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The Spangenberg Group
1001 Watertown Street, West Newton, Massachusetts 02465
Telephone: (617) 969-3820 Fax: (617) 965-3966
E-Mail: tsg@spangenberggroup.com

The Immigration Consequences of Criminal Convictions

by Rangita de Silva de Alwis

Olufolake Olaleye came to the U.S. legally in 1984 and became a legal permanent resident in 1990. She has two small American citizen children. In 1993, Ms. Olaleye was charged with shoplifting $14.99 worth of baby clothes when she tried to return the items without a receipt. Ms. Olaleye appeared in court without an attorney. She told the judge that it was a misunderstanding, that she previously had purchased the clothes. Nevertheless, she entered a guilty plea to bring the matter to a close. She was fined $360, given a 12-month suspended sentence and 12 months probation. The suspended sentence and the probation were both terminated two months later when Olaleye paid the fine in full. In 1996, Congress passed sweeping immigration reforms and her plea was retroactively converted into a deportable offense. Immigration and Naturalization Services now seeks to deport Olufolake Olaleye as an "aggravated felon".[1]

Under the same 1996 immigration law, Xuan Wilson, 32 years of age, is to be deported to Vietnam, a country she left behind at the age of four. She speaks no Vietnamese and has no familiarity with her land of birth. The offense that has resulted in the imminent tearing apart of her family is one that Xuan committed 12 years ago in the grip of a cocaine addiction. In 1988, Xuan forged a check for $19.83 at a Safeway Supermarket.[2] Since then, Xuan has turned her life around and is a caring mother to her three American children from whom she is to be separated.

The case of Jesus Collado provides another example of how under the 1996 immigration reforms, a past criminal conviction can come to haunt non-citizens. In 1974, when he was 19, Mr. Collado was convicted of a misdemeanor offense for having sex with his teen-age girlfriend. He was not sentenced to any period of incarceration. In the 23 years since, he maintained a clean record, married a U.S. citizen and has three U.S. citizen children. One week after the new immigration law went into effect, Mr. Collado returned from a three-week visit to the Dominican Republic, only to be detained and placed in removal proceedings for his 1974 conviction, which is now considered an aggravated felony under immigration law.[3]

Two Congressional enactments passed in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA), which came into effect on April 24, 1996, and the Illegal Immigration Reform and Responsibility Act (IIRIRA), which generally came into effect on April 1, 1997, have had a far reaching, negative impact on non-citizens who made the United States their home.

These new enactments have expanded the types of crimes and dispositions that trigger deportability and at the same time have cut back dramatically on the ability for Legal Permanent Residents (LPRs, otherwise known as "green card holders") to qualify as eligible for relief from deportation. In addition, recent agency and court interpretations of the law have further extended the negative impact of the new laws for LPR immigrants. The Immigration and Naturalization Act (INA) subjects an LPR immigrant

to removal from the United States, based on an ever growing list of criminal offenses which can result in deportability.

Under the 1996 laws, long-term permanent residents with strong ties to their communities in this country are subject to detention and deportation because of relatively minor transgressions committed many years ago. The retroactive applications of the 1996 laws have also broadened the definitions of what constitutes an aggravated felony to include offenses that were not considered deportable at the time of conviction.

While Congress has been making the immigration consequences of criminal convictions harsher for lawful permanent residents and other immigrants, the federal government has been devoting greatly increased resources to enforcing these laws. As a consequence, more and more non-citizen criminal defendants are being identified at ports of entry, at workplace raids and at the point of changing immigration status.

Lawful permanent residents who have been in the United States for many years and who have U.S. citizen family members are often locked away for months or even years in Immigration and Naturalization Services (INS) facilities and local jails with no possibility of release until they are deported. If the country of origin refuses to accept the detainees they can languish in jail for life. For instance, countries with which the USA has either no diplomatic ties or has strained diplomatic relations, such as Cuba, Vietnam, North Korea and Iraq, have repeatedly refused to take back those persons that left their shores many years ago. In many cases, mandatory detention amounts to punishment out of proportion to a crime for which a detainee has already paid her debt to society. Since deportation proceedings are not considered criminal in nature, a detainee does not have the right to court appointed counsel.

The IIRIRA of 1996 also dramatically revised the judicial review provisions of the Immigration and Naturalization Act (INA).[4] In some respects, the 1996 Act attempts to eliminate the judicial review of certain INS decisions altogether.[5] The right to judicial review of Executive Branch action is a cornerstone of American democracy. Never before in U.S. history have non-citizens been deported or excluded without an opportunity for judicial review. Judicial review ensures that individuals are not wrongly deprived of their rights by the government. Due process also requires recourse to a judicial forum, especially when an individual's fundamental liberty interests are involved. When that principle is eroded, its implications have far reaching consequences which affect not just the immigrant community.

As shown from the above case studies, recent changes in U.S. immigration laws have dramatically increased the likelihood of deportation and other negative immigration consequences for non-U.S. citizen defendants. Prior to 1996, an immigrant accused of a crime could avoid deportation even if he or she pled guilty to a deportable offense. This was the case if the immigrant was a "green card" holder. The LPR, or green card, status indicates that an immigrant has been lawfully admitted to the U.S. to live and work here permanently. Until 1996, a long term LPR who became deportable based on a criminal conviction was usually eligible to apply to an immigration judge for a waiver of deportation, known as a 212(c) waiver.[6]

Since 1996, many criminally convicted LPR's are ineligible to have the relief available under the 212 (c) waivers considered by an immigration judge prior to entry of a removal order. This was the result of the two Congressional enactments in 1996 which generally came into effect on April 1, 1997. These two enactments substantially expanded the types of crimes and dispositions that trigger deportability and at the same time restricted LPR eligibility for relief from deportation.

Criminal Convictions that Constitute Grounds for Deportation[7]

- *Conviction of an aggravated felony*

Under the 1996 Immigration laws (AEDPA and IIRIRA), many crimes, some quite minor, are now considered "aggravated felonies." For example, a burglary or theft conviction where the defendant received a sentence of at least one year is now considered an aggravated felony even if the sentence was suspended and the defendant did not serve any time in jail or prison.

Aggravated felony, an immigration law term of art, is a constantly expanding category which now includes not only crimes such as murder and illicit drug or firearm trafficking, but any crime of violence, theft or a burglary offense for which an individual receives a prison sentence of one year or more, or a fraud or deceit offense where the loss to the victim/s exceeds $10,000.

Misdemeanors, such as a misdemeanor sale of marijuana, a second drug possession misdemeanor, and other misdemeanors, may be found to come within the statutory definition of an aggravated felony.

The defense counsel representing a non-citizen should attempt to avoid a conviction for an aggravated felony if possible. The consequences can be devastating and irrevocable. The laws apply retroactively and an LPR convicted of an aggravated felony is subject to deportation regardless of the date of conviction. An aggravated felon is now "conclusively presumed" to be deportable and is detained without bond until removal and is debarred from virtually all forms of relief. A person deported as an aggravated felon may be banned from the United States for life.[8]

- *Conviction of a crime involving moral turpitude committed within five years of admission to the United States and punishable by a year in prison*

The crime involving moral turpitude -- once again an immigration law term of art -- includes many different offense categories.

This is a constantly evolving area of law and before advising a client to admit to or plead out to any offense, it is essential to research the question of moral turpitude thoroughly. One common, if somewhat ambiguous, definition of the term is "an act of baseness, vileness or depravity."[9]

- *Conviction of two crimes involving moral turpitude*

Conviction of two crimes involving moral turpitude can include a felony or misdemeanor committed at any time and regardless of the actual and potential sentence.

- *Conviction of any controlled substance offense*

Even if it is possible to avoid conviction for a controlled substance violation, the defense attorney must also attempt to avoid the consequences of the INA law, which renders a Legal Permanent Resident deportable if at any time after admission he or she becomes a drug addict or abuser.[10] A conviction for solicitation to commit a crime related to a controlled substance may also render an alien deportable as an alien convicted of a violation of a law related to controlled substances.

- *Conviction of a firearm or destructive device offense*[11]

Virtually any firearms offense, including attempt and conspiracy offenses, will qualify as a deportable offense.

- *Conviction of a crime of domestic violence, stalking or child abuse, neglect or abandonment*

The IIRIRA of 1996 expanded the types of criminal case dispositions that may now be considered convictions for immigration purposes and Congress for the first time defined conviction for immigration purposes. "Conviction" includes not only formal

judgments of guilt, but also dispositions where adjudication of guilt is withheld but where the following two requirements are met:

- a judge or jury has found the noncitizen guilty, or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- the judge has ordered some form of punishment, penalty or restraint to be imposed on the noncitizen's liberty.

