JOURNAL

I know about these good lawyers. They don't do it. Do you suppose you can get a member of the Bar Association to give his time for nothing? No, he leaves it to us criminal lawyers. Nothing doing—they are taking care of the wealth of corporations. That is what they are doing.
—Clarence Darrow

INSIDE . . .

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Where Are The Lawyers?

by Jan Elvin

In the summer of 1985 Earl Washington, an illiterate death row prisoner in Virginia with an IQ of 69, was transferred to the death house in Richmond to await his execution. Mr. Washington had no money to pay a lawyer to pursue the appeals to which he was legally enti-

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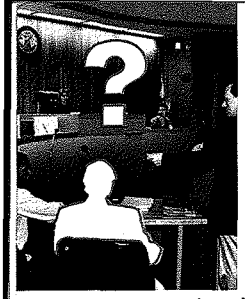
Photo by Karen Ruckman

A PROJECT OF THE AMERICAN CIVIL

NPP 15th Anniversary
See Conference Agenda on p. 14



States Fail to Meet Critical Need of Indigent Defendants

—continued from front page

tled. At the July 31, 1985 hearing where his September 5, 1985 execution date was set, Washington's trial counsel moved to have new counsel appointed to represent him in connection with any habeas corpus proceedings, and the motion was denied. This left him without an attorney to pursue post-conviction proceedings on his behalf. By late August, his date with the executioner was only two weeks away and he had not yet begun either state or federal habeas corpus proceedings.

With the clock ticking, frantic efforts were made by Marie Deans of the Virginia Coalition on Jails and Prisons, the NAACP Legal Defense Fund, and others to find a volunteer attorney for Washington. Pleas for lawyers were sent as far as New York, Washington, D.C., and Chicago, but all were rejected. Washington sat awaiting his execution. Finally, attorneys at Paul, Weiss, Rifkind, Wharton & Garrison in New York undertook a last-minute emergency effort to obtain a stay, and were successful.

Earl Washington's situation is unfortunately not unique. Many individuals who have been sentenced to death are unable to obtain a lawyer for the final stages of their appeals, and are now in danger of being executed without having exhausted the appeals provided by law. This is happening not for lack of claims to be brought, but because the prisoners are too poor to pay lawyers to bring them. Of the 1,911 death-sentenced inmates, 99.5% are indigent.

Under the federal habeas corpus statute, a death row inmate has the right to petition the federal court to review his or her case to determine whether there has been a violation of the Constitution during arrest, trial, conviction or sentencing. Indeed, the dire consequences of the death penalty demand rigorous judicial scrutiny.

While many states provide lawyers to poor people sentenced to death during the trial phase and on direct appeal to the state supreme court, representation ends after the sentence has been confirmed on automatic appeal to the state supreme court. It is then up to the indigent inmate to locate a lawyer to prepare a petition for a writ of habeas corpus. As a result, many are represented by volunteer lawyers who lack necessary expertise, or by overburdened lawyers from public interest legal projects. Some are afforded no representation at all.

Jan Elvin is the editor of the NPP JOURNAL.

There has been no action, however, in terms of funding or actual recruitment in most "Death Belt" states, with the exception of Florida.

Some state government officials feel that to execute someone who does not have an attorney would cause a "black eye" for their state. Largely because of this potential embarrassment to the state and to the legal profession, a few state bars and legislatures have belatedly launched studies of the problem. There has been no action, however, in terms of funding or actual recruitment in most "Death Belt" states, with the exception of Florida. [See CCR story, this issue, p. 6] Despite slight movement to meet the pressing need, the situation has not improved. In fact, it has deteriorated due to the rising numbers of people sentenced to death, mounting executions, and the dwindling number of attorneys willing, or able, to handle capital cases during collateral proceedings.

This "system" of representation has also resulted in chaos and disarray in the courts. Often a lawyer is found only at the last minute. In the rush to prepare the case, important issues may be overlooked or necessary investigation may not take place. Courts are required to make judgments about life and death matters on short notice and on an emergency basis. Judge John Godbold of the Eleventh Circuit Court of Appeals has pointed out that these emergency proceedings are then misunderstood by the public, while imposing tremendously difficult demands on both counsel and the courts.

Former Supreme Court Justice Lewis Powell, in a 1983 speech to the Eleventh Circuit Judicial Conference, complained of persons convicted "five or six years ago" having "their cases of repetitive review move sluggishly through our dual system."[1] He also expressed dissatisfaction over last-minute stays of execution, and the burden that they inflict upon judges.

Professor Anthony G. Amsterdam of New York University, a leading capital punishment theoretician, criticized Justice Powell for not recognizing that the system, described by Powell as "permissive" and one which "permits the now familiar abuse of process," serves a beneficial purpose to be balanced against the cost of delay. Only two weeks before Justice Powell's speech, the Supreme Court heard argument in *Barefoot v. Estelle*, 463 U.S. 880 (1983). The NAACP Legal Defense Fund presented evidence in an *amicus curiae* brief showing that between 1976 and 1983, federal courts of appeals had decided a total of 41 habeas appeals, and had ruled in favor of the death row prisoner in 30, or 73.2%, of them.

"Contemplate what this means," says Amsterdam. "In every one of these cases, the inmate's claims had been rejected by a state trial court and by the state's highest court, at least once and often a second time in state post-conviction proceedings; the Supreme Court had usually denied *certiorari* at least once and sometimes twice; and a federal district court had then rejected the inmate's claims of federal constitutional error infecting his conviction and/or

[1]Remarks of Lewis F. Powell Jr., former Associate Justice, Supreme Court of the United States, Eleventh Circuit Judicial Conference, Savannah, Georgia, May 8-10, 1983.

THE JOURNAL OF THE NATIONAL PRISON PROJECT

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The National Prison Project is a tax-exempt foundation-funded project of the ACLU Foundation which seeks to strengthen and protect the rights of adult and juvenile offenders; to improve overall conditions in correctional facilities by using existing administrative, legislative and judicial channels; and to develop alternatives to incarceration.

The reprinting of *JOURNAL* material is encouraged with the stipulation that the National Prison Project *JOURNAL* be credited with the reprint, and that a copy of the reprint be sent to the editor.

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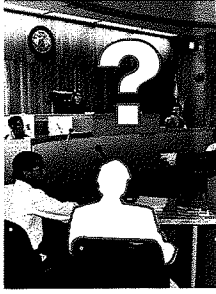
in Death Penalty Proceedings

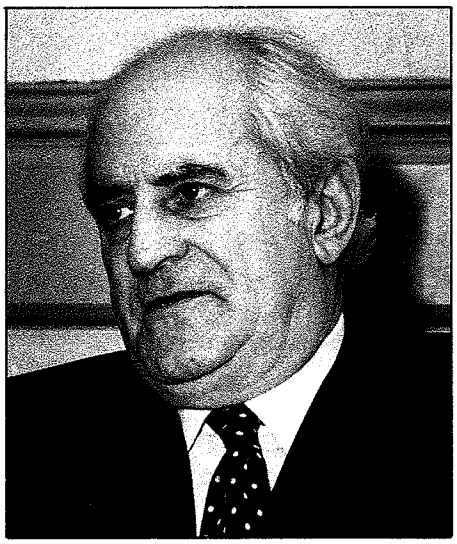


death sentence. Yet in over 70% of the cases, a federal court of appeals found merit in one or more of the inmates' claims. These figures surely suggest that the 'repetitive review' condemned by Justice Powell is not entirely without justification or social benefit in a society which prefers not to kill people in violation of its fundamental laws. Yet not a word of this does Justice Powell breathe."[2]

According to the American Bar Association's (ABA) Section on Individual Rights and Responsibilities, the rate of reversal has declined slightly since 1983, but the death penalty is still rescinded in more than 55% of the cases.

Justice Powell also omits any mention, says Amsterdam, of the fact that capital defense lawyers are, in almost every case, either unpaid volunteers donating hundreds of hours to these cases, or one of the small "corps of specialized pro bono death penalty defense lawyers." This is another "curious" omission, he says, given the *amicus curiae* brief filed in *Barefoot* by the ABA, which stated that expedited appeals in capital cases would "make incalculably more difficult the often thankless task faced by volunteer attorneys who have agreed to represent penniless, death-sentenced inmates in federal habeas proceedings. Summary procedures that deprive counsel—even those armed with a certificate of probable cause to appeal—of a minimally adequate period in which to brief and argue a client's case are likely to impair the effectiveness of all but the rarest or most well-financed of attorneys."[3]

Justice Thurgood Marshall also disputed the kind of criticism Justice Powell had offered in remarks Marshall delivered at New York University Law School in 1984. Referring to attorneys who volunteer their services to assist persons on death row in collateral challenges to their convictions and sentences, Justice Marshall said "[the attorneys] who currently are shouldering our collective burden deserve our gratitude, not our scorn and not simply our tolerance. They are making enormous sacrifices — emotional as well as financial. Prosecution of a single appeal on behalf of a person on death row frequently involves months of exhausting, seemingly futile effort. One lawyer has described the process as a 'self-lacerating investment of time and energy.' To the attorneys willing to make such investments, again and again, I wish to express my admiration and thanks."[4]



U.S. Federal District Court Judge Robert R. Merhige Jr. ordered Virginia to devise a plan which would provide lawyers to death row prisoners.

In the rush to prepare the case, important issues may be overlooked or necessary investigation may not take place.

The problem of the lack of counsel in post-conviction cases is nationwide, and, of states with large death row populations, only Florida has made a serious effort to address it. In Virginia, a lawsuit was filed last year in an effort to force the state to provide some kind of assistance to these prisoners. Virginia supplies lawyers for indigent inmates only at trial and on appeal to the Virginia Supreme Court.

Federal district court Judge Robert R. Merhige Jr. issued a recent opinion and order in that lawsuit.[5] The order held that prisoners are entitled to the appointment of counsel upon request to assist in habeas corpus proceedings in state courts. Judge Merhige also ordered the state, with 33 men on death row, to develop and implement a plan to provide lawyers for indigent prisoners. In his opinion, Merhige wrote, "The stakes are simply too high for this court not to grant, at least in part, some relief. In view of the scarcity of competent and willing counsel to assist indigent death row inmates in the exercise of seeking post-conviction relief, some relief is both necessary and warranted."

