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The Importance of Private Bar Involvement in the Nation's Indigent Defense System

By Robert L. Spangenberg

This article is adapted from a 1/17/2000 paper prepared by Robert L. Spangenberg for members of the "Core Committee" of the Kennedy School Executive Session on Indigent Defense Systems. The Executive Session is a project funded by the U.S. Department of Justice Bureau of Justice Assistance.

The core committee has discussed the necessity of including the topics of private assigned counsel and private bar contracting in our sessions on indigent defense systems. This paper suggests a few reasons why I think this is necessary.

A Look at the Numbers

Of the 50 largest counties in the country, ten do not have a public defender program. The combined population of these counties exceeds 14 million. It is my best estimate that today only approximately 1,350 of the 3,083 counties in the country have a public defender program. This amounts to only about 44% of the counties in the country. Maine and North Dakota have no public defender programs. Alabama, with 67 counties, has only three or four public defender programs. North Carolina, with 100 counties, has fifteen. Georgia, with 159 counties, has fourteen. Michigan, with 83 counties, has five. Nebraska, with 93 counties, has seven. Oklahoma, with 77 counties, has ten. South Dakota, with 66 counties, has three. Texas, with 254 counties, has five.

In addition, a rather significant number of the 1,350 counties with public defender programs have part-time or contract public defenders.

Assigned Counsel and Contract Defenders Lack a National Voice

There is no organized, national network of private assigned and private contract programs. Few states have statewide organizations serving these programs for training, education or exchange of information.

American Bar Association Standards

The ABA Standards for Criminal Justice, Providing Defense Services states in Standard 5-1.2 Systems for Legal Representation:

> (a) The legal representation plan for each jurisdiction should provide for the services of a

full-time defender organization when population and caseload are sufficient to support such an organization. Multi-jurisdictional organizations may be appropriate in rural areas.

(b) Every system should include the active and substantial participation of the private bar. That participation should be through a coordinated assigned-counsel system and may also include contracts for services. No program should be precluded from representing clients in any particular type or category of case.

(c) Conditions may make if preferable to create a statewide system of defense.

Unfortunately, the trends across the country in the last decade have not been consistent with Standard 5-1.2. None of the 50 largest counties have changed to a public defender system during that period.

In many counties where there is a primary public defender the system no longer includes the active and substantial participation of the private bar. In some of these counties a second or third public defender has been created, cutting back dramatically on private bar involvement.

In Missouri, which has a state public defender system, regional public defender offices trade off conflict cases with other regional offices, thus virtually eliminating all private bar appointments.

In every jurisdiction that uses a public defender program as the primary provider of representation to indigent defendants, there must also be an alternate system for appointment where public defenders have conflicts of interest. Thus, while there may be only approximately 1,350 counties in this country with public defender programs, there are over 3,000 with an alternate system which will most often be either a private court-appointed or a private bar contract system. However, despite the ABA's recommendation in Standard 5-1.2 that private bar participation should be through a coordinated assigned counsel system, few actually exist in the country.

Contract Programs are on the Rise

The growth of private bar contract programs has been substantial over the past 20 years. Contracts may be entered into with individual private attorneys, a group of unassociated private attorneys, law firms or bar associations. In a number of instances the contracts are put out to bid and awarded to the lowest bidder.

In many instances the contract program is created by the funding source primarily as a way to save the county or state money. In other instances statewide public defender systems are also contracting with the local bar for services and all too often without regard to the quality of the lawyers and without appropriate standards and guidelines.

Lack of Communication Between Private Bar and Public Defenders

Unfortunately, in all too many jurisdictions, there is little communication and cooperation between the public defender system and the private court-appointed system. All too frequently the two systems feel they are in competition for the same pot of money, and rather than become allies, they become adversaries.

Some public defenders view most of the private attorneys doing court-appointed work as less than competent, unconcerned about their clients and always looking for the earliest plea that will result in a fee.

Many private court-appointed counsel look at public defender attorneys as young and inexperienced, overworked and constantly picking the most complicated and difficult co-defendant to pass on to the private bar.

Erosion of the Private Bar's Presence in Criminal Law

As second public defenders grow along with large private bar contracts, there is a danger that the practice of criminal law will consist primarily of government paid, contracting law firms and a handful of highly paid private criminal attorneys who represent individuals with large sums of money who are indicted in complex litigation.

In my judgment, the responsibility for providing court-appointed counsel to indigent criminal defendants in this country should rest with the entire legal profession. More and more we find state and metropolitan bar associations spending less and less time discussing and supporting the right to counsel and the lawyers and agencies providing the representation.

Furthermore, in my travels around the United States, I am beginning to see a further erosion among bar associations regarding the rights of indigent defendants as bar groups spend more time addressing the significant needs of low-income clients in civil cases. This has become more of a concern recently as I have observed civil legal services programs seeking state funds of various kinds to replace cutbacks in LSC federal funds. In one state I visited last year, the state bar president told me that he could not support an increase in state funds for indigent defense because he had previously made that commitment to the civil legal services program.

In some states the battle is on (although never discussed in this form) between state funds for the poor in criminal cases versus state funds for the poor in civil cases. The feeling in some states is that there is a limited pot of funds for legal services to poor people and the organization with the greatest lobbying power will win.

In the 35 years I have worked in the field of legal services for the poor, I have observed that public defenders and civil legal services lawyers seldom work together on the problem of legal services to low income persons, notwithstanding the fact that from time to time they may well be dealing with the same community, population and families.

In my travels around the country providing technical assistance to local jurisdictions attempting to improve their indigent defense systems, I have found that visiting the local civil legal services program will seldom give me insight into the strengths and weaknesses of the indigent defense program or the major concerns that have brought me to the community. Having also performed technical assistance to civil legal services programs over the years, the same could be said about the lack of understanding or knowledge that public defenders have regarding the needs of the local civil legal aid program.

The Private Bar is a Needed Constituency for Indigent Defense

Institutional public defender systems need the support of state and local bar associations and the private criminal bar in order to keep the criminal justice system fair and to support an adequate budget for a quality defense system for both the public defender and private court-appointed counsel. The more private court-appointed counsel are driven out of the system, the less likely it is that necessary support can be maintained.

Keep in mind the private court-appointed system is an important vehicle for full-time public defenders who leave public defender offices but want to continue the practice of criminal law. In some jurisdictions thee attorneys become the best and most dedicated private court-appointed counsel in the area.

These are some of the reasons why I believe the public defender members and the core committee cannot ignore what I call “the rest of the world.” I hope this information will be helpful in assessing the future of our Executive Sessions and methods that we can agree upon that will result in the inclusion of this vast body of lawyers providing court appointments to this poor in criminal cases in this country.❖

NEWS FROM AROUND THE NATION

North Carolina Indigent Defense Study Commission Unanimously Votes to Recommend a Permanent Statewide Indigent Defense Commission

With the principal mandate of studying "the methods of improving the management and accountability of funds expended to provide counsel to indigent defendants without compromising the quality of legal representation mandated by state and federal law," the North Carolina Indigent Defense Study Commission held its fourth meeting on December 17, 1999, in Raleigh, North Carolina, where, by unanimous vote, the Study Commission recommended the following:

- Legislation be enacted by the North Carolina legislature to create a permanent Indigent Defense Statewide Commission to be an independent agency within the Judicial branch;
- The Commission be broad-based, but not include any active prosecutor or judge;
- The Commission be charged with determining the type of indigent defense system to exist in each of the judicial circuits throughout the state;
- The Commission appoint an Executive Director and full-time Judicial District Public Defenders who, on an annual basis, shall submit a plan and budget to the Commission regarding effective representation in each county of the Judicial District;
- The Commission be required to promulgate uniform qualifications and performance standards for each type of system throughout the state and to further develop an implementation plan to ensure that the standards are being met; and
- The Commission be responsible for providing effective assistance of counsel in all cases where counsel is mandated in North Carolina.

