THE SPANGENBERG REPORT

Volume V, Issue 3
October 1999

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1999 State Legislative Scorecard: Developments Affecting Indigent Defense

Introduction

For the fifth consecutive year, *The Spangenberg Report* presents the annual State Legislative Sessions Scorecard. This annual legislative review is our chance to provide readers of *The Spangenberg Report* with a synopsis of state legislative activities which may affect the delivery of indigent defense services across the nation in the coming fiscal year. Throughout the year, The Spangenberg Group has tracked the progress of proposed legislation and, following the methodology of our past legislative surveys, spent several weeks in the late summer conducting informal telephone interviews with public defenders, state court administrators, state and local bar officials, legislators and representatives of national organizations to determine the impact new legislation may have on the indigent defense community. The topics covered in this year's survey include: FY 2000 public defender budgets, indigent defense system changes, indigent defense setbacks, modification of death penalty procedures and sentencing reform.

Overview: 1999 was Primarily A Positive Year for Indigent Defense Providers

In the 1998 Legislative Scorecard (see *The Spangenberg Report*, Volume IV, Issue 4), we reported that for the second consecutive year, the gains experienced by indigent defense providers surpassed the number of losses. Respondents to the 1998 survey reported many improvements to the indigent defense systems in their states and several survey participants noted significant increases in their annual appropriation.

This trend of more indigent defense successes than setbacks continued into the 1999 legislative session. Appropriations in most states either remained stable or increased, and in the majority of states where public defenders reported an increase in their workload, they also announced a corresponding increase in funding. A few states reported success in their efforts to raise public defender salaries to the levels of other government attorneys in their states, and a number of states saw an increase in compensation rates for court-appointed counsel. These successes are a sign that, more and more, states are acknowledging the importance of the indigent defense function in their overall criminal justice systems.

Budget/Appropriations

The budget for **Connecticut's** Division of Public Defender Services (DPDS) for FY 2000 is $28,079,848, an increase of 12.34% over its FY 1999 budget. This includes approximately $1.4 million in federal grant money for FY 2000, up 7.69% from the $1.3 million federal funding in FY 1999. As part of this year's appropriations, the Legislature authorized and funded 51 new positions statewide for the Division of Public Defender Services. This money will support a variety of positions (attorney, investigator, social worker, clerical), and will benefit DPDS in a number of ways, including: some offices will receive additional staff; some federally-funded positions will become permanent DPDS positions; and some jurisdictions where attorneys on contract currently handle juvenile cases will have full-time juvenile defender offices established.

In addition, the Connecticut Division of Public Defender Services received funding, either through state appropriation or federal grant monies, to continue to provide a variety of specialized services. DPDS established the Psychiatric Defense Unit, located on-site at the Connecticut Valley Hospital, just over a year ago. This unit was created to work with the Psychiatric Security Review Board to provide the best-possible service to clients. Currently, a full-time attorney and a social worker staff the unit. DPDS also continued funding for the year-old state's first community court, and established three new adult drug courts, the first juvenile drug court and four domestic violence courts.

The **Georgia** Indigent Defense Council (GIDC) received a line-item budget of $4.1 million for its "grants to counties" program, a fund which distributes money to participating counties according to a population, caseload and expense formula. Counties may participate in this program by meeting guidelines established by GIDC. The appropriated $4.1 million represents an increase of $100,000 from FY 1999's appropriation to the grants to counties program. The Multicounty Public Defender Division of GIDC, a state-funded death penalty division, received $900,000 for FY 2000, a 10.57% increase from the budget of $814,000 in FY 1999. In addition to these monies, GIDC also expects to receive over $3.3 million in revenue from the following sources: the Clerks and Sheriff's Trust Account (GIDC receives interest accrued on accounts holding cash bonds or funds paid for in security or judicial disposition); a 40% share of Georgia Bar Foundation (IOLTA) funds; a Governor's Children and Youth Coordinating Council contract to continue GIDC's "seven deadly sins" tracking project; and a Governor's grant to create a trial techniques training program focusing on the preparation and trial of a DUI case. In total GIDC's budget increased 2.47% (from $8.1 million in FY 1999 to $8.3 million in FY 2000).

Legislators in **Minnesota** debated the issue of salary parity between defenders and prosecutors during the past session. The state legislature appropriated a line-item of $2,421,000 for the second fiscal year of the current biennium, beginning July 1, 2000, to fund a salary increase for both public defender attorneys and support staff. The goal of this additional money is to raise public defender salaries to the level of salaries in the State Attorney General's Office. In sum, the Minnesota State Board of Public Defense received a budget of $44,272,000 for FY 2000, a 3.82% increase from its FY 1999 budget of $42,642,000. The Board of Public Defense was awarded a one-time grant of $300,000 for a "statewide connection project," which involves connecting rural public defenders to the public defender network via the Internet.

In addition, the public defenders in Hennepin County (Minneapolis) benefitted from a state grant to the justice system in the county. The Hennepin County Public Defender received $420,000 to fund five temporary public defenders and one paralegal in response to the increased caseload caused by the enforcement of lower level crimes in the metropolitan area.

The State Public Defender (SPD) Office in **Wyoming** will now handle state post conviction relief in death penalty cases (this legislation is discussed in the Systemic Changes section of this article). In order to help defray the cost of this additional responsibility, the Legislature allocated $75,000 to the State Public

Defender budget for FY 2000. This money funds one full-time position to provide post conviction representation. In addition, the Wyoming Legislature appropriated $470,588 to the State Public Defender to cover the increased costs of capital litigation, as the number of capital cases in the state has been rising over the past few years. The State Public Defender's total budget for FY 2000 was $3,619,372.50. (See *The Spangenberg Report*, Volume V, Issue 2 for more detail.)

An appropriation increase in **Vermont** included funding to raise the rates paid to court-appointed counsel. The Vermont Defender General received a budget of $6.3 million for FY 2000, an 8.01% increase from the FY 1999 appropriation of $5,832,755. In addition, the Office of the Defender General was awarded a BJA Grant of $150,000 to Identify, Assess and Accommodate clients with developmental disabilities. (See *The Spangenberg Report*, Volume V, Issue 2, for more detail.)

Other notable budget changes include:

- Legislators in **Delaware** provided the State Public Defender with a number of one-time budget items, totaling $212,300. These funds will be used improve the Public Defender's computer systems, including new hardware, software upgrades and training on new programs for employees.
- The **Florida** Public Defender Association (FPDA), a network of Florida's 20 elected circuit public defenders, received $136.7 million from the Florida legislature. This is a 5.97% increase from the FY 1999 appropriation of $129 million. The FPDA received $1.5 million to handle sexual predator cases, as a result of new legislation (S 2192) clarifying public defenders' responsibility for representing indigent defendants charged as sexually violent predators in civil commitment proceedings.
- State money for indigent defense in **Kansas** increased, as the Board of Indigents' Defense Services (BIDS) received a state appropriation of $14.5 million for FY 2000, a .69% improvement over the FY 1999 final appropriation of $14.4 million.
- The **Ohio** Public Defender Commission was appropriated $62,393,829 for FY 2000. This is a 15.23% increase from the $54,145,350 appropriated in FY 1999.

Systemic Changes

Legislators in **Wyoming** made a number of changes to the state's Public Defender Act (WY Stat. §7-6-101 et. seq.). In response to a review of the Act conducted by the Joint Judiciary Interim Committee, SF 35 asserts that the State Public Defender Office will now handle state post conviction relief in death penalty cases as well as "in such other cases as the state public defender deems appropriate." As noted in *The Spangenberg Report*, Volume V, Issue 2, Wyoming was previously one of only two states (along with Georgia) which did not provide counsel to indigent defendants in post-conviction proceedings.

As part of SF 35, the Legislature eliminated the availability of "standby counsel." Previously, Wyoming practice had held that even when an indigent defendant waives his/her right to counsel, a public defender was appointed as "standby counsel." SF 35 amends W.S. 7-6-107 so that an individual "who knowingly and voluntarily waives his right to counsel and who elects to represent himself shall not be entitled to standby counsel under this act." Although it may be seen as a limitation to the right to counsel, this amendment was supported by the Wyoming State Public Defender, who viewed the standby counsel position as one which raised ethical as well as logistical problems.

SF 35 also addresses the issue of partial indigency, or what to do when a defendant "becomes," or is deemed to be, indigent during the course of a case. The bill establishes a procedure for determining if an individual is entitled to public defender services, and grants the State Public Defender notification of such

requests and the right to voice its opinion regarding the extension of services. In addition, the bill clarifies the law regarding service of process fees. Previously, some county sheriffs charged the public defender office up to $20 for service of process (i.e., a subpoena) on behalf of a Public Defender client. SF 35 amends W.S. 7-6-100 (b) so that this will no longer occur. Finally, Independent Contractors (i.e., court-appointed private attorneys) handling Public Defender cases in Wyoming now receive coverage under the Wyoming Governmental Claims Act and have protection against liability suits stemming from actions in indigent defense cases.

In **Iowa**, SF 451 makes a number of changes regarding the representation of indigent defendants across the state. The bill creates a five-member Indigent Defense Advisory Commission and provides for the selection of its members. This Commission will advise the Governor and the General Assembly regarding hourly rates and per case fee limitations, and will present a written report to the Governor and General Assembly every three years regarding its recommendations and activities.

Membership on the Commission will be determined by the Governor and the General Assembly. The Governor will choose three members, one of whom is nominated by the Iowa State Bar Association, and another nominated by the Iowa Supreme Court. The remaining two Commission participants shall come from the General Assembly, one from each chamber and no more than one from a particular political party. No more than three of the members may be licensed to practice law in the state of Iowa, and terms shall last for three years. Finally, the state public defender will participate as an ex officio member of the commission and as the non-voting chair of the commission.

SF 451 also implements a statutory hourly fee for cases handled by court-appointed counsel, replacing the former requirement that the State Public Defender set the rates. As of July 1, 1999, attorneys representing indigent defendants in Iowa shall receive $60 per hour for all work on Class "A" felonies; $55 per hour for Class "B" felonies; and $50 per hour for all other cases. This represents an increase from the previous rates of $55, $50 and $45 per hour for Class A felonies, Class B felonies and other cases, respectively. (See *The Spangenberg Report,* Volume V, Issue 2 for more detail.)

In addition, the bill transfers the authority to determine fee limitations for various cases from the Iowa Supreme Court to the State Public Defender. The limitations, which can be exceeded by court order, set by the State Public Defender include: a range of $1,000 - $15,000 for felonies, depending on severity of case; $200 - $1,000 for misdemeanors; $2,000 for appeals to the Supreme Court; and $10,000 for Sexual Predator Commitments. The new fee caps are all either equal to or greater than the previous limits.

Besides these provisions relating to appointed counsel in Iowa, SF 451 also addressed the issue of indigency, requiring that a person's assets, as well as his or her income, be considered when assessing ability to pay for counsel. The legislature redefined "indigent" as having an income at or below 125% of the United States poverty level (previously it was 150%), and abolished "partial indigency" unless the court makes a written judgment that not receiving appointed counsel would cause significant hardship to the applicant.

Arizona's legislators passed an initiative which appropriates state money to the courts, prosecutors and public defenders for the purpose of "speeding up" the processing of cases. SB 1013, known as the "Fill the Gap" initiative, establishes the State Aid to County Attorneys Fund, the State Aid to Indigent Defense Fund and the State Aid to the Courts Fund. In addition, the legislation creates new assessments and fines which will contribute to these funds. The money from the State Aid to Indigent Defense Fund will be used by county public defenders, legal defenders and contract indigent defense providers to process criminal cases. (See *Coalition "Fills the Gap" in Arizona* below, for more detail.)

