

ARTICLE V INDIGENT SERVICES ADVISORY BOARD

*Recommendations regarding qualifications, compensation
and cost containment strategies for state-funded
due process services, including court reporters, interpreters
and private court-appointed counsel.*

FINAL REPORT

A board created
by the Florida Legislature

January 6, 2005

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MEMBERS

Membership of the Article V Indigent Services Advisory Board

Honorable Rod Smith, Chair *Appointed by Senate President*
Senator, 14th District and Attorney

Mr. George Meros, Esq., Vice-Chair *Appointed by House Speaker*
Attorney with Gray, Harris and Robinson

Honorable Thomas Bateman *Appointed by Chief Justice, FL Supreme Court*
Circuit Judge, Second Judicial Circuit

Honorable Robert Bennett *Appointed by Chief Justice, FL Supreme Court*
Chief Judge, Twelfth Judicial Circuit

Honorable Holly Benson *Appointed by House Speaker*
Representative, 3rd District and Attorney

Honorable David Ellspermann *Appointed by Governor*
Clerk of the Circuit Court, Marion County

Honorable Joseph Farina *Appointed by Chief Justice, FL Supreme Court*
Chief Judge, Eleventh Judicial Circuit

Honorable Blair Kanbar *Appointed by Senate President*
Vice Chairman, Flagler County Board of County Commissioners

Honorable Bernie McCabe *Appointed by Governor*
State Attorney, Sixth Judicial Circuit

Honorable Lane Rees *Appointed by House Speaker*
Commissioner, Walton County, Board of County Commissioners

Mr. Alan Rosner, Esq. *Appointed by Senate President*
Attorney with Harris, Guidi, Rosner, Dunlap, Rudolph, Catlin and Bethea

Honorable James Russo *Appointed by Governor*
Public Defender, Eighteenth Judicial Circuit

INTRODUCTION

In November 1998, voters approved Revision 7 to Article V of the Florida Constitution which was effectuated on July 1, 2004. During the 2004 Legislative Session, Senate Bill 2962 was passed into law (Chapter 2004-265, Laws of Florida). The bill amplified and clarified further, the framework outlined in HB 113A (Chapter 2003-402, Laws of Florida). These two bills, taken together, outline the policies of the Florida Legislature as it relates to due process services for the indigent defendant.

The Article V Indigent Services Advisory Board (the Board), has the responsibility of “...advising the Legislature in establishing qualifications and compensation standards governing the expenditure of state appropriated funds for those providing state-funded due process services for indigent defendants provided through the courts, state attorneys, public defenders, and private court-appointed counsel. These services include, but are not limited to court-appointed counsel, court reporting and transcription services, interpreter services, and expert witnesses.” (Section 29.014, Florida Statutes).

The Board, with staff support provided by the Justice Administrative Commission (JAC), is charged in s. 29.014, F.S. with providing recommendations or revisions thereto to the Legislature by September 1 of each year. The submission date for the report of September 1, 2004 was extended to January 6, 2005.

The statute requires the Board to:

- Recommend qualifications for those providing authorized state-funded due process services;
- Recommend any needed adjustments to existing compensation standards for private court-appointed counsel and other providers of due process services;
- Identify due process services that should be included on a state contract and bid competitively on a circuit, region or statewide basis;
- Recommend statewide contracting standards for procurement of state-funded due process services and develop uniform contracting forms;
- Advise the Legislature on strategies and policies to contain costs;
- Recommend uniform standards to be applied by the Public Defender and the court in determining whether or not there is a conflict of interest pursuant to s. 27.503, F.S.; and
- Issue initial recommendations by November 1, 2003, and issue any additional recommendations or revisions thereto by September 1 of each year.

