the case.

The law established that federal prosecutors be subject to the state law and rules, and local federal court rules to the same extent, and in the same manner, as other attorneys practicing in that jurisdiction. The law generally directs DOJ attorneys to comply with the rules of court in which they are litigating, but to be mindful of whether those rules differ from the rules in which they are licensed. In conflicts between the two, DOJ attorneys should determine 1) whether the state of licensure would apply the court's rule; 2) whether the local federal court rule preempts contrary state rules; and 3) whether traditional choice-of-law principles direct compliance with a particular rule. The Justice Department has determined that the law only applies to ethical standards and has exempted federal prosecutors who are conducting investigations under federal law or litigation in federal court from complying with state laws concerning rules of evidence, procedure and substantive state law.

The Department has also determined that the law does not create new enforceable rights for litigants against the federal government. Enforcement of ethical standards in the Department's view remains unchanged.

The McDade Amendment, as the Citizens Protection Act is known, overturned a 1994 DOJ regulation that purportedly allowed federal prosecutors to directly communicate with represented persons. That regulation was struck down in *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (1998) by the Eighth Circuit Court of Appeals, which found that DOJ did not have the authority to exempt prosecutors from state ethics rules.❖

Reno: Increased Federal Response to Police Misconduct Needed

On April 15, 1999, speaking before the National Press Club in Washington, D.C., Attorney General Janet Reno called for an increased federal response to police misconduct. Reno said, "For too many people, especially in minority communities, the trust that is so essential to effective policing does not exist because residents believe that police have used excessive force, that law enforcement is too aggressive, that law enforcement is biased, disrespectful, and unfair."

Reno proposed increased federal assistance in five areas to foster police integrity and combat police misconduct. First, government and communities must develop mutual trust and confidence through promoting partnership and dialogue. Community-oriented policing has much to offer in this area.

Second, law enforcement agencies must make clear that misconduct will not be tolerated within their ranks. Agencies must establish adequate processes for receiving complaints and investigating allegations of misconduct. Further, officers must be intolerant of misconduct by fellow officers, and they must make silence about other officers' misconduct unacceptable.

Third, law enforcement agencies must recruit more minority officers and give them proper training in the use of force, including training which combats the

tendency of some officers to develop an "exaggerated sense of the differences between" police and community members.

Fourth, civil rights enforcement must be increased. The Department of Justice (DOJ) must criminally prosecute individual officers, but also bring suits against departments that display a pattern of misconduct. Reno said the DOJ would become more active in investigating pattern and practice cases.

Finally, better surveillance of the prevalence and incidence of police misconduct was necessary. Reno announced that the next National Crime Victimization Survey would include questions on police misconduct. Reno also called upon law enforcement agencies to compile data on traffic stops so that they could assess whether people of color are disproportionately stopped in their jurisdictions.❖

Attorney General Reno Calls for More Criminal and Civil Indigent Defense Resources

Speaking during a celebration of Law Day on May 1, 1999, Attorney General Janet Reno called for more resources for indigent civil and criminal legal services. Stating that we must work to make justice for all Americans a reality, Reno applauded recent efforts by prosecutors and law enforcement to vindicate the rights of victims at the same time calling for increased resources for the poor. Reno stated:

> Our Constitution guarantees defendants the right to a lawyer in major criminal cases. We preserve this right for indigent defendants through public defenders or appointed counsel. Working as a prosecutor for 15 years, I learned that our criminal justice system cannot function properly unless we have adequate funding, training, and resources for indigent defense.
>
> If we do not adequately support criminal defense for poor Americans, people will think that you only get justice if you can afford to pay a lawyer. This perception would undermine confidence in or system. Skimping on adequate representation also hurts effective law enforcement by creating delays and leading to the reversal of convictions on appeal.
>
> Finally, we must work to meet the need for civil legal services for low-income Americans. Poor women and children need this help the most. Nearly two-thirds of the clients of legal services programs are women, most of them mothers. Nearly one-sixth of all cases handled by legal services offices involve domestic violence. But each day, thousands of Americans who deserve civil justice cannot afford it. Legal services programs need more resources.❖

Nebraska to Study Death Penalty

The Nebraska Legislature voted unanimously to override the Governor's veto of legislation which would study whether the death penalty in Nebraska is applied fairly. The legislature failed to override the Governor's veto of another death penalty bill which would have imposed a two year moratorium on executions during the course of the review of the fairness of the death penalty.

The unicameral Nebraska Legislature voted 27-21 on May 20, 1999 to make Nebraska the first state in the nation to impose a moratorium on executions. The purpose was to permit time to study whether the race or class of the defendant or factors not related to the crime itself played a role in imposing a sentence of death. Under the bill, defendants could still be sentenced to death, but none would be executed during the two year study period.

Governor Mike Johanns vetoed the moratorium and the related study bill, saying that the death penalty was the law of Nebraska, and expressing concerns about the constitutionality of the moratorium.

In the final hours of the Legislative session, the moratorium was declared dead by a co-sponsor of the legislation, and attention was focused instead on over-riding the veto of the bill to study the death penalty. The legislature enacted the study bill unanimously.