In North Carolina, the state pays for all indigent defense expenditures. Trial level representation is provided at the local level; each county has the responsibility of organizing its system. A handful of the state's 100 counties employ the public defender model while the rest use assigned counsel or contract defenders. Appellate representation is provided by the State Appellate Defender.

The Study Commission was created in 1999 when the North Carolina legislature passed two bills that were merged to look at the state's indigent defense system. Senate Bill 1366 called for the creation of an Indigent Fund Study Commission to be established by the AOC with broad representation of the three branches of government, the two state bar associations, the North Carolina Academy of Trial Lawyers and the North Carolina Association of Public Defenders. Senate Bill 1255 mandated that the Administrative Office of Courts study the efficiency and cost effectiveness of the public defender programs established in several judicial districts. This bill called for recommendations relating to the implementation of a plan for the potential expansion of judicial district public defenders along with cost estimates for the increase.

The Study Commission was aided in its research by The Spangenberg Group under the auspices of the joint U.S. Department of Justice, Bureau of Justice Assistance and American Bar Association, Bar Information Program State Commissions Project. The Bar Information Program (BIP) was created in 1983 by the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID) and shortly thereafter contracted with The Spangenberg Group to provide on-site technical assistance to states interested in improving their indigent defense systems. In 1999, BIP was awarded a grant from the Bureau of Justice Assistance to increase its ability to work with states with no statewide oversight of indigent defense. The aim of

the State Commissions Project is to assist state task forces gather data and address such issues as: system funding; standards for assigned counsel, public defenders and contract counsel; and uniformity of data collection.

The Study Commission has been ably staffed by John Rubin from the University of North Carlina Institute of Government and Rick Kane, the Administrator of the Administrative Office of the Courts and his staff.❖

West Virginia Task Force Recommends an Increase to the Public Defender Services' Budget, the Establishment of a Statewide Indigent Defense Advisory Commission, and Stricter Rules Governing the Submission of Assigned Counsel Vouchers for Payment

In January, a 25-member task force made up of judges, legislators, public defenders, district attorneys and executive branch representatives recommended to the Governor and Legislature that the budget for West Virginia Public Defender Services (PDS) be increased for the specific purposes of: increasing salaries of PDS staff to competitive levels; hiring qualified management-information systems staff; and, operating an auditing division, resource center and appellate division as required by statute. Additionally, because the Task Force found the collaborative process involved in bringing together a broad-based coalition to address indigent defense issues to be an effective way to address both the quality and cost-effectiveness of defender services, it also recommended that a ten-person Advisory Commission be established to provide counsel to the Executive Director of PDS on the following areas of concern: securing adequate financing; overseeing budget preparations; developing procedures to monitor indigent defense caseloads; establishing indigent defense standards and guidelines; and, evaluating the need to establish new public defender corporations. Finally, the Task Force recommended that the Legislature substantially reduce the window for submitting assigned counsel vouchers for payment. The Task Force recommendations are especially significant as the task force was created to address the rising cost of indigent defense services in the state.

Public Defender Services (PDS) is a statewide agency of the executive branch responsible for the administration, coordination and evaluation of local indigent defense programs in West Virginia's 31 judicial circuits. All funds for indigent defense in West Virginia are provided in a state general fund appropriation. The Executive Director of PDS, appointed by the Governor with the consent of the Senate, is authorized to make grants to and contract with Public Defender Corporations in those judicial circuits in which the chief judge and/or the majority of active local bar members have determined a need for a public defender office.

Throughout the 1990's, PDS had a history of funding problems and carried a certain level of debt from year to year. For instance, in FY 1996, despite a supplemental state appropriation of $3.5 million, PDS finished the fiscal year with a debt level of approximately $4.5 million. Another supplemental appropriation of $3.4 million in FY 1997 still left PDS with a debt of $5,041,190 heading into FY 1998. Despite a 3.4% increase in its FY 1998 state funding (from $17.6 million to $18.2 million), PDS depleted its resources after only five months. A further supplemental appropriation still left PDS with a debt of approximately $4 million at the close of FY 1998. In FY 1999, the Legislature increased the appropriation to over $22 million and increased it another 22.61% (up to $27,110,905) for FY 2000.

The Executive Director of PDS, with the consent of the Governor, appointed the Task Force to study the rising costs of defender services and hired The Spangenberg Group to conduct a data audit of PDS and to help the Task Force understand the funding issues from a national perspective. The resulting assessment, *Final Report to the West Virginia Indigent Defense Task Force,* made several findings upon which the Task Force made its recommendations. For instance, TSG found that PDS is forced to base budget requests on data that is incomplete because court-appointed attorneys are

allowed to submit vouchers up to four years after the completion of the case. As such, a significant portion of each year's budget goes to paying assigned counsel for cases several years old. TSG also found that potential overall savings could be had by increasing the PDS budget to fund the auditing division, resource center and appellate division that are required by statute but have never been funded. Finally, TSG concluded that public defenders in West Virginia provide more cost-effective representation than do court-appointed attorneys, and suggested that an advisory committee be established to explore expanding the public defender system. For a copy of the report, please contact The Spangenberg Group, tsg@spangenberggroup.com or call (617) 969-3820.❖

Mississippi Lawsuits Add Pressure to State to Fund State Public Defender System

In December and January, on the eve of the Mississippi legislature's return to session, four lawsuits were filed in Mississippi trial courts that ask the courts to order the state to fund a statewide public defender system.

Three of the four lawsuits were brought on behalf of Mississippi counties and their taxpayers against the Governor and the Attorney General of Mississippi. *Quitman County v. Mississippi*, *Jefferson County v. Mississippi*, and *Noxubee County v. Mississippi*. The fourth lawsuit was brought on behalf of a public defender, J.B. Van Slyke, working in Forrest County, Mississippi, and names as defendant, in addition to the Governor and Attorney General, the Forrest County Board of Supervisors.

Plaintiff's complaint in *Quitman County v. Mississippi* notes that all costs for criminal prosecutions are paid for by the state, but the state contributes no funds for indigent defense representation. All indigent defense funds are paid by the counties, despite enactment of the Mississippi Statewide Public Defender Act of 1998, which called for numerous reforms, including state-funded, district public defender offices. Beyond minimal first year funds, the State legislature has so far refused to appropriate funds for the Commission to do its work. Indeed, the state's Attorney General, one of the defendants in the county lawsuits, has written an Advisory Opinion that the Commission's enabling legislation should be removed from the state's law books. The plaintiffs seek an order compelling the state to fund a statewide public defender system such as that called for in the 1998 Public Defender Act; one which is comparable to the existing statewide district attorney system.

In *Quitman County v. Mississippi*, plaintiffs argue the state's imposition of indigent defense costs on the counties amounts to an unfunded mandate which is inherently arbitrary because of the unpredictability of crime on a county-by-county basis. In Quitman County, the complaint recounts, county officials were forced to take out a bank loan and raise taxes to pay for $250,000 in legal costs for the death penalty trials and appeals of two men convicted of killing four members of one family. It took the county three years to repay the loan. With another appeal recently filed in the case, the county faces raising taxes again, incurring additional debt or reducing other services to pay for the legal representation.

Quitman County officials point out the crime was committed by defendants who reside outside of Quitman County, but because the crime was committed within its borders, Quitman County is obligated to pay for the legal representation of the indigent defendants.

Van Slyke's claim argues that he lacks enough resources to adequately do his job as public defender. For the past six years, Van Slyke has worked as one of two part-time public defenders under a contract with the Forrest County Board of Supervisors. In his complaint, Van Slyke reports he has an annual budget of approximately $100,000 to pay his salary, plus that of an assistant and a part-time secretary. Van Slyke, who does not have any investigators, says he represents about 800 people at initial appearance and 500 who are indicted on felony charges each year.

There are currently only three counties in Mississippi (Hinds, Jackson and Washington) that operate full-time public defender offices to represent

indigent defendants. The remaining counties appoint lawyers on a case-by-case basis, or use part-time public defenders, such as Van Slyke, who operate under contract with the county to accept an unlimited number of cases each year.

