

TESTIMONY

STATE BOARD OF INDIGENTS' DEFENSE SERVICES
BEFORE THE
HOUSE APPROPRIATIONS COMMITTEE
February 2 and 3, 2016

Dear Chairman Ryckman, Jr, and Members of the Appropriations Committee:

The State Board of Indigents' Defense Services must respectfully request supplemental funding for the current year and fiscal year 2017.

For FY 2016 - Supplemental Funding Requested is \$548,000

This urgent need is due to the cost of the next level of capital case defense – the state habeas defense for the John Robinson (Johnson County) case and other capital cases moving forward to this level, Sidney Gleason (Barton County), Scott Cheever (Greenwood County), Reginald Carr and Jonathan Carr (Sedgwick County) as well as the capital and other cases proceeding to trial: Kyle Flack (Franklin County), Alejandro Garcia-Garcia (Montgomery County) and Jonathan Maldonado-Vasquez (Shawnee County).

The Kansas Supreme Court issued its decision upholding the conviction and death sentence of John Robinson in November, 2015. This is the first decision from the Kansas Supreme Court upholding both a conviction and a death sentence. Additionally, the Gleason and Carr brothers' cases were decided and returned from the United States Supreme Court. These decisions were published subsequent to the submission of the BIDS budget.

A state habeas capital defense office is being established, with two experienced public defenders teamed with and learning from a private attorney experienced with Oklahoma state habeas capital defense and a private attorney experienced with Colorado federal capital defense. Right now, none of the BIDS defenders have the capital habeas defense experience required to provide effective assistance of counsel on these capital habeas cases. Additionally, there is the requirement of mitigation and investigation. Outside experts must be retained to accomplish these requirements. (American Bar Association 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.)

What are postconviction proceedings, and what does counsel do in them?

Postconviction proceedings address factual and legal questions that fall outside of the trial record and could not have been addressed on direct appeal. Issues raised in such proceedings might include claims of ineffective assistance of counsel or misconduct by the prosecutor, jurors, or the judge. Postconviction counsel must investigate such claims thoroughly in order to litigate all arguable meritorious issues.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), COMMENTARY TO Guideline 10.15.1

Why must Kansas fund postconviction costs in death-penalty cases?

1. **The Kansas Constitution and state law.** The Kansas Constitution declares that "[t]he right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion." Kan. Bill of Rights §8. This right is codified in relevant part at K.S.A. 60-1507, which governs the postconviction procedures for attacking criminal convictions and sentences. State law further provides for the appointment of counsel to indigent defendants in all capital K.S.A. 60-1507 proceedings. K.S.A. 22-4506(d).
2. **The United States Supreme Court.** "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309,1317 (2012). In Kansas, as in many states, the vindication of the denial of that right is typically delayed until the state postconviction phase of a case. That is because direct appeals are limited to the trial record, and "[i]neffective-assistance claims often depend on evidence *outside* the trial record." 132S.Ct. at 1318 (emphasis added). If the constitutional right to effective trial counsel is to be vindicated in postconviction proceedings, then *postconviction* counsel must be adequately funded to perform effectively in those proceedings. If postconviction counsel does not perform adequately in the state postconviction proceeding with respect to an ineffective-assistance claim then the full resolution of that claim will simply be delayed further until the federal postconviction phase. *See Martinez generally* (allowing litigation of ineffective-assistance claim anew in federal habeas proceedings if state postconviction counsel was ineffective).
3. **The Kansas Supreme Court.** The Kansas Supreme Court has held that once the statutory right to counsel attaches in state postconviction proceedings, the defendant is entitled to the effective assistance of that counsel. *See Robertson v. State*, 288 Kan. 217, 228 (2009).
4. **The Kansas Rules of Professional Conduct.** A flat-fee or similar arrangement to represent an indigent in a capital case creates an intolerable conflict of interest in

violation of K.R.P.C. 1.7 *See In re Hawver*, 300 Kan. 1023 (2014) (disbarring lawyer for fee arrangement and other ethical misconduct while representing indigent defendant in capital case).