In recent rulings, the U.S. Department of Justice has expanded the reach of this statutory definition. As a result, many state criminal case dispositions that are not convictions for any other purpose under state law will now be considered convictions triggering deportation.

Inadmissability

In addition to the grounds of deportability, the INA also contains separate grounds of inadmissibility. These grounds may apply to those lawfully admitted individuals when they travel abroad and seek readmission. The grounds of inadmissibility include the following:

- Conviction or admitted commission of any controlled substance offense, whether felony or misdemeanor (with no exception for one-time possession of less than 30 grams of marijuana), or INS reason to believe that the individual is a drug trafficker.
- Conviction or admitted commission of a crime involving moral turpitude, whether felony or misdemeanor (subject to a petty offense exception).
- Conviction of two or more offenses of any type with aggregate sentences to imprisonment of at least five years.
- Prostitution and commercialized vice.

Mandatory Removal

Under the 1996 laws, if a lawful permanent resident defendant is convicted of certain offenses, he or she will be unable to ask for any form of relief formerly available. A lawful permanent resident is precluded from seeking any relief if he or she receives one of the following criminal dispositions:

- Conviction of an aggravated felony. Thus, for LPRs who would otherwise be eligible for waiver of deportation, a disposition of the criminal case falling within the aggravated felony deportation ground is worse than a disposition falling within any of the other deportation grounds.
- Conviction of any crime involving moral turpitude or drug offense, even if not an aggravated felony, if the LPR had not resided in the United States continuously for seven years after admission and before commission of the offense.

Mandatory Detention

Effective October 9, 1998, it is mandatory for INS to detain most non-citizens convicted of offenses triggering removability when the non-citizen is released from criminal custody. Mandatory detention applies to even those LPRs who do not constitute a flight risk or a threat to public safety.

Removal Consequences

If an immigrant is removed from the United States on the basis of an aggravated felony or virtually any drug offense, the individual may never be able to return to the United States. Finally, even if the immigrant does not fall within the above two categories, he or she may be barred from future admission after removal for 5-10 years according to the grounds of removal.

Duty of Defense Counsel

The new laws place a higher burden on the criminal defense lawyer to conduct thorough investigation and advise his or her clients regarding potential immigration consequences that an LPR will face during criminal proceedings, such as whether to plead guilty to a particular criminal charge. Criminal court judgments that appear innocuous or even

favorable to the defendant may have disastrous and irrevocable consequences in immigration proceedings.

The ABA Standards for Criminal Justice, Pleas of Guilty, Standard 143.2 states that where it is apparent that a defendant faces deportation as a result of a conviction, or the defendant asks a question regarding these possible consequences, counsel should fully advise the defendant of these consequences.[12] In addition, the National Legal Aid and Defender Association (NLADA) cites the duty of defense counsel in the plea bargaining process to "be fully aware of, and make sure the client is fully aware of...consequences of convictions such as deportation."[13]

H.R. 1485 - Family Reunification Act of 1999

After the new laws went into effect, several U.S. Congressmen criticized some of the provisions pertaining to detention and deportation of permanent residents with strong and inseparable ties to the United States. A bi-partisan group of legislators has introduced a reform bill that would ameliorate some of the harshest provisions of the 1996 laws. The Family Reunification Act of 1999 (H.R. 1485) was introduced by Representatives Frank (D-MA), Frost (D-TX) and Diaz-Balart (R-FL), and referred to House Subcommittee on April 30, 1999. This bill seeks to restore some flexibility and proportionality to immigration law. The proposed law would restore a measure of discretion to immigration judges, while eliminating some of the harsh retroactive applications of the 1996 law and restoring the narrower definition of what constitutes an aggravated felony.

The Family Reunification Act of 1999, which has 84 co-sponsors as of November 2000, would give immigration judges the authority to cancel deportation cases where the individuals in question were sentenced to less than five years, provided they have been lawful permanent residents for at least five years. For those with sentences of greater than five years, deportation could be canceled for less severe felonies if there is an urgent humanitarian reason, a significant public benefit or some other compelling reason, but only after the Attorney General has determined in writing that providing this relief would pose no danger to the public.

The proposed bill also restores traditional suspension of deportation (seven years of continuous presence in the United States, good moral character and a showing of extreme hardship) for those subject to deportation under the pre-1996 standards but for whom the 1996 law made this traditional form of relief unavailable. Again, the Attorney General would first have to determine in writing that providing this relief would pose no danger to the public.❖

1. American Immigration Lawyers Association (AILA) Advocacy Update, Vol:3 No.9, June 4, 1999 at 1.

2. The New York Times, Monday, August 11, 1997, at A8.

3. Margaret H. Taylor and Alexander Aleinkoff, Deportation of Criminal Aliens: A Geopolitical Perspective, Inter American Dialogue, June 1998.

4. Before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was passed, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) had already made changes to the review of final orders of deportation under INA sec. 106. Section 440(a) of the AEDPA added a subsection, codified at INA sec. 106(a)(10), that provides that "any final order of deportation against an alien who is deportable by reason of certain enumerated criminal grounds shall not be subject to review by any court." Section 401(e) of the AEDPA repealed former INA sec. 106(a)(10), which had provided for habeas corpus review of deportation orders for aliens held in custody.

5. New INA sec. 242 has two provisions restricting review of discretionary decisions. The first provides that no court shall have jurisdiction to review "...any judgment regarding the granting of relief under INA sec.212(h) (waiver of inadmissibility for fraud or misrepresentation), sec. 212(i) (waiver of inadmissibility for fraud or misrepresentation), 240 A (cancellation of removal), 240 B (voluntary departure) or 245 (adjustment of status)." The second provides that no court shall have jurisdiction to review "...any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General."

6. An immigration judge had the discretion to grant a 212 (c) waiver if the LPR could demonstrate equities such as: long residence in the United States, close family with lawful status in the United States, evidence of hardship to the individual and

family if deportation occurred, service in the armed forces, a history of employment, the existence of property or business ties in the United States, evidence of value and service to the community, and proof of genuine rehabilitation.

7. 8 U.S.C. 1227 (a).

8. INA 212 (a) (9).

9. *United States v. Smith,* 420 F. 2d 428, 431 (5th Cir. 1970).

10. INA 237 (a) (2) (B) ...at any time after admission to the U.S. (a non-citizen) has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the U.S., or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of thirty grams or less or marijuana.

11. INA 237 (a)(2)(C)... any alien who at any time after admission is convicted under any law for purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive devise in violation of any law.

12. ABA Standards for Criminal Justice, Pleas of Guilty, Std. 143.2.

13. NLADA Performance Guidelines for Criminal Defense Representation (1994). Guideline 6.2 (a)(3).

2000 State Legislative Scorecard: Developments Affecting Indigent Defense

Introduction

The 2000 Legislative Scorecard marks the sixth consecutive year in which The Spangenberg Group provides readers of The Spangenberg Report with a synopsis of state legislative activities that may affect indigent defense services in the new fiscal year. Throughout the late summer and early fall, The Spangenberg Group (TSG) made a concerted effort to collect the results of each 2000 state legislative session through surveys and phone interviews with public defenders, state court administrators, and state and local bar officials. Each contact assisted TSG in determining to what degree certain legislation would impact the indigent defense community. Some of the topics covered include FY 2001 public defender budgets and special appropriations, modification of death penalty procedures, new sentencing patterns and reform, greater access to DNA testing and computerization of public defender offices.

Overall, indigent defense providers reported improvements to their respective programs. In some states, the right to counsel was expanded for certain case types and court phases. Many public defender offices reported budget increases for salary upgrades and staff additions. Interesting legislative initiatives addressed computerized information sharing and case-tracking, drug court expansion, and formation of indigent defense and/or death penalty commissions.