Van Slyke is represented by attorneys Steven Hanlon and Leo Rydzeqski of Holland & Knight, which has offices in Tallahassee, FL and Washington, DC. Counsel for the county lawsuits includes William H. Voth and Kathleen A. Behan of Arnold & Porter, which has offices in New York, NY and Washington, DC. Jackson, MS attorneys Robert McDuff and Dennis C. Sweet, III, are involved in all four cases, and Jackson, MS attorney Everett Sanders is part of the county lawsuits team.❖

Work Begins on Fair Defense Project In Texas

Texas Appleseed, a non-profit public interest law center based in Austin, has kicked off a multi-phase campaign to educate the public and to build a strong coalition between the bar and the community to achieve reform in the Texas indigent defense system. The Project On Fair Defense for the Indigent Accused in Texas (Fair Defense Project) has three components: (1) research and analysis of the present Texas system; (2) public education about the present system and various alternative approaches; and (3) creation of a broad coalition to promote dialogue, movement and consensus on improving equity and efficiency in the Texas indigent defense system.

Legal representation for indigent criminal defendants in Texas is provided under independent systems that have evolved in each of the state's 254 counties, with little or no oversight, and no funding from the state. For over a decade, state and national media have spotlighted Texas as a place where poor people receive unequal justice and much of that attention has focused on problems inherent in Texas' indigent defense systems.

In 1999, legislation proposing modest improvements in the Texas indigent defense law was approved by unanimous vote of both houses of the Texas legislature, but was vetoed by Governor George W. Bush. (*See Texas Governor Bush Vetoes Indigent Defense Reform Measures,* The Spangenberg Report, Vol. V, Issue 2.) The veto sparked a flurry of national media interest due in part to the seeming inconsistency with Bush's self-professed "compassionate conservatism." The veto inspired renewed determination on the part of the many individuals and institutions to join together and continue attempts to reform the system.

Over the summer and fall of 1999, Texas Appleseed began building a diverse coalition of individuals and organizations to work toward fundamental improvements in Texas' indigent defense system. Included in the coalition are lawyers, organized bar institutions, judges, prosecutors, criminal justice system administrators and community-based groups around the state. In addition, the organization has a working relationship with State Senator Rodney Ellis, the principal author of the 1999 indigent defense legislation and Chair of the Jurisprudence Committee in the Texas Senate.

Texas Appleseed received grants from the Open Society Institute and the Public Welfare Foundation to carry out the initial phase of its Fair Defense Project. With these grants, Texas Appleseed has enlisted the assistance of both The Spangenberg Group and the Texas-based Center for Public Policy Priorities to conduct research for the project. The Spangenberg Group will conduct a quantitative and qualitative study of the delivery of indigent defense services in a representative cross-section of counties in Texas. No such study has ever been undertaken in Texas, although the State Bar of Texas Committee on the Provision of Legal Services to the Poor in Criminal Matters has just completed a multi-year survey of judges, prosecutors and criminal defense attorneys in Texas, which the Appleseed research will complement. A report detailing findings of the study is expected in November 2000.

The Fair Defense Project is also receiving support from the State Commissions Project, which is a joint effort between the American Bar Association Bar Information Program and the U.S. Department of Justice Bureau of Justice Assistance. The purpose of

the State Commissions Project is to provide technical assistance and information to state task forces attempting to improve their indigent defense systems. Texas is one of several states receiving assistance from this project (*see* related article on North Carolina, infra.) ❖

Illinois Governor Calls for Moratorium on Executions

In the wake of the release of four men from death row in the past year, Illinois Governor George Ryan announced in January that he would halt all executions until a commission can review the problems of Illinois' capital punishment system. Illinois has released 13 inmates from death row since reinstating the death penalty in 1977. Most recently exonerated was an inmate whom the Illinois Court ruled was convicted with the use of improper evidence. Twelve of Illinois' death row inmates have been executed since 1977.

In announcing he was temporarily placing a moratorium on executions, Governor Ryan was quoted in the *Chicago Tribune* as saying, "I can't support a system which in its administration has proven to be so fraught with error and come so close to the ultimate nightmare - the state's taking of an innocent life." Ryan said he would appoint a commission to study the capital punishment system "in it's totality." Last year the Illinois Supreme Court and the Illinois General Assembly created their own committees to study possible reforms.

Reasons for the exoneration of the 13 former death row inmates include new DNA evidence and recanted testimony by prosecution witnesses. Convictions in five of the 13 cases were attributed in part to testimony from jailhouse informants.

According to an analysis by the *Chicago Tribune,* Illinois courts have imposed a death sentences in nearly 300 cases since the state reinstated the death penalty in 1977. At least one round of appeals has been completed in 260 of those cases, and half were reversed for a new trial or sentencing hearing.

On March 9, Governor Ryan appointed a group of high-profile Illinois attorneys and politicians to lead the probe of the state's capital punishment system. Chairing the governor's 14 member Commission on Capital Punishment will be former Chief U.S. District Judge Frank McGarr, with former U.S. Senator Paul Simon and former U.S. Attorney Thomas Sullivan serving as co-chairs. Acting as a special advisor to the commission will be William Webster, a senior partner in the Washington, D.C. law firm of Milbank, Tweed, Hadley & McCloy and a former director of the Federal Bureau of Investigation and Central Intelligence Agency.

As reported in *American Lawyer,* panelists appointed in addition to McGarr, who is a private practitioner, Sullivan, a partner at Jenner & Block, and Simon, director of Southern Illinois University's Public Policy Institute, are: Cook County Public Defender Rita Fry; Lake County State's Attorney Mike Waller; Roberto Ramirez, a non-lawyer and Mexican immigrant who is the founder and president of the janitorial company Tidy International; best-selling author and former federal prosecutor Scott Turow; Tom Needham, a former Cook County prosecutor who now serves as chief of staff for Chicago Police Superintendent Terry Hillard; former Cook County prosecutor Bill Martin; criminal defense lawyer Donald Hubert; State Appellate Defender Theodore Gottfried; Matt Bettenhausen, deputy governor for criminal justice and public safety; corporate lawyer and former prosecutor Andrea Zopp; and Montgomery County State's Attorney Kathryn Dobrinic.

The committee appointed by the Illinois Supreme Court to review capital punishment produced a report last fall with a lengthy list of reform proposals. One was to create a capital litigation trial bar of specially qualified defense attorneys and prosecutors who meet minimum levels of experience. While such a system has been used for defense attorneys in other states, the suggestion that prosecutors meet minimum standards was criticized by prosecutors as violating the Illinois Constitution by usurping the power of elected state's attorneys.

Illinois is the only one of the 38 states with the death penalty to officially halt executions while it

reviews its death penalty procedures. A similar precaution was approved by the Nebraska legislature, but vetoed by the governor last year.

Governor Ryan's moratorium was reportedly hailed by Bill Paul, President of the American Bar Association. In February, 1997, the American Bar Association called for a moratorium on executions until the nation's death penalty system is changed to afford due process.❖

Kentucky Governor's Budget Includes Significant Increases to Department of Public Advocacy

Kentucky Governor Patton announced in his biennium budget address on January 25, 2000 that he is recommending an additional $4 million be appropriated for the Department of Public Advocacy (DPA) in 2001 and another additional $6 million be provided to the agency in 2002. These proposed increases were influenced by recommendations from a Blue Ribbon Group formed by the Kentucky Public Advocate and the Public Advocacy Commission in 1999 to study indigent defense in the state.

The Blue Ribbon Group, consisting of more than 20 distinguished members representing all three branches of the government, the bar and key officials of criminal justice agencies across the state, recommended that an additional $11.7 million be appropriated for DPA in each of the upcoming biennium years. In its May 1999 report, *Analysis of Indigent Defense in Kentucky: Bringing the Department of Public Advocacy into the 21st Century*, the Blue Ribbon Group justified the increase expenditure by documenting the effects that years of chronic under-funding have had on the DPA. The report found that:

- Kentucky ranks among the bottom five states in the U.S. in funding for public defender systems;
- Kentucky ranks near the bottom of the states in public defender salaries;
- Kentucky provides inadequate representation to juveniles;
- Kentucky's public defender caseloads are two times the national recommended standards; and
- Private lawyers are inadequately compensated for work on indigent defense cases.