Nebraska has executed three people since resuming executions in 1994 after a 35-year hiatus.❖

U.S. Bureau of Justice Statistics Issues Three new Reports on Crime Trends and Prison Population in the U.S.

Serious Crime Declines for 7th Year in a Row

Serious crimes, including murder, rape, robbery, aggravated assault, burglary, larceny, car theft and arson, all declined in all areas of the country for the seventh year in a row. The decline, announced by the FBI, is based on preliminary results of the 1998 Uniform Crime Reporting (UCR) Program which gathers crime data from over 17,000 local and state law enforcement agencies nationwide.

In 1998, overall violent crime was down 7% over last year, including an 8% drop in murder, a 5% drop in rape, and an 11% drop in robbery. The declines were consistently reported in all regions of the country, with the West and Northeast reporting 8% drops in serious crime, the South a 6% drop, the Midwest a 4% drop. Cities of all population sizes experienced the declines (cities with populations between 250,000 and a million dropped 8%). Cities with populations of more than 1 million experienced declines in murder of 11%. Mid-size cities (population 250,000 to 499,000) experienced a 13% drop in murder. Declines were seen in both urban and rural areas.

Homicides Decline

The homicide rate in 1997 fell to its lowest level in since the late 1960s. The nation's largest cities accounted for much of the decline, down from 35.5 murders per 100,000 people in 1991 to 20.3 per 100,000 in 1997. Gun homicides for teens and young adults (ages 14-24) rose dramatically in the 1980s, and have begun to decline, although they remain well above the rates seen in the mid-80s. Non-gun homicides for these age groups have remained relatively constant. Males remain 9 times as likely to commit a murder as females. The number of homicides cleared by arrest has continued to decline: from 79% clearance in 1979 to 66% in 1997.

Incarceration is Up: More Than Tripling Since 1980

At the same time that serious crime is declining, incarceration is increasing, more than tripling since 1980 (BJS). As of 1996 (the latest year for which data are available), an estimated 5.5 million adults were under correctional supervision in the United States. Between 1985 and mid-year 1998, the prison and jail population had an annual growth rate of 7.3%. In mid-year 1998, the prison population had risen to 452 per 100,000 US residents, compared to 303 per 100,000 residents in 1990. Louisiana (709), Texas (700), Oklahoma (629) and Mississippi (547) had the highest incarceration rates per 100,000 state residents.

Between year-end 1990 and mid-year 1998, the federal prison population grew by 8.3%. Approximately 2.8% of adult residents of the US were under correctional supervision in 1996, compared to 1.6% of the adult population in 1985. Relative to resident population numbers, African-Americans were 6 times more likely than whites, and nearly 2½ times more likely than Hispanics to have been held in a local jail. The number of women in prison grew at a faster pace than men between July 1, 1997 and June 30, 1998 (5.4% compared to 4.7%).

For the third consecutive year, more people entered state prison for drug offenses (98,700) than for violent crimes (96,300).

At the end of June, 1998, jails were operating at 96% of their rated capacity, which included an increase over the previous year of 26,216 beds. An estimated 57% of adult jail inmates were awaiting court action on their current charge. Of the total

584,372 people detained in jail at mid-year 1998, 331,800 were unconvicted.

The BJS reports can be obtained on-line: Homicide Trends in the United States (www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm), January 1999 (NCJ 173956); Prison and Jail Inmates at Midyear 1998 (www.ojp.usdoj.gov/bjs/abstract/pjim98.htm) March 1999 (NCJ 173414; Correctional Populations in the United States, 1996 (www.ojp.usdoj.gov/bjs/abstract/cpius96.htm) March 1999 (NCJ 171684).❖

North Carolina Establishes Two Committees to Review Indigent Defense Services

The North Carolina Legislature established two new commissions to review the provision of indigent defense services within the state. The first is a commission to be appointed by the Legislature. The second, under direction of the Administrative Office of the Courts, will examine methods for improving the management and accountability of funds spent for indigent defense, while being mindful of not compromising the quality of representation.

North Carolina's indigent defense services are state funded, with a small number of district defenders appointed by local judges and a large number of counties with assigned counsel and contracts. There is also a state funded, state appellate public defender in North Carolina.❖

Florida Criminal Justice Estimating Conference

The State of Florida is experiencing an over-estimation of bed need for jails and prisons, and has recently revised down the expected need for the future. At the Criminal Justice Estimating Conference in April, 1999, prison admissions projections had to be revised downward as projections had overestimated the impact of legislative changes, crime trends and time served in jail rather than prison. The estimates represent the consensus view of representatives from the Governor's Office, the State Legislature and the Supreme Court. Florida currently incarcerates 440 people per 100,000 residents of the state. At mid-year 1998, jails in the four largest local jurisdictions were running over-capacity: Dade County at 117%; Broward County at 124%; Orange County at 120%; and Hillsborough County at 107%.

Criminal filings in Florida have continued to increase every year since 1986. Yet, the incarceration rate has declined to 16% in fiscal year 97-98 (from a high of 31% in FY 88-89).

Drug offense filings have increased nearly 100%, from 27,456 in 1986 to 56,377 in 1997. In FY 1997-98, drug offenses remained the largest single crime type resulting in admission to prison. The overwhelming majority of drug crimes are possession and sales for possession convictions.