Virginia was ordered to provide death row prisoners with trained legal assistance during capital post-conviction proceedings. Currently, death row inmates obtain volunteer lawyers by contacting Marie Deans of the Virginia Coalition on Jails and Prisons. Deans has found it impossible to recruit from a shrinking number of attorneys willing to volunteer for death row cases.

Jack Boger, former assistant legal counsel for the capital punishment project of the NAACP Legal Defense and Education Fund, Inc., testified in *Giarratano* that post-conviction counsel must do a complete investigation of the client's background. He or she must also obtain the services of mental health and other experts, locate and interview former attorneys in the case, and review the entire record and the direct appeal process to determine whether error occurred. All previous convictions and records in those cases must be investigated as well as the initial determination of guilt.

"A complete knowledge of federal constitutional criminal procedure law and state substantive criminal law is rudimentary for post-conviction counsel. Capital post-conviction proceedings are permeated by 4th, 5th, 6th, 8th, and 14th Amendment jurisprudence, and knowledge of that ever-changing law is a fundamental necessity. Equally important is federal habeas corpus procedural law, which is complicated by doctrines of law unique to those proceedings. Exhaustion of state remedies, procedural default and its exceptions, presumptions of correctness of state court findings, and exceptions to such a presumption, and abuse of the writ law add significantly to the complexity of post-conviction proceedings."

—*continued on next page*

[2]Anthony G. Amsterdam, "The Tilt Against Death Row Prisoners," *Human Rights*, Winter 1987, Vol.14, No.1, p.51.

[3]Brief of *amicus curiae* of the American Bar Association in *Barefoot v. Estelle*, U.S. No. 82-6080, pp. 6-7.

[4]Remarks delivered by Justice Thurgood Marshall at New York University School of Law, April 9, 1984.

[5]*Giarratano v. Murray*, 85-0655-R, Dec. 1986.

"The death penalty frequently results from nothing more

—continued from previous page

Boger himself had, at the time of trial, represented as many as 80 inmates in state or federal post-conviction, and had helped write briefs in 300 other such cases. These cases may require 30 days of round-the-clock work, he said. Meanwhile, the attorney's work is shaped by the calendar of events leading up to the execution. As Justice Marshall put it, once the execution date is set, the race is on.

"In practice, one may be in one, two, or even three courts at once," said Boger, "depending on the status of the litigation. An attorney must simultaneously develop multiple courses of action."

A demanding task for trained lawyers, handling a death case would be next to impossible for the death-sentenced inmate. Many are limited educationally, have psychological problems, and may have low intelligence. Often they have emotional difficulties exacerbated by strained relationships with their families. Most importantly, in the face of death they are unable to summon the detachment needed to litigate their own case. Even prisoners who possess greater intelligence or emotional stability simply do not have the resources, legal or financial, to do an adequate job.

Jonathan Shapiro, a criminal defense attorney from Alexandria, Virginia, testified that he had received a desperate call from Chan Kendrick, director of the Virginia ACLU. Kendrick begged Shapiro to take the case of Wilbert Evans. Evans had an execution date set for four weeks hence, and Kendrick convinced Shapiro that he could enter the case "solely for the purpose of getting a stay of execution." Shapiro agreed to those terms, but found that once he was on the case, he could not simply abandon Evans. The emotional drain and the financial burden of the case came as a shock to him.

"I stayed and stayed and finally it was my case," he testified.

"Would you take another death case?", he was asked.

"Never," replied Shapiro.

The court reached the conclusion in *Giarratano* that the guarantees of the Constitution can only be met by the continuous services of attorneys to investigate, research, and present claimed violations of fundamental rights.

The need for attorneys continues to grow every day, and it goes unheard and unmet. In the South, where death row populations are the largest and the need the greatest, virtually nothing has been done at the state level.

"Once the execution date is set, the race is on," said Justice Thurgood Marshall.

Efforts have been made in Georgia to establish funding for a capital defense resource center at Georgia State University Law School. Yet, even though Georgia is in dire need of lawyers trained in death penalty litigation, no funding has been provided. Since the state allocates no funds for indigent defense at the trial level, leaving it to local communities, it is unlikely that the state will establish adequate funding for representation at post-conviction.

The North Carolina Death Penalty Resource Center, housed in the state's Office of the Appellate Defender, currently employs two attorneys. Through the cooperation of the state supreme court and the chief justice, private funding was obtained, and the group hopes to stabilize in the future by receiving permanent state funding.

In March Federal and state judges met with Texas bar officials to try to bring some order out of the chaos there. Some headway has been made, although things have proceeded at a snail's pace. A newly formed Death Penalty Legal Defense Fund, funded privately and with $5,000 from the Texas Civil Liberties Union, has nearly completed a census of who is on death row and by whom they are represented. Previously, an execution date could be set and never brought to the attention of those who would block it. According to Gara LaMarche, Director of the Texas Civil Liberties Union, "We're looking at a state where it is debatable whether or not the schools will open. There won't be any publicly funded professional staff organization set up here. Nonetheless, steps are being taken to turn what used to be a seriously disorganized approach to representation into a more orderly system."

Alabama, Mississippi, Louisiana, Oklahoma, and Arizona provide no funds for attorneys handling state and federal habeas corpus proceedings. While in some states proposals have been made to organize recruiting or funding efforts, the numbers on death row continue to mount while no action is taken.

The need is urgent and the situation desperate, as the volume of federal habeas petitions increases. More and more indigent death row prisoners are exhausting their direct appeals, which means that more often, inadequate defense will result in the execution of those who should have received a lesser sentence. The problem is not new. Sixty-three years ago, Clarence Darrow said:

> *I will guarantee you that you can go through the Tombs and you won't find one out of one thousand that isn't poor. You may go to Sing Sing and you will not find one out of one thousand who isn't poor. Since the world began, a procession of the weak and the poor and the helpless has been going to our jails and our prisons and to their deaths.*
>
> *They have been judged as if they were strong and rich and intelligent. They have been victims, whether punishable by death for one crime or one hundred and seventy crimes.*
>
> *And, we say, this is no time to soften the human heart. Isn't it?*[6]

Representation At Trial

> *That's the night the lights went out in Georgia,*
> *That's the night they hung an innocent man.*
> *Don't trust your soul to no backwoods Southern lawyer . . .**

In the fearful world of capital punishment, individuals live or die simply due to factors such as where they live, the color of their skin, or their economic station. Sometimes, however, one person may live and one may die just because one attorney made a mistake, and another did not.

Justice Thurgood Marshall has pointed out that the complexity of capital litigation and the inexperience of many lawyers in capital cases may lead to mistakes which spell the difference between life and death:

[6]Clarence Darrow, *Attorney for the Damned*, Simon and Schuster, Inc., New York, NY, 1957, p.102.

*"The Night the Lights Went Out in Georgia," Pix-Russ Music, written by Bobby Russell.

than poverty and poor lawyering."

Often trial counsel simply are unfamiliar with the special rules that apply in capital cases. . . . Though acting in good faith, they inevitably make very serious mistakes. Thus, in cases I have read, counsel have been unaware that certain death penalty issues are pending before the appellate courts and that the claims should be preserved; that certain findings by a jury might preclude imposition of the death penalty; or that a separate sentencing phase will follow a conviction. The federal reports are filled with stories of counsel who presented no evidence in mitigation of their client's sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute. I kid you not, precisely that has happened time and time again.[7]

Almost as if to assure that no attorney ever takes a death penalty case twice, thereby gaining expertise, most states, particularly in the South, are unwilling to pay court-appointed counsel adequately. Limits are placed on expenditures and compensation which, along with discouraging attorneys from volunteering to take cases, means that funds are not available for investigation, procurement of necessary expert witnesses, or other expenses vital to the effective assistance of a poor person charged with capital murder.

The funds which states and counties do provide are far below the minimum amounts needed. One Mississippi lawyer worked for 400 hours and was paid $1,000, a compensation rate of $2.50 per hour.

While quality representation at the post-conviction phase is most vital to the ultimate fate of the defendant, vigorous representation at the trial level would alleviate the need for a large number of appeals down the road. Fundamental improvement is needed in the quality of trial preparation and performance, yet, ironically, the quality of representation usually improves as one

[7]Remarks of Justice Marshall at Judicial Conference of United States Court of Appeals for the Second Circuit, September 6, 1985. For examples of the type of representation described by Justice Marshall, see, e.g., *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *King v. Strickland*, 748 F.2d 1462, 1463-64 (11th Cir.1985); *Douglas v. Wainwright*, 739 F.2d 531 (1984); *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984); *Young v. Zant*, 677, F.2d 792, 798 (11th Cir. 1982); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982).

One Mississippi lawyer worked for 400 hours and was paid $1,000, a compensation rate of $2.50 per hour.

climbs the appeals ladder.

The Mississippi Supreme Court recently noted that, "the average Mississippi criminal defense lawyer has no familiarity [with] highly technical death penalty issues. . . . In Mississippi, persons accused of capital crimes have been represented by attorneys with no previous trial experience of any kind and one was even represented by a third-year law student."[8]

The indigent defendant may pay for the attorney's shortcomings with his or her life.

For example, John Young, 18 years old at the time the crime took place, was convicted in the 1975 murder of three elderly Macon, Georgia women. Young was appointed an attorney who was addicted to drugs and who actually disappeared for years after the trial. He also put on no mitigating evidence. He missed details about Young's life such as the fact that when he was three years old he saw his mother killed by her boyfriend.

Young's case went through habeas proceedings before the attorney could even be found. When he was located, attorneys were able to document his physical and emotional inability to represent anyone at that time. Yet the federal court refused to consider the evidence, saying that despite the fact that the attorney had gone into hiding and was unavailable during earlier appeals, the time to have raised the issue had passed. In a bizarre twist, the trial lawyer was convicted on drug charges, and found himself serving time in the same institution as his former client.