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

The Governor's proposed budget increases are designed to:

- Correct a budget imbalance caused by increased caseloads;
- Bring the salaries paid to Kentucky's public defenders in line with those paid in comparable southeastern states;
- Open new public defender offices in 21 counties to improve access to and raise the quality of representation;
- Reduce public defender caseloads by adding new attorneys; and
- Provide adequate support services to the public defender system.

For more information on the work of the Blue Ribbon Group, see Volume V, Issue 2 of *The Spangenberg Report*. The Blue Ribbon Group report was prepared following a study conducted by The

Spangenberg Group under a grant to the Kentucky Public Advocate.❖

Washington Legal Foundation Challenge to Texas IOLTA Dismissed

A U.S. District Judge in Austin ruled in late January that the Texas Interest on Lawyers Trust Accounts program (IOLTA program) did not unconstitutionally take the money of a lawyer's client, dismissing with prejudice a long-running challenge to the program.

The Washington Legal Foundation (WLF) brought suit against the Texas Equal Access to Justice Foundation, which administers the Texas IOLTA program, on behalf of William Summers, a client of a Houston attorney. WLF argued there was an improper taking of Summers' property under the Fifth Amendment when Summers complained the interest on his $1,000 retainer belonged to him, and should have not been used by the IOLTA program to finance legal services for low-income Texans. WLF also unsuccessfully argued that the IOLTA program violates the First Amendment as it forced clients such as Summers to support speech he finds offensive.

All 50 states have IOLTA programs. Under these programs, law firms deposit funds held for clients into special accounts when the funds constitute nominal amounts or are only held for a brief time. Interest from these accounts is distributed to programs that provide legal services to low-income persons. The vast majority of states use IOLTA funds to assist programs providing assistance in civil matters, but two -- Georgia and Michigan -- also use IOLTA funds to assist indigent criminal defense programs.

The opinion comes following a remand by the U.S. Supreme Court for a determination of whether there had been a taking of Summers' property and whether he was due any compensation. A Fifth Circuit panel had reversed the district court's summary judgment for the defendants, concluding that the interest earned on client funds held in IOLTA accounts is a property interest within the reach of the Fifth Amendment. The same judge who granted summary judgment to the Texas IOLTA program almost six years ago, U.S. District Judge James Nowlin, again wrote for the defendants. "The Court finds that the costs of sub-accounting in lawyer and staff hours . . . in addition to bank charges exceed the costs of IOLTA . . . . These costs make net interest to clients infeasible except in cases where large sums of money are held or when client funds are held for long periods of time. In these cases, the client funds would not be placed in IOLTA."

Judge Nowlin found the IOLTA program cost Summers nothing, thus the governmental action involved does not implicate fundamental principles of justice and fairness. Nowlin rejected Summers' First Amendment claim on the basis that the purpose of the program -- to fund legal services for the poor -- is an important state interest.

The IOLTA program in Texas was adopted by the Texas Supreme Court in 1984 and became mandatory in 1988. The program raises nearly $5 million annually to fund legal services for the poor. WLF reportedly plans to appeal the decision.❖

Chief Judge Calls for Increased Compensation to Court-Appointed Counsel in New York

In her January 2000 State of the Judiciary Address, New York Chief Judge Judith S. Kaye called for sweeping reforms to New York's system of assigned counsel, including an increase in compensation rates paid to court-appointed attorneys in the state. Last increased in 1986, the current rates paid to New York court-appointed attorneys are among the lowest paid in the nation: $25 per hour for out-of-court work and $40 per hour for in-court work, with caps of $800 for non-felony cases and $1,200 for felony cases. The rate for appellate work in criminal cases is fixed at $40 per hour. Kaye called for an elimination of per-case limits and new rates of $60 per hour for misdemeanor cases and $75 per hour for felony and family court cases.

Judge Kaye's recommendations were based on a report, *Assigned Counsel Compensation in New York: A Growing Crisis*, prepared by Chief Administrative

Judge Jonathan Lipmann and Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton on behalf of the Office of Court Administration (OCA). One of the findings influencing a call to increase assigned counsel compensation rates was that of a dramatic attrition rate over the past decade in the number of attorneys who agree to accept court-appointed cases. The largest drops were in judicial districts covering the southern part of New York, where the cost of living is the highest. In the First Department (which covers the Bronx and Manhattan) in 1989, there were 1,030 attorneys on the assigned counsel panel who actively accepted assignments. In 1999, that figure was down to 400; a decrease of more than 60 percent. The decline in active panel participants in the Second Department (encompassing Brooklyn, Queens and Staten Island) was even more dramatic, with almost 70 percent fewer attorneys taking appointments in 1999 (300) than 1989 (940).

Assigned Counsel Compensation in New York: A Growing Crisis also discusses findings of a recent New York State Bar Association study on the economics of law practice in New York, which calculated that the average New York attorney's hourly overhead rate was $35.75. That is $10.75 an hour *more* than a court-appointed attorney would be paid for an hour of out-of-court work.

The report predicts that raising attorney compensation to the recommended levels would cost an additional $71,800,000 annually. Currently, all assigned counsel costs in New York are the responsibility of the counties. To ease the fiscal impact on the counties, the report recommends that the increased cost of assigned counsel be funded by revenue from mandatory surcharges imposed upon conviction in all offenses. The majority of revenue from the surcharges, which range from $5 for a parking offense to $150 for a felony conviction, currently goes to the state's general fund and totals roughly $70 million annually. After Judge Kaye announced this proposed funding measure, Governor Pataki announced he has no intention of diverting court-generated fees to fund increased assigned counsel compensation rates, and that he is unlikely to support any increase in assigned counsel rates, no matter what the source of funding.

The report proposed one other salient reform: creation of a commission that would periodically review assigned counsel compensation rates. The proposed commission would make non-binding suggestions to the legislature, and would consist of representatives of the governor, the legislature, the chief judge, counties and municipalities. ❖

NYCLA Seeks Injunction Setting New Rates For Court-Appointed Counsel

The New York County Lawyers Association (NYCLA) recently filed suit against the State of New York claiming that the inadequacy of the rates of compensation for assigned counsel is a systemic violation of the rights of children and indigent adults to legal representation under the state and federal constitutions. *New York County Lawyers' Association v. George E. Pataki and The State of New York.*

The NYCLA action seeks declaratory and injunctive relief against Governor George E. Pataki and the State of New York, alleging that failure on the part of the State to increase the rate of compensation for assigned private counsel who appear in these proceedings constitutes denial of access to meaningful and effective legal representation for children and indigent adults as required by the New York and United States Constitutions.

While the number of attorneys in New York's First and Second Departments who actively participate in the assigned counsel program has plummeted in the past ten years, the number of children and indigent adults in New York City required to be represented by assigned private counsel in family and criminal court proceedings at the trial and appellate levels has escalated. To meet this increase in demand, plaintiffs contend, those lawyers who participate in the assigned counsel program must take on more cases, which in turn undermines the quality of the representation and causes delays in the administration of justice.

As noted in the preceding article, the compensation rates for assigned counsel in New York, which are set out in Article 18-B of the New York County law, Article 2 of the Family Court Act, and Article 2 of the Judiciary Law, have not been changed since 1986.

The NYCLA argues that Defendants have a constitutional and statutory obligation to ensure that qualified assigned private counsel are available and able to provide meaningful and effective representation to children and indigent adults in New York City, and that Defendants' failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total compensation per case has created a disincentive for adequate preparation prior to a hearing or trial on the part of the attorney, as well as a risk of inadequate legal representation in New York City, in violation of the state and federal constitution.