The Consensus Estimating Conference predicted that the Prison Releasee Reoffender Act (PRRA) passed during the 1997 Legislative Session would increase re-admissions to prison at a much higher rate than occurred. The PRRA provided that offenders who commit specified acts of violence within three years of their release from prison are subject to a mandatory maximum prison sentence and must serve 100% of the sentence. Only 25% of the projected admissions occurred in the twenty-one months since its passage.

Overall, the average amount of time served has risen, from approximately 15 months in 1989 to approximately 38 months in April, 1999. D.C. beds have been running more than 5,000 beds over need while total capacity has continued to increase and is projected to continue increasing until August 2002 under the revised projections.❖

CASE NOTES

U.S. Supreme Court Rules Defendant Has Right Against Self-Incrimination During Guilty Plea

A criminal defendant does not waive the Fifth Amendment privilege against self-incrimination at sentencing by pleading guilty in federal court, the U.S. Supreme Court ruled in Mitchell v. U.S. (#97-7541).

In a five-to-four decision, the majority held that the sentencing judge violated the defendant's Fifth Amendment rights by drawing adverse inferences from the defendant's refusal to testify at sentencing.

Mitchell pleaded guilty without a plea agreement to charges of conspiring to distribute cocaine, but reserved the right to contest the amount she distributed. The trial judge advised Mitchell that she was waiving her right to remain silent by pleading and elicited a statement from Mitchell that she had committed "some of" the charged conduct. At a hearing, the prosecution presented testimony that she distributed more than five kilos and Mitchell called no witnesses. Mitchell argued that the only reliable testimony indicated that she sold only two ounces of cocaine. The trial court ruled that as a consequence of her plea, Mitchell had no right to remain silent about the details of her crime, and that her failure to testify was a persuading factor in the court's reliance on the co-defendants' testimony against her. The District Court found that Mitchell had distributed more than five kilos, thus mandating a ten-year minimum sentence.

Writing for the majority, Justice Anthony Kennedy first noted the general rule that a witness may not, in a single proceeding, voluntarily testify about a subject and then later assert the Fifth Amendment privilege when cross-examined (Rogers v. U.S. 340 U.S. 367 [1951] and Brown v. U.S. 356 U.S. 148 [1958]). The concerns which justify cross-examination when a defendant testifies are absent at a plea colloquy, the Court found.

The majority further stated that both Rule 11, that a defendant's guilty plea serves as a waiver of the Fifth Amendment privilege, and the judge's advisory concerning waiver, apply only at trial. "The purpose of Rule 11 is to inform the defendant of what she loses by foregoing the trial, not to elicit a waiver of privilege for proceedings still to follow." The majority also expressed concern that prosecutors would bring indictments that do not specify drug quantities and force guilty-plea defendants to provide self-incriminating evidence concerning amounts if the Court allowed a guilty plea to be interpreted as a waiver of the right to remain silent.

Finally, the majority declined to adopt an exception to the rule established in Griffin v. California (380 U.S. 609, 1965) that would permit adverse inferences to be drawn from a defendant's silence at the sentencing phase.❖

Fifth Circuit Court of Appeals Bars Video Sentencing

A federal defendant may not be sentenced via video conferencing, the Fifth Circuit Court of Appeals held in U.S. v. Navarro (#97-41162, 3/8/99). A sentence proceeding in which the defendant and the judge are not in the same place violates Rule 43 of the Federal Rules of Criminal Procedure.

The Court found that the plain language of Rule 43, that the defendant be present at sentencing, means that the defendant must be physically present in court. In this case, the defendant, his lawyer and the prosecutor were in one room while video conferencing equipment and the judge was 300 miles away in a similarly equipped room. The defendant objected to the teleconferencing but was overruled by the judge.

The Court found support for this interpretation from a number of sources. First, the exception established in Rule 43(b) allows for a defendant who is initially present at the trial to be removed if the defendant ignores warnings regarding disruptive behavior; the majority finds this to support its contention that the Rule requires physical presence, not merely the "within sight or call" which the dissent reads in Rule 43. Second, the majority cite to the advisory committee notes that accompany the Rules. The notes show that the committee considered the government's argument at the time concerning the cost of transporting defendants to sentencing hearings, and carved out an exception in misdemeanor cases to physical presence if the defendant so agrees. Finally, the majority viewed the civil counterpart, Rule 43(a), which stress the importance of face-to-face testimony

and that video testimony cannot be justified in civil cases simply for convenience reasons.❖

New York and Pennsylvania Courts Agree, Juveniles Have Speedy Trial Rights

Juveniles have a right to speedy trials similar to that of adults, the New York Court of Appeals held in In re Benjamin L. (NY CtApp, #7) and the Pennsylvania Superior Court held in Commonwealth v. Dallenbach (Pa SuperCt #2095 Pittsburgh 1997).

The New York Court of Appeals noted that it had previously interpreted the Due Process Clause of the Constitution of New York as providing adults with a speedy trial right in criminal matters. The Court of Appeals held here that many of the reasons for ensuring speedy trials for adults also apply to juveniles.