EXECUTIVE SUMMARY

In performing its duties this year, the Board held four meetings on the following dates: July 30, 2004; August 5, 2004; December 1, 2004 and December 14, 2004. In addition to the meetings of the Board, the Indigent for Costs Subcommittee met via conference call on August 2, 2004 and the Pro Se Indigent for Costs Subcommittee met via conference call on December 6, 2004. The following is a summarization of these meetings:

- July 30, 2004: The Board discussed that neither the General Appropriations Act, nor the substantive legislation, addressed indigent for costs. The issue arises when a defendant receives the services of a private attorney (retained by the defendant, defendant's family, or pro bono), but is unable to afford the other due process costs associated with the defense. The Chair appointed an Indigent for Costs Subcommittee consisting of Judge Joseph Farina, Chair, Alan Rosner, Bernie McCabe and David Ellspermann to review and discuss this issue. Modifications to the Board's initial recommendations and cost containment strategies were also discussed and identified as items to be addressed during upcoming meetings of the Board.
- August 5, 2004: The Indigent for Costs Subcommittee suggested procedural recommendations to the Board. The Board directed JAC to collect data on indigent for costs for the remainder of the fiscal year. JAC is to report costs related to private counsel who may serve pro bono, be paid by the defendant, or be paid by a third party.

The report of the Board was due 90 days after the implementation of Article V, but prior to the date each Indigent Services Committee (ISC) was required to implement the registry for its respective circuit. Based upon the timing, and the fact that the implementation phase had barely begun, the Board voted to request an extension of the required submission date of the report from September 1, 2004 to January 6, 2005.

The Board discussed issues related to court reporter cost sharing, management of the court-appointed counsel registries, statutory caps, expert witness fees and allowance for fixed monthly fee contracts for court-appointed counsel.

- December 1, 2004: The Board considered the qualifications for court-appointed counsel adopted by the ISC for the judicial circuits and concluded that the ISCs are in the spirit of compliance with the Board's recommendations as codified in the Final Report dated January 6, 2004. It was determined that no legislative recommendation is necessary on this issue. The Board asked that JAC pay due process costs within their recommended ranges absent extraordinary circumstances. The Court should reference extraordinary circumstances if an order is issued for fees in excess of the Board's ranges. The Board addressed the issue of indigent for costs. Based upon a letter of legislative intent, it was determined that these costs should be paid from the public defender's appropriation within each circuit. Board members were reminded the Legislature agreed, if this policy creates a shortfall for a public defender, then the necessary appropriation would be replenished. Senator Smith further indicated this issue would be addressed in the upcoming legislative session. The Board asked JAC to apply the same review criteria

when evaluating invoices for indigent for costs services as they apply when processing for payment other court-appointed counsel due process costs. The issue of the State lien for indigent for costs was discussed. The Board recommended the inclusion of the issue within the 2005 glitch bill. The Board discussed the issue of pro se indigent for costs and appointed a subcommittee to consider a recommendation. The members of the Pro Se Indigent for Costs Subcommittee include: Judge Joseph Farina, Chair, Bernie McCabe, James Russo, and George Meros. Various strategies for cost containment that including, incentives for good stewardship such as reallocation of funds, programs such as mediation, “rocket dockets”, pre-trial intervention and revenue sharing rewards were suggested.

- December 14, 2004: The Board considered and adopted the recommendations of the Pro Se Indigent for Costs Subcommittee that include: Pro Se defendants be limited to the rates and providers other indigent defendants are required to utilize; be required to utilize standardized forms and procedures provided by JAC; JAC review the standardized form, monitor the defendant and have authority to challenge the bills in the same manner currently authorized by statute for indigent defendants represented by court-appointed counsel; and, establish a State lien for the cost of the provided due process services. The Board reviewed the requirements for indigent for costs adopted in the Eleventh Circuit and agreed they might be an acceptable statewide format. It was decided to implement and monitor the pro se indigent for costs procedures for approximately one year, at which time the issue would be further reviewed by the Board.

The Board considered whether to suggest statutory language to require the state attorneys to declare whether or not they will seek the death penalty in capital cases within an established timeframe. This could have a variety of cost saving consequences. The Chair requested that the state attorney and public defender associations consider this issue.

The Board directed JAC to include its cost containment strategies in the final report. JAC was directed to prepare the report of the Board’s recommendations for submission to the Legislature and to finalize and distribute forms for use in pro se indigent for costs cases.

FINAL RECOMMENDATIONS

The members of the Board acknowledge time constraints and the complexity of due process services issues limited their ability to fully address all aspects for inclusion in their recommendations. In recognition of these limitations, the Board has directed JAC to undertake further data collection and analysis for future consideration. However, it is the consensus of the Board that the data reviewed, along with the public testimony received, are sufficient to support the following recommendations:

DUE PROCESS SERVICES

- Due process service providers should be paid within the ranges recommended by the Board absent extraordinary circumstances.