Budget/Appropriations

As reported in the past few legislative scorecards, indigent defense appropriations generally either remained stable or increased. The 2000 legislative session continued the trend of adequate or increased funding for indigent defense. **Illinois'** State Appellate Defender, which has five regional trial offices throughout Illinois and handles most of the state's indigent direct appeals, received a considerable increase in funding for the State Appellate Defender Death Penalty Trial Assistance Office. The Death Penalty Trial Assistance office provides trial counsel with expert witnesses, investigators and mitigation specialists. The Death Penalty Trial Assistance office received $1,896,189, an increase of $1,046,189 (55.2%) from FY 2000. The **Connecticut** Division of Public Defender Services received a FY 2001 budget of $30,512,677, a 1.7% increase from the previous year. Connecticut also received more than $2,000,000 in federal grant dollars. The budget increase will staff two juvenile court locations previously staffed by contract attorneys with full-time public defender employees. The Division of Public Services hopes that these new positions will improve the quality of services available to juvenile clients. **Minnesota's** indigent defense budget for FY 2001 is approximately $47 million, which is an increase of 6.4% ($3 million) over the prior fiscal year. The increase reflects salary

upgrades. **Nebraska's** Commission for Public Advocacy, a state-funded commission which assists small rural counties with financing and handling capital and other serious cases, received approximately $650,000, which is an increase over last year. As in Minnesota, the additional funds will help provide for salary increases. The Board of Indigent Defense Services in **Kansas** reported an FY 2001 appropriation of $15,438,502, which is approximately $1 million more than it received last year. The additional funds will go toward salary increases. The Office of the **Ohio** Public Defender, which provides direct representation in all capital trial, direct appeal and state post-conviction cases and oversees the delivery of non-capital trial level services throughout the state, received an FY 2001 budget of $8,801,835, including several grants that increased its overall budget from the original General Revenue Fund figures. Ohio's FY 2001 budget for county public defenders is $37,505,032. The approximate $5 million (about 15%) increase in General Revenue Funds is designated for county public defender staff increases.

Systemic Changes

A number of states enacted legislation that profoundly changes the existence and future of their respective indigent defense systems. The **North Carolina** General Assembly passed the Indigent Defense Services Act of 2000, which creates the Office of Indigent Defense Services, an independent agency within the state's Judicial Department that will include a 13 member Commission on Indigent Defense Services. The legislation allows both the Office and Commission broad authority over the delivery of indigent defense services in North Carolina with the purpose of providing statewide oversight of services and expenses, improving services, developing standards and guidelines for provision of services and determining which delivery methods for indigent persons would serve which districts best. For further information, please refer to *The Spangenberg Report*, Volume VI, Issue I (August 2000).

Effective July 1, 2000, the **Mississippi** Statewide Public Defender Act of 1998 was repealed, but two new offices, the Mississippi Capital Post-Conviction Office and the Mississippi Office of Capital Defense Counsel, were created. The Office of Capital Defense Counsel represents indigent defendants in capital trial and direct appeal proceedings, and the Capital Post-Conviction Office represents defendants in post-conviction proceedings and may continue to represent said individuals in federal habeas corpus proceedings if the office is appointed to do so by a federal court. The enacted legislation also called for creation of the Mississippi Public Defender Task Force, to study indigent defense in Mississippi and report to the legislature in late September, 2000. The Task Force produced a report with findings and recommendations for the Mississippi State Legislature on September 29, 2000. For further information, please refer to *The Spangenberg Report*, Volume VI, Issue I (August 2000).

Right to Counsel

The **Colorado** legislature expanded the list of persons eligible for representation by the public defender through House Bill 00-1174. This bill amended 21-2-101(1) of the Colorado Revised Statutes to allow the public defender to handle "partially indigent" cases. Prior to this, it was the sole responsibility of the Alternate Defense Council to handle partially indigent cases, as well as conflict of interest cases with the Public Defender. In **Maryland**, the legislature provided funding to the Public Defender to represent defendants at bail hearings in Baltimore City, as well as indigent defendants appearing at "early disposition" hearings at the Baltimore City Central Booking Facility and in the Misdemeanor Court. However, a bill to provide funding for representation by the public defender for persons at bail hearings throughout the state failed to pass.

Regarding juvenile matters, **Illinois** passed legislation that expanded the right to counsel for certain juveniles during custodial interrogation. Public Act 91-0915 (SB 730 Enrolled) amends the Juvenile Court Act of 1987 by adding a provision that requires a minor under the age of 13 at the time of committing an act that, if committed by an adult, would be a violation under certain sections of the Criminal Code of 1961 to be represented by counsel during the entire custodial interrogation of the minor. **Alaska** expanded the right to counsel in juvenile emergency state custody cases. HB 259 allows "the natural parent, adoptive parent, or guardian" of a child under emergency custody of the state the opportunity to representation by an attorney from the Public Defender Agency at public expense without a court order. The Public Defender may be retained for the investigation period before the hearing and the hearing itself. After the hearing, the bill allows the continuance of representation by the public defender if eligibility requirements are met. If that person is determined to not be eligible for court-appointed counsel, the court will exact the expenses accrued during the hearing representation. This bill does not require the public defender to commit to this type of representation.

Though **Minnesota** Session Laws 2000, Chapter 357 actually cuts back on the right to counsel, the Minnesota Board of Indigent Defense proposed the legislation. The legislation reduces the right to counsel for children under the age of ten and was suggested by the Board of Public Defense in response to differing appointment practices in each judicial district for such children appearing in juvenile court under a CHIPS (Children In Need of Protective Services) petition. At such a young age, children are often unable to articulate what situation would be best for them. The public defender or court-appointed attorney then often has to decide what course of action would be most beneficial for the child, therefore acting as a second guardian rather than an attorney. Since a child that young is appointed a guardian in the first place, the opinion of the Minnesota Board of Indigent Defense is that the assigned lawyer can only serve as a second guardian and therefore is unnecessary. Chapter 357 states, "The juvenile court may not order the district public defender to represent a minor who is under the age of ten years, to serve as a guardian ad litem, or to represent a guardian ad litem."

Due to the retroactivity of **Kansas** Senate Bill 323, a corrections reform bill that addresses prison overcrowding by reducing the probation time and incarceration period under certain convictions, the Board of Indigent Defense Services (BIDS) expects many new cases. The court may "impose a less severe penalty upon the inmate, including the power to reduce the minimum below the statutory limit on the minimum term prescribed for the crime of which the inmate has been convicted," though it does not alter sentencing guidelines. This reduction of probation or incarceration is allowed only if the court finds no reasons that the safety of the public will be jeopardized by the early release of the inmate. BIDS plans to ask the government and legislature for a budget enhancement since it did not receive any supplemental funding for this new legislation.

Death Penalty[1]

Though most states did not enact the many death penalty reform/abolition legislative proposals considered this past legislative session, the mere consideration and debate of this issue is of merit and worth mentioning. **Illinois** imposed a moratorium on the death penalty during this legislative session, while **Delaware, Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania** and **Washington** all examined bills to establish a moratorium on the death penalty. Of the eight states that reviewed legislation to abolish the death penalty **(Georgia, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, Virginia** and **Washington), New Hampshire's** legislation passed both houses before being vetoed by

Governor Jeanne Shaheen. Both **Pennsylvania** and **Kentucky** considered legislation that would increase the minimum age of eligibility for the death penalty from 16 to 18. Neither state enacted the legislation. **Virginia** set the minimum age of 16 at the time of the offense for the imposition of the death penalty. **South Dakota** enacted legislation to eliminate the death penalty for mentally retarded defendants, while **Arizona, Missouri, Oklahoma**, **Oregon** and **Pennsylvania** all considered similar legislation.

Numerous states reviewed legislation to study changes in death penalty procedures. **Alabama** considered legislation to implement a study to examine the state death penalty process and reasons for enacting a moratorium on executions. **Arizona** considered two pieces of legislation, one of which would create a study to examine the state death penalty process, the other a commission to study the sentencing of mentally retarded defendants. Both pieces of legislation were not enacted. (However, the Attorney General formed a Capital Case Commission. See page 18.) The **California** legislature passed Assembly Bill 1740, which included a study of the public defender system. The bill was vetoed by Governor Gray Davis. **Connecticut** introduced a bill to create a commission that would examine racial disparities in the criminal justice system, as well as ensure the fair and reliable imposition of capital sentences of death sought/obtained on the basis of race. **Missouri** legislation to remove procedural limits for presenting DNA evidence in capital cases was not enacted. **Virginia** legislation to establish a Crime Committee to study DNA testing was not enacted, nor was a proposal to study the death penalty process.

In 1998, the **Florida** legislature passed legislation which was signed by the Governor that removed rights from death row inmates in order to speed up executions. On September 8, 2000, the Florida Supreme Court invalidated the measure as unconstitutional.

DNA

Due to the high-profile status of DNA in recent years, there was a flurry of DNA testing legislation around the country. Many states enacted legislation for new DNA testing programs or extended the statute of limitations of DNA evidence admissions. **Oklahoma** Indigent Defense Services (OIDS) received a $250,000 appropriation to begin a DNA forensic testing program. The DNA Forensic Testing Act (SB 1381) became effective July 1, 2000. Affiliated with the Capital Direct Appeals Division, the program investigates, screens and presents claims of proof that scientific evidence will demonstrate the factual innocence of indigent persons convicted of, and at present time incarcerated on, any felony. The program will present the claim to the appropriate prosecutorial agency. Eligibility for the program requires present incarceration on a felony conviction, sufficient amounts of evidence for testing by both the defense and the prosecution, and an affidavit exhibiting indigency (as determined by OIDS based on rules for determining indigency declared by the Court of Criminal Appeals pursuant to the Indigent Defense Act). The program will give priority to those defendants with claims involving definitive (or near definitive) proof of factual innocence through scientific evidence or facing either a lengthy prison sentence or death sentence.