The NYCLA asks the Court to declare as unconstitutional those portions of the County Law, Family Court Act and Judiciary Law which provide for fixed rates and per-case limits for the representation of children and indigent adults in New York City. Further, the NYCLA claims that Defendants' failure to provide sufficient compensation to assigned counsel constitutes tortious interference with NYCLA's obligation under the assigned counsel program to provide a list of attorneys competent to provide meaningful and effective representation to children and indigent adults in New York City.

The NYCLA's complaint references Chief Judge Kaye's State of the Judiciary Address and the report prepared by the OCA. The NYCLA is represented by attorneys Davis Polk & Wardwell.

New York Supreme Court Rules That Capital Defense Counsel Can Claim Fees of Their Associates and Paralegals

Genesee County Supreme Court Justice Joseph McCarthy in a declaratory judgment against New York State recently ruled that lawyers representing indigent capital defendants were entitled to the reimbursement not only of their fees, but also the fees of their associates and paralegals. *Mahoney v. Pataki*, 1-1999- 45939.

The court commented that the New York Court of Appeals had properly approved a fee schedule for capital counsel that included rates of compensation for legal and paralegal assistants. The Supreme Court stated that the interpretation of the terms "fee schedules" and "rates of compensation" allowed for sufficient leeway to include within the broad ambit of those terms the hourly rates for other staff members uniformly accepted in current law firm business practice.

The tension between Governor Pataki and the Court of Appeals can be traced back to November 1996, when the Court of Appeals authorized a capital defense counsel fee schedule establishing hourly rates for lawyers and their legal assistants. The Court of Appeals, which has final authority to approve compensation rates in capital cases, set hourly rates of $175 for lead counsel, $150 for second counsel, $40 for law firm associates and $25 for paralegals. In 1998, the Court of Appeals reduced the fees for lead and secondary attorneys to $150 per hour and $100 per hour, respectively, but did not change the fees for legal assistants and paralegals.

After initial Court approval of the fee schedule in 1996, the State refused to pay law firm associates and paralegals for capital defense assistance, claiming misinterpretation of statutory law.

Mark J. Mahoney, who brought this case on behalf of himself and other capital defense lawyers, argued that by refusing to pay the fees of paralegals and associates, the State forced experienced lawyers to spend time doing tasks that can be done by less costly paralegals and associates, which in the end costs the State more in attorney fees.❖

BJS Issues Report on State Prison Expenditures, 1996

Based on the 1996 Survey of Government Finances by the U.S. Bureau of the Census, in August

of 1999 the Bureau of Justice Statistics released *State Prison Expenditures, 1996*. According to the report, in 1996 the states and the District of Columbia spent $22 billion on building, staffing and maintaining adult prisons; the Federal Bureau of Prisons allocated an additional $2.5 billion, for a total expenditure on prisons of $24.5 billion. Total state correctional expenditures include the cost of operating prisons and ". . .related institutions such as reformatories, prison farms, (and) institutions exclusively for the criminally insane. . ."

State prison expenditures increased 83% between 1990 and 1996, an average 11% increase per year, while federal prison expenditures inflated 160%, an average increase of 17% each year. BJS estimates the average annual operating cost of a state inmate is $20,100, a federal inmate $23,500. The total annual cost of state correctional expenses increased from $53 per U.S. resident in 1985 to $103 in 1996, a 7.2% increase per year. This spending is approximately twice the annual increase per year for state education (3.6%) and more than twice the increase for state natural resources (2.9%). However, *State Prison Expenditures, 1996* reports that "corrections' relative share of the total outlay remained small. At $994 billion, State spending for education in FY 1996 was nearly ten times larger than that for corrections."

BJS reports that most correctional funds are used for daily prison operations. The states allocated only six percent of the 1996 state prison expenditure for new construction or major repairs and used the remaining 96% of prison funds for "salaries, wages, benefits, and other operating expenses." Employee salaries and benefits accounted for two-thirds of operating costs in 1996. Operating costs in 1996 varied from state to state, due to differences in costs of living, wage rates, climate and geography. However, BJS notes certain conditions affect operating costs state-wide, such as inmate-to-staff ratios. Those prisons with low average costs per-inmate reported high inmate-to-total-staff ratios; those with low inmate-to-total staff ratios were of a high average cost per inmate. Minnesota accounts for the highest average annual operating cost- per-state-inmate at $37,800, whereas Alabama is the lowest with $8,000.❖

U.S. Department of Justice Bureau of Justice Statistics Issues Special Report on Women Offenders

The Bureau of Justice Statistics (BJS) recently released *Women Offenders*, a special report based on Census Bureau population estimates for July 1, 1998. The report states that women account for approximately 14% of violent offenders in the United States, an average of 2.1 million female violent offenders per year. Women ". . . accounted for 1 in 50 offenders committing a violent sex offense including rape and sexual assault, 1 in 14 robbers, 1 in 9 offenders committing aggravated assault, and more than 1 in 6 offenders described as having committed a simple assault." The authors of *Women Offenders* report that more than three out of four female offenders victimize other females. Approximately 62% of those female offenders had a previous relationship with their victims (either as an intimate, relative or acquaintance) as opposed to male offenders, of whom only 36% knew their victims. The report also notes that both male and female murder rates have declined; 1998 is of the lowest rate since 1976.

According to the report, in 1998, an estimated 3.2 million women were arrested; that number accounts for nearly 22% of all arrests that entire year. Twice as many juvenile females were arrested in comparison to adult females. The report found women offenders are more likely to be under the influence of drugs at the time of their offense rather than alcohol: "40% of women inmates compared to 32% of male inmates had been under the influence of drugs when the crime occurred." Women inmates are also of greater economic disparity compared to male inmates. Only eight percent of male inmates received welfare assistance before arrest, whereas 30% of female inmates reported receiving welfare assistance prior to arrest.

Women Offenders estimates 84,000 women were incarcerated in the U.S. in 1998. Excepting property offenses, women received shorter sentences than those of men and length of prison stay for women was less than that of men for every type of offense. Of those serving sentences, "nearly two-thirds of women under probation supervision are white," however, "nearly two-thirds of those confined in local jails and State and Federal prisons are minority – black, Hispanic and other races." About six in ten women in state prisons are the victims of past physical or sexual abuse, usually by a family member or intimate. Approximately seven in ten women under correctional sanction are mothers of minor children, which accounts for more than 1.3 million children under the age of eighteen.❖

BJS Report Finds That Imprisonment of Juveniles Doubles

The number of offenders under age 18 admitted to adult state prisons in the U.S. more than doubled over a 12 year period, rising from 3,400 in 1985 to 7,400 in 1997. These figures were revealed in *Profile of State Prisoners Under Age 18, 1985-97*, a recently released report of the U.S. Justice Department's Bureau of Justice Statistics (BJS).

The report notes that in 37 states and the District of Columbia, all eighteen-year-olds are processed as adult defendants and most states allow certain categories of offenders under age eighteen to be incarcerated in adult prisons and housed with older inmates.

The report attributes the crack-down on youthful offenders primarily to the spate of drug-gang violence and high-profile school shootings in the last decade. Since 1992, over 30 states have passed laws that expanded provisions for prosecuting offenders under age eighteen in adult criminal courts, thus eroding protections traditionally available to juvenile offenders.

According to the report, every state now has at least one provision to transfer juveniles to be tried in adult courts. As of 1997, 28 states have statutes that automatically exclude certain types of offenders from juvenile court jurisdiction, 15 states permit prosecutors to file some cases directly to adult criminal courts and 46 states allow juvenile court judges to decide to send cases to adult courts.

As a result of such changes, the number of young people sent to prison rose from 18 per 1,000 violent crime arrests of persons under age 18 in 1985 to 33 per 1,000 arrests in 1997.

In a related development, on March 7, Californians voted affirmatively to a proposal that will make it easier to charge juveniles as young as fourteen as adults for serious crimes and impose life sentences.❖

CASE NOTES

Second Circuit Upholds Limit on Attorney-Client Communications Intended to Conceal Witness Tampering Probe

In *U.S. v. Padilla,* Second Cir., No. 98-1360 (February 2, 2000), the Second Circuit Court of Appeals held that a court order preventing defense lawyers from revealing during an ongoing trial that their clients were being investigated for alleged jury and witness tampering did not violate their clients sixth amendment right to counsel.