The delinquency petition in In re Benjamin L. was filed more than a year after the incident upon which it was based occurred, yet the juvenile court refused to dismiss the case on speedy trial grounds.

The Court of Appeals prescribed a balancing test for juvenile cases like that set forth for adults in People v. Taranovich (335 N.E.2d 303, 1975). Taranovich sets out five criteria for determining speedy trial violations: 1) the extent of the delay, 2) the reason for the delay, 3) the nature of the underlying charge, 4) whether or not there has been an extended period of pre-trial incarceration, and 5) whether or not there is any indication that the defense has been impaired due to the delay. The Court of Appeals stressed that the test must be applied with the goals, character and unique nature of juvenile proceedings in mind. Each factor must be assessed in light of the unique qualities of juvenile procedures.

In Pennsylvania, following a five month period between the filing of the juvenile petition and a hearing date, the state obtained a continuance which resulted in another 13 month delay of the hearing.

The Superior Court held that there is no controlling Pennsylvania Supreme Court or U.S. Supreme Court precedent on the right of a juvenile to have a speedy trial, and that neither the state's 10-day limit on detaining juveniles nor the one-year complaint to trial rule for adults applied in this case. However, the U.S. Supreme Court has made clear that juvenile delinquency proceedings must provide for fundamental fairness in order to comport with due process requirements (McKeiver v. Pennsylvania, 403 U.S. 528, 1976). In Dallenbach, the court held that fundamental fairness has a temporal component.

The holding cites to the concern in juvenile proceedings for rehabilitation and reformation, and that these factors require prompt adjudication. The court also pointed to the community's need to be protected from repeat delinquent acts. The court left determination of precise time-frames to be determined by individual judges and suggested a commission of juvenile court judges consider setting a standard.❖

U.S. Supreme Court Rules Media Cannot Enter Residence During Execution of Warrant When Riding with Police

Law enforcement officers cannot allow news media to enter private residences with them during the execution of warrants, the U.S. Supreme Court held in two cases (Wilson v. Layne, U.S. # 98-83; and Hanlon v. Berger, U.S. #97-1927).

In Hanlon, a federal judge had issued a warrant authorizing the search of the Bergers' 75,000-acre ranch in Montana for evidence that the Bergers had illegally taken wildlife. Reporters and photographers from the Cable News Network went along with federal government officials to execute the warrant, recording the search.

In Wilson, federal law enforcement agents had identified Dominic Wilson as a dangerous felon under "Operation Gunsmoke," an effort to arrest armed individuals with outstanding local, state or federal warrants for drug or violent offenses. Law enforcement officials obtained a warrant to search the house they believed to be Wilson's, but which in fact belonged to his parents. Just before 7 a.m., the search warrant was executed. Geraldine and Charles Wilson, the parents of Dominic, were in bed when law enforcement officials entered their house. Charles Wilson, dressed only in a pair of briefs, ran from the bedroom to the living room to investigate the noise,

and found five armed officers. Believing him to be Dominic Wilson, officers subdued him on the floor. Geraldine Wilson next entered the living room wearing a nightgown. During the time that the officers were in the house, a photographer for the Washington Post took numerous photographs. Not finding Dominic Wilson, the officers left. The photos were never published.

The U.S. Supreme Court ruled that such media ride-alongs during the execution of search warrants violated the Fourth Amendment rights of the home owners. Chief Justice Rehnquist, writing for the majority, indicated that the practice of inviting the media to document the execution of a search warrant in a person's home, clearly violated the "centuries-old principle of respect for the privacy of the home" embodied in the Fourth Amendment.

"It may well be that media ride-alongs further the law enforcement objectives of the police in a general sense, but that is not the same as furthering the purposes of the search. Were such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down."

The Court also rejected arguments that the ride-alongs are justified by governmental interests in publicizing anti-crime efforts and that ride-alongs could serve to minimize abusive conduct by the police.❖

Florida Court of Appeals Holds Once Right to Counsel Attaches to Specific Offense, It Carries Over to Inextricably Intertwined, Uncharged Offenses

The Florida Court of Appeal for the First District held that once the Sixth Amendment right to counsel attaches with respect to a charged offense, law enforcement officers are forbidden to engage in questioning the defendant in the absence of counsel not only about the charged offense but also about uncharged offenses that are inextricably intertwined with the charged offense (Taylor v. State Fla. CtApp, 1st Dist. #97-4454).

While investigating a burglary, police learned that jewelry belonging to the victim had been pawned, and that the pawn ticket contained the defendant's name and thumb print. The defendant was arrested and charged with dealing stolen property. Counsel was appointed and the defendant asserted his right not to be questioned outside counsel's presence.

Subsequently, the defendant was interviewed outside counsel's presence. At the start of the interview the defendant waived his right to have counsel present. The interrogating detective stated that he was interested only in the burglary, not in the charged offense. The detective asked whether the defendant was involved in the burglary, and he responded that he had never been to the house nor to the pawn shop. This statement was used against him in the prosecution for dealing in stolen property. He was not prosecuted for the burglary.

The state argued that because the questioning concerned an offense to which the defendant's right to counsel had not attached, there was no Sixth Amendment violation. The majority acknowledged that the right to counsel is offense specific, but if questioning such as happened in this case were permitted, the right to counsel would be illusory.