Connecticut amended the statute of limitations which required petitions for new trials to be brought within three years after the judgment or decree. Public Act 00-80 modified C.G.S. §52-582, Petition for New Trial to allow DNA evidence that was not "discoverable or available at the time of the original trial" at any time after the "discovery or availability of such new evidence."

In **California**, a DNA testing package comprised of SB 1342, AB 2814 and AB 1742 passed the legislature. Of these three bills, SB 1342 grants a defendant convicted of a felony and currently serving a term of imprisonment the right, under certain conditions, to make a written motion for DNA testing.

The written motion must include an explanation of how the requested testing would raise reasonable doubt regarding the validity and/or severity of the defendant's sentence. This legislation requires the state of California to assume responsibility for the costs of DNA testing if the defendant is indigent. **Washington** established the opportunity for inmates with certain sentences to request post-conviction DNA testing. Chapter 92, Laws of 2000 (Substitute House Bill 2491) allows a defendant sentenced to death or life without parole on or before December 31, 2002 to submit a request for post-conviction DNA testing. The request may be submitted only if DNA testing either was not sufficiently developed at the time to test the DNA evidence available or if the court ruled DNA testing did not meet acceptable scientific standards. On and after January 1, 2003 a defendant must raise the issue(s) of DNA at trial or on appeal. The legislation also provides an order for the Office of Public Defense to prepare a report by December 1, 2001 detailing post-conviction DNA testing information, such as the number of appeals for post-conviction DNA testing denied by the attorney general's office and a summary for the basis of the denials.

In **Illinois,** Public Act 91-0871 (HB 4593 enrolled) amends the Criminal Code of 1961 with Section 33-5, a forensic science evidence preservation mandate for homicide and sex offense prosecutions that requires law enforcement and the State Attorney's Office to preserve "any physical evidence secured in relation to a trial and sufficient official documentation to locate the evidence." The act establishes evidence retention time periods according to certain ranges of convictions. This amendment provides sentencing of a Class 4 felony for violating this act and establishes certain guidelines after conviction for petitioning by the State's Attorney's Office or law enforcement to dispose of the evidence. One guideline for allowed disposal of evidence is if the defendant "is allowed the opportunity to take reasonable measures to remove or preserve portions of the evidence in question for future testing." Similarly, **Michigan** passed legislation establishing guidelines for destroying DNA samples. Public Act 30 of 2000 (SB 594) requires the state police forensic laboratory to follow certain procedures when destroying DNA samples and information "submitted by an individual who has been eliminated as a suspect in a crime." The department is required by this act to permanently store a DNA profile of any individual "convicted of or found responsible" for certain violations under the Michigan penal code.

Mandatory DNA testing for certain convictions may be used to incriminate a select population. **Alaska** legislation (HB 294) requires people convicted of burglary to submit DNA samples. This bill establishes the offense of not submitting a DNA sample as a Class A misdemeanor. The bill also provides for police or peace officers to execute the DNA sampling (in the form of oral swabs) and a mandatory court order for destroying the sample.

Drug Courts

New Mexico received funding through the federal Juvenile Accountability Incentive Block Grant for eight juvenile drug courts. The funding will provide for new staff positions, particularly in rural areas. **Virginia** legislation requires first-time juvenile drug offenders to receive drug assessment and treatment. **Maine** Public Law 780 (LD 2014) appropriates $77,912 from the General Fund for the Judicial Department to establish alcohol and drug treatment programs in the Superior Courts and District Courts. This appropriation will also provide for the implementation of a Drug Court Coordinator to assist the Judicial Department with establishing and running the alcohol and drug treatment programs. These programs must "include local judges and be community based and operated separately from juvenile drug courts." Defense attorneys are one of many different entities that are required to collaborate with the Judicial Department in assisting with the establishment and maintenance of these programs.

The **Colorado** State Public Defender received $64,896 for a Drug Court Internship Project which uses law students and social work graduate students to address the multiple problems faced by many of the drug court clients. **Alaska** HCR 11 is a resolution affirming that substance abuse contributes to crime and interferes with the rehabilitation of those convicted of crimes. The bill allows for Alaska to "redirect and restructure resources to provide standardized screening and culturally appropriate substance abuse treatment in the corrections system." It also provides for the Department of Corrections and the Department of Law to administer sanctions against those offenders within the criminal justice system who do not cooperate with such court-ordered treatment.

Sentencing

Alabama House Bill 83 creates the Alabama Sentencing Commission to review state sentencing policy of adult and juvenile criminal offenders. The Commission will provide oversight of the sentencing system in Alabama by researching the present "state sentencing structure, including laws, policies, and practices, and recommend changes to the criminal code, criminal rules of procedure, and other aspects of sentencing necessary" to ensure "an effective, fair and efficient" sentencing system. The Commission will also review the problem of overcrowding in county jails. The Commission will make recommendations and publish an annual report, as well as draft a major overhaul of the entire sentencing structure and present the plan to the legislature during the 2002 Regular Session.

Michigan enacted legislation to revise sentencing. Public Act 279 (SB 373) modifies the law of criminal procedure with felony sentencing guidelines revisions. The act classifies a number of felonies accidentally enacted or omitted after the sentencing guidelines were first enacted, and changes the factors and classifications of crimes. The bill states, "[A] court may depart from the appropriate sentence range established under the sentencing guidelines set forth...if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." This legislation is not retroactive and affects the minimum sentences imposed by the court for felonies committed on or after January 1, 1999. **Alaska's** sentencing legislation allowed for community based sentencing. House Bill 372 allows the opportunity for the court, with the consent of the offender, to deliver a sentence "based upon a negotiated agreement between the victim and the offender, or between the offender and the community if there is no victim." The bill's final section allows the court to presume that the defendant is able to provide restitution unless the defendant establishes "clear and convincing" evidence of the inability to provide restitution at the sentencing hearing.

Many states considered changes to juvenile sentencing. **Idaho's** Senate Bill 1374 amends the existing law to provide various sentencing options for juveniles convicted as adults. The current law requires a juvenile convicted as an adult and subject to a mandatory or discretionary waiver to be considered an adult in all areas and supervised by the state's adult probation system. This new legislation allows district court judges the opportunity to combine sentencing and probation services for waived juveniles "if a finding is made that adult sentencing measures would be inappropriate...." The bill allows the judge to revoke the juvenile's sentencing program if the juvenile is not complying with the program requirements and "transfer the convicted person to the county jail or to the custody of the state board of correction for the remainder of the sentence." In **Ohio**, Am. Sub. SB 179 lowered the minimum age of custody to the Department of Youth Services from age 12 to 10 (though the minimum age to be tried as an adult remains at 14). It also introduces blended sentencing for juveniles in which a juvenile's adult sentence is suspended unless he/she either commits a felony or misdemeanor offense of violence within the

jurisdiction of the Department of Youth Services, or engages in conduct that poses substantial risk to the safety of the victim or community. If these acts occur then the juvenile must serve the adult sentence. S.B. 181 criminalizes truancy and permits individuals primarily caring for a truant child to be held responsible for his or her absenteeism. Among other measures, this bill also grants the court to order the person(s) in care of the truant student to perform up to 70 hours of community service.

Other notable sentencing changes:

Connecticut Public Act 209 changed the prior law under which any adult who was previously a Youthful Offender to be eligible for accelerated rehabilitation, which is probation for up to two years with or without conditions. A 15-or 16-year-old child charged as an adult may be granted Youthful Offender status, which allows court records to be sealed and sentencing limited to a maximum of four years incarceration/probation. If the rehabilitation is completed and there are no additional arrests, the underlying charges are dismissed. This new legislation allows the court to permit accelerated rehabilitation to a person who has not been determined a Youthful Offender within the past five years.

New York Chapter 107 (S. 4691-A A.30002), or the Hate Crimes Act of 2000, metes out sentencing enhancements or elevates a crime one grade level when the defendant commits an offense specified within the legislation and either intentionally selects the victim or intentionally commits the act(s) due to prejudiced opinions regarding "race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation."