5. **The American Bar Association.** The ABA guidelines for capital defense counsel emphasize the need to “ensure funding for the full cost of high quality legal representation” in capital cases, and state, without exception, that “[f]lat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.” (ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DATH PENALTY CASES 9.1 (2003)).

Of the original thirteen death penalty convictions, there are ten death penalty convictions moving forward at this time. Three cases were permitted to plea to a sentence of incarceration until death during the appeal process: Scott, Elms, Marsh.

CASES AND REMAINING COSTS:

Costs of the Capital Habeas Proceedings are:

Training and travel to training for two public defenders - \$5,000

(Note: One defender is teamed with one habeas experienced private attorney)

Attorney fees for private counsel in **John Robinson** - \$75,000 (\$150/hr. x 500 hrs.)

Travel to meet client in segregation custody (2 trips/month for 6 months) - \$24,000

Mitigation Expert - \$40,000 (\$100/hr. x 40 hrs.)

Investigator - \$20,000 (\$50/hr. x 400 hrs.) \$159,000

Attorney fees for private counsel in **Sidney Gleason** - \$60,000 (\$150/hr. x 400 hrs.)

Travel to meet client in segregation custody (2 trips/month for 6 months) - \$24,000

Mitigation Expert - \$40,000 (\$100/hr. x 40 hrs.)

Investigator - \$20,000 (\$50/hr. x 400 hrs.) \$144,000

Attorney fees for private counsel in **Reginald Carr** - \$15,000 (\$150/hr. x 100 hrs.)

Mitigation Expert - \$40,000 (\$100/hr. x 40 hrs.)

Investigator - \$20,000 (\$50/hr. x 400 hrs.) \$85,000

Attorney fees for private counsel in **Jonathan Carr** - \$15,000 (\$150/hr. x 100 hrs.)

Mitigation Expert - \$40,000 (\$100/hr. x 40 hrs.)

Investigator - \$20,000 (\$50/hr. x 400 hrs.) \$85,000

Remaining Cases

Kyle Flack- FR Trial begins 2/1/2016

Lodging and meals for two defenders - \$14,000

Lodging and meals for investigator and mitigation staff - \$7,000

Fees and travel for all expert witnesses - \$17,000 \$45,000

Alejandro Garcia-Garcia - MT Trial begins 4/25/2016

Lodging and meals for two defenders - \$4,000

Lodging, travel, fees and meals for investigator and interpreter - \$11,000 \$15,000

Jonathan Maldonado-Vasquez - SN Trial begins 5/9/2016

DNA expert fees and travel - \$4,000

Interpreter - \$6,000 \$10,000

While all of these capital cases continue to move forward, there are an insufficient number of public defenders to handle the caseload. An additional public defender is needed in Garden City to assist with not only the caseload in Finney County but also to drive to Dodge City where there are not enough private attorneys qualified and willing to accept appointed felony cases.

An additional public defender is needed in Chanute, where the judicial district case load has increased 5.79% and in Montgomery County where the caseload has increased 17.77%. At this writing, there are 11 homicides in Montgomery County, a county with a population of 30,000, and only two public defenders to handle the entire case load of these and all manner of felony cases.

The cost is salary \$53,000 x 3 + benefits = \$180,000.

Supplemental Funding Requested for FY 2017 - \$500,000

Now that the Kansas Supreme Court has issued its first opinion affirming a death sentence, and as more death sentences are affirmed on direct appeal, the costs of capital cases will increase exponentially as the state continues to charge and try new capital cases while cases in which convictions and death sentences are affirmed on direct appeal will begin winding their way through the state and federal postconviction process, with multiple petitions to the United States Supreme Court. The attached diagram describes the legal process.

The habeas capital cases for John Robinson, Reginald Carr and Jonathan Carr, will require 1,000 hours of private attorney work in FY 2017 at a cost of \$450,000. The less factually complex case of Sidney Gleason will require 333 hours.

In-house defenders, mitigators and investigators will have completed the requisite training and will have gained the requisite experience in FY 16 to accomplish those duties in FY 17 that were performed by private experts in FY 16.