In **Washington**, the legislature authorized counties to seek reimbursement of extraordinary criminal justice costs related to investigation, prosecution, indigent defense, jury impanelment, expert witnesses, interpreters, incarceration, and other

adjudication costs of aggravated murder cases. HB 1599 technically applies to all counties, though it is intended specifically to benefit the smaller counties in the state, which face the threat of bankruptcy if involved in a long and expensive serious criminal case. In order to receive the money, counties must submit a "petition for relief" to the state Office of Public Defense (OPD), which compensates attorneys handling appointed appellate and death penalty cases in the state. This office will work with the Washington Association of Prosecuting Attorneys and the Washington Association of Sheriffs and Police Chiefs to institute a procedure for processing and prioritizing the petitions. When evaluating the petitions, the OPD, the Association of Prosecuting Attorneys and the Association of Sheriffs and Police Chiefs must consider, among other factors, "disproportionate fiscal impact relative to the county budget, efficient use of resources, and whether the costs are extraordinary and could not be reasonably accommodated and anticipated in the normal budget process." The groups shall then develop a list of counties which they recommend should receive funding, and submit that to the legislature before January 1 of each year.

Another legislative initiative requires the OPD to perform a study evaluating the costs and expenses of representing indigent parents, guardians, legal custodians and children in dependency and termination of parental rights hearings at the trial-court level, and make recommendations for "an equitable method" of payment in such cases. The Office of Public Defense must present its report to the Legislature by December 6, 1999.

Finally, the Washington legislature took up the issue of coordinating family court services in the state, after legislative analysis showed that there was "significant case overlap in the case types of juvenile offender, juvenile dependency, at-risk youth, child in need of services, truancy, domestic violence, and domestic relations." In response, legislators passed HB 1663, creating a Unified Family Court pilot program, in hopes that such a court system will provide coordinated legal and social services for families facing a range of inter-related problems. The court system shall emphasize non-adversarial dispute resolution and a flexible response to the issues facing families involved in more than one sector of the justice system. The Office of the Administrator of the Courts will study and evaluate the project on a biennial basis, and the first three sites will be selected through a request for proposal process.

In **Kansas**, attorneys employed by the state Board of Indigents' Defense Services (BIDS) received pay parity with attorneys in other state civil servant positions. BIDS attorneys are considered "unclassified" civil servants, and, prior to the passage of the bill, earned less than "classified" civil servants who work in organizations such as the Department of Revenue and most large state agencies. Supporters of BIDS' push for parity used a Spangenberg Group report, *Comparative Analysis of Kansas Board of Indigents' Defense Services Attorney Salaries with Selected States' Attorney Salaries* (November, 1998) in their lobbying efforts. Now BIDS attorneys will earn salaries comparable to their attorney counterparts in other state agencies. The Legislature appropriated $250,000 to BIDS in order to implement this change.

The **Delaware** General Assembly made the positions of State Public Defender and Chief Deputy full-time and will pay these individuals the same rate as the Attorney General and Chief Deputy Attorney General. Previously, the Public Defender and Chief Deputy positions were part-time. The Legislature created a committee to recommend salaries for the Attorney General and Public Defender. Membership on this committee will include representatives from the state Budget, Public Defender, Attorney General, and Controller offices. In addition, the Public Defender is ordered to work with the State Personnel Office to develop a plan for reorganization and present it to the Finance Committee Chairs of the House and Senate by October 1, 1999.

Vermont has begun to pay court-appointed counsel the rate of $50 per hour, which was first

ordered by the Supreme Court in 1992 and intended to be effective for FY 1993. However, the legislature passed a legislative override in 1992 stating: "Notwithstanding 13 V.S.A. §5205(a) and Administrative Order of the Vermont Supreme Court as amended, the rate of compensation for the services of ad hoc counsel in public defender cases shall be $40 per hour through June 30, 1997." The sunset date was extended in 1997 through June 30, 1998, and payment of $40 per hour continued for a year after that date. However, this year the legislature appropriated $580,881 to the Office of the Defender General to pay appointed counsel the higher rate. As of July 1, 1999, Vermont has begun to adhere to the $50 rate.

The **New Jersey** Legislature changed the method of handling termination of parental rights (TPR) cases in the state. Previously, the participants in TPR cases (both the children and parents) were represented by pro bono attorneys, while in dependency cases, the children were represented by Law Guardians, who are attorneys appointed to represent the children, and parents and guardians received legal counsel from private attorneys retained by the Office of the Public Defender. SB 1977 brings TPR practice in line with dependency practice. The New Jersey Legislature appropriated $1.2 million to the State Public Defender to cover the costs of the office's new responsibilities. The State Public Defender has also created an entirely separate administrative division to oversee and pay the private attorneys assigned to represent parents in TPR and dependency cases, in order to avoid any possible conflict of interest.

The **Alaska** Public Defender Agency is responsible for representing parents in child dependency cases. In the 1998 legislative session, the Alaska Legislature passed a new Children in Need of Aid (CINA) law which in many ways restricted parents' rights in favor of quicker permanent placement outside the family, if deemed necessary by the court. The Public Defender has spent the past year fighting this and advocating for parents in a number of ways, declaring that "reasonable efforts" must be provided to the parents in these cases. One method employed by the Public Defender has been to join with other state agencies in all budget presentations, in order to demonstrate that public defenders are an integral part of the child protection system, and must have the ability to help parents receive the services they need while the court decides if children should remain in the home. They have also begun participating in a capital project received by the Department of Health and Social Services to reduce the number of children who have been in foster care for long periods of time. This year, for example, the Public Defender Agency expects to receive up to $250,000 in a transfer from Health and Social Services.

Other notable changes include:

- In **Alabama**, HB 53 raised the rates of compensation for court-appointed attorneys and eliminated the per case caps for capital and life imprisonment cases. The new rates went into effect on June 10, 1999, and will increase again on October 1, 2000. (See *The Spangenberg Report*, Volume V, Issue 2, for more detail)
- In **Florida**, this year's legislature addressed the issue of public defender conflict of interest cases. HB 327 gives the court the authority to conduct hearings to investigate a public defender's claim of conflict of interest.
- **Georgia**'s legislators addressed the issue of juvenile mental competency during this past session. HB 417 provides for delinquency proceedings to be paused in order to determine the mental competency of the charged juvenile, and creates a program of treatment, rehabilitation and/or supervision for juveniles determined not to be mentally competent.
- The **Illinois** Legislature passed legislation addressing criminal justice in the state. As described in *The Spangenberg Report*, Volume V, Issue 2, SB 27 creates the Task Force on Professional Practice in the Illinois Justice System, a body charged with examining issues affecting the development of attorneys' (both defenders and prosecutors) professionalism, including: caseload levels, salary structure, annual training needs and technological needs.

- Public Defenders in **Indiana** are now responsible for representation of parents in abuse and neglect (CHINS) cases. Although it varies by county, public defenders in the majority of cases represent parents while Guardians Ad Litem, which may or may not be attorneys, represent the children. Previously, the parents were represented by pro bono attorneys.
- In **Kentucky**, the Legislature in 1998 amended Kentucky statutes so that compensation rates for appointed attorneys are now set by the Department of Public Advocacy (DPA), and no longer by state statute. The DPA produced a fee schedule in March of 1999, and a selection of the rates is as follows: $40 per hour for non-violent felonies, with a cap of $1,200 (no trial) or $1,800 (with trial); $50 per hour for violent felonies subject to 80% Parole Eligibility, with a cap of $2,400 (no trial) and $3,000 (with trial); and $50 per hour for capital cases where the prosecutor is seeking the death penalty, with a cap of up to $12,500. The rates for non-capital cases increased from the previous reimbursement figures of $25 per hour for out-of-court work and $35 per hour for in-court work for all case types. There was no change in the rates for capital cases.
- Defendants in **Minnesota** who are released on bail and who fail to appear at scheduled court appearances are now required to pay the costs incurred by the prosecutor or governmental agency due to this failure to appear. This is in addition to existing law which provides that failure to appear on a felony charge constitutes a crime for which a fine and imprisonment may be punishment, and those who fail to appear on a misdemeanor charge may be guilty of a misdemeanor. All of the monies collected from this fine revert back to the county treasury.
- The **Nebraska** Legislature implemented some major changes regarding the provision of interpreter services. LB 54's revisions include asking the Nebraska Supreme Court to draft standards for interpreters in court proceedings, and create a fee schedule for interpreters. In addition, the State General Fund will now be used to pay for interpreter services, ending the traditional practice of this being the counties' responsibility.
- The Executive Director of the **Virginia** Public Defender Commission reports that the state's drug court program is growing rapidly. This year, the courts will be implemented in six new jurisdictions.

The statewide indigent defense systems in Colorado and Connecticut experienced notable systemic changes which were not initiated by the state legislatures. In **Colorado**, rates of compensation for court-appointed counsel increased as a result of a court order. Previously, appointed counsel in Colorado received $40 per hour for their work out-of-court, and $50 per hour for their efforts in-court. As of July 1, 1999, rates have been changed to $65 per hour for Death Penalty Litigation, $51 per hour for Type A Felonies; $47 per hour for Type B Felonies; and $45 per hour for Juvenile and Misdemeanor cases, regardless of whether the attorney was working in or out of court. Some of these rates are lower than the original in-court rates, but most work is done out of court, and these rates did increase. The following waivable per case maximums remain in effect: $5,000 for capital cases with no trial; $10,000 for capital cases with a trial; $5,000 for Felony 2 with trial; $2,500 for Felony 1 with no trial; $3,500 for Felony 3 with trial; and $1,750 for Felony 3 with no trial.

The **Connecticut** Public Defender Services Commission adopted several new policies regarding Special Public Defenders (SPDs). SPDs handle the Division of Public Defender Services' conflict cases and are employed on both a contractual and ad hoc/hourly rate basis. The Commission raised the rates of reimbursement to these attorneys as of July 1, 1999. Rates for court-appointed attorneys in non-capital felony cases have been raised from $20 per

hour for out-of-court work to $40 per hour; and from $25 per hour for in-court work to $60 per hour. In capital cases, appointed counsel receive $60 per hour for all work, an increase from $50 per hour. Contract counsel compensation rates have been raised from $325 to $500 per case.

The Commission also took a number of steps to increase oversight of Special Public Defenders, creating the position of Director of Special Public Defenders and establishing Supervision, Evaluation, Qualification and Training Guidelines for Special Public Defenders.

Indigent Defense Setbacks

There were a handful of states in which indigent defense providers did not receive positive results during the legislative session. In Michigan, the state appropriation for the State Appellate Defender Office (SADO) was cut by 20%, falling from approximately $5,000,000 in FY 1999 to $4,000,000 in FY 2000. The legislature approved SADO's budget request, but the governor vetoed the amount and insisted on the lower figure. There was no opposition to the Governor's move from the State Supreme Court. SADO is located within the judiciary. The 20% budget reduction translates into a 20% reduction in staff. The only positive aspect of the cutback was that the battle had been waged long enough for SADO staff to anticipate a possible reduction. So far, just one staff member has been laid off; other staff voluntarily found employment elsewhere.

Two bills which would have significantly altered the face of indigent defense in **South Dakota** failed to pass. HB 1019 and HB 1239 provided for the creation of a statewide public defender program to handle high-grade felony cases (Classes 1, A, and B), as well as a Public Defender Commission to coordinate this representation. However, neither bill made it past the House Judiciary Committee, and South Dakota remains one of only three states (Pennsylvania and Texas are the others) with no statewide oversight of indigent defense at any level. (See *The Spangenberg Report*, Volume V, Issue 1 for more detail.)