In **Virginia**, significant juvenile sentencing reforms passed that set the age of 16 at the time of the offense as the minimum age for the imposition of the death penalty and set age 11 as the minimum age for commitment to the Department of Juvenile Justice as a disposition.

Methamphetamine

The media has focused on methamphetamine recently due to it's high profile as an easily-produced and extensively-abused drug, and at least three states introduced sentencing legislation to combat the production and circulation of the drug. **Illinois** Senate Bill 1695 amends the Controlled Substances Act to eliminate the exception of methamphetamine manufacture. This legislation excludes the manufacture of methamphetamine from the original section which excluded methamphetamine manufacturing from Class 4 felonies. Therefore, methamphetamine manufacturing is now a Class 4 felony and a much more serious offense. **Washington** Chapter 132, Laws of 2000 (Substitute Senate Bill 6260) adds a 24-month sentence enhancement for those convicted of manufacturing methamphetamine or possession of the drug's derivatives with the intent to manufacture methamphetamine if a person under the age of eighteen was within the area at the time in which the crime was committed. **Alaska** House Bill 3: Drugs: Possession of Precursor Chemicals targets methamphetamine laboratories. It establishes very harsh consequences (Class A felonies) for manufacturing this drug. It also does not differentiate between the amount of chemicals in possession: "...a listed chemical with intent to manufacture any material, compound, mixture, or preparation that contains methamphetamine...."

Restitution

A variety of different restitution mechanisms were established this past legislative session. **Ohio** House Bill 283 established an up-front application fee. A partial payment/contribution program was also established in some of the OPD branch offices: "Pursuant to section 120.04 of the Revised Code, the county shall pay to the state public defender a percentage of the payment received from the person in an amount proportionate to the percentage of the costs of the person's case that were paid to the county by the state public defender pursuant to this section. The

money paid to the state public defender shall be credited to the client payment fund created pursuant to division (B)(5) of section 120.04 of the Revised Code." **Idaho** Senate Bill 623 allows a provision in existing law for restitution ordered at the sentencing of a juvenile. The legislation requires that "Court-ordered restitution shall be paid prior to any other court-ordered payments unless the court specifically orders otherwise." The purpose of this bill is to give priority to victim restitution over all the other payments ordered in the sentencing. Juvenile offenders or their parents are required to provide the funds for these payments. Shelby County, **Alabama** enacted the Prisoner Reimbursement to the County Act (House Bill 875). This act requires any sentencing court within Shelby County to order any person convicted of a misdemeanor or felony, adjudicated a juvenile delinquent or in need of supervision, or any person found in contempt of court for violation of a court order or probation order who is incarcerated in a county or municipal jail or juvenile detention facility or a similar facility (or parents/guardians who are parties in a juvenile case) to pay the actual costs of housing, maintenance, and medical costs associated with his or her confinement. These costs will not exceed $60 per day and will include costs for the entire time of the stay in jail, including any period of pretrial detention.

Computerization of Public Defender Systems/Offices

Connecticut Public Act 00-20 allows the Division of Public Defender Services to share information through an "offender-based tracking system" currently being built for statewide use by criminal justice agencies. Per legislation, the Division of Public Defender Services may now access conviction information as defined by statute, information otherwise available to the public, and information, including non-conviction information, "concerning a client whom the division has been appointed by the court to represent and is representing at the time of the request for access to such information." **Minnesota** Session Laws 2000, Chapter 377 grants the public defender access to the computerized criminal justice information system to which most criminal justice state agencies already have access. Before this legislation passed, the public defender obtained criminal justice information on their clients by asking the prosecutor for criminal histories. The district public defender, state public defender and/or attorneys working for a public defense corporation now have "Access to data under this section" that is "limited to data regarding the public defender's own client as necessary to prepare criminal cases in which the public defender has been appointed...." The public defender is not allowed access to certain information, such as law enforcement active investigative data. Since passage of the bill on April 13, 2000, state agencies are working to develop the capability to distribute this information over the Internet. The passage of this legislation will help Minnesota public defenders represent cases more effectively and efficiently. **New Mexico's** legislative session allowed comprehensive computer training for the new computer equipment within the public defender office.

Race Commissions/Studies

Some legislatures considered studying the role race may play in the criminal justice system, particularly traffic arrests. **Connecticut** Public Act 00-154 established a Commission on Racial and Ethnic Disparity in the Criminal Justice System. Per legislation, the Commission is responsible for researching statutes, policies and procedures used by state agencies for evidence of racial and ethnic disparities for both adults and juveniles. The Commission will prepare informative reports and develop plans to reduce racial and gender bias, as well as draft legislation to combat any bias perceived by the study. **Washington** Chapter 118, Laws of 2000 (Engrossed Second Substitute Senate Bill 6683) is a response to concerns regarding the possibility of "racial profiling" of traffic stops. This legislation requires the Washington State Patrol to collect data on

each traffic stop, including the race/ethnicity, gender and age of the individual stopped, whether a search was executed as a result of the stop and whether an arrest was made or a citation issued. The criminal justice training commission and the Washington State Patrol will compile the collected data and report the findings to the legislature no later than December 1, 2000. The legislature also provides a provision for state patrol and local law enforcement to obtain training materials on racial profiling. Meanwhile, the **Illinois** Senate failed to take action on House Bill 3911, which proposed to amend the Illinois Vehicle Code by adding a provision for a traffic stop statistical study on race.

Public Defender Initiatives

Idaho House Bill 421, which was requested by the State Appellate Defender, amends Section 19-2803 of the Idaho Code to provide appellate counsel in criminal proceedings with a copy of the pre-sentence report and documentary exhibits, in the event that such materials were transmitted to the Supreme Court or Court of Appeals for use in appellate proceedings in which the state or any of its officers is a party in an official capacity. Prior to this legislation, only the Attorney General was privy to these materials, and the defense had to submit a motion for production of those materials to the court. This legislation ensures that the defense will have the same access to and notification of the pre-sentence report and evidence as the attorney general.

Illinois Public Act 91-0877 (HB 4698 enrolled) is the Public and Appellate Defender Immunity Act, which grants any public defender, assistant public defender, appellate defender, assistant appellate defender or any person involved in the work of these defenders, immunity from liability of any damages "...in which the plaintiff seeks damages by reason of legal or professional malpractice, except for willful and wanton misconduct." **California** AB 2406 was jointly sponsored by the prosecution and defense to rectify Proposition 115, which allowed the court the sole right to question prospective jurors. This legislation allows both the prosecutor and the defense to question prospective jurors after completion of the court's initial examination. However, the court may, at its discretion, limit the oral and direct questioning by each party.

Setbacks

Though the past legislative session was positive overall for indigent defense providers, there were some defeats to the improvement of indigent defense systems worth mentioning. **Maine** considered LD 2067, a bill that would have allowed the State Court Administrator to "establish guidelines for contracting with private providers to ensure that effective pretrial services are provided as an alternative to bail for indigent criminal defendants" through a request-for-proposal procedure for the contracts. This bill did not pass due to financial concerns. The Maine House of Representatives also introduced a proposed study order to establish a task force to develop a plan to implement a pilot program for a public defender's office. The study order failed to received any action. **Michigan** legislature passed Public Act 208 of 2000 (SB 1222), which amends criminal procedure to allow a police officer to arrest all misdemeanants with offenses punishable by more than 92 days if there is "...reasonable cause to believe the person committed or is committing the violation, regardless of whether the violation was committed in the peace officer's presence."

Conclusion

The Spangenberg Group would like to thank all who assisted with the information for this article. TSG is always interested in court or legislative actions which affect indigent defense systems. If you would like to share your experiences, please contact us by phone: (617) 969-3820, fax: (617) 965-3966 or email: tsg@spangenberggroup.com. ❖

1. Information from the *ABA Section of Individual Rights and Responsibilities: State Legislative Activity Summary: Selected Bills: 1999-2000*, which includes selected legislation that appears to address death penalty implementation factors most directly addressed in the ABA resolution.

Additional Non-Legislative Developments

During the research for the 2000 State Legislative Scorecard, TSG learned of some non-legislative indigent defense initiatives that are worth mentioning. After the implementation of the death penalty moratorium in **Illinois**, on May 12, The Task Force on the Professional Practice in the Illinois Justice System issued a report finding the criminal and juvenile justice systems to be in "crisis." The Task Force report highlights several problems resulting from the systemic underfunding of the defense function, including: indigent defense caseloads far in excess of national standards; high turnover in public defender offices due to low pay; and, ever increasing demands on the public defenders due to unfunded mandates in the form of new public acts affecting the juvenile and criminal justice systems. The Task Force has met to discuss the specifics of how the state should be responsible for more funding and oversight of indigent defense. The results of that are... For further information, please refer to *The Spangenberg Report*, Volume VI, Issue I (August 2000). In January 2000, the 25-member **West Virginia** Task Force 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. These recommendations are quite significant since the task force was created to address the rising cost of indigent defense services in the state. The Task Force also recommended establishing a statewide indigent defense advisory commission, and stricter rules governing the submission of assigned counsel vouchers for payment. For further information, please refer to *The Spangenberg Report*, Volume V, Issue 4 (March 2000).