Case Chart

District Court Capital Cases Seeking Death Penalty:

Kyle Flack

David Bennett

There are additional capital cases in district court where the notice of the death penalty has not been filed:

Vinh Nguyen – SG

Carnell McNeal – SG

Steven Edwards – SG

Luis Alvarado – Meraz – SG

Camillo Ovalle – Cruz – CQ

KSC:

Gary Kleypas

Doug Belt

Scott Cheever

Justin Thurber

James Kahler

Frazier Miller

CAPITAL HABEAS:

John E. Robinson

Jonathan Carr

Reginald Carr

Sidney Gleason

DISTRICT COURT

Flack – FR, Bennett – LB, Nguyen – SG,
Alvarado-Meraz – SG, Ovalle-Cruz – CQ

KANSAS SUPREME COURT

Belt – SG, Cheever – GW, Thurber - CL,
Kahler – OS, Miller - JO

**UNITED STATES SUPREME
COURT**

DISTRICT COURT

KANSAS SUPREME COURT
Kleypas - CR

**UNITED STATES SUPREME
COURT**

STATE HABEAS DISTRICT COURT

Robinson – JO, Gleason – BT,
R. Carr – SG, J. Carr - SG

KANSAS SUPREME COURT

DISTRICT COURT

KANSAS SUPREME COURT

FEDERAL HABEAS

**10TH CIRCUIT COURT OF
APPEAL IN DENVER**

STATE OF KANSAS
FOURTEENTH JUDICIAL DISTRICT
MONTGOMERY AND CHAUTAUQUA COUNTIES

102 W. 7th, SUITE A
COFFEYVILLE, KS 67337
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DISTRICT JUDGES
Gary House, Div. 3, Independence
Jeffrey D. Gossard, Div. 2, Coffeyville

MAGISTRATE JUDGE
David A. Casement

CLERKS OF THE DISTRICT COURT
Joni Pratt-Chief Clerk
Cynthia Weaver-CQ Co.

F. WILLIAM CULLINS
CHIEF JUDGE-DIVISION 1

January 27, 2016

Representative J. R. Claeys
House Budget Subcommittee
State Capitol, Room 274 West
300 Southwest 10th Avenue
Topeka, KS 66612

Patricia A. Scalia, Director
Kansas State Board of Indigents' Defense Services
714 SW Jackson Street, Suite 200
Topeka, KS 66603-3714

Re: Written Testimony In Support of Kansas State Board of Indigents' Defense Services

I am F. William Cullins, Chief Judge for the 14th Judicial District. The 14th Judicial District encompasses both Montgomery County and Chautauqua County. Before I begin, I would like to apologize for not being present in person, but the need for hearing dates in the 14th has made my attendance impossible.

The majority of our criminal caseload is handled by the public defender's office of the Kansas State Board of Indigents' Defense Services. The Court highly supports Mrs. Scalia's budget and her efforts to add an additional public defender to the public defender's office in the 14th Judicial District.

The need for an additional public defender in the 14th Judicial District is urgent for the following reasons: There are 11 homicide cases pending within the 14th Judicial District, despite the fact we are a rural location. Three of the 11 homicide cases pending are capital cases. Back in the fall of 2015, when there were only 9 homicide cases pending, I spent four weeks attempting to locate qualified counsel to represent 4 of these 9 homicide defendants. Without the help of the attorneys the Kansas State Board of Indigents' Defense Services provides, and the direct input of Mrs. Scalia, the 14th would never have been able to provide qualified legal representation for these defendants.

Even if we were not flooded with homicide cases, the 14th needs the additional public defender to handle the normal criminal caseload that exists within the 14th Judicial District. Last year 660 criminal cases were filed within the 14th Judicial District. The vast majority of those were handled by the public defenders that the Kansas State Board of Indigents' Defense Services provides.