The defendants were on trial for murder and other crimes stemming from an extortion business and a gang war. During their trial the judge received a letter from a jail inmate alleging that the defendants were plotting to pay witnesses to commit perjury and that a juror had already been "bought off." The inmate asked that the information not be revealed to the defendants or their lawyers, citing fear of reprisals against himself or his family.

The judge agreed with the prosecution and ordered defense counsel not to reveal the investigation to their clients. Sixteen days after the first meeting and a week before trial, the judge turned over evidence from the investigation to the defense and lifted the ban against discussing it with the defendants.

The defendants were convicted. On appeal, they argued that the judge's order prohibiting their lawyers from discussing the mid-trial investigation with them violated their Sixth Amendment right to counsel.

Rejecting the defendants' argument, the court distinguished *Geders v. United States* 425 U.S. 80 (1976) which involved a blanket prohibition of lawyer-client communications. The court stressed that even though *Geders* involved a blanket prohibition of lawyer-client communications, the prohibition here was narrow. The court stated that the difference between *Geders*, and this case "is not the quantity of communication restrained but its constitutional quality." For similar reasons, the defendants could be excluded from conferences involving the obstruction of justice investigation.

The court agreed with the ruling in the case of *Perry v. Leeke*, 488 U.S. 272 (1989), which found no Sixth Amendment violation in a court barring a defendant from communicating with counsel during a brief recess that intervened between the defendant's direct and cross-examination.

The Court agreed with *Perry* that even though a lawyer's communications with his or her client must "remain unconstrained," they are subject to "reasonable limitations" when the client is acting as a witness. The court declared that the district court's order banned only communications that were "centrally related" to the investigation of the uncharged crimes which would jeopardize the integrity of the trial process. On this basis, no Sixth Amendment rights were violated in *Padilla.*❖

Florida Supreme Court Holds That Absent Client's Consent, Admission of Client's Guilt Is Ineffective Assistance, Whether Or Not There Was Prejudice

A majority of the Florida Supreme Court in *Nixon v. Singletary, Fla*., No. SC 93192 (January 27, 2000) held that a defense attorney who concedes the defendant's guilt to the trier of fact without the defendant's consent renders ineffective assistance in violation of the sixth amendment. In a per curiam opinion the majority ruled that the showing of prejudice that is usually required for a finding of ineffective assistance was unnecessary in this situation.

The Petitioner in this post-conviction relief proceeding had pleaded not guilty to murder. Defense counsel, facing what he considered overwhelming evidence of the petitioner's guilt, adopted a strategy designed to save the petitioner from the death penalty rather than win an acquittal.

The defense counsel in his opening statement at trial told the jury that it will be proved beyond reasonable doubt, "that the petitioner is responsible for the victim's death." During closing argument defense counsel also declared, "I wish I could stand before you and argue that what happened was not caused by Mr. Nixon, but we all know better."

The petitioner claimed that he did not give counsel permission either to enter such a plea or to employ a trial strategy in which guilt would be admitted.

The prosecution urged the application of the exception to *Strickland v. Washington,* 466 U.S. 668 (1984), carved out in *United States v. Cronic,* 466 U.S. 648, 659 (1984).

In *Cronic*, the Supreme Court stated that prejudice will be presumed if the accused is denied counsel at a critical stage of the trial or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

The prosecution argued that counsel's statement during opening and closing argument would constitute a breakdown of the adversarial process.

Even though a majority of the court accepted that counsel may have been acting in good faith in employing a strategy which might be in the petitioner's best interest, this decision cannot be made without the consent of the defendant. The determining factor is whether the petitioner consented to counsel's strategy. The case was remanded for evidentiary hearing to determine whether the petitioner consented to his attorney's strategy.❖

South Carolina Supreme Court Holds That Deliberate Misconduct on the Part of the

Prosecution Creates Irrebuttable Presumption of Prejudice

In *State v. Quattlebaum, S.C.,* No. 25051 (January 26, 2000), the South Carolina court held that a prosecutor's deliberate eavesdropping on a conversation between a criminal defendant and his attorney violated the defendant's Sixth Amendment right to counsel regardless of whether the defense can show prejudice as a result.

The defendant turned himself into the sheriff's officers for questioning about a murder and other crimes. His attorney met with him at the sheriff's office in a polygraph room that was equipped with a video camera, which could be monitored from a detective's office. Several sheriff's officers and a prosecuting attorney listened to the conversation between the defendant and his attorney and recorded it. The eavesdropping and the recording were not disclosed to the defendant or his attorney until two years later. A jury convicted the defendant and sentenced him to death.

On appeal, the state Supreme Court agreed with the defendant's arguments that the eavesdropping violated his Sixth Amendment right to counsel and that the prosecutor's subsequent participation in the trial undermined the integrity of the judicial system.

The state argued that since charges had not been filed against the defendant when the eavesdropping occurred, the Sixth Amendment's right to counsel had not yet attached. The court declared that this argument "ignores the two years during which the State continued adversarial proceedings against appellant while failing to disclose the fact of the eavesdropping and the existence of the videotape."

In *Weatherford v. Bursey*, 429 U.S. 545 9 (1977), the U.S. Supreme Court faced a situation in which a co-defendant serving as an informer attended meetings between the defendant and his attorney. The Supreme Court held there was no Sixth Amendment violation in the absence of any tainted evidence, communication of defense strategy to the prosecution, or purposeful intrusion by the government.

The South Carolina court determined that this case departed from *Weatherford* because the prosecutor knowingly eavesdropped on the attorney-client conversation. Precedents from federal courts of appeal on prosecutorial receipt of confidential defense information show a mix of approaches. The South Carolina court in deciding to adopt an approach which is consistent with existing federal procedure and was endorsed by the Supreme Court prior to *Weatherford,* stated:

> "a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct."

The court went on to state that it will not tolerate " deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice."❖

The U.S. Court of Appeals for the First Circuit Holds That Funding of Sentencing-Related Expert Services Must be Handled Ex Parte

In a decision which the First Circuit Court of Appeals noted may be its first explicit ruling on the point, the court held in *United States v. Abreu*, First Cir., No. 99-1403 (January 3, 2000), that government funding of sentence-related expert services must be handled ex parte. The first circuit overturned a district court ruling which allowed the government to attend a hearing on a defense lawyer's request for funding for a psychiatric examination he hoped would support a downward departure for diminished capacity.

The defendant pleaded guilty to a drug crime while represented by counsel appointed pursuant to the CJA. Counsel, concerned about the defendant's mental state sought an evaluation by a licensed psychologist before sentencing. Using the procedure set forth in the CJA, counsel filed an ex parte application for the funding of expert services. The District Court held an ex parte

hearing but limited it to the question of whether the hearing of the application would be ex parte. The District Court answered that question in the negative and required defense counsel to file a new application with notice to the government.

On appeal, the court stated that section 3006A(e)(1) makes clear that the request for funding should have been handled ex parte:

> "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain services."

The court also pointed out that given the importance of sentencing to the defendant, it is crucial that he have a fair opportunity to marshal a defense at sentencing as well as trial. The case was remanded, so that the District Court could hear ex parte any matters that were not presented by counsel due to the government's presence and then reconsider whether it should grant the funding application.❖

U.S. Court of Appeal For the Ninth Circuit Finds the Pre-1998 System Fails AEDPA Requirements for Appointment of Counsel

In *Ashmus v. Woodford*, Ninth Cir., No 99-99007 (January 24, 2000), the Court of Appeals for the Ninth Circuit held that California's pre-1998 mechanisms for appointing counsel and assuring competency of appointed counsel on review of death penalty cases do not satisfy the "opt in" provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).

The court reversed *Calderon v. Ashmus,* 523 U.S. 740, 63 CrL 245 (1998), which overturned on procedural grounds the ruling reached in this case in a class action suit.