In **Ohio**, a few bills which would have examined the justice system as a whole, and the death penalty in particular, have all but been defeated. HB 278 would have established the Commission to Study Racial Equity in the Justice System; HB 299 would have given the defense the right to use local, state and/or national statistics to demonstrate that the death penalty has been imposed in an unfair manner. In addition, this bill would have required the Ohio Attorney General to specify the race, gender, age and income of death-sentenced offenders in the state's annual Death Penalty report. Finally, a third bill, HB 300, would have required that the Prosecution in capital cases to establish "proof beyond any doubt" of both the crime and the aggravating factor in order to impose the death penalty. Although these three bills are not completely dead, our contacts report that the bills have little chance of receiving further hearings.

In most years, the **South Carolina** Office of Indigent Defense (SCOID) can expect approximately 45% of its funding to be collected from alternative revenue sources, including: an application fee and a percentage of a criminal conviction surcharge levied against every defendant who is convicted of, pleads guilty or nolo contendere to, or forfeits bond for, an offense tried in general sessions, magistrate and municipal courts. This year, however, alternative revenues did not come in at anticipated levels, causing funding problems for SCOID. The Director of SCOID has been exploring different avenues for additional funding, but has had no luck so far. As a result, the Office is falling behind in its accounts payable. SCOID received its FY 2000 funding in September; until then, the only money to help pay the bills came from the fine surcharge revenues, which trickled in slowly.

Experience shows that programs such as South Carolina's which rely heavily upon alternative revenue may encounter problems over time if collections do not come in at expected levels each year. Alternative revenue sources can never be adequately budgeted for, and if collections are low in a particular year, whether due to the sources of funds being "tapped out" and unable to increase any more, or financial trouble in the

region, programs can find themselves in a fiscal emergency, as is the case with SCOID now.

A bill which would have made significant changes to indigent defense in **Texas** passed both houses of the Legislature, but was vetoed by Governor Bush. This bill would have: shifted the authority to appoint counsel from local judges to an appointing authority supervised by the county commissioners; required the timely appointment of counsel to indigent pre-trial detainees; insisted upon the provision of more explicit information to indigent defendants on the process for obtaining assigned counsel; authorized the commissioners courts of two or more counties to create a jointly funded regional public defender; and required that all counties submit an annual report on indigent defense to the Texas Judicial Council's Office of Court Administration. (See *The Spangenberg Report*, Volume V, Issue 2, for more detail.)

Death Penalty

A few state legislatures brought up the issue of the costs and implications of the death penalty. Two bills addressing this subject and discussed in previous issues of *The Spangenberg Report* have passed and been signed by the Governors in each state. The enaction of SB 574 in **Illinois** represents the first time that state money will be dedicated to trial-level indigent defense in Illinois. This legislation establishes a capital litigation trust fund to assist counties in the prosecution and defense of capital cases, as well as sets compensation for court-appointed counsel in capital cases at a rate not to exceed $125 per hour with no cap. Pursuant to HB 2035, The **Louisiana** Indigent Defense Board (LIDB) will now 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. LIDB will also oversee the provision of reasonable services, including investigative, expert, and other services for such cases. LIDB did not receive any additional money to handle these new responsibilities. (See *The Spangenberg Report*, Volume V, Issue 2 for more detail on these two bills.)

The **Nebraska** Legislature passed a bill appropriating $160,000 for a study to examine whether the death penalty in Nebraska is applied fairly. Pursuant to LB 76A, the Nebraska Crime Commission is to examine all homicides committed on or after April 20, 1973, looking at: the facts of each case; the race, gender, religious preference and economic status of the defendant and the victim; the charges filed; the result of the judicial proceeding; and the sentence imposed. This study was authorized after Nebraska Governor Mike Johanns vetoed a bill, which had been passed by both houses, which provided for a moratorium on executions while the study was conducted. (See *The Spangenberg Report*, Volume V, Issue 2, for more detail.)

The **Oklahoma** Indigent Defense System (OIDS) was appropriated $1 million in 1998 to represent Terry Nichols in state court for the Oklahoma City bombing. Nichols has already been tried and convicted in federal court. However, this past May, the Oklahoma Legislature took away $900,000 of these funds to assist the victims of the tornadoes which ravaged thousands of homes in Oklahoma in May. As a result, OIDS petitioned the Court to be released from defending Mr. Nichols, who faces a sentence of death if convicted. The Court granted this request. Private attorneys will be appointed to represent Nichols, and additional funding will be provided from the state Judicial Fund, which is made up of excess court fees.

Legislators in **Utah** made some amendments to that state's death penalty statute. HB 44 provides that aggravated murder is a capital offense, and creates new affirmative defenses to the charge of aggravated murder or attempted aggravated murder. Under this bill, the defendant can claim as an affirmative defense: "extreme emotional distress for which there is a reasonable explanation or excuse," or "a reasonable belief that the circumstances provided a legal justification or excuse for his conduct." This defense

can only be used to reduce aggravated murder to murder or reduce attempted aggravated murder to attempted murder.

Sentencing

There were a number of sentencing changes passed in this year's legislative session. In **Rhode Island**, the State Public Defender is working with the Attorney General and Rhode Island Supreme Court to institute a "Surrender Day," upon which all individuals wanted by warrants could come in and have the warrant canceled. The individual would then be released, with a later date set for disposition.

The **Vermont** legislature initiated a hate-crime injunction law. A hate motivated crime is defined as one which is motivated by the victim's "actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap... sexual orientation or gender identity." Under S45, first-time violators can be charged criminally and receive up to a year in jail, and/or receive a $2,000 fine. Second-time offenders may have to pay up to $10,000, and/or spend up to three years in prison.

The **Ohio** House of Representatives created the offense of reckless homicide, effective as of September 1999. This filled a gap in the Ohio sentencing code, which previously provided for negligent, knowledgeable, and purposeful homicide. Also in Ohio, the Senate enhanced the penalties for crimes committed in a "School Safety Zone," defined in SB 1 as a school, school building, school premises, school activity, school bus and an area within 1,000 feet of the boundaries of any school premises.

Washington legislators decided to increase the availability of drug and alcohol treatment, in order to cut down on repeat offenders. The Legislature had enacted a Special Drug Offender Sentencing Alternative (DOSA) in 1995, which provided persons convicted of certain crimes with the opportunity to receive drug and/or alcohol counseling. Those who participated in this program were released from prison early and continued outpatient counseling. DOSA was never fully taken advantage of, as many eligible offenders opted instead to participate in another program, Work Ethic Camp, which emphasized physical labor as a conduit to personal improvement. Work Ethic Camp was more attractive to many potential participants because DOSA only applied to offenders convicted of certain crimes, and those who participated in Work Ethic Camp received a three day credit for each day served. In this past session, HB 1006 increased the types of convictions to which DOSA applies, and removed the three day credit from Work Ethic Camp. Finally, the new law makes drug and alcohol evaluation more available, and not only authorizes counties to implement drug courts, but also provides some funding for these undertakings.

Also in Washington, the Offender Accountability Act (SB 5421) significantly alters the method of providing post-confinement supervision of those convicted of crimes against persons. Now, when individuals are sentenced, the judge will determine the amount of time to be spent in jail, and the maximum amount of time to be spent in "community custody," which is similar to parole. At the end of a person's confinement in jail or prison, the Department of Corrections (DOC) will evaluate him. Those deemed to be dangerous will be given a period of community custody within the judge's recommended time frame. Those who do not appear to be dangerous are released with no supervision. While in community custody, the individual is monitored by the DOC. If the released offender violates his custody, he can be sent back into prison through an administrative hearing process (i.e., without seeing a judge). This act goes into effect July 1, 2000. The Sentencing Guidelines Commission will create a sentencing grid to determine the length of time to be served in community custody after an offender has been in confinement.

Finally, Washington's SB 5214 allowed for the detainment of individuals aged 12 to 21 if arrested for illegal possession of a firearm on school premises. Before they can be released, offenders must be evaluated by a county designated mental health professional. Furthermore, locker searches by school officials are permissible if there is reason to believe a student has brought a gun onto the premises.

In **Florida**, legislators strengthened the state's Three Strikes law. Among other changes, HB 121 redefines the method of determining a habitual offender, allows a sentence of probation to count as a strike and allows a single conviction on multiple charges to count as multiple strikes. The bill also raises the sentences for aggravated assault on a law enforcement officer or an individual over 65 years of age, and re-institutes mandatory minimum sentences for drug trafficking.

Florida legislators also passed the "10/20/Life" Bill (HB 113), which creates a mandatory minimum term of 10 years for aggravated assault, burglary or possession of a firearm by a felon if the person committing the offense had a firearm or destructive device while perpetrating the offense. The sentence increases to a minimum of 20 years if the firearm or destructive device is discharged while committing a felony (with no distinction between purposeful and accidental discharge); and to 25 years to life if the discharge of the firearm/destructive device causes death or great bodily harm.

Legislators in **Arizona** addressed sexual assault in SB 1410. This bill creates a new crime, "violent sexual assault," and provides for a life sentence if a person commits a sex assault using a weapon if that person has one prior conviction for sex assault using a weapon.

Conclusion

Overall, the 1999 legislative sessions resulted in more positive changes than negative consequences for indigent defense providers across the country. We thank all of those respondents who spoke with us, and *The Spangenberg Report* will continue to report on the legislative activities that may impact the delivery of indigent defense services in the coming year.❖

NEWS FROM AROUND THE NATION

Mental Health Courts in the United States

Since publication of the last issue of The Spangenberg Report, we have had a number of requests for more information on mental health issues and mental health courts. Below we provide additional information on the three existing Mental Health Courts in the United States.

Broward County, Florida

In June 1997, the Chief Judge of the Seventeenth Judicial Circuit Court (Broward County) for Florida, established a "Mental Health Court." Initiated as one of the projects of the Mental Health Task Force, the court was established to expedite the mentally ill defendant through the criminal justice system by balancing the needs of the defendant and the community. In an administrative order establishing the court, the Chief Judge wrote: "This circuit has recognized that the creation of 'specialized courts' within other divisions of the court has enhanced the expediency, effectiveness and quality of judicial administration. It is essential that a new strategy be implemented to isolate and focus upon individuals arrested for misdemeanor offenses who are mentally ill or mentally retarded."

Modeled on the drug court that was previously established in Broward County, the mental health court sought to establish a mechanism by which to divert mentally ill defendants to community based services while maintaining the court's authority over the individual. Criminally charged clients, arrested for misdemeanors (excluding domestic violence and driving under the influence and including battery and other violent offenses only with the victim's permission) may be referred to the court. Unlike the drug courts, however, referral to the mental health court is not dependent on the offense charge. The

Broward court has many ways in which a mentally ill client can be referred to the court's jurisdiction.

The goals for the court, as defined in the first progress report, included: 1) creation of effective interactions between criminal justice and mental health systems; 2) ensure legal advocacy for the mentally ill defendant; 3) ensure that mentally ill defendants do not languish in jail because of their mental illness; 4) balance the rights of the defendant and the community; 5) increase access for mentally ill defendants to community based services; and 6) divert mentally ill defendants charged with minor criminal offenses to community treatment.

A defendant appearing before the court will first be evaluated by the judge, with input from the public defender, prosecutor and court monitor. The judge will determine whether to accept jurisdiction. The defendant will then have a review hearing during which the team determines and agrees upon a treatment plan. Periodic reports back to the court and appearances track compliance with the plan. Once the judge determines that the defendant is receiving the long-term treatment needed and is stable, the charges are dismissed.

While this court relies on non-adversarial approaches to adjudication, like drug courts do, there are times when the court may function in a more traditional way. At times, the public defender in the court has advocated that the court accept jurisdiction for a client, and the prosecutor has opposed the request. As in a traditional court-room, each side argues and the judge issues a ruling, but here the ruling is whether or not the court will accept jurisdiction over the client.