James David Raulerson, convicted in Florida of killing a police officer, had a court-appointed lawyer who failed to make any plea at all for his client's life. "It's awfully hard to argue for a man's life," he said. "I have done it too many times, it never gets easy. I do not feel as though I can persuade you now. . . .

"It's extremely difficult for me now after having argued for two or three

—*continued on next page*

[8]*Irving v. State*, 441 So. 2d, 846 (Miss. 1983).

The condemned man himself remembers the many points of his procession through the judicial system at which he might have been spared, but was not. He knows, too, from his years of waiting in prison, that most of those who committed crimes like his have evaded the execution that awaits him. So do the prosecutors who have pursued him through the court system, and the judges who have upheld the sentence. And so do the defense lawyers, exhausted and overwrought for reasons that, given their client's crimes, must be hard for most people to fathom.

I am one of those lawyers, and I know the sense of horror that propels those last-minute appeals. The horror derives not from death, which comes to us all, but from death that is inflicted *at random*. . . . Up close, that is what capital punishment is like. And that is what makes the state's inexorable, stalking pursuit of this or that particular person's life so chilling.

David Bruck
attorney in South Carolina

In the case of Michael Smith, executed last summer in Virginia, there was clearcut constitutional error, but the lawyer didn't raise it on appeal. They're not going to execute the *lawyer*. Lawyers don't even get disbarred for that. Nothing happens! They go right on practicing. But the client gets executed for a mistake that the lawyer made. To me, that is offensive beyond words. There's something unseemly about that, about executing people because their lawyer didn't know that some case was percolating in the federal system and was about to be decided by the Supreme Court. That was Michael Smith's situation. That's not right. It's like shooting ducks in a barrel, killing a person if the lawyer hasn't preserved any of the issues. I don't know what thrill the state or the Attorney General gets out of that. How defenseless can a person be?

Stephen Bright
Southern Prisoners' Defense Committee, Atlanta, Georgia

The lawyers who volunteer to represent convicts on death row perform a second essential function: they ensure that we do not forget what we are doing.

Justice Thurgood Marshall

—continued from previous page

days to feel that I'm very effective in front of you. . . . You heard all the testimony, I'll say nothing further on behalf of my client other than just weigh and consider your decision."

The attorney never told the jury that Raulerson was married and had a child; that his stepfather had died in his arms after being shot several years earlier; or that he had maintained regular employment for a number of years before the death of his stepfather.

In a classic example of how the death penalty is arbitrarily applied, Judge Joseph Hatchett of the U.S. Court of Appeals for the Eleventh Circuit described the case of John Eldon Smith in Georgia:

> *[Smith's codefendant] Machetti, the mastermind of this murder, has had her conviction overturned, has had a new trial and has received a life sentence. This court overturned her first conviction because in the county where the trial was held, women were unconstitutionally under-represented in the jury pool . . . .Her lawyers timely raised this constitutional objection. They won; she lives.*
>
> *John Eldon Smith was tried in the same county, by a jury drawn from the same unconstitutionally composed jury pool, but because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. His lawyers waived the jury issue. Smith v. Kemp*, 715 F.2d 1459, 1476 (1983).

Young, Raulerson, and Smith have been executed.

Trial attorneys for Terry Goodwin, another Georgia case, stressed to the jury that they were representing Goodwin only because they had to. They told the jury, "Well, if you decide to impose the death penalty today and you decide to sentence him to the electric chair, historically speaking, you have got a very likely candidate.

"He is a little old nigger boy, he would not weigh 150 pounds. He had got two court-appointed attorneys appointed by this court to represent him to do the very best we can do for him. He is poor. He is broke. He is probably mentally retarded. I dare say he has not got an I.Q. of over 70. He is uneducated. Probably just unwanted. This is the kind of people that we have historically put to death in Georgia."

The jury sentenced Goodwin to death. After years of appeals other attorneys succeeded in having Goodwin's death sentence set aside [684 F.2d 794 (1982)] and a new trial granted. Goodwin pled guilty and is serving a life sentence in the Georgia prison system.

Goodwin is not an isolated example. Two other Georgia death row inmates, Charlie Young and George Dungee, were referred to as "niggers" by their defense counsel in closing arguments.

David Bruck, a defense attorney from South Carolina, pointed out that "These spectacles have a cost for our legal system, and that is the self-respect of our legal institutions. We would not dispose of property in any legal proceeding the way those people's lives were disposed of."

Justice Marshall, dissenting in the denial of certiorari in *Messer v. Kemp*, 106 S.Ct. 864 (1986), wrote,

> *Counsel did not inform the jury, during summation or at any other time, that petitioner had no prior criminal history, had been steadily employed, had an honorable military record, had been a regular churchgoer, and had cooperated with the police. Counsel did not give the jury a single reason why it should spare petitioner's life. . . .*
>
> *The net result was that the petitioner was without an advocate at the sentencing phase.*

A former law clerk to Supreme Court Justice John Paul Stevens recently wrote that "the imposition of the death penalty frequently results from nothing more than poverty and poor lawyering." In his experience he found, "Again and again, in cases that I reviewed, potential mitigating evidence was readily available—medical experts who could testify to mental retardation or other evidence of diminished capacity; relatives who could help explain how and when this individual had been brutalized; fellow veterans who could testify about combat valor, or about the haunting, warping effects of the battles they had experienced together. Again and again, defense counsel made little or no effort to reach such witnesses."[9]

In June of this year the Supreme Court denied relief to a Georgia death-sentenced inmate named Christopher Burger. In his dissent, Justice Blackmun said, "His counsel failed to investigate mitigating evidence and failed to present any evidence at the sentencing hearing despite the fact that petitioner was an adolescent with psychological problems and apparent diminished mental capabilities. . . ."[10]

The lawyer never asked for a psychological evaluation of his client, spent only six hours total with him, and rejected the assistance of a lawyer who had known Burger from his home town on the basis that the lawyer was black. The lawyer had offered to come to Georgia to assist at his own expense.

"In my view," said Justice Blackmun, "if more information about this adolescent's psychological problems, troubled childhood, and unfortunate family history had been available, there is reasonable probability that . . . 'the sentencer— including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Strickland v. Washington*, 466, U.S., at 695.'"[11]

While some capital cases are well-defended by appointed counsel, as long as many trial lawyers remain ill-trained, underpaid and inadequately monitored, the poor will continue the march to their deaths without ever having been given a fair chance in our legal system.

FLORIDA'S CCR

More Staff Needed for "Emergency Surgery"

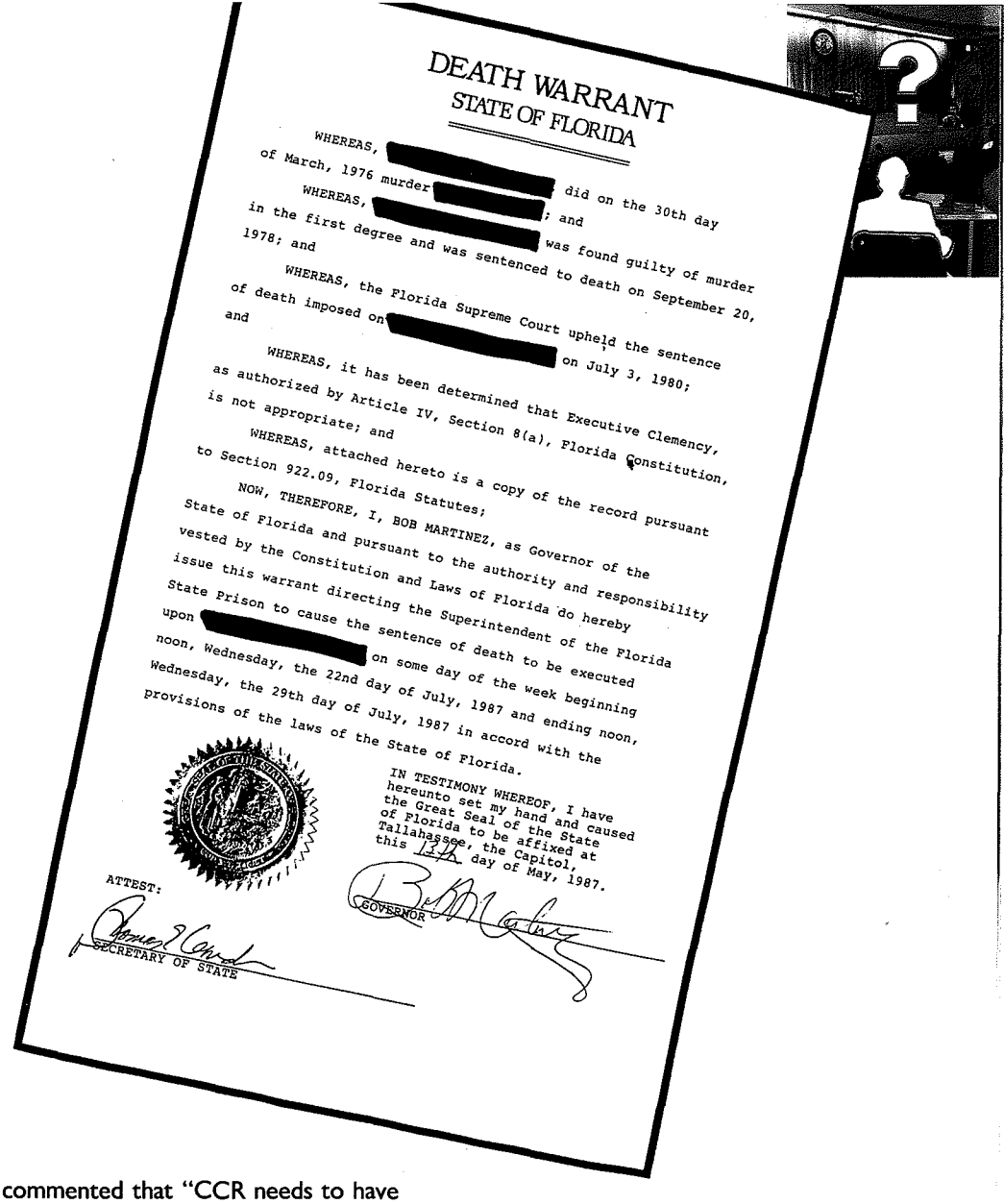
Two years ago Florida created the Capital Collateral Representative (CCR), a law office mandated to represent indigent defendants in state and federal post-conviction proceedings which challenge the validity of either the judgment of guilt or the death sentence.[12]

[9]Sloan, "Death Row Clerk," *The New Republic*, February 16, 1987.