The current demographics of Montgomery County (Montgomery is the larger county and 90% of the criminal cases are filed in Montgomery County) suggests this trend will continue. According to statistics from a Kansas County Mental Health Needs Assessment conducted in 2013, Montgomery County ranked as follows in these important categories per one thousand people:

*note, the higher the ranking the worse you are under these stats

104 out of 105 Counties in Department of Corrections court commitments
97 out of 105 Counties for single-parent families
92 out of 105 Counties for out-of-home child placement
79 out of 105 Counties for child removal due to parental substance use
104 out of 105 in drug treatment admissions
104 out of 105 in alcohol treatment admissions
102 out of 105 for food stamp benefits
102 out of 105 for percent of adult labor force unemployed
96 out of 105 for childhood poverty

As we all know, there is a constitutional duty to provide legal representation in criminal cases. The 6th amendment to the United States Constitution, states, in relevant part "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed and to have the assistance of counsel for his defense."

The 14th Judicial District needs the assistance of the Kansas State Board of Indigents' Defense Services to meet our constitutional mandate. The Court would respectfully request that the legislature provide the needed funds to add an additional attorney to the public defender's office in the 14th Judicial District.

Sincerely,
F. William Cullins
Chief Judge 14th Judicial District.

VAN Z. HAMPTON
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January 27, 2016

Senator Steve Fitzgerald
State Capitol, 135-E
300 SW 10th Street
Topeka, Kansas 66612

Re: Public Defender in Garden City

Dear Senator Fitzgerald,

I was made aware that your Committee will be considering a proposal for funding an additional attorney in the Public Defender Office in Garden City. I am writing now to request your favorable action on this proposal.

Patricia Scalia, Director of the State Board of Indigent Defense Services, informed me that this proposal is being presented today. In my haste to urge your favorable consideration, I do not have time to set out the details of my reasons. However, I will express two important reasons.

First, we are in need of additional experienced and qualified attorneys who can adequately represent persons charged with crimes in western Kansas. As Chief District Judge of the 16th District (Ford, Gray, Meade, Clark, Comanche and Kiowa counties) I am forced to seek attorneys outside this Judicial District who are qualified to accept appointments to represent high level felony defendants. At times, when we have representational conflicts or otherwise do not have a qualified attorney available in our Judicial District, the Public Defender Office in Garden City has accepted appointments to represent indigent defendants for us. They are presently unable to help us that way because that office has reached its maximum client number.

Second, if we do not have qualified attorneys to represent felony defendants, the result may be reversal on appeal in event of conviction, or perhaps additional collateral challenges due to inadequate representation.

Please consider favorably the request to add an attorney position in the Public Defender Office in Garden City.

Sincerely,



SENATE WAYS AND MEANS JUDICIAL SUBCOMMITTEE

Hon. Steve Fitzgerald, Chairman
Hon. Caryn Tyson, Vice Chairman
Hon. David Haley, R.M. Member

January 27, 2016

10:30am

Room 546-S

Chief Judge Daniel D. Creitz

Thirty-First Judicial District

1 N. Washington

Iola, KS 66749

dancreizt@acdc.kscoxmail.com

TESTIMONY IN SUPPORT OF BOARD OF INDIGENT DEFENSE BUDGET REQUEST

Thank you, Mr. Chairman, and this honorable committee for this opportunity to submit written testimony in support of the Board of Indigent Defense Budget Request. I am Daniel D. Creitz, Chief Judge of the Thirty-First Judicial District, which includes Allen, Neosho, Wilson and Woodson counties. The Southeast Kansas Public Defender Office (SEKPDO) in Chanute serves my district, and needs another attorney.

This is due to a 5.79% increase in felony cases filed in the Thirty-First Judicial District in the last year. This increase is not an aberration. There has been a steady increase in the past 19 years.

In 2015 the SEKPDO stopped taking appointments. This was necessary because the attorneys wanted to ensure adequate and appropriate representation of clients. This was a huge problem for my district.

There simply are not enough public defenders to defend all the cases. There are also an insufficient number of private attorneys to fill the gap, and even if there were, private attorneys cost more per case than public defenders. This increased cost would soon exceed the cost of another public defender. So private attorneys are not the fiscal solution.

I respectfully urge that you approve this budget request so that another attorney can be hired by the SEKPDO.