The Mental Health Task Force, which founded the court, has also undertaken building a secure detention facility for mentally ill defendants in order to increase the number of available treatment beds. The court has faced some problems in a lack of treatment beds, especially residential services.

The Broward County Mental Health Court has not yet been in operation long enough to be evaluated on the basis of client outcome, but such an evaluation is beginning this fall with support from the MacArthur Foundation. John Petrila, Chair of the Department of Mental Health Law and Policy at the University of South Florida will direct the evaluation which will focus on interviewing key participants in the workings of the court, examine the day to day operation of the court, and compare client outcomes over time to a similar jurisdiction.

King County, Washington

In King County, Washington, a mental health court was established in February, 1999. The impetus for the court was the slaying in 1998 of a Seattle fire fighter by a mentally ill man who had fallen between the gaps of the criminal justice and mental health systems.

Presiding District Judge James Cayce said: "Usually incarceration is not the most effective means for reducing recidivism for these [mentally ill] offenders, as jail does little to treat the mental illness. Through our joint efforts, the courts and health and human service providers can offer more efficient case processing for these defendants." The goal, he continued, was to stop the mentally ill from cycling repeatedly through the criminal justice system.

The goals of this court are: 1) reduce the number of times mentally ill offenders come into contact with the criminal justice system; 2) reduce inappropriate use of institutionalization for the mentally ill; 3) improve the health and well-being of mentally ill defendants; 4) expedite case processing; 5) develop greater linkages between the criminal justice and mental health systems; and 6) protect public safety.

The King County Mental Health Court (MHC) is staffed by a team of people, including the judge, a prosecutor, a defender, a treatment court liaison and probation officers. Each of these team members will receive special training in mental illness. Defendants may be referred by jail psychiatric staff, or referred for consideration by police, attorneys, family members, probation officers, or another District court when the judge determines that the defendant could be better served by the Mental Health Court. The MHC can refuse to accept a case into its jurisdiction (at the judge's discretion), and participation is voluntary since the defendants are asked to waive their rights to trial.

The MHC was initiated to address the needs of "mentally ill, developmentally disabled and dually diagnosed offenders (mentally ill and chemically abusing) who are charged with misdemeanor state offenses in District Court." The guidelines for admittance to MHC state that the court's jurisdiction covers those defendants who are subject to a competency hearing or suffer from significant mental illness and/or developmental disability which is directly connected to the crime. Part of the purpose of the MHC was to allow individualized treatment packages and referral to appropriate treatment providers.

Anchorage, Alaska

The third mental health specialty court was established in the Third Judicial District (Anchorage) for Alaska in April, 1999. Under the auspices of the Alaska Mental Health Board, the court is an effort to respond to the criminalization of the mentally ill. This court was also established as a mechanism to divert mentally ill persons accused of misdemeanors from the correctional system into community residential and treatment services.

The administrative order that enabled the court cited a number of factors that made the court necessary: 1) a large number of misdemeanor cases involve individuals suffering from mental disabilities; 2) the Alaska Department of Corrections is the largest provider of institutional mental health services in the state; 3) a more humane approach that will divert the mentally ill out of overcrowded jails and into appropriate treatment is needed; and 4) no existing method adequately can accomplish the evaluation and diversion process. For these reasons, Alaska's Third Judicial District established the mental health court which will rely upon specialized, trained judges to create effective integration of services between agencies to expedite diversion.

Eligible defendants were described simply as those misdemeanants with diagnosed, or manifest symptoms of, mental illness, developmental disability and/or organic brain disorder.

The court's objectives included: "faster case processing, improved access to community mental health resources, relief of jail overcrowding, reduced clinical and legal recidivism and improved public safety and order."

Participating defendants will be seen for bail review hearings or change of plea and sentencing hearings. Those requesting trial will be ineligible. Defendants may be referred to the court by any interested party (law enforcement, attorneys, mental health providers, family members or other judges).

The court is described as requiring increased collaboration between the court system, attorneys, law enforcement, the department of corrections, and community mental health providers.

One challenge that was identified almost immediately was the shortage of accessible supervised and supported housing (treatment beds) and the excess number of arrestees who are eligible compared to the court's current capacity.

A Previous Mental Health Court in Indianapolis

Although the three mental health courts currently operating in the US are innovations following on efforts to establish other specialized courts, there was at least one prior effort to establish a mental health court. Following negotiations between the mental health community centers and the presiding judge in Indianapolis, Indiana, a mental health court was established in the county hospital for cases involving anyone charged with a minor crime who was suspected of being mentally ill.

Between 1980 and 1985, arrestees could be brought directly to the emergency room for evaluation and detention during the evaluation process when police officers suspected mental illness. The judge, housed in the hospital, could then have easy access to the emergency room and the inpatient unit at the hospital. At the preliminary hearing, the judge had the authority to order the defendant to treatment. Interestingly, a written description of the workings of this court makes no mention of the presence of a public defender, court-appointed defense attorney or

advisement of rights [Sipes, GP et al. A Hospital-based Mental Health Court. Community Mental Health Journal 22(3) 1986].

In 1985, changes in the interpretation of the appropriate laws ended this pilot project.

Factors Related to Defending in Mental Health Courts

Mental health courts, like drug courts, raise a number of issues both personal and strategic for defense attorneys. Some defenders may be uncomfortable pleading their client to an extended period of court supervision when they could plead to limited court oversight, even time served, in a traditional court. In such instances, the question of advocating for the mentally ill client can be complicated: is it in the client's interest to obtain access to services or to be out of custody? Can the client articulate his or her own interests with a reasonable degree of understanding and assessment of the available option?

While a client may be judged competent to stand trial, he or she may in fact not comprehend, under the law, the proceedings and consequences adequately to make a knowing, willful and intelligent waiver of the right to trial (for a discussion of the differences between competence to stand trial and competence to waive rights and plead guilty, see the ABA Criminal Justice Mental Health Standards). Although a client must be deemed competent to stand trial in order to come under the court's jurisdiction, that same client may not be able to rationally assess the consequences and options related to choosing between standard criminal proceedings and the extended, treatment-based court jurisdiction of the mental health courts. Unlike in the situation of drug courts, the mental health court by definition is serving a client population that is often impaired in judgment, insight, comprehension, assessment of future possibilities and cognitive functioning. Precisely for the reasons that a client is eligible for the court, that client's capacity for decision-making must be carefully assisted and protected by counsel.

Additionally, there is a concern that mental health courts will coerce patients into treatment, an issue that the Broward County evaluation will examine closely. This issue has long been difficult for mental health advocates. Typically, the defense attorney's role is to do whatever is ethically necessary to get the client the most favorable outcome, usually meaning the least restrictive outcome. The mental health courts, however, often retain jurisdiction over clients for an extended period of time, almost certainly longer than the amount of time a client would have served in jail. For defense attorneys, the ethical issues between the client's rights to remain free of medication, free from court jurisdiction, out of treatment, and at the same time having a significantly increased risk of re-arrest, extended jail sentences, and deterioration while in custody will be especially difficult.

Mental health courts also pose a different burden on the defense community: the need to be trained and knowledgeable about mental illness. Defense attorneys, not solely those working in the mental health courts but all defense attorneys working in the jurisdiction where the courts operate, will need to be able to identify mental illness. Unlike in drug courts, where the vast majority of cases can be identified because the charges specifically relate to drug offenses, the charges against mentally ill clients may or may not be related to the mental illness in an overt way. For instance, if a client is arrested for disorderly behavior, he or she may just have had too much to drink, or the drinking may have been a effort to self-medicate an underlying mental illness. Defense attorneys will have to be able to distinguish.

Similarly, although the need to develop the skills to work with mentally ill clients exists regardless of whether a mental health court is in operation, the consequences of an attorney not developing those skills could become more significant. As mental health courts refer more clients to already scarce treatment beds, criminal defendants who seek treatment outside the purview of the courts may have an increasingly difficult time obtaining services. Since many of the mentally ill are in the criminal justice system because of a lack of available treatment, access for those mentally ill clients not in the mental health court referral system may decline further.

Certainly, then, the need for specialized training in identifying and working with mentally ill clients will increase. Some of these courts are already recognizing the need for special training for the judges, but defense attorneys will also have to become more skilled in identification and advocacy related to mental illness. This will necessitate defense attorneys working with community advocates and treatment providers to better understand the ways in which the local mental health system works, how and why clients rotate through the mental health and criminal justice systems, and the options for planning better interaction between the two systems. Appropriate treatment and referral decisions should not be left to the judge in mental health courts, but as with all sentencing decisions, defenders should advocate for the best possible option.❖

Oregon Public Defense Services Commission Established

In its most recent session, the Oregon State Legislature established a Public Defense Services Commission (PDSC) to study the current status of indigent defense services in the state of Oregon, make comparisons with other states' systems, and submit a report with recommendations for changes, including any necessary legislative changes, to the state's 71st Legislative Assembly (2001). The bill calling for the study commission was a compromise, after two bills proposing changes to the structure of indigent defense in Oregon failed to gain adequate support.

Currently in Oregon, the state provides all funding for indigent defense services. At the trial level, the Indigent Defense Services Division of the Administrative Office of the Courts administers contracts with each county program, which may choose a public defender, private bar contract or court-appointed counsel system. The State Public Defender handles direct appeals. One of the initial two bills proposed to transfer the responsibilities of the Indigent Defense Services Division from the judiciary into an independent commission. This new public defender commission would have begun operations upon passage of the bill, but the actual operative date for the changeover was not to occur 7/1/2003. Until that date, the commission was to hire a staff to study various issues, adopt rules, etc. The competing bill proposed to house indigent defense within a "public corporation," effective 7/1/2000. The corporation bill was portrayed as a less expensive alternative to the commission model.

The enacted legislation calls for a nine member commission located in the judicial branch of state government. Four of the members are to be non-lawyers and five are to be active Oregon State Bar members, with not more than one public defender, judge and district attorney. Of the non-lawyer members, not more than one may be an employee of a public defender or contract defender. In addition to these nine members, there will be two advisory members, one a state Representative appointed by the Speaker of the House of Representatives and the other a Senator appointed by the President of the Senate. The Chief Justice, State Court Administrator and chairperson of the State Public Defender Committee shall serve as ex officio members. The Chief Justice will appoint the chairperson and vice chairperson of the Commission.

The Commission is charged with studying:

- the current system of providing representation and transcripts in appellate cases;
- the current method for assigned counsel to make requests for case-related expenses, such as investigation, expert witnesses, travel, etc.;
- methods for containing costs of public defense;
- the current structure, organization, service delivery systems, compensation and staffing levels of public defense providers; administration, policies, standards, guidelines, workloads and expenditures of the public defense system; and the types of cases for which public defense services are mandated;
- methods of ensuring effective representation of indigent defendants in compliance with Oregon Revised Statutes, the Oregon Constitution, the

U.S. Constitution, the Oregon Code of Professional Responsibility, the Oregon State Bar's "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases" and national standards for public defense services;

- workload, structure and staffing information from other components of the justice system which serve areas in which public defense services are mandated; and
- delivery models, types of cases handled, compensation levels, policies, standards, guidelines, workloads, expenditures, management, cost containment efforts and practical experiences of public defenders in other jurisdictions.

Additionally, the Judicial Department has been directed to establish a pilot indigency verification unit in three judicial districts during the 1999-2001 biennium and provide reports on the pilot to the PDSC. The pilot program will include the administrative determination of eligibility for public defense counsel and a right to judicial review of the administrative decision with the standard of review being "substantial and compelling reasons".