[10]*Burger v. Kemp*, 55 L.W. 5131 (6/26/87).

[11]*Id.*

[12]See, Elvin, "Florida Death Penalty Appeals Office



DEATH WARRANT
STATE OF FLORIDA

WHEREAS, [redacted] did on the 30th day of March, 1976 murder [redacted]; and

WHEREAS, [redacted] was found guilty of murder in the first degree and was sentenced to death on September 20, 1978; and

WHEREAS, the Florida Supreme Court upheld the sentence of death imposed on [redacted] on July 3, 1980; and

WHEREAS, it has been determined that Executive Clemency, as authorized by Article IV, Section 8(a), Florida Constitution, is not appropriate; and

WHEREAS, attached hereto is a copy of the record pursuant to Section 922.09, Florida Statutes;

NOW, THEREFORE, I, BOB MARTINEZ, as Governor of the State of Florida and pursuant to the authority and responsibility vested by the Constitution and Laws of Florida do hereby issue this warrant directing the Superintendent of the Florida State Prison to cause the sentence of death to be executed upon [redacted] on some day of the week beginning noon, Wednesday, the 22nd day of July, 1987 and ending noon, Wednesday, the 29th day of July, 1987 in accord with the provisions of the laws of the State of Florida.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed at Tallahassee, the Capitol, this 13th day of May, 1987.

GOVERNOR

ATTEST:

SECRETARY OF STATE

The CCR office began operating in the fall of 1986, as the population of death row reached 239, the largest in the United States, and as the pool of volunteer lawyers available to provide post-conviction death penalty representation became completely exhausted. In a state where someone is sentenced to death nearly every week, the backlog resulting from the inability to proceed with executions motivated the Legislature to act.

Volunteer groups were unable to handle the tremendous caseload and recruitment of volunteer attorneys became an impossible task. None of the large law firms which had agreed to take cases would get involved ahead of the issuance of a death warrant. When the Florida Supreme Court indicated that no one would be executed without counsel, wheels were set in motion for the creation of CCR. James Rinaman, past president of the Florida Bar Association, said that the CCR bill succeeded in part because of the joint support of the Attorney General, the Governor, the judiciary, and the bar association, but that most decisive in its passage was support from 18 of the largest law firms in the state. These same firms had been heavily lobbied earlier to provide legal representation and consequently understood the tremendous need for skilled counsel.

Last year, when former Governor Graham began signing four warrants a month, resources at CCR were strained at the seams. Only 30 days were allowed to litigate death penalty claims after the warrant was signed. Under this system, at any one time there are large numbers of people who are eligible for death warrants, but the Governor gives no warning as to which of those he will sign the warrants on. With only 30 days to appear before four or five courts, and with nine attorneys to do that, working at CCR burned out four lawyers within the first year. Director Larry Helm Spalding says, "Unless the executive develops some predictable method of signing death warrants, and until CCR is properly funded, CCR cannot meet the 30-day rule *and* ensure meaningful access to the courts."

Judge John C. Godbold of the Eleventh Circuit Court of Appeals said that working within the 30-day limit amounted to "emergency surgery," and commented that "CCR needs to have more lead time to work up the necessary papers and to do the necessary preparation. Even 60 days would still be emergency surgery."[13]

Desperate to convince the Legislature of the need for more money and staff, last fall Spalding asked the Bar Information Program of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants to sponsor a study of attorney hours required in post-conviction capital cases. Spalding hoped to be able to establish a baseline comparison to show CCR's need for increased funding. The study, conducted by the Spangenburg Group of Newton Highlands, Massachusetts, was to assist legislators in providing a reliable caseload/workload formula to serve as a foundation for CCR's budget request for Fiscal Year 1988 and beyond.[14] It revealed that 41 firms in Florida averaged 2,284 attorney hours and $18,467 out-of-pocket expenses on an "average" death penalty case on appeal.

CCR's budget was determined largely on a "best-guess" basis. The ABA study has now shown that the guess was inadequate. CCR has requested an increase from $840,000 to $2.9 million.

"I think everybody realizes CCR needs more help," says Jim Smith, former Attorney General and a prime mover in the passage of the bill to create CCR, "but they are just not a popular program in the Legislature."

Additional positions have recently been funded by the Legislature, and CCR hopes to increase its staff of experienced attorneys.

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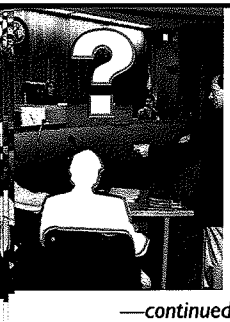
Opens," *NPP JOURNAL*, No.7, Spring 1986, p.1.

[13]Source, NPP interview with Judge John C. Godbold on February 19, 1987.

[14]"A Caseload/Workload Formula for Florida's Office of the Capital Collateral Representative," and a separate document on the survey of private attorneys, entitled "Time and Expense Analysis in Post-Conviction Death Penalty Cases" are available without charge from John Arango, project coordinator, Bar Information Program, Box 338, Algodones, NM (505) 867-3660.



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For more information about CCR, contact Larry Helm Spalding, Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, FL 32301, 904/487-4376. ■

POST-CONVICTION

ABA Funds Death Penalty Project

Julia Cade

The nationwide problem of lack of representation for indigent persons on death row has become so critical that the American Bar Association (ABA) has become actively involved. The ABA's Post-conviction Death Penalty Representation Project has been in the proposal/study phase for several years, but was formally inaugurated in August 1986.

"After years of foot-dragging," said Russell F. Canan, consultant to the project, "the ABA has finally decided to take an aggressive role in this crisis."

The Board of Governors of the ABA has granted the Project $88,000 for fiscal year 1987-88.

At no time has the ABA taken a position either in favor of or against the death penalty. However, the ABA has been on record for a number of years as taking a strong stand supporting the provision of counsel for post-conviction proceedings. The paper resolutions by the ABA House of Delegates in 1979 and 1982 on this issue have produced no concrete responses. The new Post-conviction Project has received funding, has a small staff and an initial crop of volunteer attorneys.

For years the full-time death penalty bar has consisted of approximately one dozen attorneys on the staffs of organizations such as the Legal Defense Fund (LDF), Southern Prisoners' Defense Committee (SPDC), Team Defense, ACLU, Southern Poverty Law Center and specialized appellate offices in public defender programs in a handful of states. However, the national death row census has climbed from 593 persons in December, 1979 to over three times that number: 1,911 in August, 1987.

Part of the ABA Post-conviction Project's mission is to appeal to state legislatures, courts, Congress, bar associations and the general public through an education campaign to provide adequate public funding for representation of indigent death row inmates. By using the Florida CCR example as a successful model, along with similar programs in California and North Carolina, the Project can build on what many think is the only sensible long-range solution to the crisis on death row: state-funded appellate offices/resource centers.

Until the long-range objective can be met, an emergency placement system has been set up as another part of the ABA Post-conviction Project's mission. Experienced post-conviction death penalty litigators have been hired as consultants for the private bar *pro bono* attorneys who take on the "falling between the cracks" emergency cases in the interim. As of this writing, 70 attorneys have volunteered. In addition, a recruitment effort has been launched in the large urban centers of New York City, Boston, Philadelphia, Chicago and Washington, D.C. to enlist commitments from large firms. The next stage of recruitment will be in some of the death penalty states such as Texas and Arizona.

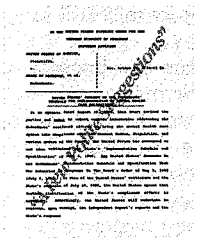
The consultants to the Project are Esther Lardent and Russell Canan. Lardent has organized *pro bono* litigation systems throughout the country, and Canan is an experienced death penalty litigator. Debbie Fins of the Legal Defense Fund also served as consultant during the first year. The group has developed the recruitment effort, drafted pleadings and a handbook, and is formulating a mentor system in every state to assist the volunteer attorneys with their cases.

Interested attorneys should contact Esther Lardent, ABA Post-conviction Project, 1800 M Street, N.W., Washington, D.C. 20036, (202) 331-2279; Russell Canan, 511 E Street, N.W., Washington, D.C. 20001 (202) 393-7676. ■

Julia Cade is a paralegal at the Prison Project.

U.S. v. Michigan: An Update From the Battlefield

Elizabeth Alexander



In the first issue of the *JOURNAL*[1], we reported on the efforts of William Bradford Reynolds to transform the Special Litigation Section of the Civil Rights Division into another battalion in the counterrevolutionary army against civil rights. One of the major battlefields in Reynolds' war has been the State of Michigan. In 1984, Reynolds personally vetoed a settlement negotiated by his own lawyers because it imposed too many obligations on the Michigan prison system. After Justice Department lawyers filed a new toothless consent decree at Reynolds' behest, federal district judge Richard A. Enslen rejected it as unenforceable and required the Department of Justice and the State to file a new consent decree that included significantly stronger provisions for enforcement, including compliance hearings and a role in monitoring for the National Prison Project.

Since the consent decree was entered, in some areas the decree has had a significant impact in curing constitutional violations. In other areas, major problems remain. One constant, however, has been the failure of the Department of Justice to advocate on behalf of the constitutional rights of the Michigan prisoners.

Most recently, at the urging of the Prison Project, and over the objections of the Department of Justice, the judge held a contempt hearing on the issue of

Elizabeth Alexander is a senior staff attorney with the National Prison Project.

[1]See Alexander, "Justice Department Retreats: The Michigan Case," *NPP JOURNAL*, No. 1, Fall 1984, p.1.

overcrowding. The judge learned that, among other conditions caused by the overcrowding, new prisoners were being housed on the bulkheads in the Reception Area. Aside from being a serious fire hazard, the Reception Center was home to an army of pigeons that befouled the beds and food of the prisoners.