In **New Jersey**, halfway through FY 2000, the Office of the Public Defender entered into agreement with the Division of Revenue for the Department of Treasury to assume all responsibilities of billing, collecting and reporting fees from the clients of the Office of the Public Defender. This transfer of responsibilities is expected to ensure all efforts are made to collect service reimbursement for the Office of the Public Defender.

The **Colorado** State Public Defender established a few important computerized resources for its offices. The Colorado State Public Defender recently implemented an automated resource library on its Intranet that includes appellate briefs, death penalty motions, regular trial court motions, annual training conference materials and outside training materials. A critical factor in making this viable is an automated indexing system that allows all library material to be submitted, indexed and reviewed electronically. Colorado also has established an on-line approval process for case-related expenditures, such as travel requests and hiring of experts. With this automated system, attorneys submit their request electronically to the Chief Deputy or Public Defender. Attorneys are notified whether their requests are approved in an expedient manner. Once approved, the expense is incorporated into an accounting database which helps to improve the tracking of expenses. ❖

News From Around the Nation

New Report Critical of System for Representing Indigent Juveniles in Texas

In October, 2000, Texas Appleseed released a report, *Selling Justice Short: Juvenile Indigent Defense in Texas*, that chronicles problems plaguing the system for representing indigent juveniles charged with delinquency offenses. The report is part of a broad effort spearheaded by Texas Appleseed to review indigent defense in Texas. Beyond representation of indigent juvenile offenders, the study is examining the representation of indigent adults in misdemeanor and non-capital felony cases, a review of capital trial representation, and a review of the system to identify and assist indigent defendants with mental illnesses in Texas.

Researchers spent much of the summer visiting 23 counties and interviewing judges, private attorneys, prosecutors, county officials, public defenders, and others to learn, first-hand, about the various ways in which indigent defense services are provided in Texas. The additional reports will be released in early December. The Spangenberg Group is preparing the review of the representation of indigent adults in misdemeanor and non-capital felony cases in Texas.

Chief among the findings in *Selling Justice Short* are:

1. Texas lacks a uniform and consistent system for providing representation to juveniles who can't afford to hire an attorney. Each county determines its own approach as to how and when a minor receives counsel. There are no guiding standards common from one jurisdiction to the next.
2. The process of appointing counsel to represent juveniles is fraught with numerous disincentives to effective attorney advocacy. Compensation rates are very low and attorneys are rarely compensated for out-of-court work. In some counties, courtroom cultures and the compensation rate structures contribute to excessively quick dispositions.
3. There are some juvenile courts that do manage to provide children with prompt, competent counsel who represent their clients conscientiously and vigorously. However, there are no common standards, guidelines or oversight procedures to ensure that this is the norm in every court.
4. Many children have court appointed attorneys who lack expertise in the area of juvenile law. Many counties fail to provide sufficient training, resources and support services.
5. Many judges feel pressured by the county to control their budgets and to move cases quickly. Many attorneys report feeling unduly pressured to process cases quickly.
6. In the vast majority of cases, the juvenile client and his attorney meet for the first time only minutes before the child first appears before the judge on the delinquency charge. These meetings often occur in the courtroom or hallways. In some counties, it is common for the juvenile to enter a plea of guilty at this first court appearance.
7. There is very little advocacy at disposition (sentencing) hearings. Attorneys rarely seek, or are provided with, experts with whom to consult regarding the rehabilitative, educational or mental health needs of juveniles. Instead, attorneys rely almost exclusively on probation officers for dispositional recommendations and rarely present the court with alternative plans.
8. The role of probation varies significantly across jurisdictions. Though some probation officers play an appropriately distinct role, in a majority of the counties visited, the probation officers assume, to varying degrees, what are traditionally defined as prosecutorial and/or defense attorney functions.
9. In every jurisdiction visited, attorneys, judges and probation officers agree that there are insufficient pre and post dispositional services.
10. Children often do not understand their legal rights and the existing procedures fail to provide most

juveniles with adequate representation at certain critical stages of the juvenile justice process.

Selling Justice Short was investigated and prepared by a team of experts on juvenile representation headed by Cathryn Stewart of Northwestern University School of Law. Patricia Puritz, Director of the American Bar Association Juvenile Justice Center also played a key role. Funds were provided by the Southern Poverty Law Center and the ABA Juvenile Justice Center. Texas Appleseed is a non-for-profit, non-partisan law center based in Austin, Texas. ❖

ABA Call to Action: A Moratorium on Executions

Prompted by increasing evidence that the capital punishment system is rife with unfair practices, ABA President Martha Barnett invited lawmakers, humanitarians and members of the legal community to a "Call to Action: A Moratorium on Executions" at the Carter Center in Atlanta, Georgia during October 11th and 12th, 2000. The private convention called for a temporary moratorium on all executions nationwide until fairness is restored to the capital punishment system. Though the ABA takes no official position on the death penalty, the ABA does oppose the execution of the mentally retarded and youths who were under the age of 18 at the time of the crime.

Each of the governors in the capital punishment states without a moratorium received a letter from Barnett urging them to support a moratorium on executions and to undertake a comprehensive review of their respective capital punishment systems. Barnett's letter asked the governors to follow the example of Illinois Governor George H. Ryan, who implemented a moratorium in his state and created a commission to study the capital system in Illinois on January 31, 2000. Barnett wrote that, "While there may be a wide disparity of views on capital punishment, there is almost universal consensus that we should not be executing the innocent."

Illinois Governor Ryan was a guest speaker at the program, as well as: Stephen B. Bright, Director of the Southern Center for Human Rights in Atlanta; David Baldus, Joseph B. Tye professor of law at the University of Iowa College of Law and expert on empirical studies of capital charging and sentencing; former First Lady Rosalynn Carter, human rights advocate, Presidential Medal of Freedom recipient; Texas State Senator Rodney Ellis, an active proponent of criminal justice reform; and Barry C. Scheck, Co-founder of the Innocence Project at the Cardozo School of Law in New York City.

The ABA first called for a moratorium on executions in 1997 due to the unacceptable rate of errors in death penalty cases. The "Call to Action" in Atlanta reiterated the need for a nationwide moratorium and addressed some of the significant problems within the capital punishment system, such as lack of qualified counsel for representing capital defendants, racial prejudice and its effect on sentencing, post-conviction review restrictions and lack of sufficient funding for counsel. ❖

Arizona Capital Case Commission Meets

A commission formed to ensure fairness of the administration of the death penalty in Arizona met for the first time on September 27, 2000, commencing a four-month study period. Prompted by the recent exonerations of death row inmates throughout the nation, Attorney General Janet Napolitano created the Capital Case Commission last spring to review the death penalty process in Arizona. The Attorney General addressed the Commission during the first meeting, saying that though she is confident that Arizona's criminal justice system is not rife with systemic abuses alleged in other states, it is incumbent upon her as the State's chief legal officer to instill confidence in the people of Arizona that the death penalty is imposed fairly, promptly and methodically.

The Attorney General also announced that the Commission will not debate the death penalty itself.

The 30-member Commission of judges, defense attorneys, prosecutors, victims' rights advocates and legislators began the first meeting by examining files and research information of capital cases that the Arizona State University's Center for Urban Inquiry compiled especially for the Commission. The Commission is holding a series of meetings to carefully analyze all information provided, study all aspects of the capital case process and make recommendations. The last meeting of the Commission is scheduled in December, 2000. The Attorney General hopes to present the Commission's recommendations to the Governor, legislature and judiciary around that time. That depends, on part, if the Commission is able to complete its work in just four months; it may request an extension of time. The short length of the Commission's review period and the refusal to address the merits of the death penalty were criticized by the Coalition of Arizonians to Abolish the Death Penalty. ❖

Joint DNA "Innocence Project" Formed by Orange County, California District Attorney and Public Defender

Orange County, California District Attorney Tony Rackauckas and Public Defender Carl Holmes recently initiated the first program in the state of California in which a prosecution agency works with the defense to identify inmates who may have been wrongfully convicted. Established this past September, the "Innocence Project" is a statewide new program that will test DNA, fingerprints or other evidence at the request of inmates convicted in Orange County.