COURT-APPOINTED COUNSEL

The Board had recommended in its Final Report dated January 6, 2004, minimum qualifications for private counsel appointed by the court. [See Appendix A] The staff of the Justice Administrative Commission reported on the qualifications adopted by the Indigent Services Committees. [See Appendix A-1] The Board made the following recommendation:

- Based upon the report by staff regarding the adoption of the Board's recommendations for attorney qualifications, it was decided that the Board would not seek the codification of these qualifications in statute. Rather, they will continue to monitor for voluntary compliance with their recommendations.

EXPERT WITNESSES

The Board had recommended in its Final Report dated January 6, 2004, proposed fee ranges for expert witnesses. [See Appendix B] The staff of the Justice Administrative Commission reported on the due process fee ranges adopted by the Indigent Services Committees. [See Appendix B-1] The Board made the following recommendations:

- JAC pay due process costs using the fee range adopted and recommended by the Board.
- JAC issue an objection to any fees outside the ranges adopted by the Board unless there has been a finding of unusual or extraordinary circumstances by the Court.
- Recognizing the need to address market conditions, it was decided that the Board would not seek the codification of these specific rates in statute. Rather they will continue to monitor for compliance with their recommendations.

INDIGENT FOR COSTS

The issue of indigent for costs was the primary issue addressed by the Board. It had not been specifically addressed in any prior reports or legislation. The issue arises when a defendant receives the services of a private attorney (retained by the defendant, defendant's family, or pro bono), but is unable to afford the other due process costs associated with his or her defense. [See Appendix C] The following are the recommendations of the Board:

- The Legislature should appropriate specific funds for due process costs of individuals who are indigent for costs.
- The Legislature should create a State lien for the costs of individuals who are indigent for costs.
- To be found indigent for costs, an individual must complete and submit the Supreme Court approved indigence application form to the Court clerk.
- The motion to the court to be found indigent for costs must include whether counsel is providing legal services pro bono, paid by the client, or paid by a third party. If counsel is receiving a fee for the legal services, counsel must advise the court of the amount of the fee.
- Due process services may only be provided upon motion and order of the court. The motion must include services and costs requested and justification for each service. The order shall include costs the individual is entitled to, an approved amount for each cost, and a cap which the due process costs shall not exceed.
- Counsel for a client declared indigent for costs must utilize due process providers approved by the applicable judicial circuit's Indigent Services Committee and at the approved rates of compensation. Due process costs which a court may authorize include the cost of court reporters, depositions, subpoenas, investigators, experts, and appeal, and any other similarly needed due process service or cost.
- Once the court finds the client of the privately retained counsel indigent for costs, counsel must comply with the same requirements as court-appointed counsel. These requirements are delineated in the applicable Florida Statutes, Memoranda issued by the State of Florida, Chief Financial Officer, the policies and procedures of JAC and the Office of the State Courts Administrator, Administrative Orders of the circuit courts, and the requirements of the judicial circuit's Indigent Services Committee.

PRO SE INDIGENT FOR COSTS

This issue had not been specifically addressed in any prior reports or legislation and is similar to indigent for costs, in that the defendant can not afford the due process costs associated with his or her defense. There are no legal costs since the defendant is representing himself or herself. [See Appendix D] The Board expressed concern regarding the potential increased requests for

this type of service and would ask that the Legislature provide some guidelines regarding its applicability. However, recognizing there is a constitutional right to these services, the Board made the following recommendations:

- The Legislature should appropriate specific funds for due process costs of individuals who are pro se indigent for costs.
- The Legislature should create a State lien for due process costs of individuals who are pro se indigent for costs.
- To be found pro se indigent for costs an individual must complete and submit to the court clerk the Supreme Court approved indigence application form.
- To be found pro se indigent for costs an individual must complete and submit a motion to the court.
- Individuals who are found pro se indigent for costs should utilize standardized forms and procedures as developed by JAC.
- JAC should have authority to audit the records of costs of individuals who are pro se indigent for costs.
- JAC should have authority to challenge the bills of individuals who are found pro se indigent for costs.
- Due process services may only be provided upon motion and order of the court. The motion must include services and costs requested and justification for each service and amount requested. The order shall include costs the individual is entitled to, an approved amount for each cost, and a cap which the due process costs shall not exceed.
- An individual declared pro se indigent for costs must utilize due process providers approved by the applicable judicial circuit's Indigent Services Committee and at the approved rates of compensation. Due process costs which a court may authorize include the cost of court reporters, depositions, subpoenas, investigators, experts, and appeal, and any other similarly needed due process service or cost.
- Once the court finds the individual pro se indigent for costs, the defendant must comply with the same requirements as court-appointed counsel. These requirements are delineated in the applicable Florida Statutes, Memoranda issued by the State of Florida, Chief Financial Officer, the policies and procedures of JAC and the Office of the State Courts Administrator, Administrative Orders of the circuit courts, and the requirements of the judicial circuit's Indigent Services Committee.