Based on the testimony at the hearing on May 22, 1987, the judge found the State in contempt, temporarily stopped the influx of prisoners into the system, and ordered the State to end all overcrowding in the system by November 1, 1987, or pay fines of $10,000 per day. The Department of Justice refused to ask for sanctions against the State.

Another major victory for the Constitution occurred with the abolition of the Michigan Intensive Program Center (MIPC). This "super-maximum" prison, originally set up as a facility for behavior modification, locked troublesome prisoners for prolonged periods in cells in which the lights were controlled from outside the cell by the staff. A catwalk allowed staff observation into an inmate's cell at any time without the inmate's knowledge. Indeed, the "psychologist" assigned to MIPC did part of his "counseling" from the catwalk. The frustrated and isolated inmates responded by throwing human waste and setting fires.[2]

Although Department of Justice experts condemned the prison, the consent decree failed to address MIPC's continuing existence as a super-maximum facility. The National Prison Project, in its limited role as amicus curiae (friend of the court), however, continued to insist on MIPC's abolition. Ultimately, the Michigan Department of Corrections agreed to change MIPC into a protective custody facility in order to satisfy the court's orders. Throughout the litigation, despite the strongly worded reports of its own experts, the Department of Justice never opposed the continued operation of MIPC.

An even more egregious example of Justice's blindness to basic constitutional requirements was its position regarding the mental health care provisions of the consent decree. Under the consent decree and its State Plan for Compliance, the State of Michigan was to present a plan for adequate mental health care by April 1985. The Department of Justice agreed to an extension of that deadline to October 1985.

On the date that the mental health plan was due, the State filed an adequate mental health plan—along with a motion asking the court to relieve the State of its obligation to implement the plan. The Department of Justice did not oppose the State's motion. Once again, the National Prison Project as friend of the court had to battle alone for the Constitution. Luckily, the Prison Project prevailed and Judge Enslen held the State of Michigan in contempt of court for failing to submit a mental health plan to the Court that the State was prepared to implement.[3]

A final example of Justice's approach to enforcing the consent decree involves the fire safety provisions. Primarily because of bureaucratic delays in planning, numerous provisions for fire safety improvements have fallen seriously behind schedule. In July of 1986, the state officials met with Justice and its fire safety expert. The fire safety expert recommended a set of revised dates for completion of the projects, contingent on agreement by the State to provide closer monitoring on the projects and to complete all the work by the end of 1987.

In October of 1986, the State filed its motion for an extension of time. Justice urged the court to approve the request, even though the State's request did not include the new monitoring requirements recommended by Justice's fire safety expert. Subsequently, on the eve of the hearing, the State proposed even later dates for completion of the projects. Even though many of the dates extended into 1988, the Department of Justice did not ask that the State be held in contempt. Ultimately, although it granted the extended schedules, the court found the defendants in noncompliance with the fire safety requirements and required the State to designate someone from the Governor's office to monitor future fire safety compliance. In the event of future noncompliance, the court's order specifically referred to the official's responsibility to demonstrate why the State should not be held in contempt of court.

In the course of the litigation, Judge Enslen had repeatedly reminded the Department of Justice that its role is to enforce the consent decree, rather than to enforce the Department of Justice's limited notions of what the Constitution requires. In short, Mr. Reynolds' personal assurance to the judge that the Department of Justice would vigorously enforce the consent decree has become just one more broken promise from the leading contra in the civil rights war. ■

[2]Such problems are typical of those engendered by such facilities. See Bronstein, "Super-Max Prisons Have Potential for Unnecessary Pain and Suffering," *NPP JOURNAL*, No. 4, Summer 1985, p.1.

[3]Subsequently the State submitted another plan to the court. After modifications, in October of 1986 the court accepted the plan and ruled that the State had purged its contempt.

Few Diversion Programs Are Offered Female Offenders

Russ Immarigeon

"Planners concerned with reducing the size of the female prison population," a report from the New York State Division of Criminal Justice recently observed, "must look for solutions at the front end of the criminal justice system, not at the back end. That is, programs and policies that are geared toward keeping women out of institutions will have a greater impact on reducing the size of this population than will efforts directed at lowering their rate of return."[1]

The second part of the Women in Prison two-part article appears in this issue. This two-part article raises serious doubts about the propriety and efficacy of imprisoning women offenders who are not a public safety risk. Last issue Russ Immarigeon described the state of women's imprisonment in the United States and offered some suggestions about how this situation has developed. In part two, printed in this issue, he describes several programs throughout the country to divert or remove women from incarceration and discusses concerns for testing the success of such diversion programs.

Unfortunately, very few programs focus specifically on displacing women offenders from terms of imprisonment. In the past, female offender-oriented programs have tended toward providing increased (and necessary) services for women and their children *while incarcerated*. Only recently have programs started to specifically keep women from

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[1]New York State Division of Criminal Justice Services, *Female Offenders in New York State*, p. 62.

A high percentage of imprisoned women have a history of being physically and/or sexually abused.

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being imprisoned in the first place, or reduce their length of stay after being sentenced to jail or prison.

These emerging programs are long overdue, and are especially timely.

Several months ago, the U.S. Bureau of Justice Statistics reported that the population of women's prisons has been growing at a greater rate than the population of men's prisons every year since 1981. Since crime statistics for this period suggest that female criminality has increased only with regard to property, non-violent offenses, this surge in women's imprisonment results from harsher sentencing for a class of offenders who would be less likely to receive prison terms if they were male.[2]

Moreover, evidence increasingly suggests that many imprisoned women become "criminal" as a result of a history of physical or sexual abuse. Self-report data gathered by Brandeis University researcher Mary E. Gilfus from 96 women incarcerated at a state women's prison in Massachusetts reveals some significant relationships between abuse and "criminality."

"The link between early exposure to violence and entry into criminal patterns," Gilfus argues, "lies in the economic necessity which is created by the coping strategies chosen in responding to physical and sexual violence." These strategies include substance abuse, running away from home, and early pregnancy.

Gilfus recently told the Third National Family Violence Research Conference held at the University of New Hampshire that "as children [many of the women she interviewed] were exposed to such an overload of traumatizing events, including parental death and suicide as well as life-threatening physical abuse, neglect and rape, that the day to day violence in their lives was often over-shadowed and down-played. They were struggling so hard simply to survive one trauma after another that they could not afford to stop to feel the pain or register the impact of what seemed like 'normal' violence. It seemed as if they were accustomed to such a high level of violence (much like background noise) that they did not think it unusual or abusive unless it became life-threatening, and therefore did not define violent encounters as such until pressed to do so.[3]

Programs designed to address the circumstances and needs of abused and non-abused women offenders, and to divert or remove these women from imprisonment include the Justice Outreach Program of the Women's Self-Help Center in St. Louis, Community Services for Women of the Social Justice for Women program in Boston, and the Elizabeth Fry Center in San Francisco.

Women's Self-Help Center's Justice Outreach Program

The Women's Self-Help Center was established in 1976 to reduce physical and sexual abuse against women in St. Louis by providing a crisis hotline, client services, and community education and training. Gradually, the Center's professional and volunteer staff became increasingly involved with battered women who killed their partners in self defense. Through work with these women, the Center soon realized that a high percentage of imprisoned women have a history of being physically and/or sexually abused.

Research conducted by the Center's staff confirmed their worst suspicions. "Thinking back over the first 17 years of their lives," the Center's study found, "11.2% [of those women responding to the Center's initial inquiry] reported having been sexually abused, 12% reported physical battering, and 16% reported having been subjected to both physical and sexual abuse as children.

"Reflecting on their experiences as adults," the study also found, "25.6% [of these imprisoned women] reported being victims of physical battering, 4.8% rape, and 23.2% reported being victims of physical abuse and rape."[4] Furthermore, a study by the Missouri Department of Human Services of women prisoners at the Renz Correctional Center found that 80% of them were incarcerated as a result of their affiliation with abusive males.

The Justice Outreach Program goes into city and county jails to find women arrestees or offenders with a history of being physically or sexually abused. "Women are extremely self-blaming," says Carol Dodgson, a Women's Self-Help Center social worker. "They are confused about how they put up with abuse for so long." The Justice Outreach Program works with these women so that they can talk specifically and articulately about their abuse in court. "It is important," Dodgson adds, "to explain the context of the killing to the jury."

The Justice Outreach Program acts as an intermediary between women offenders and judges, jail staff, attorneys and probation officers. In addition to locating community services and providing counseling for these women, the program tries to educate criminal justice professionals about the realities of women who have suffered from physical and sexual abuse.

Community Services for Women

In January 1987, Social Justice for Women, a private, non-profit agency offering comprehensive services to female offenders, established Community Services for Women, an alternative sentencing program to divert women from MCI-Framingham, the women's prison in Massachusetts.

According to Sister Jeannette Normandin, who served for six years as Framingham's chaplain, the program recommends "punitive yet constructive sanctions for women offenders who are on the verge of going to Framingham for the first time who are serious about changing the course of their life."

"It's not somebody telling her what she needs."

Sr. Normandin, who found at Framingham that "prison doesn't work as a deterrent or as rehabilitation," attends Boston Municipal Court sessions three times a week to identify cases where women offenders seem prison-bound. Referrals also come from prosecution and defense attorneys, probation officers, and even some judges. After identifying potential clients, Sr. Normandin speaks with the client's prosecuting and defense attorneys and the assigned probation officer. She then asks the court for a continuance (in Massachusetts, sentencing occurs immediately following conviction).

A sentencing plan is developed with the offender. "It's not somebody telling her what she needs," says Sr. Normandin. Many of the women accepted as clients have problems associated with alcohol or drug abuse, mental illness or mental retardation. Sentencing plans consist of community service or restitution matched with the offender's specific

[2]See, for example, Peter Applebome, "Women in U.S. Prisons: Fast-Rising Population," *New York Times*, June 16, 1987; and Nicholas C. McBride, "U.S. Putting More Women in Prison, Victimizing Many Children," *Christian Science Monitor*, June 16, 1987.