The Public Defense Services Commission is to report annually on its progress to the interim judiciary committees and just prior to the 2001 legislative session it is to submit a report to the legislature with its preliminary findings and recommendations, along with its work plan and proposed budget for the 2001-03 biennium.❖

New York's Indigent Defense Oversight Committee Issues Third Report

In June 1999, the First Department Indigent Defense Organization Oversight Committee issued its third evaluation of how the indigent defense system for New York City was working. The Committee monitors and evaluates each of the organizations in New York City which provide indigent defense services, based on standards promulgated in 1996. Those criteria include: professional independence of the organization, qualifications of the lawyers, training, supervision, caseloads, promotion and evaluation of employees, support services, quality control, and compliance with standards of professional responsibility.

In the fall of 1995, the Appellate Division of the Supreme Court, First Department, at the request of the New York County Lawyers' Association, the Association of the Bar of the City of New York, the Bronx Bar Association and with the agreement of The City, enacted Court Rules by which the Indigent Defense Organization Oversight Committee was established. The Oversight Committee's first responsibility was to create standards and guidelines against which to measure defense organizations' performance. Once the standards were promulgated by the Appellate Division, the Oversight Committee began its monitoring work.

The Oversight Committee was expected to conduct annual evaluations of all of the indigent defense organizations, including the oldest and largest organization, the Legal Aid Society, the Harlem-based Neighborhood Defender Services, and the Office of the Appellate Defender, as well as the contract organizations which were first created in 1997. There are three such organizations in the First Department (which covers Manhattan and the Bronx, but does not cover Brooklyn, Queens or Staten Island): the New York County Defender Services, the Bronx Defenders and the Center for Appellate Litigation. The Oversight Committee, although having no staff of its own, was considered an important component in the evaluation of the defender organizations that bid to provide services.

The RFP to which contractors respond requires successful bidders to adhere to many of the ABA Standards as promulgated in Chapter 5 of the ABA Standards for Criminal Justice: Providing Defense Services. In its 1999 report, the Oversight Committee found that the City's requirement that the contractors hire only experienced staff resulted in a high quality of services. Further, the contractors' ability to limit their own caseload also raised the quality of representation, although almost every organization went over the projected caseloads. Unlike the contract organizations, the Legal Aid Society has no ability to limit its caseload.

The Committee noted that "quality of life" arrests in Manhattan had significantly increased the number of misdemeanor cases in the system. For the third consecutive year, the Committee noted that the system for provision of indigent defense is underfunded (particularly the Legal Aid Society).

The Committee also commented that the Bronx Defenders policy to co-counsel felony trials was "generally good for clients."❖

Coalition "Fills the Gap" in Arizona

In 1997, county prosecutors, county public defenders and the Arizona Supreme Court, which represented the state's various courts, formed a coalition called "Fill the Gap" to support legislation designed to reduce delays in the processing of cases. The coalition's efforts produced preliminary success in 1998 when the legislature passed a bill to study funding discrepancies among the two ends (law enforcement and corrections) and the middle (courts, prosecutors, and defense) and the resulting impact on case processing time. Then in 1999, the Arizona legislature passed SB 1013, which provides $5 million over the next two years in state assistance to county attorneys, county public defenders, legal defenders, contract indigent defense counsel and Justice and the Superior Courts for the processing of criminal cases.

Several factors contributed to the success of the initiative. The Fill the Gap coalition used the goal of speedier case-processing time as a selling point to the legislature and the public. The coalition provided extensive statistical information and garnered public support to help persuade the legislature to fund the initiative. In 1999, after a year of study, the coalition requested a significantly smaller state appropriation, down from the $19 million requested in 1998 to 1999's request for $5 million over two years. Another important factor was the coalition's suggestion to increase fine surcharges and recoupment efforts to help fund the costs of improving case-processing time. This demonstrated to the legislators that coalition members were creative and committed to making the initiative work.

Between 1992 and 1996, federal and local funding initiatives in Arizona resulted in a 21 percent increase in the number of police officers in the streets, producing corresponding increases in the number of arrests. To address the rise of arrest rate, the legislature expanded the operational capacity of the state prison system by 6,600 beds. Meanwhile, increased felony filings and more adult probationers led to longer delays in case processing time. The Fill the Gap coalition demonstrated that although additional resources were being provided for the front and back ends of the criminal justice system - law enforcement and corrections -- the same level of resources were not being provided for the middle, adjudicatory part of the system – courts, prosecution and defense – leading to the call to Fill the Gap.

Counties and localities fund almost 75 percent of the criminal justice system in Arizona. State funding was sought to enable the courts, prosecutors and defense to process the increased caseload in a timely manner. The Arizona coalition was modeled after Florida's Fill the Gap initiative, which was also successful in securing additional funding for the courts, public defenders and state attorneys (see *The Spangenberg Report,* Volume 2, Issue 1*).*

The Arizona Criminal Justice Commission will administer and allocate monies to each county from the state aid to county attorneys fund and the state aid to indigent defense fund. The Arizona Supreme Court will administer the state aid to the courts fund and the criminal case processing and enforcement improvement fund. To supplement appropriations for the initiative, an additional seven percent will be levied on every fine or penalty imposed and collected by the court in both criminal offenses and civil penalty cases. Furthermore, five percent of any monies collected by the Supreme Court, the Court of Appeals or the Superior Court for the payment of filing fees, including clerk fees, diversion fees, fines, penalties, surcharge, sanctions, probation fees and forfeitures,

will also be remitted to the state treasurer who will allocate the monies toward the initiative.

The monies collected from fine surcharge or collection fees will be distributed according to the following formula: 21.61 percent to the state aid to county attorneys fund, 20.53 percent to the state aid to indigent defender fund 57.37 percent to the state aid to the courts fund and 0.49 percent to the department of law for the processing of criminal cases.❖

Capital Defense Risk Pool Now In Effect in Utah

During the 1997 legislative session, Utah's legislators created a Capital Indigent Defense Fund (the Fund) to assist counties facing the high costs of defending individuals charged with a capital crime. Participating counties may tap into the Fund to reimburse attorneys handling capital cases. The Fund did not become active until January 1, 1999, because it needed $250,000 in start-up funds, which were provided by the counties which elected to participate in this financial assistance plan.

Counties which choose to take part in the Capital Indigent Defense Fund are assessed an annual contribution dependent upon population and property valuation. Currently, 20 of Utah's 29 counties have joined. If a defendant in any of these 20 counties is charged with a capital crime, the judge or a county official may notify the Capital Indigent Defense Fund Board (the Board), which oversees the Fund. The Board has pre-contracted with capital defense-qualified attorneys in Utah, and will contact one of them regarding the upcoming case. Unless the attorney argues for extraordinary costs, he/she will enter into a contract with the Board for $80,000. This will cover fees for the lead attorney and co-counsel. Fees for expert witnesses, investigators, etc., are paid by the Fund as well.

No counties have utilized the Capital Indigent Defense Fund since it began in January. Consequently, in the coming year, the Board plans to ask the counties to contribute only half of the amount they would be assessed under the contribution formula.❖

Criminal Victimization Trends Show Declines in Crime

The U.S. Department of Justice's Bureau of Justice Statistics (BJS) recently released a report on the National Crime Victimization Survey (NCVS) that confirms evidence of declining crime rates reported from other measures. The results of the 1998 NCVS found declines in every major category of crime, including a 7% decline in violent crime and a 12% decline in property crime compared to 1997. Victimization declined in all age, ethnic and gender categories, as well as in urban and rural areas.

Violent crimes, simple assaults, and sexual assaults (including rape) were more often committed by a non-stranger (intimate partner, relative or friend/acquaintance). Robbery was more often committed by a stranger.

The NCVS is a nationally representative survey of approximately 43,000 households that collects data on non-fatal crimes against persons older than 12. The NCVS captures evidence of crimes not reported to the police because it asks for victimization rather than reported crime. It also asks respondents about victimization every six months over a number of years. Respondents are asked to report on victimization that occurred only during the six months since they were last questioned. This strategy, known as anchoring, limits over-reporting that can result when a respondent inaccurately estimates the time since a major event.

The other primary source of national crime data, the Uniform Crime Reports, are based on police department reporting. Between 1993 and 1998, the NCVS found that approximately one half of crimes were reported to the police.

This report is available from BJS at www.ojp.usdoj.gov/bjs.❖

National Conference of State Legislatures Reports Excellent Fiscal Conditions

The National Conference of State Legislatures (NCSL) issued a preliminary report on the condition

of state budgets, finding that the general fiscal condition of the states is excellent. NCSL reported that at the end of FY 99, aggregate state ending balances totaled $33.4 billion in surpluses, surpassing the previous high mark set in FY 1980.

Based on its 1999 survey (this year 44 states responded), NCSL reported that states are using surpluses for "rainy day funds" or other reserve funds (17 states), tax cuts of one kind or another (20 states), increased funding to specific programs (13 states), capital construction projects, including prisons and other public safety expenditures (13 states), and other spending like reducing the state debt.

Four major areas are indicated by FY 2000 spending priorities: K-12 school spending, higher education spending, corrections spending and Medicaid. Corrections grew by almost 5%, about the same as FY 99. Spending on education and corrections continued trends observed in recent years.

States are projected continued, although more modest, growth for FY 2000. Fourteen states included expected income from the tobacco settlement, which enhanced overall revenue.❖

U.S. Prisons Cost $24.5 Billion per Year

State and Federal prisons cost $24.5 billion to run in 1996, the most recent year for which data are available, according to a new report issued by the Bureau of Justice Statistics. The vast majority, $22 billion of that is spent by states, with $20.7 billion being expended on operating costs.

Since 1990, state expenditures on prisons have increased 83%, federal expenditures have increased 160% to $2.5 billion per year.

Per capita, prison costs for the United States are approximately $103 per year, up from $53 in 1985 (calculated in constant 1996 dollars). For comparison, The Spangenberg Group used a sample of 13 states to estimate the national average per capita cost for indigent defense, finding it to be approximately $8 per year. Per resident spending for state prisons increased each year an average of 7.3% between 1985 and 1996, compared to the average annual increase in education spending over that period which was 3.6%.

The average annual cost per inmate for 1996 was just over $20,000. Minnesota had the highest average cost per inmate at $37,800 and Alabama had the lowest at $8,000. California ($3 billion), New York ($2.2 billion) and Texas ($1.7 billion) had the largest expenditures.❖

US Population Under Correctional Authority Increases

The Bureau of Justice Statistics recently released a report indicating another increase in the total number of people under correctional control (probation, parole, jail and prison populations). The total number of people under correctional authority is now estimated to be 5.89 million, or one in every 34 adults in the United States.

Since 1990, the probation population has increased 28% and the parole population by almost 33%. Texas (555,780) and California (435,044) had the largest numbers of people on probation and parole in 1998.

Three in five of those on probation had been convicted of a felony offense. Twenty-four percent had been convicted of a drug law violation. One in five probationers were women, up 18% since 1990.

Although the number of people on parole increased as well, the rate of increase was smaller than the yearly average between 1990 and 1998. Ninety-six percent of parolees had been convicted of a felony. Women accounted for 1 in 8 of those on parole.

Probation and parole data is obtained by BJS through administration of a survey of state authorities with jurisdiction over the relevant programs.