APPENDIX A

ARTICLE V INDIGENT SERVICES ADVISORY BOARD
COURT APPOINTED COUNSEL
QUALIFICATION RECOMMENDATIONS

RECOMMENDATIONS

1. Qualifications and Compensation for Court Appointed Private Counsel.

A. Qualifications.

Florida Statute 27.40(2) sets forth that “[p]rivate counsel appointed by the court to provide representation shall be selected from a registry established by the circuit Article V indigent services committee or procured through a competitive bidding process.” Florida Statute 27.40(3)(a) reads in part that “[e]ach circuit Article V indigent services committee shall compile and maintain a list of attorneys in private practice, by county and by category. To be included on a registry, attorneys shall certify that they meet minimum requirements established in general law for court appointment, are available to represent indigent defendants in cases requiring court appointment of private counsel, and are willing to abide by the terms of the contract for services.”

In criminal cases, the Article V Indigent Services Advisory Board recommends the Florida Legislature enact into general law that before private counsel is appointed by the court, either from a registry established by the Circuit Article V Indigent Services Committee or procured through a competitive bidding process, the following minimum qualifications be met. The attorney must:

- 1) be a member in good standing of The Florida Bar.
- 2) have attended within the previous 12 months a minimum of ten hours of Florida Bar approved continuing legal education devoted to criminal law.
- 3) provide proof of malpractice insurance.
- 4) meet the following experience requirements:
 - a) In misdemeanor cases the attorney shall have been a member of The Florida Bar for at least one year and an experienced and active trial practitioner with no fewer than three state or federal jury or non-jury trials.
 - b) In juvenile cases the attorney shall have been a member of The Florida Bar for at least one year and an experienced and active trial practitioner with no fewer than three delinquency dispositions or three state or federal jury or non-jury trials.
 - c) In third degree felony cases the attorney shall have been a member of The Florida Bar for at least two years and an experienced and active trial practitioner with no fewer than three state or federal jury or non-jury trials.

- d) In second degree felony cases the attorney shall have been a member of The Florida Bar for at least two years and an experienced and active trial practitioner with no fewer that seven state or federal jury trials.
- e) In life felony cases, capital sexual battery cases and Jimmy Ryce cases, the attorney shall have been a member of The Florida Bar for at least five years and an experienced and active trial practitioner with no fewer than ten state or federal jury trials.
- f) In capital death penalty cases the Article V Indigent Services Advisor Board recommends adoption of Florida Rule of Criminal Procedure 3.112(f-g).

In criminal appellate cases the Article V Indigent Services Advisory Board recommends the Florida Legislature enact into general law that before private counsel is appointed by the court, the following qualifications be met. The attorney must:

- 1) be a member in good standing of The Florida Bar.
- 2) have attended within the previous 12 months a minimum of ten hours of Florida Bar approved continuing legal education devoted to appellate law.
- 3) provide proof of malpractice insurance.
- 4) meet the following experience requirements:
 - a) In misdemeanor and felony third degree appeals shall have been a member of The Florida Bar for at least two years, an experienced and active trial or appellate practitioner in the field of criminal law or have prior experience in the appeal of at least three criminal cases.
 - b) In non-capital felony appeals and Jimmy Ryce cases shall have been a member of The Florida Bar for at least three years, an experienced and active practitioner in the field of appellate criminal law or have experience in the appeal of at least five criminal cases.
 - c) In capital death penalty appeals the Article V Indigent Services Advisory Board recommends the adoption of Florida Rule of Criminal Procedure 3.112(h).