[3]Mary E. Gilfus, "Life Histories of Women in Prison." Boston, MA: Women's Health and Learning Center, 1987. pp. 4-5.

[4]Women's Self-Help Center, "The Justice Outreach Program: A Proposal." St. Louis, MO: Women's Self-Help Center, 1986. Further information about this program can be obtained from Louise Bauschard, Executive Director, Women's Self-Help Center, Inc., 2838 Olive St., St. Louis, MO 63103/ (314) 531-9100.

skills and talents and special supportive services designed to meet their needs. Prostitutes, for example, receive shelter from pimps and supportive services toward leaving the profession. Community Services for Women monitors the sentencing plans, and reports to the court, probation and defense and prosecution attorneys on each plan's progress.[5]

The Elizabeth Fry Center

The Elizabeth Fry Center was established in 1986 to provide shelter and meals, child care, job workshops, money management training, parenting training, employment counseling, substance abuse counseling, personal counseling and recreational and religious programs for low-risk women prisoners and their children under age six.

The Center's program is authorized by legislation which permits women prisoners to serve part of their sentence with their children in a residential setting. "The Elizabeth Fry Center," according to The Rev. Deborah Haffner, the Center's director, "is founded on the conviction that it is with the community, not with the distorted culture of prison, that the offender must learn to cope."

The Center, a Project of the San Francisco Council of Churches, is located in a large Victorian house near Golden Gate Park and the University of California Medical Center, and has enough bedspace for 10 women and their children. Ten staff members operate the program on an around-the-clock basis.[6]

Conclusion

The programs identified in this article are not the entire universe of program efforts designed to divert women from incarceration. Other programs exist, and several programs are now in the process of starting. Clearly, however, too few programs challenge the appropriateness of women's imprisonment. More work is required.

As with any programs promising to serve as an alternative to imprisonment, these face several important tests before their displacement function can be defined as successful. First, do they act as true alternatives to imprisonment? Second, do they divert enough women offenders to reduce overcrowding in many women's institutions without prompting an expansion of the number of available cells? Lastly, what values accompany the

Do they act as true alternatives to imprisonment?

implementation of these programs? None of these programs is being formally evaluated, but the history of alternatives to imprisonment programs suggests a number of cautions.

The Social Justice for Women's alternative sentencing program, for example, targets women who have not been imprisoned before, along with women who seem to require and desire direct social services. Given the program's small staff and caseload, however, how many of these women would actually have been imprisoned? Local studies have not been done to identify the characteristics of women offenders in the Boston Municipal Court receiving terms of imprisonment. Moreover, in generally providing services to women in need, the program may be stretching its limited resources to cover too many functions, resulting, perhaps, in intervention with women who would not ordinarily be imprisoned.

Programs focusing exclusively on women offenders are not likely to divert the full number of women offenders who could potentially be diverted from imprisonment. The Elizabeth Fry Center, for instance, only serves 10 women and their children. Although several similar centers exist in California, women entering the state's penal system outnumber women being released to these programs. Moreover, such programs are unlikely to receive enough funding to support the quantity and range of staff expertise required for such efforts touching larger numbers of women.

The criminal justice system is basically a series of agencies with uncoordinated services.

Thus, for the displacement of as many women as possible from imprisonment, traditional criminal justice agencies, such as pretrial service, probation, defense, and parole agencies, will have to specifically apply their efforts toward women offenders. However, few agencies are likely to initiate such an emphasis without the advocacy and input of reformers outside the system.

Lila Austin, a founder and administrator of Social Justice for Women, makes several cogent points in this regard. The criminal justice system, she says, is basically a series of agencies with uncoordinated services. Women are particularly affected by such disorganization. Within a relatively short period of time (e.g., six months), women offenders go rapidly through the criminal justice process, from pre-trial detention to post-release, and get programmatically lost along the way.

Private sector agencies, Austin argues, are in a better position to take a system-wide perspective, and to bring various service providers together, often for the first time, for the benefit of women offenders. Social Justice for Women, of which Community Services for Women is a significant part, provides health, pregnancy, parenting, substance abuse counseling and other services for women offenders in a variety of institutional and non-institutional settings. In this way, Social Justice for Women addresses women's needs, not state agency priorities. "We're not running prisons," Austin observes, "we are on the outside conscious of what's going on."

Finally, M. Kay Harris, an associate professor of criminal justice at Temple University, has written that "it is doubtful that reformers can make any real progress toward reduction of imprisonment if their efforts are shaped and limited to satisfy the strident demands of the present harsh political climate." Programs for women offenders may be strongest in this regard. Like many of the vibrant parent-child programs run by Prison MATCH and other organizations, the alternative to imprisonment efforts in this article each stress the importance of identifying and addressing the unique social and economic needs of female offenders who are imprisoned, not the political and punitive needs of state agencies. Unlike institution-based programs, however, they directly challenge the appropriateness of women's imprisonment.

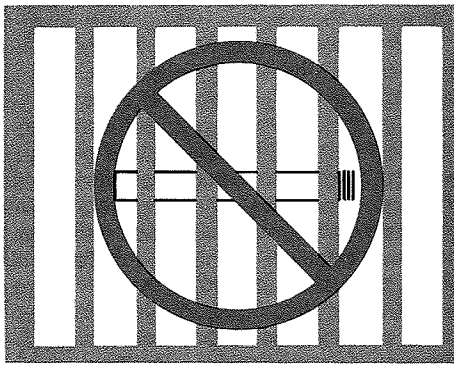
Harris argues further that "significant movement away from the practice of imprisonment cannot be anticipated as long as alternatives (to imprisonment) are developed from a dominantly pragmatic point of view without careful consideration of the underlying values and goals."[7] Emerging women's programs largely go beyond incarcerative goals and values, and stress concrete and specific needs. Observing that many of the women in her study were drug-addicted, Gilfus argues that "a sound social policy should address addiction. Prisons are not and will probably never be optimal sites for the treatment of addictions." ■

[5]Futher information about this program can be obtained from Sister Jeanette Normandin, Community Services for Women, 20 West St., Boston, MA 02111/(617) 482-0747.

[6]Further information about this program can be obtained from The Rev. Deborah Haffner, Director, The Elizabeth Fry Center, 1251 Second Avenue, San Francisco, CA 94122/(415) 681-0430.

[7]M. Kay Harris, "Strategies, Values, and the Emerging Generation of Alternatives to Incarceration." *New York University Review of Law & Social Change*, 12(1): 169, 1983-1984. See also, M. Kay Harris, *The Goals of Community Sanctions*. Washington, D.C.: U.S. National Institute of Corrections, 1986.

Weighing Privilege to Smoke Against Rights of Non-Smokers



New and disturbing information has surfaced about the health hazards of tobacco smoke for non-smokers who are exposed. The NPP recognizes that smoking may be one of the few privileges retained by prisoners which helps to relieve the boredom, tension and cruelty of prison life. At the same time, prison officials are faced with increasingly difficult housing and classification decisions because of pervasive overcrowding. Although we know of no easy solutions, we believe that these difficult issues need to be addressed.

L. Felipe Restrepo

Anybody who has been subjected to tobacco smoke in confined quarters should not be surprised at the new-found social awareness that tobacco smoke is, at least, obnoxious, offensive and irritating, and at worst—deadly. Constant exposure to environment smoke in the restricted confines of a prison or jail is a problem that must be addressed. The Surgeon General of the United States' annual smoking report confirmed the obvious, that the ill effects of tobacco smoke are not confined to the smoker. "[It] is now clear that disease risk due to inhalation of tobacco smoke is not solely limited to the individual who is smoking, but can also extend to those individuals who inhale tobacco smoke in room air."[1]

While there is no constitutional right to be free from tobacco smoke, there is likewise, no legal right to smoke in the presence of non-smokers. John F. Banzhaf, the Executive Director of Action on Smoking and Health (ASH) suggests that the rights of non-smokers and smokers can be readily accommodated by restricting smoking to designated areas. Such an approach would be particularly suitable in a prison situation where the privilege to smoke must be weighed against the rights of non-smokers to be free of tobacco smoke. Because individual inmates are not free to move about the prison at their pleasure the only way to ensure that both interests can be accommodated would be to establish smoking and non-smoking sections in common areas.

The privilege to smoke is currently regulated in common carriers, no-smoking areas in theaters, hospitals and public buildings, to cite a few. Many ordinary, and less offensive activities, such as consuming liquor, spitting, changing one's clothes and listening to loud music are currently regulated or prohibited without violating anyone's privacy rights. Government in this country has traditionally regulated activities that in and of themselves might not be offensive or hazardous but when performed in the presence of others prove to be both obnoxious and hazardous. Spitting, for example, was declared illegal due to the spread of tuberculosis at the turn of the century; while those of majority are free to drink, they are not free to drive and endanger the lives of others.

In further support of his position that there is no per se "right" to smoke Banzhaf argues that common carriers and public places are under no obligation to accommodate analogous activities such as chewing and spitting tobacco and burning incense. Furthermore, smoking has long been regulated with the objectives of reducing fire risks and damage to property and manufactured goods. One can only hope that protecting the health of non-smokers is as worthy a goal.

The Surgeon General's most recent report,[2], only confirms numerous earlier studies which established a clear link between exposure to tobacco smoke and various types of illnesses[3].

> *The relative abundance of data reviewed in this Report, [The Surgeon General's 1986 Report], their cohesiveness, and their biological plausibility allow a judgement that involuntary smoking can cause lung cancer in non-smokers. Although the number of lung cancers due to involuntary smoking is smaller than that due to active smoking, it still represents a number sufficiently large to generate substantial public health concern.*[4]

The fact that other carcinogens and pollution sources have been prohibited or are strictly regulated by federal, state and local governments supports the proposition that the general public has a right to be protected from such agents. According to a 1985 Gallup survey, conducted on behalf of the American Lung Association, 75% of all adults polled believe that smokers should refrain from smoking in the presence of non-smokers; 79% of those polled were of the opinion that smoking should be restricted to designated areas in the work place. Another poll conducted by Liberman Associates on behalf of the American Lung Association found that 94% of those polled were of the opinion that public places should have designated smoking areas; 85% of those polled felt that smoking should be restricted to designated areas in the work place.