Focusing its decision on U.S. v. Arnold (106 F.3d 37, 3rd Circ. 1997), the majority held that once the right to counsel has attached to a specific offense, it carries over to uncharged crimes that are inextricably intertwined with the charged offense. ❖

Ford Claim "Conundrum" is Resolved by Arizona District Court

Michael Poland's execution was stayed by the Arizona District Court on October 20, 1998 to give Poland a chance to litigate his competence to be executed under Ford v. Wainwright (477 U.S. 399, 1986; holding that the Eighth Amendment prohibits the state from executing a prisoner who is insane).

On that same day, Poland attempted to amend his previously denied habeas petition with a new claim that he was not competent to be executed under Ford. Rather than permit the amendment to the previously dismissed petition, the District Court took the view that the Ford claim was a new petition, but not subject to Antiterrorism and Effective Death Penalty Act's (AEDPA's) requirement the petitioner seek permission from the court prior to filing a second or successive petition (Poland v. Stewart, USDC for Arizona, #98-1891-PHX-SPK).

Basing its opinion on the reasoning in Stewart v. Martinez-Villareal (where Martinez-Villareal had raised a Ford claim in an earlier petition, but having had it dismissed as un-ripe, filed a subsequent petition re-alleging the claim when facing execution), the Court found that Poland could not have raised the claim earlier without having it dismissed on ripeness grounds. "To have ruled otherwise would essentially foreclose a federal district court from *ever* considering such a Ford claim (especially if such claims truly are not ripe unless a death warrant has issued and an execution date is pending)." As a result, the Court finds that AEDPA does not bar Poland's action.

"The Court's primary interest is, of course, that Petitioner not be executed unconstitutionally in violation of Ford." In summarizing its options, the Court stated that it could take any of three paths. First, it could review petitioner's competence while the execution was imminent and without issuing a stay; but this would require hasty review of a lengthy record and potentially impede deliberation where error is irreversible. Second, the Court could rule the Ford claim ripe since the state had moved for a new execution date; but this would be in reality fictitious since the state moved for a new execution in December of 1998 and the Arizona Supreme Court has taken no action on the request. Third, the Court could proceed with an evidentiary hearing on petitioner's competence, but that finding would be largely moot as no execution is imminent and the question which must be answered concerns petitioner's mental state at the time the execution is imminent.

The conundrum, as explained by the Court, is that competency under Ford cannot be considered ripe for adjudication unless there is a pending execution date, yet issuance of a stay of execution to examine the issue of competency effectively vacates the execution date, thereby making the Ford claim no longer ripe. Since the Ford claim must consider the petitioner's current competence, not a prior competence, an evidentiary hearing when no execution is pending is effectively a moot proceeding.

In addition, and more importantly according to the Court, the claim is not exhausted. There have been no state court proceedings to address the question of Poland's competence to be executed. Because Poland has had no state competency hearing, the Respondent asked that the District Court dismiss Poland's petition without prejudice. Once a new execution date is set, Poland could then seek a state hearing on his competency to be executed. The Court finds this problem more significant following enactment of the AEDPA, which "appears to limit the availability of federal hearing even more so than under pre-AEDPA habeas law."

The Court found that "Respondent offers a practical solution to this logical puzzle.... [in that] Respondent represents that it will not oppose a competency hearing in state court (and in fact will request such a hearing be held prior to Poland's rescheduled execution date)." Respondent has also represented that it will not oppose Poland's request for a competency hearing as successive or late. Given the state's representation, the Court dismissed Poland's petition without prejudice and lifted the stay of execution such that Poland could seek state court review of his competence to be executed.❖

Ninth Circuit Court of Appeals Holds Forfeiture Invalid Without Adequate Notice

In U.S. v Marolf (9th Circ. #97-56275, 4/12/99) the Ninth Circuit Court of Appeals held that an administrative forfeiture is void if the government fails to provide constitutionally adequate notice to the property owner. In addition, if the limitations period for instituting judicial forfeiture proceedings has run,

the owner is entitled to return of the property or its equivalent, unless the government's failure to cure the problem can be excused by laches or some other equitable doctrine.

The majority of the Circuit agreed with other federal Circuits that constitutionally inadequate notice of administrative forfeiture renders the forfeiture void. The Circuit then went on to say that civil forfeiture laws provide scant procedural protections and so the government must be held to strict observance of the protections that do exist.

The case was before the Circuit Court because of a ruling by the U.S. District Court that also found the forfeiture void because of defective notice, but concluded that the government's failure to file a judicial forfeiture action could be put aside. The Drug Enforcement Agency (DEA) seized a vessel that had been used in international drug smuggling. The DEA published notice of the seizure and the intent to forfeit, but failed to send notice to the claimant even though they suspected that he was the owner and subsequently proved it. DEA forfeited the vessel about three months after its seizure.

The claimant moved for return of the vessel more than five years after its seizure. He had been convicted and sentenced on charges of conspiring to import marijuana. His motion post-dated the five-year period in which the government could have instituted judicial forfeiture proceedings.