Inmates in each of California's 33 prisons will be notified of the project through postings in prison libraries. Inmates may write to the DNA coordinator at the Orange County District Attorney's office to request consideration of their respective cases. A committee of two prosecutors-- one of whom is a DNA specialist--and either a deputy public defender or a law professor will review each application. If a case contains forensic evidence that could be tested by the Sheriff's Crime Lab, then testing will be ordered on those cases. If the DNA testing indicates that the inmate did not commit the crime, then the District Attorney will file a writ of habeas corpus to petition the inmate's release.

Though the California legislature recently passed a bill that permits a current inmate convicted of a felony to submit a motion requesting DNA testing to the trial court that entered the judgment of conviction in his or her case (S.B. 1342), Orange County's District Attorney and Public Defender offices decided to pursue this program because it is less restrictive than the program set up by the legislature. ❖

Case Notes

Florida Announces Standards to Govern Judicial Participation in Plea Negotiation

In *State v. Warner*, Fla., No. SC 94842, 6/22/00 a majority of the Supreme Court held that a trial court may at its discretion take a limited part in plea negotiations upon the request of a party.

The majority recounted the problems that generally arise from judicial participation in plea bargaining. For example, a defendant may perceive judicial involvement as coercion to plead guilty. Also, getting judges involved has been said to undermine the use of presentence investigation reports and victim input.

On the other hand, the majority reasoned that there are also advantages to limited judicial participation in plea bargaining. It has been suggested that judicial

plea bargaining serves to restore to judges some sentencing power that has been lost to prosecutors. Judicial involvement is also known to simplify the process, make negotiations more formal and provide for procedural uniformity. Further, a defendant has a better basis for relying on a plea if he/she knows the judge concurs with the bargained for sentence.

The majority decided that having refused to issue per se condemnation of judicial participation in plea bargaining in *Davis v. State,* 308 So.2d 27 (Fla. 1975), the time had come to announce some "minimum safeguards" for such participation. The Court held that if a party so requests a trial court has discretion to participate in plea bargaining. All plea discussions in which a trial court participates must be made on the record. Once the trial court gets involved in plea discussions, it may actively discuss potential sentences and comment on proposed agreements, the majority stated.

Quoting *People v. Cobbs,* 505 N.W. 2d 208 (Mich. 1993), upon which the Court modeled its procedures, the Court stated that the question to be answered by the trial court is: "Knowing what you know today, what do you think the sentence would be if the defendant pled guilty as charged?" This approach limits the trial court's participation to giving a candid statement of how the case appears at a given time. During the discussion stage, the Court may consider victim input and presentence investigation reports, but this does not limit the prosecution's right to introduce additional facts later on. On the other hand, the trial court may not predict the likely sentence if the defendant declines to plead. The Court felt that this prohibition was necessary to avoid potential for coercion. Finally, the majority felt that the trial court was not automatically subject to recusal if discussions in which it played a role did not produce a plea. Relying on *Cobbs*, the majority felt that the mere fact that a judge has stated how the case appeared at an early stage does not prevent the judge from being fair and evenhanded when more facts have become known. ❖

Eleventh Circuit Promulgates Standards For Judging Ineffective Claims

In *Chandler v. United States*, 11th Circuit (en banc), no. 97-6365, 7/21/00, a majority of the en banc U.S. Court of Appeals for the Eleventh Circuit held that trial counsel in a capital case did not provide ineffective representation in violation of the Sixth Amendment right to counsel at the penalty stage by relying on lingering doubt about his client's good character.

The petitioner was a large-scale marijuana grower who offered $500 to an associate to murder the victim, who was a suspected police informer. At a hearing on his claim that counsel was constitutionally ineffective at the penalty phase, the petitioner presented the testimony of over two dozen other witnesses who testified to specific good acts by the petitioner. The petitioner claimed that trial counsel was constitutionally ineffective for failing to investigate and discover these other witnesses and for failing to present their testimony at the penalty phase.

The Court however felt that a reasonable lawyer could have decided that presentation of mitigation evidence would be counterproductive because it would open the door to potentially harmful cross-examination and nullifying rebuttal.

The majority compiled a list of general principles and presumptions relating to the performance prong of counsel ineffectiveness claims. The majority distilled the rules from additional Supreme Court decisions as well as its own precedent:

- The standard for counsel's performance is reasonableness under prevailing professional norms.
- The burden of persuasion is on a petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable.
- Judicial scrutiny of counsel's performance must be highly deferential.
- Courts must indulge the strong presumption that counsel's performance was reasonable and that

counsel made all significant decisions in the exercise of reasonable professional judgment.
- The reasonableness of a counsel's performance is an objective inquiry.
- When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.
- In reviewing counsel's performance a court must avoid using the distorting effects of hindsight and must evaluate the reasonableness of counsel's performance from counsel's perspective at the time.
- No absolute duty exists to investigate particular facts of a certain line of defense.
- The reasonableness of counsel's acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the petitioner's own statements or actions, evidence of a petitioners statements and acts in dealing with counsel is highly relevant to ineffective assistance claims.
- Counsel is not required to present every non-frivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with the counsel's strategy.
- No absolute duty exists to introduce mitigating or character evidence. ❖

The Tennessee Court of Criminal Appeals Decides that Disqualification is an Appropriate Response to the Appearance of Impropriety

In *State v. Bryan*, Tenn. Ct. Crim. App. No. M1999-00854-CCA-R9-CD, 8/4/00, the Court held that an attorney cannot continue to represent a murder defendant while at the same time sharing office space and advertising his practice along with the very lawyer who filed the murder charge when he was the district attorney. The court stated that this situation presented a case in which disqualification is an appropriate response to the appearance of impropriety.

The defendant was charged with first-degree murder and hired the son of the district attorney to represent him. While the case was pending, the district attorney left office to enter private practice and share office space with his son. The state moved to disqualify the son on the ground that he had been joined in practice by the attorney who was responsible for charging his client. The defendant resisted the disqualification motion with an affidavit attesting that no conflict of interest existed and, in the alternative, that he expressly waived any conflict. Also, the father executed an affidavit stating, among other things, that he and his son were solo practitioners who did not share fees, staff or access to each others files, that he did not actively participate in the defendant's prosecution and was unaware of any facts in the case, and that he would not participate in the defense.

The trial court found that neither lawyer had acted or would act in an unethical manner, but that an appearance of impropriety nevertheless required disqualification -- especially since the indictment signed by the father might be read to the jury at trial. ❖

Prosecutor's Graphic Comments in a Child Sex-Abuse Case Constituted Prosecutorial Misconduct

A prosecutor's graphic description of the sex act in a child sex-abuse prosecution, when coupled with her assertions that children do not make false accusations, amounted to an expression of the prosecutor's personal opinion that assumed facts not in evidence and encouraged the jury to decide the case on the basis of emotion rather than facts. *State v. Alexander*, Conn., No. 16031, 8/15/00.

The pervasive prosecutorial misconduct in this case denied the defendant due process, the court concluded. In both initial summation and rebuttal, the jury was invited to ignore the facts presented in evidence. The defendant's comments during closing argument did not invite the prosecutor's comments in response. Given that the state's case rested on a

credibility contest between the defendant and the complainant and that there was little evidence against the defendant other than the complainant's word, the court held the defendant was entitled to a new trial. ❖

First Circuit Rejects Narrow Reading of U.S. Supreme Court Decision on Scope of Sixth Amendment Protection

The U.S. Court of Appeals for the First Circuit in *United States v. Bender*, 1st Cir., No. 99-2190, 8/4/00) held that the Sixth Amendment does not allow the prosecution to use a defendant's uncounseled statements about other crimes that indirectly incriminate the defendant with respect to the charge to which his right to counsel had attached. The court stated that questioning a defendant about his plans to fabricate an alibi and to possibly kidnap and/or murder the witnesses against him would elicit evidence of his consciousness of his guilt of the pending charge.

The defendant was incarcerated in connection with a federal gun charge as well as state charges. Inmates reported that the defendant had mentioned plans to fabricate an alibi and to possibly kidnap or murder government witnesses who were going to testify against him. An undercover agent met the defendant in jail and spoke with him about his plans to commit the future crimes. The undercover agent did not question the defendant about the pending charges.

The Court in applying the principles laid down in the U.S. Supreme Court decision in *Massiah v. United States*, 377 U.S. 201 (1964), and *Maine v. Moulton*, 474 U.S. 158 (1985), stated that even though the defendant's statements did not relate to the pending charges, "so long as the statements were incriminating as to the pending charges and were deliberately elicited by government agents, they cannot constitutionally be admitted in the trial of those charges."