State and local legislators have responded to public demand by passing laws regulating smoking in public places. Today, according to the Office of Smoking and Health's "National Status Report," 42 states and the District of Columbia have passed some form of legislation governing the "privilege" to smoke. Alaska, Florida, Minnesota, Montana, Nebraska, Utah, and Washington have enacted comprehensive legislation prohibiting smoking in public places. Seventeen other states have enacted legislation restricting smoking to designated areas in offices and other work places.

Two recent federal courts have recognized employees who are particularly sensitive to tobacco smoke as handicapped employees for purposes of the Federal Vocational and Rehabilitation Act, 29 U.S.C. 701 *et seq.* Although the plaintiffs were not afforded relief in these particular cases the courts were willing to recognize the severe implications of exposure to tobacco smoke in the work place[5]. In *Parodi* the case was remanded to determine whether suitable employment in a safe environment was available. The *Vickers* court refused relief arguing that there was no duty on the part of the employer to provide an environment wholly free of tobacco smoke. The court also noted that the plaintiff could help himself by simply closing his

Felipe Restrepo is a former law clerk at the Prison Project who now works as a public defender in Philadelphia.

[1]*Washington Post*, Dec. 17, 1986, p.A1.

[2]*The Health Consequences of Involuntary Smoking*, 1986, U.S. Dept. of Health and Human Services.

[3]See, for example, "Lung Cancer and Passive Smoking," *Int. J. Cancer* 27, (1-4) 1981; "Non-smokers Rights," *The AMA Journal*, May 19, 1978, Vol. 239, #10.

[4]See footnote 2.

[5]*Parodi v. Merit Systems Protection Board*, 690 F.2d 731 (9th Cir. 1982); *Vickers v. Veterans Administration*, 549 F.Supp. 85 (W.D. Wash. 1982).

office door and that the employer had made reasonable efforts to accommodate the employee's handicap. Although these cases were decided prior to the 1986 Surgeon General's Report, the conclusions of the Report are consistent with the court's findings. However, it should be noted that the Surgeon General emphasized that the mere separation of smokers and non-smokers within the same air space is not enough to eliminate the adverse effects of passive smoking. The Report concluded:

1. Involuntary smoking is a cause of disease, including lung cancer in nonsmokers.

2. The children of parents who smoke compared with the children of non-smoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures.

3. The simple separation of smokers and non-smokers within the same air space may reduce, but does not eliminate, the exposure of non-smokers to environmental tobacco smoke.[6]

Given the confinement and close quarters associated with prison life a substantive argument can be made that the effect of tobacco smoke on non-smokers violates their Eighth Amendment right to be free of "[unnecessary] and wanton infliction of pain."[7] The Supreme Court long ago articulated the standard governing Eighth Amendment violations as: "[The] evolving standards of decency that mark the progress of a maturing society."[8]

As society has come to recognize the ill effects of passive smoking in the past few years, a logical connection can be drawn between exposure to tobacco smoke in a confined area with little or no ventilation and "... confinement conditions that can lead to painful and tortuous disease with no penological purpose."[9] The Federal Bureau of Prisons has recognized the potential harm associated with passive smoking and has published rules establishing non-smoking areas within the institutions under its jurisdiction.[10] The comment to the rule notes that:

> *The Surgeon General of the United States has determined that smoking and passive inhalation of environmental tobacco smoke pose a health hazard. The Bureau of Prisons, in establishing its smoking/non-smoking rule, is attempting to reduce potential hazards to individual health and safety, and to provide a more comfortable living and working environment for staff and inmates. By providing designated areas for smokers, as well as other areas where individuals are not exposed to smoke the Bureau is eliminating a potential source of discord among inmates.*[11]

Those even vaguely familiar with prison conditions are aware of acute ventilation problems in many corrections facilities. Prison litigation is replete with references to inadequate prison ventilation and air flow.[12] It would stand to reason that, given the nature of confinement in a restricted environment, the ill effects of passive smoking are exacerbated.

Any discussion of this issue would not be complete without addressing the privilege to smoke and its implications. Smoking may be the only source of pleasure many inmates enjoy and it may help reduce tensions among the prisoner population. Depriving prisoners of this privilege altogether would no doubt increase tension and could prove to be a point of contention between smokers and non-smokers. Furthermore, many guards and other staff members may resent not being able to smoke among the prisoner population.

Although there are no easy solutions to this problem, some alternatives exist. An increased awareness of the dangers of passive smoking should encourage classification systems which take smoking into consideration; classification schemes might consider smoking when assigning cellmates. The privilege to smoke can be preserved while minimizing the exposure of non-smokers to tobacco smoke by designating non-smoking sections in common areas such as dining halls, day rooms and by improving the ventilation systems in prisons.

It would be unrealistic to expect every prison and jail to adopt the same regulations or criteria when addressing this problem in light of the differences in size, logistics, and staff. These problems should not give rise to excuses for doing nothing or postponing action on this problem.

Decisions must be made and various possibilities should be explored in developing a plan that would accommodate the interests of both groups. The ill effects of "passive smoking" are all too obvious and demand immediate attention. ■

[6]See footnote 2, page 7.
[7]*Gregg v. Georgia*, 428 U.S. 153, 173 (1978).
[8]*Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[9]*Daigre v. Maggio*, 719 F.2d 1310, 1312 (5th Cir. 1983), citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981).
[10]Federal Register, Vol. 51, No. 53, p. 9615, Sec. 551.160 (1986).
[11]See footnote 10 at 9615.
[12]See, for example: *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *Toussaint v. McCarthy*, 597 F.Supp. 1388 (N.D. Cal. 1984); *Wright v. Rushen*, 642 F.2d 1129 (9th Cir. 1981); *Palmigiano v. Garrahy*, 443 F.Supp. 956 (D.R.I. 1977).

For the Record:

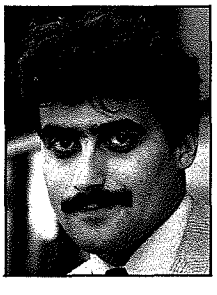
■ On May 1, 1987, the National Prison Project announced that its AIDS Education Project had completed and published a Resource Bibliography on AIDS Among Prisoners. The bibliography lists the AIDS policies of various state and federal correctional agencies, educational and training materials, legal cases and articles on legal issues, general reports and articles in the press. Copies of the bibliography are available from the National Prison Project at a cost of $5.00, prepaid.

■ The Sentencing Project of Washington, D.C. announces the publication of the 1987 National Directory of Felony Sentencing Services. The 23-page directory lists 83 programs in 25 states that offer services to defense attorneys in preparation of alternative sentencing plans for felony offenders. Listed programs include both public defender-based services and private services that accept referrals on a fee basis. Copies of the Directory are available at the following costs: 1-4 copies, $9.00 each; 5-15 copies, $7.50 each; 16 or more copies, $6.00 each. Order from: Directory, The Sentencing Project, 1156 15th St., N.W., Suite 520, Washington, D.C. 20005/(202) 463-8348.

■ Administrative Director Sharon Goretsky has left the Prison Project to take a job as administrator of a D.C. law firm.

The Prison Project is happy to welcome two new staff lawyers, Mark Lopez and Jere Krakoff. Lopez, a graduate of Rutgers University Law School, has worked at the ACLU of Illinois for the past two years, having been chosen from over sixty candidates to receive the Kennedy-Coleman Fellowship for minority attorneys. At the ACLU of Illinois, Lopez worked on a wide range of civil liberties cases, including drug testing, AIDS and individual rights, and First Amendment. Krakoff has extensive litigation experience in prison and other civil

Mark Lopez



Jere Krakoff

COMMEMORATION OF FIFTEEN YEARS OF PRISON LITIGATION

NATIONAL PRISON PROJECT 15th ANNIVERSARY

The National Prison Project is celebrating its 15 years in prison litigation. Come join us for workshops, a symposium and a dinner party.

This will be a one-day event on October 24, 1987. In the morning staff members of the NPP will conduct the workshops. During the afternoon noted panelists will participate in a symposium on the history and future of prison litigation. In the evening we will have our 15th birthday party with dinner and some remarks by people close to the Project's work. A detailed agenda follows below.

Join us in our celebration—as we review the past and move on into the future. A nominal fee of $35 includes the workshops, symposium and dinner party (lunch is not provided).

OCTOBER 24, 1987
SATURDAY

PROGRAM

Workshops

9:00-10:15 AM
WORKSHOP 1: AIDS in Prison

WORKSHOP 2: Moving Litigation to Settlement

10:45-12 NOON
WORKSHOP 3: Race in Criminal Justice

WORKSHOP 4: Court Orders and Compliance

Workshops will be conducted by NPP staff.

Workshops and Symposium will be held at Georgetown University Law Center in Washington, D.C. (600 New Jersey Avenue, N.W.)

LUNCH
Participants are on their own

Symposium

1:00-5:00 PM

OPENING REMARKS: **HONORABLE ROBERT R. MERHIGE, JR.**
Senior U.S. District Judge,
Eastern District of Virginia

PANEL: **HISTORY OF PRISONERS' RIGHTS LITIGATION**

WILLIAM BENNETT TURNER
TURNER & BRORBY, San Francisco, California
Lead Counsel in Texas prison case, *Ruiz v. Estelle*

PHILIP J. HIRSCHKOP
HIRSCHKOP & GRAD, Alexandria, Virginia
Lead Counsel, *Landman v. Royster*; co-founder of the National Prison Project

LYNN WALKER
Program Officer, The Ford Foundation
Former Chief, Special Litigation Section, U.S. Department of Justice, Civil Rights Division

PANEL: **FUTURE OF PRISONER'S RIGHTS LITIGATION**

VINCENT NATHAN
NATHAN & ROBERTS, Toledo, Ohio
Special Master in Texas, New Mexico, Puerto Rico and Georgia prison cases

ALLEN BREED
President, National Council on Crime & Delinquency; Special Master and Monitor in various prison and jail cases; former Director, National Institute of Corrections

CHARLES OGLETREE
Adjunct Professor, Harvard Law School; former Deputy Public Defender, District of Columbia

CLOSING REMARKS: **NORVAL MORRIS**
Kreeger Professor of Law, University of Chicago Law School

☐ **Please pre-register me for the National Prison Project's 15th Anniversary Celebration—I am enclosing the $35 fee.**

☐ **Please send me information for overnight hotel arrangements.**

NAME _____

ORGANIZATION _____

ADDRESS _____

Others who may be interested in attending (please include address):

_____

_____

Send to: National Prison Project, 1616 P Street N.W., Washington, D.C. 20036.
Space is limited so please register by September 15.