This report is available from BJS at www.ojp.usdoj.gov/bjs.❖

NEWS FROM AROUND THE WORLD

Legal Aid Developments Around the World:

A Chronicle of The Spangenberg Group's Recent International Work Experiences

> (3) In the determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> ***
>
> (b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;
>
> ***
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; and to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Article 14, International Covenant on Civil and Political Rights

As countries democratize and build a civil society based on the rule of law, many governments and non-governmental organizations are expanding access to justice through the delivery of legal services to the indigenous or economically disadvantaged. In many cases, programs that are being designed or established often provide services in both civil and criminal cases beyond the limited scope set out by the above international covenant.[1]

In the past few years, The Spangenberg Group has served as consultant to governments and/or legal aid organizations in countries such as Canada, India, Ireland, Japan, New Zealand, Poland, Lithuania, Scotland, the United Kingdom. We have also hosted study tours on indigent defense in the United States for foreign justice system officials. Our most recent guests include representatives from the Irish Department of Justice and the Lord Chancellor's Office of England and Wales. The demand for information on legal aid organization models and legal aid development trends around the world has also increased significantly. As a result, we have become more active in our international work. In the last two years, members of The Spangenberg Group have traveled to Cambodia, Canada, China, England, Poland, Scotland and Thailand to conduct site assessments, attend conferences, and train legal services providers. Our international experiences strengthen our belief that the exchange of information is beneficial to practitioners in the field. It is in this spirit that we are sharing some of our recent international experience with you.

Cambodia

In the summer of 1999, Michael Schneider, of counsel to The Spangenberg Group, traveled to Cambodia to evaluate legal services provided by the Cambodian Defenders Project. The Cambodian Defenders Project (CDP) was founded by the International Human Rights Law Group in 1993 with the aim of promoting the rule of law and strengthening democratic processes and respect for human rights by providing high quality legal representation to Cambodia's poor and vulnerable. CDP lawyers provide direct client representation in criminal and civil cases, conduct workshops and training programs for other NGOs, give television and radio interviews about legal issues, review and comment on draft legislation, and, through CDP's Women's Resource Center, conduct provincial training programs on domestic violence and women's rights. CDP is in its final year of a localization process which is scheduled to end in September 2000, with CDP as a completely Cambodian-staffed and managed legal aid provider.

Cambodia's laws and procedures are ostensibly modeled on the French civil law system. However, other elements also play an equally, if not more, important role, including: traditional Khmer dispute resolution mechanisms favoring non-adversarial conciliation by prominent persons in the community; Soviet-Vietnamese style criminal process characterized by police-extracted confessions and a highly politicized judiciary; as well as principles of international human rights law derived from the United Nations Transitional Authority in Cambodia governance

period, and subsequently incorporated into the Cambodian Constitution of 1993.

Michael conducted a fourteen-day fact-finding mission to evaluate CDP's functioning as a legal aid organization and the quality of legal services being provided by CDP attorneys. He spent eight days in Phnom Penh and two one-day visits to CDP's Siem Reap and Battambang offices interviewing the following persons: CDP staff, judges and clerks of the Phnom Penh Municipal Court and the Cambodian Supreme Court, officials from the Ministry of Justice, representatives of Khmer human rights and women's rights non-governmental organizations, officials of the United Nations Center on Human Rights, a representative of the United States Agency for International Development, a member of the Cambodian Senate, and the President of the Bar Association of the Kingdom of Cambodia. Michael also observed court proceedings; examined selected dossiers, CDP forms and written pleadings filed by CDP attorneys; and reviewed CDP's case-tracking data. He concluded that CDP is one the few success stories in the Cambodian legal system.

Despite the difficult and complex circumstances in which CDP attorneys operate, Michael found the overall quality of CDP legal representation is remarkably strong. With the help of technical assistance provided by the International Human Rights Law Group, CDP attorneys generally brainstorm theories of cases, engage in relatively sophisticated motion practice, recognize the importance of investigating cases thoroughly, and continue to effectively develop such trial and appellate skills as making objections, examining witnesses, and presenting opening and closing arguments.

China

The Spangenberg Group began its work in China in 1997. Officially established in 1996, China's legal aid system has expanded rapidly with almost 700 offices spread throughout the country today. In addition to government sponsored legal aid offices, women's legal services centers and clinical programs at selected universities also provide legal assistance to the poor.

In October 1997, Bob Spangenberg and Mr. Douglas Eakley, then President of the Legal Services Corporation, were invited by the China Reform Forum and the China Legal Aid Foundation to exchange information on the legal aid systems in China and the United States. Mr. Spangenberg and Mr. Eakely toured five provinces and visited various legal aid centers throughout China and gained substantial insight into the Chinese legal aid system. Seminars on legal aid were held in each location with legal aid lawyers and local visits were made to Bar Associations in each city.

In January 1998, under the auspices of the International Republican Institute, Bob Spangenberg and the other foreign experts were invited to return to train some 70 Chinese legal aid officials, legal aid providers, and law professionals in sessions entitled "Delivery of Legal Aid in the United States," "Financing Legal Aid,""Providing Legal Aid in Civil Cases," "Training and Preparing Legal Aid Providers," and "Legal Aid Obstacles and Trends."

Since then, The Spangenberg Group has been closely following legal aid developments in China, and has continued an on-going dialogue with members of the Legal Aid Center of the Ministry of Justice of the People's Republic of China, the Director of the Legal Aid Center of Guangdong Province, representatives of The Ford Foundation, the Huadong Institute of Law and Politics, the American Bar Association, and Chinese legal system scholars such as Jonathan Hecht and Benjamin Liebman.

Our strong interest in the development of legal aid in China and our relationships with various Chinese legal aid organizations have led to requests from the Legal Aid Center, the Ford Foundation, the Canadian International Development Agency, and the American Bar Association to serve on steering committees to plan, coordinate and participate in legal aid conferences and training seminars.

Most recently, The Spangenberg Group assisted the Legal Aid Center, the Canadian International

Development Agency and the Ford Foundation with the planning and coordination of the "International Conference on Development of Legal Aid Legislation and System in China," held in March 1999. Together with Professor Charles Ogletree of Harvard Law School and Mr. Gerry Singsen, Bob Spangenberg conducted seminars to assist some 70 Chinese legal aid providers in reviewing their proposed legal aid legislation. Bob also led a plenary seminar on "Policy and Practices of Legal Aid Lawyers, their Clients and National Standards" and led various breakout workshops.

The Spangenberg Group is also represented on the planning committee for the "Supporting Legal Aid in China" conference, which is coordinated by the American Bar Association. Bob is one of the three legal specialists responsible for planning the substance of the conference and the selection of American participants for the conference, which hopefully will take place in China in the next several months.

Furthermore, The Spangenberg Group, in cooperation with Professor Ogletree, Ms. Titi Liu of the Huadong Institute of Law and Politics and Ms. Phyllis Chang of the Ford Foundation, designed a curriculum to train Chinese legal aid lawyers on the nuts and bolts of their everyday practice, which was originally scheduled to take place in Suzhou in May 1999. The Legal Aid Center has also approved The Spangenberg Group to conduct site work and provide technical assistance to the Legal Aid Center in Guangzhou. It is anticipated that this work will be undertaken in the near future.

The issue of legal aid in China gained momentum in October 1997 when presidents Jiang Zemin and Bill Clinton launched "the Rule of Law" initiative to train judges and lawyers and give technical aid on drafting and educating the public on legal aid. During President Clinton's trip to China in June 1998, the administrations reaffirmed their commitment to legal aid by announcing that a Sino-US conference on legal aid and human rights would be held at the end of 1998. Mrs. Clinton and Secretary of State Madeline Albright also visited the Beijing University Women's Legal Services Center and the Pudong Legal Aid Center to demonstrate the administrations' continued interest in legal aid.

Southeast Asia

In June 1999, Bob Spangenberg attended the "Practitioner's Forum: The Rule of Law, Human Rights and Legal Aid in Southeast Asia and China" and conducted workshops on "Developing Strategic Case Management" and "Determining Your Client Base and Operating Within Your Structural Constraints" at the conference. The conference, attended by members of various legal aid centers from Burma, Cambodia, China, Indonesia, Malaysia, Philippines, Sri Lanka, South Africa, Thailand, to Vietnam, was sponsored by the International Human Rights Law Group and the Asian Human Rights Commission.

The objectives of the forum were: to improve dialogue and communication between individuals and groups attempting to strengthen the rule of law in Southeast Asia, to build working relationships between regional legal aid practitioners and to provide a forum of "legal experts," who have specialized legal training and knowledge of the rule of law, legal techniques and first hand experience in legal aid, to share their experiences with each other.

Southeast Asian legal aid offices are established to promote rule of law, legal literacy and provide representation to clients. While some centers provide representation in criminal and civil cases, others only have the funding to focus on issue-related cases, such as extending access for a particular indigenous group or focus solely on labor and/or women's issues. Many of the offices share similar obstacles such as the lack of legal education among the population they serve, the lack of funding, a high demand for their services, and limitations on travel expenses and networking. Despite all these obstacles, many of the offices have been in operation for more than ten years and have been making impact in their communities.

Representatives of Southeast Asian legal aid centers and the international "experts" attending the conference held dialogue which critically examined their countries' legal systems, discussed ways to develop tools for effective legal representation and

international norms and institutions established for fair trial standards. In addition to exploring ways and means to tackle their practice-related issues, such as lawyering skills, case overload and budgetary issues, forum participants also dealt with ethical and moral issues related to the set-up of their offices. In general, attendees gained tremendous insight into how legal services are provided in their neighboring countries and learned innovative ideas on how to improve and strengthen their cause.

Central and Eastern Europe

In April 1998, "Legal Aid for Indigent Criminal Defendants for Central and Eastern Europe: a Meeting of Experts" was held in Oxford, England. In July 1999, a follow-up conference entitled "Making the Empirical Case for Improved Indigent Defense in Central and Eastern Europe" was held in Poland.

Despite constitutional requirements in some countries that legal services must be provided to criminal defendants in accordance with certain criterion, implementation of this constitutional right in the region has been impaired for various reasons ranging from cronyism to simply a lack of interest. The Oxford conference brought together Council of Europe officials, European Human Rights Commission members, Ministry of Justice's officials, Supreme Court judges, Bar Association representatives, non-governmental organizations, and various legal aid experts from Belgium, Bulgaria, Czech Republic, France, Hungary, Lithuania, Poland, Romania, Slovakia, Spain, United Kingdom and the United States to address the problem. The conference provided a first-time opportunity for participants to place indigent defense within a human rights context and exchange comparative information on their respective countries' constitutional rights and legal aid situation.

Armed with information from the Oxford meeting, participants returned to their home countries and began to gather information and survey possibilities to establish indigent defense systems. In July 1999, sponsors of the Oxford conference – the Public Interest Law Initiative at Columbia Law School, Interights, the European Roma Rights Center and the Constitutional and Legal Policy Institute – held a follow-up meeting in Poland to discuss and plan an empirical study model to assess the provision of legal aid to the indigent in Central and Eastern Europe. Participants emerged from this meeting with a model study, likely to be implemented in Poland, Lithuania and Bulgaria and eventually other countries in the region.

Biannual International Legal Aid Conferences

Across the globe, jurisdictions with highly developed legal aid programs are facing similar problems in which their programs are being squeezed due to budgetary constraints. In 1994, in recognition of this trend, an international group of legal services practitioners, academics and policymakers came together for the first International Conference on Legal Aid which was held in The Hague in the Netherlands. In 1997, Bob Spangenberg traveled to Edinburgh, Scotland to attend the second International Legal Aid Conference which covered topics such as the future prospects for legal aid in the new millennium; living with a capped budget; contracting for legal services; prioritization and rationing limited resources; the role of the mixed model of legal services provision; funding class action or impact litigation; alternative dispute resolution and legal aid; and alternative funding mechanisms for legal services.

In the summer of 1999, Marea Beeman traveled to Vancouver, Canada and attended the "Legal Aid in the New Millennium"conference. Research findings were presented from studies of legal aid programs in the Netherlands, Canada, Scotland, Australia, Denmark, England and Wales, New Zealand and the United States.

The international conferences that we have attended and the work we have performed in several regions of the world in the area of legal aid reform have been and continue to be very encouraging. While the primary focus of The Spangenberg Group is on

domestic work, we will continue to share our experiences and expertise in other parts of the world.

