

TESTIMONY

STATE BOARD OF INDIGENTS' DEFENSE SERVICES
BEFORE THE
SENATE WAYS AND MEANS SUBCOMMITTEE
January 26, 2016

Dear Mr. Chairman and Members of the Senate Ways and Means Subcommittee:

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

DNA expert fees and travel - \$4,000

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

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**