The AEDPA's opt-in provision, codified at Chapter 154 of Title 28 of the U.S. Code, creates a quid pro quo arrangement States that meet certain requirements regarding the appointment of counsel for indigents in death penalty cases are rewarded with favorable deadlines and expedited treatment for habeas corpus petitions in such cases.

Among the standards imposed by the provisions is the requirement that a state "establish by rule of its court of last resort or by statute, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings."

The Ninth Circuit evaluated and held inadequate the pre-1998 rules regarding the appointment of counsel in collateral proceedings which were governed by the California Supreme Court's "Policies Regarding Cases Arising from Judgments of Death" and "Internal Operating Practices and Procedures."

The court decided that the legislative history of 2265(a) shows that Congress intended the rule or statute to be mandatory and that Congress deemed the provision of competent counsel at all stages of post-conviction review to be essential to the quid pro quo of Chapter 154. The court further stressed that Congress had further sought to avoid the case-by- case evaluations of the competency of individual appointed counsel that federal courts would have to contact in the absence of a mandatory state scheme.❖

Massachusetts Applies State Constitutional Principle

In *Commonwealth v. Rodriguez,* Mass No. 07984 (January 18, 2000), a majority of the Massachusetts Supreme Court held that highway roadblocks conducted by police to interrupt the flow of drugs or other contraband violated Article 14 of the Massachusetts Declaration of Rights.

The court had previously upheld roadblocks aimed at catching intoxicated drivers using the balancing test that is called for under Article 14's federal

constitutional counterpart, the Fourth Amendment. The Fourth Amendment test uses a balancing test to weigh the severity of the road block's interference with the driver's liberty.

Departing from this analysis, the majority in this case felt that "there is no imminent threat to public safety and no nexus between the activity (driving) and the law enforcement objective (narcotics interdiction)." The court commented that since there was no connection between the means and the ends "there is nothing to balance." The court went on to say that:

> "Unlike the minimal and focused intrusion occasioned by operating while under the influence road blocks, drug interdiction road blocks are designed solely to further criminal justice goals."

The majority compared its state constitutional analysis to the "special needs" analysis of the Fourth Amendment. Under the special needs test "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'. . . .But where. . .public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."❖

U.S. Supreme Court Approves California Procedure To Guarantee Appellate Rights of Indigents

The majority of the U.S. Supreme Court held in *Smith v. Robbins,* U.S., No.98-1037 (January 19, 2000) that the procedure set out in *Anders v. California,* 386 U.S. 738 (1967), is not the only procedure capable of protecting indigent defendants' constitutional rights. The majority asserted that an alternative procedure outlined by the California Supreme Court in a post-*Anders* decision, *People v. Wende* 600 P.2d 1071 (1979), is sufficient and is in some way superior.

The procedure established in *Wende* differs from the *Anders* procedure by not requiring appointed counsel to identify arguable issues. Instead, counsel files a brief that summarizes the procedural and factual history of the case, with citations to the record. Counsel also asks the court to independently examine the record for arguable issues, and he or she remains available to brief any issues flagged by the court. Another digression from *Anders* is that counsel neither moves to withdraw nor explicitly expresses the judgment that any appeal would be frivolous, although this judgment is implicit.

Anders and the case law upon which it rested were intended to promote due process as well as equal protection, the majority observed. The majority concluded that the *Wende* procedure fulfills these goals.

In comparing the *Wende* procedure to the one disapproved in *Anders*, the majority pointed out that the old procedure required only a determination by counsel that an appeal would be unlikely to succeed and not that an appeal was frivolous. Under *Wende,* both the counsel and the appellate court must find the appeal to be totally lacking in arguable issues before the appeal can be cut off.

Secondly, the old procedure allowed counsel to withdraw and for the court to decide that an appeal would be meritless without appointing new counsel. Under *Wende*, counsel does not move to withdraw, and the court orders briefing by counsel if it finds arguable issues.

Thirdly, while the old procedure allowed counsel to make a bare assertion that an appeal would be meritless, under *Wende,* counsel does not move to withdraw, and the court orders briefing by counsel if it finds arguable issues.

The majority concluded that since there were some weaknesses in the *Anders* procedure and that the *Wende* procedure has corresponding strengths, there was no constitutional violation in California's failure to follow *Anders.*

The dissenting opinions described the majority opinion as a deviation from settled law.❖

Louisiana Supreme Court Holds That Confession to Another Crime Should Not Have Been Admitted Without Corroboration

A majority of the Louisiana Supreme Court held in *State v. Hobley,* La., No. 98-KA-2460 (December 15, 1999), that a capital defendant's uncorroborated confession to an unadjudicated offense should not have been admitted at the penalty phase of his trial. The majority distinguished *State v. Hamilton,* 681 So.2d 1217 (La. 1996), where an uncorroborated confession to an unadjudicated offense was deemed admissible at the penalty phase. In *Hamilton*, defense counsel had conceded that the defendant had committed the unadjudicated murder to which he had confessed, and therefore, the court had not addressed whether the confession was reliable to prove by clear and convincing evidence that the defendant had committed murder.

The defendant in *Hobley* confessed to the murder of which he was found guilty and told police that, at the time, he had been hiding out after being involved with others in a fatal shooting in Houston. The state was allowed to present the portion of the defendant's confession regarding the Texas shooting.

In *Hobley*, the Louisiana Supreme Court preferred to adopt the ruling in *State v. Brooks (Brooks 11)*, 648 So.2d 366 (La. 1995), and *State v. Connolly*, 700 So.2d 810 (La. 1997). In *Brooks 11* and *Connolly,* the court refrained from adopting in full force the corpus delicti rule that requires, in the guilt phase, corroboration of a confession to support a guilty verdict.

The majority asserted that *Brooks 11* and *Connolly* "established the baseline for determining the reliability and trustworthiness of a confession to other crime evidence introduced at the penalty phase," and the state's showing in this case did not meet this standard. In reversing the death sentence the majority stated:

> . . .Absent extrinsic evidence linking defendants to the alleged crime, we cannot say that defendant's admission to the unadjudicated crime was neither the result of braggadocio nor, as his sister suggested in her testimony, an attempt to protect a sibling.

Dissenting opinions believed that the overall confession was corroborated by the evidence of the charged murder and was indistinguishable from *Hamilton*.❖

Missouri Court of Appeals Narrows Definition of "Frivolous" Appeal

The Missouri Court of Appeals, Western District in *Martin v. State,* Mo. Ct. App. (En banc), No. WD54915 (December 21, 1999), held that counsel appointed to represent a convicted defendant on direct appeal or on appeal of the denial of a motion for post-conviction relief is not obligated to pursue an issue that counsel believes is frivolous. The court further held that the *Anders* brief is not required on post conviction review when counsel determines that an appeal would be frivolous.

In *Anders v. California,* 386 U.S. 738 (1967), the U.S. Supreme Court held that a request for withdrawal of an appeal the court-appointed appellate counsel believes to be wholly frivolous must be accompanied with a brief "referring to anything in the record that might arguably support the appeal."

The court stated that case law interpreting *Anders* blurred the distinction between "the concept of an appeal without merit and the concept of a frivolous appeal."

As to what constitutes "frivolousness," the court explained was the idea that a claim or defense is clearly and facially so devoid of any rational argument "that it has absolutely *no prospect* of succeeding."

In post-conviction matters, such as an appeal of the denial of post-conviction relief, counsel faces less burdensome requirements than on direct appeal. Rule 55.03(b) provides that by asserting an argument in a court document, counsel certifies to the best of his or her knowledge, information, and belief that the legal contentions in the document are warranted by existing law or by a nonfrivolous argument for a change in the law or the establishment of new law.