1. The International Covenant of Civil and Political Rights was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200A (XXI) of 16 December 1966. There are approximately 116 signatory countries, of whom many, but not all, have ratified the covenant. The covenant was signed by the U.S. Government in 1977.❖

CASE NOTES

Supreme Court Requires Jury Unanimity on the Violations that Make Up a "Series" in a Continuing Criminal Enterprise Prosecution

Richardson v. United States, 119 S. Ct. 1707 (1999). Resolving a conflict among the federal courts of appeals, the Court concluded (6-3) that a jury in a federal criminal case brought under 21 U.S.C. § 848 must unanimously agree not only that the defendant committed a "continuing series of violations" but also that the defendant committed *each of the individual violations* necessary to make up that continuing series.

Eddie Richardson was known as the "King" of the Undertakers, a Chicago street gang that distributed a variety of drugs over a period of years from 1984-1991. In 1994, a federal jury convicted him of violating 21 U.S.C. § 848, which forbids a person from engaging in a "continuing criminal enterprise" (CCE). Richardson had asked the trial judge to instruct the jury that it must "unanimously agree on which three acts constituted [the] series of violations." The trial court rejected that proposed instruction, however, instead telling the jury that it "must agree unanimously that [Richardson] committed at least three federal narcotics offenses" while adding that they did *not* have to agree as to the particular three violations. On appeal, the Seventh Circuit upheld the instruction.

On its way to vacating that judgment, the majority of the Supreme Court first noted that the phrase "series of violations" might simply refer to a single element of the CCE statute. In that case, the series could be proven by a variety of means (which would not require unanimity). As an example, the court considered a hypothetical burglary statute, which requires actual or threatened use of force as an element. Typically, a jury must agree unanimously that force was threatened or used, but not on *how* the force was applied or threatened (e.g., by gun or knife). That is, unanimity is required as to the element itself (threat or use of force), but not as to its means (waving a gun or pointing a knife). Thus, the present case depended on whether the phrase "series of violations" defines a single element, which might be proven by an endless variety of means (without jury unanimity) or several elements (each of which the jury must unanimously agree was committed by the defendant).

Interpreting the statute for the Court, Justice Breyer considered "language, tradition, and potential unfairness." Breyer found it significant that Congress used the word "violation," as opposed to act or conduct. Violation, he wrote, suggests a "violation of law," which involves a higher standard of judgment. Indeed, he noted, the word "violation" is traditionally interpreted as conduct that violates the law, something which requires jury unanimity. Likewise, the breadth of the statute, which could encompass relatively minor acts as part of the "series," also raises concerns that juries might sharply disagree on what a defendant did or did not do or simply convict on a generalized feeling of guilt. Responding to the dissenters, the majority said it was not concerned that requiring jury unanimity would make it more difficult for the government to prove its case. The Court remanded the case to the court of appeals for it to consider whether to engage in a harmless error analysis.❖

Supreme Court Announces Rule on Exhaustion, Requires Claims to Be Raised in State Courts Even When Review Is Discretionary

O'Sulllivan v. Boerckel, 447 U.S. 911 (1999). This habeas case arose in the state courts of Illinois, where review by the supreme court is discretionary.

By a 6-3 margin, the Court held that the petitioner did not properly exhaust three claims he raised in the federal district court. The claims were denied in his direct appeal to the intermediate Appellate Court of Illinois but omitted from his petition for review to the Illinois Supreme Court. The petitioner had not raised the claims in the state supreme court because they failed to meet the published criteria which that court uses to decide whether to grant review. In this case, the Court said, a state court remedy was "available," even though rarely granted. In doing so, the Court resolved an issue that had divided the courts of appeals. Indeed, the Seventh Circuit had ruled that the claims were exhausted, finding that Boerckel had exhausted his state remedies by including the claims in his direct appeal to the Appellate Court of Illinois. *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998).

In her opinion for the six-member majority, Justice O'Conner started with the proposition that habeas petitioners must give state courts a *fair* opportunity to act on their claims (her emphasis). In this case, the majority concluded, fair means "one complete round of the state's established appellate review process," which the Court considered to include both tiers of a two tiered system. The Court rejected Boerckel's argument that the state's discretionary review process discourages litigants from including some claims in their petition for review. Finding it difficult to discern which claims might fall into the "discouraged" category, the Court opted for a bright-line rule that simply requires all claims to be presented or suffer procedural default. The Court noted that in South Carolina the state supreme court has specifically stated that an application for review is *not* necessary to exhaust a claim previously presented to the intermediate court of appeals. O'Conner suggested that states might consider this approach if the rule announced in this case leads to an increased burden on the state's supreme court.

Three justices dissented in an opinion by Justice Stevens, who criticized the majority for "improperly commingl[ing]" the doctrines of exhaustion and procedural default. According to Stevens, exhaustion is merely a question of whether a state court remedy remains *available* at the time of the federal petition. In this case, the answer was clearly no, because Boerckel had completed the full appellate process. Procedural default, on the other hand, is a separate rule of waiver, and requires the petitioner to follow proper state law procedures while his claims are being exhausted so that the State has a fair opportunity to pass upon the claims. In this case, the dissenters argued, Boerckel gave the state of Illinois a fair opportunity by presenting his claims to the Illinois Court of Appeals in his appeal of right. Thus, his claims were not procedurally defaulted and should have been considered by the federal courts.❖

Supreme Court Finds Blame Shifting Confession Inadmissible, But Fails to Agree on Rationale.

Lilly v. Virginia, 119 S. Ct. 1887 (1999). The Court held that a blame-shifting confession by a non-testifying co-defendant may never be admitted as a "statement against penal interest" without violating the Confrontation Clause. All of the Justices concurred in the judgment (reversing and remanding the case), but several Justices offered their own rationales.

The case arose in Virginia's state courts, during the capital murder trial of Benjamin Lee Lilly. Lilly and two other men, including Lilly's brother, Mark, were accused of a crime spree that included the abduction and murder of Alex DeFillipis. Lilly's brother, Mark, gave a confession in which he admitted a limited role in the crimes and inculpated Benjamin as the killer. During Benjamin's separate trial, Mark asserted his Fifth Amendment right not to testify, but the trial court admitted Mark's confession over a hearsay objection as a "statement against penal interest." The Virginia Supreme Court affirmed, applying what it called a "firmly rooted exception" to the hearsay rule. Noting its concern that the Virginia

court's decision represented a "significant departure" from Supreme Court precedent, the Court granted *certiorari*.

The four member plurality, led by Justice Stevens, first reviewed the "firmly rooted" doctrine, describing a hearsay exception as firmly rooted "if, in light of longstanding judicial and legislative experience, it rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection" provided by confrontation. Next, the Court noted three situations that raise the issue of a statement against penal interest: (1) confessions offered against the declarant; (2) confessions of another offered by a defendant; and (3) confessions by an alleged accomplice offered against a defendant (such as at issue here). The first category is a "firmly rooted exception," according to the Court. The second does not implicate the confrontation clause because such statements are offered by a defendant as exculpatory evidence. The third category includes cases like the instant case and encompasses statements that are "inherently unreliable." After reviewing a long line of cases, the court concluded with "the decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule..." The Court then proceeded to review, *de novo*, the trial court's determination that several factors made the confession in this case sufficiently reliable to satisfy the residual admissibility test and concluded that neither corroborating evidence, a *Miranda* waiver, nor the absence of any express promise of leniency sufficiently enhanced the statements' reliability. Accordingly, the Court remanded the case to the Virginia courts for a harmless error analysis.

Justice Scalia concurred with the plurality, saying the case presented a "paradigmatic Confrontation Clause violation," and should be remanded.

The remaining four Justices, led by the Chief Justice, concurred in the judgment, but wrote that the plurality had gone too far. Mark Lilly's statements inculpating Benjamin Lilly, which were separated in time and context from Mark's self-incriminating statements, were not even "statements against interest," so the case should simply be reversed on the hearsay ground. There was no need, the Chief Justice wrote, to establish "a complete ban on the government's use of accomplice confessions that inculpate a codefendant." Likewise, the Chief Justice wrote, the court should not presume to evaluate the residual hearsay issue, because the lower courts did not analyze the issue under the Confrontation Clause, but only under state hearsay rules. Thus, the concurring justices wrote, the court should give deference to the lower courts and remand with instructions to conduct the residual hearsay analysis and, if error is found, to consider whether it is harmless error.❖

Supreme Court Strikes Down Chicago's Gang Loitering Law as Unconstitutionally Vague

City of Chicago v. Morales, 119 S. Ct. 1849 (1999). In 1992, the Chicago City Council enacted The Gang Congregation Ordinance, which prohibits criminal street gang members from "loitering" with one another or with other persons in a public place. After both the Illinois Appellate Court and the Illinois Supreme Court held the law invalid, the Supreme Court affirmed that the law's definition of loitering -- "to remain in any one place with no apparent purpose" -- rendered the ordinance void for vagueness.

In his plurality opinion, Justice Stevens expressed "no doubt" that Chicago could have drafted a constitutional ordinance that directly prohibited "intimidating conduct" by gang members. Indeed, he found no dispute that the presence of "obviously brazen, insistent, and lawless gang members ... on the public ways intimidates [and] imperils" Chicago residents (quoting the City of Chicago's brief). Nevertheless, the law was not directed at gang members only and, moreover, its use of the phrase "to remain in any one place with no apparent purpose" left the ordinance with no *mens rea* requirement at all. Thus, while three Justices concurred only in part, six members did agree that the law gave too much discretion to law enforcement. On this point, the

Court felt bound to accept the construction of the law as determined by the Illinois Supreme Court, which said the law "provides absolute discretion to police officers to determine what activities constitute loitering." Justices Kennedy and O'Conner apparently felt that was sufficient and joined only that much of the opinion, with the latter writing specifically to "characterize more clearly the narrow scope of today's holding."❖

Washington's Sexually Violent Predator Law May be Unconstitutional As Applied

Young v. Weston, 176 F.3d 1196 (9th Cir. 1999). The Ninth Circuit has remanded a case filed by a habeas petitioner who alleges that his treatment under Washington's sexually violent predator law is punitive and, therefore, unconstitutional as applied. Washington's law served as the model for the Kansas civil commitment law that the Supreme Court found free from facial defects in *Kansas v. Hendricks*, 521 U.S. 346 (1997). According to the Ninth Circuit, however, that decision was based on the non-punitive nature of the confinement. The petitioner in this case alleged facts "which, if proved, would establish the punitive nature of his confinement and would entitle him to relief." Among other things, Young alleged that for over seven years he has been confined in a Special Commitment Center (SCC), within the perimeter of a larger state prison facility. He also alleged that the SCC is essentially maintained by the state Department of Corrections, that its facilities and restrictions are incompatible with mental health treatment, and that he has been subjected to increasingly punitive conditions, including security "walk throughs" by DOC personnel and the use of shackles and prison clothing when he is transported for medical care. After concluding that the factual issues had not received a full and fair hearing by the state courts, the Ninth Circuit panel remanded the case for an evidentiary hearing in the district court.❖

Florida Supreme Court Bars Execution of Persons 16 Years of Age or Younger

Brennan v. State, 24 Fla. L. Weekly 5365 (July 8, 1999) (1999 WL 506966). Keith Brennan was sixteen years old when he and Joshua Nelson, aged eighteen, murdered Tommy Owens and stole his car. Both Brennan and Nelson were convicted of capital murder and sentenced to death. The Florida Supreme Court upheld the death sentence for Nelson, but concluded that the death penalty is cruel or unusual, in violation of the Florida Constitution, when applied to a person who was sixteen years old at the time of the crime. Essentially, the Court extended the rationale it had used in an earlier case, *Allen v. State*, 636 So. 2d 494 (1994), which barred execution of persons fifteen and younger on the ground that no person of that age had been executed in Florida for more than fifty years. In the present case, the Court could find no reported case in which the death penalty had been carried out against a sixteen-year-old in since 1940 and, accordingly, extended the rule. ❖

Ninth Circuit Finds That Three Questions about the Availability of an Attorney "Right Now" Constitute an Unequivocal Request That Should Have Halted Questioning

Alvarez v. Gomez, no. 98-55133 (9th Cir., July 28, 1999) (1999 WL 543746).