In overturning the District Court, the Ninth Circuit held that it was the government's carelessness that allowed for the statute of limitation to run out. While the claimant may well have postponed filing his claim until after the statute of limitations ran, it was as the result of the government's failure to adequately notify the claimant. ❖

Prosecutor Has No Right to Override Defendant's Jury Trial Waiver in Oregon

The Oregon Supreme Court struck down as unconstitutional a statute that granted prosecutors the right to insist on a jury trial despite a defendant's waiver of the right to a jury (State v. Baker, Oregon Supreme Court #S45664).

The Oregon Constitution, modeled after the Sixth Amendment to the U.S. Constitution, says that in "all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed.... providing, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone... (Article I, Section II)."

The Court held that this language clearly establishes that it is the defendant who is entitled to waive a jury, and only the trial judge has "the power to defeat a defendant's choice to be tried by the court sitting without a jury."❖

Procedural Delays Lead to Dismissal of Case in Minnesota

The Minnesota Supreme Court dismissed a criminal charge in a case because the procedural irregularities that delayed the trial for over a year from the time of the defendant's arrest so troubled the court that it used its supervisory authority even though the defendant could not prove a speedy trial violation.

The Minnesota Supreme Court reviewed the case under the four-step test set out in Baker v. Wingo 407 U.S. 514 (1972). The second factor requires an inquiry into the reason for the delay. The Court found that although some of the delay was the defendant's responsibility, a portion of the delay was attributable to the prosecutor and the various trial judges among whom the case shuttled. Although there was no evidence of bad faith, the case was transferred between judges for seven months, never staying with any one judge for more than two months.

The delay which most troubled the Court occurred due to the prosecutor's scheduling conflict. Asserting that prosecutors are not "fungible," the prosecutor refused to send another attorney to try the

case. The case was ultimately tried by another prosecutor, however.

The Court determined that the duty placed on the trial courts and prosecutors to protect the defendant's right to a speedy trial was, in this case, violated and that the interests of justice mandated dismissal.❖

Second Circuit Court of Appeals Holds Conflict of Interest at Sentencing Not Ineffective Assistance of Counsel

The Second Circuit Court of Appeals held that a defendant's disagreement with counsel over strategy that was aired during a sentencing hearing does not give rise to a presumption of prejudice in the context of a post-trial claim of ineffective assistance of counsel (U.S. v. White, 2nd Circ. #98-1102).

At the sentencing hearing, the defendant requested substitution of counsel, complaining that his attorney had failed to call a witness and moved for judgment of acquittal and a new trial. Counsel was allowed to respond to these allegations.

In support of his ineffective assistance of counsel claim, the defendant alleged that a conflict of interest arose when counsel responded to the allegations concerning deficient performance at sentencing. The defendant argued that counsel was faced with a choice of defending herself against the allegation or defending the client and potentially being subjected to malpractice liability. The resulting conflict adversely affected counsel's performance, by, for example, prompting her to contradict him in open court. ❖

Sixth Circuit Court of Appeals Rules Reversal Warranted as Result of Cumulative Effect of Prosecutorial Misconduct

The cumulative effect of isolated instances of prosecutorial misconduct, including improper bolstering of a government witness, improper vouching for a government witness's reliability, and an improper challenge to a testifying defendant's credibility, require reversal and a new trial.

The Sixth Circuit Court of Appeals held in U.S. v. Francis (6th Circ. #97-1129) that the conviction of the two defendants, a father and son, for laundering large amounts of money for drug dealers must be overturned.

The misconduct occurred when the prosecutor told the jury of a plea agreement which included a lesser sentence if the government's witness told the truth while testifying. The prosecutor indicated that the agreement depended on whether she, the prosecutor, believed her own witness's testimony. The prosecutor also improperly bolstered a witness's testimony by implying to the jury that the testimony had been corroborated by evidence available to the government but not made available to the jury. Finally, the prosecutor improperly impeached a testifying defendant's credibility by referring to him as a liar, a con man and by telling the jury that the defendant thought he could charm his way into the jury member's hearts and minds. The Court held, in this instance, that the impropriety came from the prosecutor's failure to link such impeachment to evidence before the jury.

Individually, none of the misconduct was flagrant, the Court held, as they were isolated and not deliberate incidents. As a result, the standard for determining whether reversal is mandated is established by U.S. v. Bess (583 F.2d 749 (CA 6 1979)). That test mandates reversal if: 1) the proof of guilt is not overwhelming; 2) the defense objected to the misconduct; and 3) the trial court failed to cure the misconduct by admonishing the jury.

Here, the prosecutor's comments did not individually satisfy Bess. Defense counsel failed to object to any of the comments and proof of guilt was rather strong. However, the prosecutor used improper methods and did so pervasively and repeatedly. Therefore, "when we review the numerous examples of impropriety in the case together and in the context of the entire trial, a new trial is appropriate," the Court determined.❖

Cross-Examination to Elicit Unprovable Facts is Misconduct, Rules Maryland Court of Appeals

During trial, a prosecutor engaged in misconduct requiring reversal of the defendant's conviction by repeatedly attempting to elicit a testifying co-defendant's acknowledgment of a statement that incriminated the defendant allegedly made during failed plea negotiations, a Maryland Court of Appeals held (Elmer v. State Md. CtApp. #31-1999).