Anniversary Celebration

6:00 PM **Cocktails (cash bar)**

7:30 PM **Dinner Party**

OPENING REMARKS: **ALVIN J. BRONSTEIN**
Executive Director, The National Prison Project

REMARKS: **IRA GLASSER**
Executive Director, American Civil Liberties Union

KEYNOTE SPEECH: **JOHN COLEMAN**
former President, Edna McConnell Clark Foundation

Cocktails and Dinner will be held at the Hyatt Regency Washington on Capitol Hill (400 New Jersey Avenue, N.W.)

rights areas. He handled *Inmates of the Allegheny County Jail* v. *Pierce*, and other significant prison cases during his more than ten years as an attorney for a Pittsburgh Legal Services program. More recently he worked for the Lawyers' Committee for Civil Rights Under Law, where he litigated, among other things, a number of voting rights and school desegregation cases.

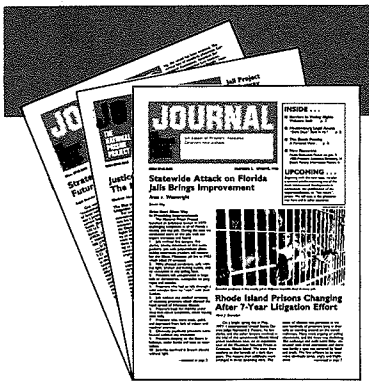
■ The *VORP Network News*, the quarterly journal of the Victim-Offender Reconciliation Program, is now available for general subscriptions. Published by the PACT Institute of Justice of Michigan City, Indiana, the journal covers current trends in victim issues, community corrections, mediation, or restitution programming. Regular features include case studies, mediation issues, profiles of new programs, interviews with prominent criminal justice practitioners, and up-to-date news about funding, development, and other issues equally pertinent to already operating programs as well as programs in the planning stages.

"VORP" refers to the face-to-face meeting conducted by a trained mediator between victim and criminal offender. During the meeting, which is voluntary for both parties, facts of the case are discussed, feelings talked about, and appropriate restitution negotiated. While only a handful of programs were in operation even as recently as three years ago, today there are VORP programs in over 25 states, as well as throughout Canada and England. These programs are operated by judges, probation departments, private organizations, police and sheriffs' departments, victim organizations, and other community groups.

Subscriptions to *VORP Network News* are $20 for the calendar year; bulk subscriptions are available. For sample issue or further information, contact PACT Institute of Justice, 901 Washington Street, P.O. Box 177, Michigan City, IN 46360/(219) 872-3914.

■ The Lewisburg Prison Project, P.O. Box 128, Lewisburg, PA 17837, distributes booklets which are helping prisoners nationwide to solve problems within the prisons. A quarterly "Legal Bulletin" is available on request by free subscription. Four manuals, on parole, civil actions, paralegal advocacy, and administrative detention, as well as sets of the 30 Bulletins, are distributed at a low cost; send for a brochure.

PUBLICATIONS



QTY. COST

The National Prison Project *JOURNAL,* $20/yr. $2/yr. to prisoners.

QTY. COST

The Prisoners' Assistance Directory, the result of a national survey, identifies and describes various organizations and agencies that provide assistance to prisoners. Lists national, state, and local organizations and sources of assistance including legal, library, medical, educational, employment and financial aid. 7th Edition, published April 1986. Paperback, $20 prepaid from NPP.

QTY. COST

Offender Rights Litigation: Historical and Future Developments. A book chapter by Alvin J. Bronstein published in the **Prisoners' Rights Sourcebook** (1980). Traces the history of the prisoners' rights movement and surveys the state of the law on various prison issues (many case citations). 24 pages, $2.50 prepaid from NPP.

QTY. COST

The National Prison Project Status Report lists by state those presently under court order, or those which have pending litigation either involving the entire state prison system or major institutions within the state. Lists only cases which deal with overcrowding and/or the total conditions of confinement. (No jails except District of Columbia). Periodically updated. $3 prepaid from NPP.

QTY. COST

Bibliography of Women in Prison Issues. A bibliography of all the information on this subject contained in our files. Includes information on abortion, behavior modification programs, lists of other bibliographies, Bureau of Prison policies affecting women in prison, juvenile girls, women in jail, the problem of incarcerated mothers, health care, and general articles and books. $5 prepaid from NPP.

QTY. COST

A Primer For Jail Litigators is a detailed manual with practical suggestions for jail litigation. It includes chapters on legal analysis, the use of expert witnesses, class actions, attorneys' fees, enforcement, discovery, defenses' proof, remedies, and many practical suggestions. Relevant case citations and correctional standards. 1st edition, February 1984. 180 pages, paperback, $15 prepaid from NPP.

QTY. COST

The **Jail Litigation Status Report** gives a state-by-state listing of cases involving jail conditions in both federal and state courts. The **Report** covers unpublished opinions, consent decrees and cases in progress as well as published decisions. The **Report** is the first nation-wide compilation of litigation involving jails. It will be updated regularly by the National Jail Project. 1st Edition, published September 1985. $15 prepaid from NJP.

Fill out and send with check payable to

The National Prison Project
1616 P Street, NW
Washington, D.C. 20036

NAME _____

ADDRESS _____

CITY, STATE, ZIP _____

HIGHLIGHTS

The following are major developments in the Prison Project's litigation program since December 31, 1986. Further details of any of the listed cases may be obtained by writing the Project.

Black v. Lewis—This case, challenging the conditions of confinement in the Administrative Segregation Unit at the Arizona State Prison in Florence, was settled with a consent decree in June 1985. In June of this year the court vacated the defendants' motion to dismiss and found the defendants in noncompliance with two provisions of the stipulated agreement. The court also extended the monitoring period to July 31, 1987 and a compliance report was submitted by the monitor at that time.

Bobby M. v. Graham—This case challenges conditions and practices at three Florida juvenile training schools. A settlement was reached in April on all the issues and final court approval is expected during the summer. All issues were settled favorably to the plaintiffs. There will be now be two 100-bed secure facilities where there had been three training schools confining a total of 1200 children.

Cody v. Hillard—This suit challenges conditions at the South Dakota State Penitentiary. On January 12th, we reargued the overcrowding issue before the Eighth Circuit sitting *en banc*. A compliance hearing was held on July 7-10 on the issues settled in the partial consent decree.

Inmates of D.C. Jail v. Jackson—This case challenges conditions, primarily overcrowding, at the D.C. Jail and we have previously obtained a series of favorable decisions. On March 11, the court entered a contempt order against the defendants due to continued overcrowding and other issues.

Inmates of Occoquan v. Barry—This lawsuit was filed in August 1986 and challenges conditions at the Occoquan I, II and III facilities at Lorton Reformatory, the District of Columbia's prison in Virginia. An order requiring a population cap, effective June 1, was stayed by the judge, extending the date until at least the end of July. A special officer has also been appointed by the judge to investigate ways of coping with the influx of prisoners.

Jerry M. v. D.C.—This action challenges conditions of confinement at D.C.'s juvenile facilities. The second and third monitor reports have been filed as well as the plan for reform required by the consent decree. Defendants are not in compliance and further litigation may be required. Early this year the plaintiffs received payment of $94,000 in attorneys' fees for the work leading up to the consent decree.

Palmigiano v. DiPrete—This is the statewide prison conditions case in Rhode Island which previously resulted in a series of favorable decisions. In December, the defendants filed a motion asking that further population reductions scheduled for January 1, 1987 be re-examined. A hearing was held May 22-23. The judge reserved decision on the defendants' motion and issued an interim order imposing a $3,000/day fine beginning August 1, 1987 if the current population cap is exceeded.

Phillips v. Bryan—This is a conditions case at Nevada's maximum security prison which resulted in a consent decree in 1983. A hearing was held on July 27, 1987 on plaintiffs' motions to continue the court's jurisdiction and to have defendants held in contempt for violations of the settlement.

Shrader v. White—Prisoner access to tools and scrap metals was the only outstanding issue in this case challenging conditions at the Virginia State Penitentiary at Richmond. In May a settlement was reached in the plaintiffs' favor, providing for the adequate securing of these tools and metals to reduce the possibility of these materials being made into weapons.

U.S. v. Michigan/Knop v. Johnson—This is a statewide Michigan prison conditions case. Trial was completed in *Knop* in April 1987, and the parties are awaiting the court's decision. In *U.S. v. Michigan* the court issued a temporary order in May cutting off prisoner intake into the Department of Corrections. The court also found the State of Michigan in contempt of court with fines of $10,000 per day if overcrowding continues after November 1, 1987. The court is considering whether to make the *Knop* plaintiffs full parties in the *U.S. v. Michigan* case.

Washington v. Tinney/Johnson v. Galley—This case challenges conditions and allegations of brutality and use of force at two Maryland state prisons. The NPP is in the process of settling the majority of the issues in this suit. Those issues which remain unsettled will most likely go to trial the latter part of September.

Witke v. Crowl—Equal protection and conditions of confinement are the issues in this case filed in 1982 on behalf of the women incarcerated at the North Idaho Correctional Institution. In response to objections filed by the Prison Project, the court modified a previous order which adopted the monitor's report on defendants' compliance with the terms of the settlement agreement. The court found the defendants not in compliance with the requirements for parity in industry programs. ■

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