Police in Los Angeles, California, arrested Mario Alvarez after fingerprints linked him to a car that was used to get away from a robbery-murder. During a taped interview that was later admitted at trial, police read Alvarez his *Miranda* rights and asked if he wished to waive them. Alvarez responded, "Can I get an attorney right now, man?" A detective replied, "Pardon me?" after which Alvarez asked, "You can

have an attorney right now?" The detective told Alvarez that he could have one appointed. Then Alvarez asked, "Well, like right now, you got one?" Although *Miranda* duty attorneys were available, the detective told Alvarez that an attorney would be appointed at his arraignment, if he could not afford one. Alvarez then said, "Alright, I'll -- I'll talk to you guys," and proceeded to admit that he had committed the robbery and shot the victim. His confession was admitted at trial and Alvarez was convicted of felony-murder and sentenced to life imprisonment without possibility of parole.

In this federal habeas appeal, the Ninth Circuit held that Alvarez's "thrice-repeated" questions concerning whether he could get an attorney "right now" constituted an unequivocal request for an attorney and, therefore, the investigators' failure to cease questioning at that point rendered his later statements inadmissible. The court applied the standard from *Davis v. United States*, 512 U.S. 452 (1994), but reviewed an earlier decision, *Smith v. Illinois*, 469 U.S. 91 (1984), for a set of facts upon which to base its conclusion. The court read *Smith v. Illinois*, *supra*, as deeming a suspect's statement, 'Uh, yeah, I'd like to do that,' after hearing of his right to counsel as a clear invocation. The court also said that several of its own precedents involved a clear invocation based on the following statements: "Can I call my attorney?" or "I should call my lawyer;" "I have to get me a good lawyer, man. Can I make a phone call?;" "You know, I'm scared now. I think I should call an attorney;" and "Can I talk to a lawyer?"

The court questioned the "good faith" of the investigators, saying, "The correct answer to each of Alvarez's three questions, after all, was a simple unambiguous 'yes.'" After finding the other evidence against Alvarez to be "equivocal" as to the murder and "arguably insufficient" as to the robbery, the Court reversed the conviction.❖

NACDL Fee Award Upheld in FBI Crime Lab Probe

Nat'l Ass'n of Criminal Defense Lawyers v. Dep't Of Justice, 182 F.3d 981 (D.C. Cir. 1999).

In 1995, the Department of Justice's Office of Inspector General opened an investigation into allegations of wrongdoing at the FBI's crime laboratory. After top newspapers reported that the investigation had turned up problems, the National Association of Criminal Defense Lawyers (NACDL) filed requests with the DOJ under the Freedom of Information Act. Failing a timely response, NACDL filed suit in federal court. Shortly thereafter, the OIG's final report was publicly released. While litigation continued over a draft of the report and the working papers, NACDL moved the district court for an interim award of attorney's fees. In June 1998, the court awarded $118,000 in fees, calling NACDL's actions "a significant cause of the public release of the final report." The DOJ appealed, arguing that the district court did not have discretion to make the interim award.

Judge Ginsberg, writing for a unanimous panel, dismissed the appeal for lack of jurisdiction, finding that the interim award was not an appealable collateral order. Although the court did say that some interim fee awards might be immediately appealable, this one was not, because the DOJ had failed to show a "real prospect of irreparable harm." NACDL had argued that it was suffering financial hardship as a result of the protracted litigation, but the court did not find any prospect of NACDL becoming judgment proof. Accordingly, the district court's order was not reviewable on interlocutory appeal.

The DOJ also asked the court, in the alternative, to invoke its supervisory power in the case and to issue a writ of mandamus, arguing that the district court's decision "set a precedent with portents well beyond the facts and arguments in this litigation... ." The court wrote that this argument "lies somewhere between exaggeration and speculation," and declined to issue the writ.❖

New Jersey Withdraws Appeal, Concedes Racial Profiling Decision

State v. Soto, 324 N.J. Super. 66, 734 A.2d 350 (1999). Just weeks before oral argument in the Appellate Division, the State of New Jersey withdrew

its appeal in *State v. Soto*, a case that played a role in bringing racial profiling to national attention. At the same time, the Attorney General of New Jersey released a report conceding that racial profiling "is real - not imagined." *Star-Ledger* (Newark N.J.) at 1 (April 21, 1999) (1999 WL 2972873).

Three years ago, Judge Robert E. Francis of the Superior Court of New Jersey found that the New Jersey State Police had engaged in selective enforcement on the New Jersey Turnpike by stopping motorists on account of their race and he ordered the suppression of evidence seized in nineteen cases. Evidence of racial profiling came from surveys conducted by the pubic defender's office in conjunction with Dr. John Lamberth, an expert in statistics and social psychology. Dr. Lamberth found that about 14% of cars on the highway had black occupants and that African Americans made up roughly the same percentage of those clearly speeding during his survey. Information from police records concerning the same stretch of highway, however, revealed that nearly half of stopped persons whose race was identified were black. Another defense statistician concluded that blacks were nearly five times as likely to be stopped on that part of the highway. The court rejected testimony from a statistician offered by the state as repeatedly "assum[ing] the answer to the question."

The defendants bolstered their case with testimony of two former troopers who said they had been coached to make race-based profile stops, as well as statements of the Superintendent of the State Police, whose comments to the media and his own department provided "Key corroboration for finding the State Police hierarchy allowed and tolerated discrimination... ."

After the dismissal of the appeal, the state committee for publications decided to publish Judge Francis' 1996 opinion. Commenting on this "very consuming case," Jeffrey Wintner, Deputy Public Defender, said that two factors played a role in the success of this action. First was the ability to obtain discovery under *State v. Kennedy*, 588 A.2d 834 (N.J. Sup. A.D. 1991), which sets the threshold for proceeding with discovery in selective enforcement cases. Second was the limited access of the Turnpike, which "facilitated our job in conducting the necessary demographic studies."❖

Montana Holds That Police Do Not "Step into the Shoes" of Fire Fighters Who Observe Evidence in Plain View

State v. Bassett, 982 P.2d 410 (Mont. 1999).

Stephen Bassett fell asleep while smoking and nearly burned his Montana home to the ground. The morning after, a member of the volunteer fire department was "mopping up" when he discovered several marijuana plants growing in Bassett's bedroom closet. A deputy sheriff was notified and he arrived at the home after all of the work related to fighting the fire was complete. Without obtaining a warrant, the officer entered the home and seized the plants.

Bassett was charged with manufacturing marijuana. He moved to suppress the evidence, citing both the state and federal constitutions. The trial court denied the motions, finding that the firefighter had lawfully been on the premises and that he had observed the evidence in plain view. The court also ruled that Bassett no longer had a reasonable expectation of privacy after the fire because his home was largely destroyed and open to the elements. Bassett pleaded guilty to felony possession of drugs, reserving the right to appeal the denial of his motion to suppress.

On appeal, the State of Montana argued that the deputy sheriff had "stepped into the shoes" of the firefighter and, thus, that the plain view doctrine applied. The Montana Supreme Court reviewed three different approaches to this issue. The State of Washington follows the rule that police officers may step into the shoes of firefighters and seize whatever the firefighters themselves may have lawfully seized. *State v. Bell*, 737 P.2d 254 (Wash. 1987). Arizona permits officers to step into the shoes of firefighters, but only while the firefighters are involved in their

customary work and only in the areas where firefighters are working. *Mazen v. Seidel*, 940 P.2d 923 (Ariz. 1997). The Ninth Circuit holds that police may not step into the shoes of firefighters. *United States v. Hoffman*, 607 F.2d 280 (9th Cir. 1979).

The Montana Supreme Court adopted the *Hoffman* approach, first holding that homeowners retain a reasonable expectation of privacy in their homes after a fire and that a person need not take any affirmative steps to retain that privacy expectation. The court went on the reject the Arizona approach on the ground that the constitution "protects people, not places" and the mere fact that firefighters may lawfully enter the premises does not permit police officers to do the same regardless of the time or place. After rejecting any exception to the warrant requirement on the basis of exigent circumstances, the court reversed and remanded the case.❖

JOB OPENINGS

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

Three Openings at the Kentucky Department of Public Advocacy

The Kentucky Department of Public Advocacy (DPA) has announced openings for three positions. The DPA provides legal representation to indigent citizens who have been accused or convicted of crimes and represents the interests of Kentuckians with developmental disabilities.

The Department of Public Advocacy's Frankfort Central Office is looking for a General Counsel. The General Counsel will serve as the legal advisor to the Public Advocate and the Deputy Public Advocate and represent the agency in litigation and administrative hearings at the direction of the Public Advocate. In addition, the General Counsel will provide legal analysis and advice on complex legal issues facing the DPA and its clients, participate in meetings and planning sessions where legal analysis is critical, testify before legislative committees, provide advice and consultation to other legal staff within the DPA, draft proposed legislation or policy and respond to open records requests.

Candidates must be licensed to practice law in Kentucky and possess sufficient professional experience in litigation, policy development and analysis, ethics and legal research and analysis. Interested applicants should send a resume and direct any questions to: Ed Monahan, Deputy Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. Phone: (502) 564-8006, x140; Fax: (502) 564-7890.

The Frankfort Central Office is also accepting applications for the position of Trial Division Director. This individual will direct and lead the delivery of DPA's entire trial effort to ensure the effective delivery of quality trial level services. The Trial Division Director will develop, implement and monitor budgets throughout the Trial Division, as well as participate on the management team that determines and sets DPA policy. The Director will also work with the Regional Managers to provide education and to improve the quality of services in DPA's full-time offices. Finally, the Director will also be involved in the legislative and rules-making process as well as assisting in the public relations efforts of the Department.

Applicants must have a minimum of five years of direct trial experience in the practice of law; criminal defense experience is preferred and previous supervisory experience is desirable. Applications must be submitted by November 26, 1999; interested applicants should send a resume and direct any questions to: George Sornberger, Trial Division Director, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, KY 40601. Phone: (502) 564-8006; Fax: (502) 564-7890.

Finally, the DPA is searching for an individual to serve as Juvenile Post-Dispositional Branch Attorney in its Owensboro Office. The attorney will handle all matters regarding juvenile issues in the Western Kentucky area, including detention matters and issues surrounding the juvenile's case, as well as representing

any juvenile who is placed in a state-run juvenile detention facility.

The Juvenile Post-Dispositional Branch Attorney position requires a minimum of three years of experience. Interest or background in juvenile criminal law is preferred. Applicants must submit a cover letter, resume, writing sample and transcript to Gail Robinson, Department of Public Advocacy, Fair Oaks Lane, Suite 302, Frankfort, KY 40601. Phone: (502) 564-8006; Fax: (502) 564-7890.❖

NEW PUBLICATIONS

Updated Spangenberg Group Articles: Available Soon

The Spangenberg Group devoted some time this summer to updating our reports on public defender application fees and rates of compensation to court-appointed counsel. *Public Defender Application Fees*, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-By-State Overview*, and *Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-by-State Overview* should be completed by the end of October. These reports are produced by The Spangenberg Group on behalf of the American Bar Association Bar Information Program. Please contact The Spangenberg Group to receive copies of these updated articles.❖

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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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