The defendant was convicted of shooting a pedestrian from a vehicle in which the defendant and his co-defendant were riding. At their joint trial, the issue of which defendant had fired the gun was disputed. During cross-examination of the co-defendant, the prosecutor asked whether the co-defendant had ever said the defendant was the shooter. The co-defendant's attorney objected, and, at the bench, stated that the prosecutor must be basing the question on information gathered during aborted plea bargain discussions. The objection was overruled and the prosecutor tried several more times to get the co-defendant to say that he had accused the defendant. The co-defendant steadfastly denied making such a statement.

The Maryland Court of Appeals held that because the defendant was not a party to the co-defendant's plea negotiations, he was not protected under Maryland Rule 5-410 which protects admissions made during plea negotiations from being used at trial. However, the defendant was protected under the hearsay rule as the testimony the prosecutor sought to elicit would have been inadmissible.

Citing U.S. v. Elizondo (920 F.2d 1308, 7th Circ, 1990 "a prosecutor may not ask a question 'which implies a factual predicate which the examiner knows he cannot support by evidence...'" at 1313) the court found that it was misconduct for a lawyer "to inject inadmissible matters before a jury by asking a question that suggests its own otherwise inadmissible answer."

The court held that the prosecutor's conduct in this case violated these principles, that the prosecutor's questions "suggested the existence of facts which he could not prove." Once the source of information was made clear, the prosecutor knew he could not prove the facts he hoped to elicit and lacked a good faith belief in the factual predicate implied by the question. The question improperly implied the prosecutor's personal knowledge concerning the witnesses truthfulness.❖

Ineffective Assistance of Counsel for Failure to Tell Defendant of Plea Offer in Florida

The Florida Supreme Court held that counsel renders ineffective assistance in violation of the Sixth Amendment by failing to advise the defendant of the state's offer of a plea bargain. The Court further held that the defendant does not have to allege and prove that the trial court would have accepted the terms of the offer.

In an April 8, 1999 per curiam opinion in Cottle v. State (Florida Supreme Court #91,822), the Court held that 1) counsel failed to communicate a plea offer or misinformed the defendant concerning the possible penalty, 2) that the defendant would have accepted the offer, and 3) acceptance of the offer would have resulted in a lesser sentence. The intermediate appellate court had held that the defendant must show that the offer would have been accepted by the trial judge, but the Supreme Court rejected that requirement. The Court held that there was an "inherent prejudice" that satisfied the prejudice prong of Strickland v. Washington (466 U.S. 68, 1984).❖

Third Circuit Court of Appeals Says Prosecution Must Take Affirmative and Real Steps to Secure Key Witness

The Third Circuit Court of Appeals overturned a life sentence for murder because the state failed to adequately attempt to locate the sole eyewitness. In McCandless v. Vaughn, (3rd Circ. #97-1585, 3/30/99), the Circuit Court found that when the prosecution seeks to admit prior testimony of a key witness, the Sixth Amendment's Confrontation Clause

requires a showing that the authorities took affirmative and real steps to secure the witness for trial before asserting in court that the witness is unavailable.

At McCandless' preliminary hearing, the only eyewitness to the shooting testified that McCandless was the triggerman. That witness, John Barth, was also implicated in, and had been arrested for, the murder, but agreed to testify against McCandless. Barth agreed to testify in exchange for the prosecutor arranging for his release on bail and a promise that the charges against him would be dropped pending successful conclusion of the case against McCandless. After providing testimony at the preliminary hearing, the witness absconded. The trial court declared the witness unavailable and allowed for his preliminary hearing testimony to be read into the record. McCandless was convicted and sentenced to a mandatory life term.

The Third Circuit, citing Roberts v. Ohio (448 U.S. 56, 1980), noted that a witness's out-of-court statement is admissible once the prosecution has established that the declarant is unavailable and that the prosecution's statements exhibit "adequate indicia of reliability." The prosecution must establish the witness's unavailability by showing that it made reasonable, good-faith efforts to obtain the testimony. Even a remote possibility, if it is genuine, of securing the testimony is sufficient to trigger a duty to pursue the witness. The more important the witness, the more sensitive the confrontation issues, especially when the witness is an accomplice or has some other substantial reason to cooperate with the prosecution as here.

Given the circumstances of this case – that the prosecution was seeking the death penalty and that the key witness faced liability for the crime – the prosecution's efforts to locate Barth did not satisfy the good-faith requirement. The prosecution never sought to modify the conditions of bail even after two failures to appear. The Court stressed that is was clear well before trial that the witness would not appear unless the prosecution took affirmative action to secure his presence, which they did not.

The Court found that the authorities checked prison and police records and twice visited his home (once slipping a subpoena under his door), and one month later repeated these same efforts. Officials were able to reach Barth's wife at the time of jury selection, who informed them that she had met with the witness in a neighboring state just two weeks earlier. The Court found that it should have been obvious that the meeting had to have been arranged and that a check of phone records would have been fruitful. Yet, the authorities merely sought unsuccessfully to obtain the phone company's voluntary assistance, and when told a warrant was needed, failed to seek one. Further, authorities made only token efforts to trace Barth in the neighboring state, and failed to even phone the witness's father who was the surety on his bond.