The court decided that when counsel has made a careful study of the applicable transcripts and there is no arguable claim, counsel should advise the client of Rule 4-3.1 which forbid counsel to bring proceeding or assert an issue without a nonfrivolous basis for doing so. The court, taking into consideration the fact that potential claims of error on the part of counsel are generally more readily identifiable at the post-conviction stage than in direct appeal, concluded that it was not necessary to impose upon counsel the requirement of a brief similar to an *Anders* brief at this stage.❖

Appellate Court of Illinois Holds Doctrine of Sovereign Immunity Does Not Apply to State or County Employees if the Duties Breached Do Not Arise as Result of Defendants' State Employment, and Sovereign Immunity Does Not Pertain to County Employees

In a legal malpractice action filed by a former client of the Cook County, Illinois Public Defender against several individual public defenders and the County of Cook, the Appellate Court of Illinois held that whether or not public defenders are state employees or county employees, the circuit court erred in applying sovereign immunity because defendants' professional duties to their clients did not arise solely as a result of their government employment. *Johnson v. Halloran,* No. 1-98-2365, (Ill App. 1 Dist.) (Jan 13, 2000).

In the underlying criminal case, lab reports disclosed by the State during pre-trial discovery showed that body fluids on the panties and a vaginal swab taken from the victim immediately following the attack revealed the presence of H activity, indicating that such body fluids were from a person who was a secretor. The blood and saliva samples taken from the victim and from Johnson, who was charged with the rape, showed that they were both nonsecretors. These results established that Johnson could not have been the sole donor of the foreign body fluids found on the person or clothing of the victim. Johnson's public defender, Halloran, did not seek to use this information in the trial. Instead, at a pretrial hearing, Halloran presented a motion in limine to prohibit the State from introducing any evidence of blood, semen or saliva testing. The circuit court granted Halloran's motion in limine in September, 1992. Following a bench trial, Johnson was convicted and sentenced to 30 years in the Illinois Department of Corrections. Prior to this conviction, no DNA test was performed on Johnson, the victim, or the victim's husband. Johnson's conviction was vacated on March 8, 1996, pursuant to a post-conviction petition based on DNA test results.

In the instant case, defendants filed a motion to dismiss plaintiff's complaint based on the statute of limitations, which was denied. Defendants also filed a motion for summary judgment on the basis of sovereign immunity, arguing that public defenders are employees of the state and therefore the circuit court lacked subject matter jurisdiction to hear the case because plaintiff's claims must be brought in the Illinois Court of Claims. The circuit court granted this motion.

On appeal, plaintiff contended that the circuit court erred in granting summary judgment in favor of the defendants on the basis of sovereign immunity because a) public defenders are not agents or employees of the state, and b) defendants' professional duties to their clients do not arise solely as a result of their government employment.

The question to be determined by the court was whether the defendants owed a duty to the plaintiff which existed independent of their employment by the state or if the duty allegedly breached by defendants had no existence outside their state employment.

The court, applying *Currie v. Lao,* 148 Ill. 2d (1992), quoted from that case:

> Where the charged act of negligence arose out of the State employee's breach of a duty that is imposed on him solely by virtue of his State employment, sovereign immunity will bar maintenance of the action in circuit court. Conversely, where the employee is charged with breaching a duty imposed on him independently of his State employment, sovereign immunity will not

attach and a negligence claim may be maintained against him in circuit court. In other words, where an employee of the State, although acting within the scope of his employment is charged with breaching a duty that arose independently of his state employment, a suit against him will not be shielded by sovereign immunity.

The Illinois Court of Appeals, drawing analogies with state-employed doctors, decided that the duty of representing a client is derived from the lawyer's status as a licensed attorney and is wholly independent of the lawyer's state employment. The court also referred to *Polk County v. Dodson,* 454 U.S. 312 (1981) where the Supreme Court of the United States ruled that, "Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defense program."❖

TRANSITIONS

Pittsburgh Has New Public Defender

After last fall's election resulted in a new county government, Allegheny County (Pittsburgh), PA now has a new Director of its Office of the Public Defender. Susan Ruffner most recently served as a juvenile judge on the Allegheny County Court of Common Pleas, to which she been appointed by Pennsylvania's Governor Ridge. Now, Allegheny County's new County Executive, Jim Roddy, has appointed Ruffner to assume the difficult task of heading the public defender's office.

Ruffner is well-known in the Pittsburgh legal community. After graduating from George Washington University Law School, Ruffner worked in the Allegheny County district attorney's office as a general trial attorney and an appeals attorney, and in grand jury investigations. In 1984, she became a liaison for then-county Commissioner Barbara Hafer. When Hafer became state auditor general, Ruffner became her chief deputy counsel. She worked as a chief magistrate in the city of Pittsburgh for three years, beginning in 1991. From 1994, until her appointment to the bench in 1999, she served as chief legal counsel to the Port Authority.

Our regular readers know that the Allegheny County Public Defender's Office is currently operating under a consent decree arising from a suit on behalf of indigent defendants, who accused the county of neglecting to provide adequate legal services to poor criminal defendants and the mentally ill. Under the consent decree, Allegheny County agreed to hire a consultant to assist the public defender's office in improving the quality of services it provides to indigent persons. Last fall, the County and the plaintiffs agreed to retain The Spangenberg Group to help the office develop a variety of practices and procedures, including a merit hiring policy, a computerized case-tracking system, performance standards and procedures for addressing excessive workloads. The Spangenberg Group's work is part of a process that will ultimately result in substantial increases in staffing, resources and technology, all to the end of providing higher quality legal services to indigent defendants in Allegheny County.

WHAT'S NEW AT THE SPANGENBERG GROUP?

NEW STAFF!

TSG welcomed two new staff members in February.

Research Associate Rangita de Silva-de Alwis has a Masters-in Law (LL.M) and a Doctorate in Law (S.J.D.) from Harvard Law School. Before coming to the Boston area, she taught international law and jurisprudence at the Faculty of Law, University of Colombo in Sri Lanka. Rangita has worked as a Fellow of the European Law Research Center at Harvard Law School and taught constitutional law at Stonehill College in Massachusetts. Before joining The Spangenberg Group she was a Policy Analyst with the Massachusetts Immigrant and Refugee Advocacy Coalition. Rangita is working on TSG's international projects and on the BJA-BIP State Commissions Project.

Research Assistant Jaime Bailey is a 1999 graduate of Boston College, where she earned a Bachelor of Arts in English, cum laude. Most recently Jaime worked at the Boston College Development Office. She also served as an intern for a Massachusetts state senator. Jaime is currently working on projects in Texas and King County, WA. Don't be surprised if you get a call from Jaime requesting comparison information from your program on caseload, expenditure, etc.❖

NEW PROJECTS!

State Commissions Project

In August, 1999, TSG began work on a one-year project funded jointly by the American Bar Association Bar Information Program and the U.S. Department of Justice Bureau of Justice Assistance called the State Commissions Project. The goal of this joint effort is to provide technical assistance and information to state task forces attempting to improve indigent defense systems. TSG is currently working with state task forces in Georgia, Illinois, Nevada, North Carolina, Oregon, Texas and Vermont. The project has been granted a one-year renewal. (*See* related articles in this issue on the Texas Fair Defense Project and on the North Carolina Indigent Defense Study Commission).

King County, Washington

In January, TSG began work on a project in King County (Seattle), Washington. King County's public defense system is quite unique. It consists of a single county agency (The Office of Public Defense) that administers contracts with four private, non-profit public defender agencies. King County selected The Spangenberg Group as consultant to its Public Defense Study Oversight Committee, which is examining whether the current system produces:

- A lack of coordination with other criminal justice agencies;
- A lack of parity with County departments with regards to compensation of staff and technology; and
- A lack of a strong public policy voice to represent the views of the public defense function.

Under the guidance of the Oversight Committee, The Spangenberg Group is preparing a report that evaluates the current system, provides comparison information from the indigent defense systems in other similarly-sized counties, and analyzes the costs and benefits of adopting alternative approaches in King County. The Spangenberg Group will then facilitate at least two meetings during which key stakeholders will work to develop a consensus on improvements to the system. A final report, including a plan for implementing the changes, if any, will be completed in May, 2000.❖

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

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