Responding to the government's argument that *Moulton* does not apply because the defendant's statements do not relate to the pending charges, the Court reasoned that "nothing in *Moulton* supports this limitation and Sixth Amendment jurisprudence is to the contrary."

The Court, reiterating the *Moulton* principle, held that a defendant's Sixth Amendment right to have counsel act as a medium between him and the government would not amount to much if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses. ❖

The U.S. Court of Appeals For The Third Circuit Holds that Neither Statute or Eighth Amendment Requires Court to Entertain Appeal to a Sentence of Death that Defendant has Repudiated

The defendant in *States v. Hammer*, 3d. Cir., No. 98-9011, 8/31/00, pleaded guilty to murdering a fellow prisoner. After being sentenced to death, he decided not to appeal but, instead, to seek the prompt performance of the sentence. He has assured the Third Circuit that he will not change his mind if the court grants his motion to dismiss the appeal that has been filed on his behalf.

The court ordered briefing on the issue of whether federal death penalty law, 18 U.S.C. Sec. 3595, forbids a condemned defendant from waiving the right to appeal. In preparing to decide the issue, the court heard from the defendant personally via video conferencing and was impressed by the cogency with which he pressed his arguments in favor of allowing the execution to go forward without further legal proceedings.

The Court stated that even though Sec.3595 states that a capital sentence "shall be subject to review by the court of appeals upon appeal by the defendant." It goes on to specify what the court of appeals is to review, the issues the court must address, and the circumstances that call for overturning a death sentence.

What the statute does not do is "explicitly require an appeal by a defendant under a death sentence," the court noted. The court stated that "the absence of such a requirement would seem to establish clearly that a defendant is not required to appeal a sentence of death." The Court further stated that had Congress had so intended to impose such a requirement, Congress would have expressly done so.

The Court remanded the case with an instruction to the district court to fix an early new date for the implementation of the sentence of death. ❖

Pennsylvania Supreme Court Identifies Factors to Determine Whether Torture is an Aggravating Circumstance in a Death Penalty Case.

In *Commonwealth in Ockenhouse,* Pa., No. 254 Capital Appeal Docket, 8/21/00, the Pennsylvania Supreme Court identified factors to consider when evaluating the sufficiency of evidence to establish the death penalty aggravating circumstance that a murder was committed by means of torture.

The defendant was found guilty of robbing and murdering an elderly woman in her home. The death sentence was based on two statutory aggravating circumstances: that the murder was committed in the course of a felony, and that murder was committed by means of torture. The defendant did not challenge the death sentence, but the court's statutory duty to review all capital sentences included its consideration of whether the prosecution had presented sufficient evidence of the torture aggravator.

The Court held that under established case law, the prosecution was required to prove beyond a reasonable doubt that the defendant intentionally inflicted on the victim a "considerable amount of pain and suffering that was unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity." The Court went on to explain that the torture analysis required "an intent to cause pain and suffering in addition to the intent to kill...that is to say that there must be an indication that the defendant was not satisfied with the killing alone." ❖

Defendant Does Not Have Federal Right to Counsel in Seeking Leave to Appeal After Guilty Plea

A majority of the Michigan Supreme Court held in *People v. Bulger* (Mich., No.112694, 7/18/00), that a defendant convicted on a guilty plea has no federal constitutional right to the appointment of counsel when seeking permission to bring a discretionary appeal. The Court reasoned that an appeal following a guilty plea is different from an appeal following a trial and that the state's procedures for appeals from plea-based convictions are sufficient to provide meaningful access to the courts.

The defendant plead guilty to a drug crime. After being sentenced, he requested that the trial court appoint counsel to prepare his application for leave to appeal. The trial court denied his request. The Michigan Supreme Court, in agreeing with the trial court decision, drew on the U.S. Supreme Court reasoning in *Ross v. Moffitt,* 417 U.S. 600 (1974). *Ross* distinguished *Douglas v. California,* 372 U.S. 353., which recognized a constitutional right to appointed counsel for an indigent's first appeal as of right. The Constitutional issue according to *Ross* was whether failing to provide appointed counsel denies indigents meaningful access to the appellate system. In distinguishing appeals following guilty pleas from appeals following trials, the foremost distinction, the majority stated, is that a defendant who has pleaded guilty has admitted his guilt, severely limiting the issues available on appeal. In addition, the court stated that such a defendant, unlike one who goes to trial, has "acceded to the state's fundamental interest" in the finality of guilty pleas. ❖

Maryland's Death Penalty System Does Not Satisfy Federal Habeas "Opt-in" Provisions

In *Baker v. Corcoran*, 4th Cir., No. 99-24, 7/19/00, the U.S. Court of Appeals for the Fourth Circuit declared that Maryland's systems for appointing, compensating, and ensuring the competency of counsel for indigent defendants in state post-conviction proceedings in death penalty cases fall short of the standards set out in the so-called opt-in provisions of the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA). The Fourth Circuit declared that those provisions, which trigger more favorable filing deadlines and other benefits for states whose capital punishment schemes satisfy certain criteria, are therefore not available to Maryland officials.

Under Section 2261 (b) and (c) of the AEDPA, a state must "establish by statute, rule of its court of last resort, or by another agency authorized by state law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings."

In Maryland, the Office of the Public Defender (OPD) is the state agency responsible for appointing counsel to represent indigent prisoners in post-conviction proceedings. As a matter of practice, state habeas petitioners are almost always represented by private panel attorneys in order to avoid conflict of interest with respect to assertions that an OPD attorney provided ineffective representation at trial or on direct appeal.

The Fourth Circuit noted that under the federal Criminal Justice Act, attorneys appointed to represent capital defendants in federal habeas corpus actions may be paid up to $125 per hour and that fee awards in the six figures are not uncommon. In contrast, the OPD pays panel attorneys $30 per hour for out-of court time and $35 per hour for in-court time subject to a cap of $12,500 for each attorney. Due to the cap, the chief of the Capital Defense Division of the OPD testified that a panel attorney in one capital post-conviction proceeding had been compensated at a rate of $13 per hour. The Fourth Circuit held that "in light of these findings, we cannot conclude Maryland adequately compensates state post-conviction counsel. A compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate."

Further, even though the OPD has promulgated a regulation setting forth a minimum standard of competency for panel attorneys in capital litigation, the court found that the OPD does not actually apply this standard in appointing post-conviction counsel in capital cases. The Court characterized the system as an ad hoc process under which members of the OPD seek out counsel that they believe to be well known in the legal community and attempt to enlist them in post-conviction representation. Having established that Maryland's current competency safeguards are deficient under the federal statute, the court added that under *Booth v. Maryland*, 940 F. Supp.849, 60 CrL 1104, when a state agency establishes a mechanism for the appointment and compensation of post-conviction counsel, that agency may also promulgate the required standards of competency for such attorneys. ❖

Arizona Court of Appeals Holds that Fair Trial Does Not Cure Counsel's Bad Advice Regarding Plea Offer

A majority of the Arizona Court of Appeals held that a defendant can establish a colorable claim of ineffective assistance of counsel under the Sixth Amendment by showing that he rejected a favorable plea bargain on the basis of counsel's bad advice. *State v. Donald*, Ariz. Ct. App., No. 1 CA-CR 97-0551-PR, 9/26/00.

The petitioner in this action for post-conviction relief was offered a plea bargain that would have made him eligible for "soft time," which means parole after service of one-half the sentence imposed. The

maximum sentence stated in the proffered agreement was eight years. The petitioner claimed that his counsel presented the offer to him but failed to adequately explain the benefits of the bargain and the risks of going to trial. The defendant rejected the offer, was convicted by a jury, and was sentenced to a "flat term" of 10 years. In his petition for post conviction relief, he claimed that he would have accepted the plea offer had he understood what it meant.

The majority agreed with the defendant that even if a defendant has had a fair trial, he may seek relief from his conviction on the ground that he was led by counsel's ineffective assistance to reject a plea agreement he otherwise would have accepted. The decision whether to accept or reject a plea offer is usually the most important a defendant faces and it cannot be made unless counsel has advised the defendant of the merits of the offer and the risks of going to trial, the majority stated. Just as the right to effective assistance is violated if misadvice induces a guilty plea, so too does a violation occur if ineffective representation leads a defendant to reject a favorable offer, the majority held. ❖

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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:

Robert L. Spangenberg, President
Marea L. Beeman, Vice President
David J. Carroll, Senior Research Associate and Business Manager
Rangita de Silva-de Alwis, Research Associate
Jaime Bailey, Research Assistant
David J. Newhouse, MIS Analyst
Michael R. Schneider, Of Counsel

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