The Court concluded that far greater effort would have been made had the prosecution not obtained Barth's favorable testimony at the preliminary hearing and had needed him for trial. Such a disparity is an affront to the Confrontation Clause the Court found. The Court granted McCandless' habeas corpus petition.❖

Admissibility of Technical and Specialized Knowledge Expert Testimony

The United States Supreme Court held in Kumho Tire Company, Ltd., et al., Petitioners v. Patrick Carmichael, etc., et al. (119 S.Ct. 1167, Decided March 23, 1999) that the Daubert v. Merrell Dow Pharmaceuticals (509 U.S. 579, 1993) standard for the admissibility of expert testimony applies not only to scientific evidence, but also to technical and other specialized knowledge. The Daubert "gatekeeping" role of the trial court applies to any specialized knowledge which might become the subject of expert testimony. The decision in Kumho derives from a challenge to expert testimony in a civil case, but as with Daubert, it can be expected to have an important impact on criminal cases.

Daubert focused on the admissibility of scientific expert testimony, holding that the Federal Rules of Evidence Rule 702 "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the

task at hand (at 597)." The Court pointed out that scientific evidence is admissible only if it is both relevant and reliable.

The four factors set out in Daubert for assessing the reliability of scientific evidence are: 1) whether the theory or technique can be (and has been) tested; 2) whether it has been subjected to peer review and publication; 3) whether there is a high known or potential error rate and whether there are standards for controlling for error; and 4) whether the theory or technique enjoys general acceptance within the relevant scientific community.

In Kumho, the Court overturned the holding of the Eleventh Circuit Court of Appeals which had found that Daubert only applied to scientific evidence, not technical or other specialized knowledge. The Supreme Court concluded that the trial court may consider one or more of the specific factors set out in Daubert, but that the test of reliability is flexible, and the trial court has broad latitude in determining how to assess ultimate reliability and admissibility. The Court restated that the four criteria used Daubert are neither necessary nor exclusive, and do not apply to all experts in every case.

Kumho resulted from Patrick Carmichael's attempt to introduce expert testimony from a tire failure analyst in litigation against the tire manufacturer. On July 6, 1993, Carmichael's right rear tire blew out resulting in an accident that caused one death and severely injured others. Carmichael filed suit claiming that the tire was defective. At trial, Kumho Tire challenged the reliability of Carmichael's expert. The trial judge conducted a Daubert test and found that the testimony did not meet the standards for admissibility. The Eleventh Circuit reversed, stating that the Daubert standard clearly applied only to scientific evidence, not skill or experience-based knowledge.❖

No IAC for Failing to Oppose Client's Release on Own Recognizance

A Federal Judge for the Northern District of New York has rejected a magistrate's ruling that trial counsel was ineffective for failing to oppose his client's request to be released on his own recognizance after his guilty plea. The defendant, Durrel Dow, subsequently failed to appear for his sentencing hearing and was given a term of 8 to 25 years instead of the 1 to 4 year term of his plea bargain.

The Magistrate Judge David Hurd ruled that Dow had received an incompetent defense from the Oneida County Public Defender's Office because he had been represented by four different lawyers who did not communicate among themselves and did not familiarize themselves with the case. The magistrate also found that they failed to seek youthful offender status for Dow and persuaded him to plead to the top count of the indictment. Most importantly, the magistrate said, was the failure to oppose Dow's request for ROR given the serious consequences that attached to a failure to appear at sentencing. Magistrate Hurd stated that Dow could have fared no worse and would have been better off without any legal representation.

Northern District Chief Judge Thomas McAvoy overruled Hurd, however. Judge McAvoy ruled that defense lawyers have no duty to provide their clients with legal advice regarding pre-sentencing release. McAvoy found that Dow's explicit direction to his attorney to seek release pending sentencing created a presumption of reasonableness.❖

NEW PUBLICATIONS

Look for the First Special Report on Indigent Defense from the Bureau of Justice Assistance

Too frequently, indigent defense issues are overlooked in the criminal justice system. For example, while a significant amount of research is produced for professionals working in courts, corrections and law enforcement, relatively little is produced to benefit the indigent defense practitioner. Recognizing this imbalance, U.S. Department of Justice Bureau of Justice Assistance (BJA) Director Nancy Gist recently launched a series of Special Reports on Indigent Defense as one of the ways her department is working to get useful information into the hands of indigent defense practitioners throughout the country.

The series of articles will focus on critical challenges facing indigent defense and share information on innovative approaches indigent defense programs are taking to address issues concerning their practice and operations. The Spangenberg Group is currently completing the first article in the series, which focuses on the use of technology among public defender programs.

This first Special Report describes the range of technological equipment and utilization found in public defender offices throughout the U.S. and discusses how technology has improved efficiency and affected the quality of services provided to clients. In addition, the report highlights innovative technological practices taken by several public defender organizations in the areas of case management, criminal justice information integration and litigation support technologies.

The report will be distributed by BJA sometime this summer. It will also be available at the Department of Justice's web site (http://www.usdoj.gov) by the end of August.❖

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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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