In dependency cases the Article V Indigent Services Advisory Board recommends the Florida Legislature enact into general law that before private counsel is appointed by the court the following minimum qualifications be met. The attorney must:

- 1) be a member in good standing of The Florida Bar.
- 2) provide proof of malpractice insurance.
- 3) meet the following experience requirements:
 - a) In dependency cases the attorney shall have observed a total of thirty hours of hearings which shall include six shelter hearings, three dependency hearings and one termination of parental rights hearing and attend annually, at least three hours of continuing legal education at the Dependency Court Improvement Project Conference, or an equivalent.
 - b) In termination of parental rights cases the attorney shall have at least ten dependency trials, or one year of dependency experience.
 - c) In appellate cases the attorney shall have at least three years experience in dependency or appellate law and must have been lead counsel in a minimum of three contested dependency trials and three contested termination of parental right trials or demonstrate knowledge through experience in the practice of family law.

The Article V Indigent Services Advisory Board is aware that in some circuits conflict counsel qualification requirements are higher than those set forth above. The board believes each circuit should have the discretion to increase the minimum standards and qualifications for conflict counsel. The board recommends the Florida Legislature make the experience requirements for appointment to criminal cases and dependency cases set forth above minimum requirements allowing the Circuit Article V Indigent Services Committees the discretion to set higher experience standards than those set forth by general law.

APPENDIX A-1

Qualifications of Attorneys for Court-Appointed Cases

Adopted as of 11/23/2004

Type of Case	Recommended Qualifications – Experience	Circuits with Qualifications Equal or Greater than ISAB Recommendation
Misdemeanor	One year experience; no fewer than three state or federal jury or non-jury trials	2, 6, 8, 10, 11, 12, 14, 15, 17, 20
Juvenile	One year experience; no fewer than three delinquency dispositions, or three state or federal jury or non-jury trials	1, 2, 6, 8, 10, 11, 12, 13, 14, 15, 17, 19, 20
Third Degree Felony	Two years experience; no fewer than three state or federal jury or non-jury trials	2, 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 20
Second Degree Felony	Two years experience; no fewer than seven state or federal jury or non-jury trials	2, 6, 8, 10, 12, 17, 20
Life Felony Capital Sexual Battery Jimmy Ryce	Five years experience; no fewer than ten state or federal jury or non-jury trials	2, 8, 10, 12, 15, 17, 20
Capital Death Penalty	Five years experience; lead counsel in no fewer than nine state or federal jury or non-jury trials of a serious or complex nature and at least three cases in which the charge was murder; Rule 3.112	1, 2, 4, 6, 8, 10, 12, 13, 14, 15, 16, 17, 18, 20
<i>Criminal Appellate</i>		
Misdemeanor or Third Degree Felony Appeals	Two years experience; active practice in appellate criminal law or no fewer than three criminal appeals.	2, 6, 8, 10, 12, 13, 14, 15, 17, 19, 20
Non-Capital Felony or Jimmy Ryce Appeals	Three years experience; active practice in appellate criminal law or no fewer than five criminal appeals.	1, 2, 6, 8, 10, 12, 14, 15, 16, 17, 19, 20
Capital Death Penalty Appeals	Five years experience; active practice in appellate criminal law or no fewer than one appeal of a murder conviction where death was imposed and appeal of felony conviction in no less than three felony convictions; Rule 3.112	1, 2, 4, 6, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20
<i>Dependency/TPR</i>		
Dependency Case	Observed 30 hours of hearings to include six shelters, three dependency and one termination of parental rights	1, 2, 6, 8, 10, 12, 13, 17, 18, 19, 20
Termination of Parental Rights	Experience in no fewer than 10 dependency trials or one year of dependency experience	2, 8, 12, 13, 17, 18, 20
Appellate cases	Three years in dependency or appellate law and no fewer than three contested dependency trials; or no fewer than three contested terminations of parental rights; or demonstrated knowledge of dependency.	1, 2, 6, 8, 10, 12, 13, 17, 18, 20

APPENDIX B

Administrative Order Expert Witness Fee Ranges

As Recommended in Final Report - January 6, 2004

Administrative Order Expert Witness Categories	Average (C)	Suggested Ranges (D)
Investigators - Per Hour (A)	\$ 37.86	\$30 - \$50
Investigators-Per Case (B)	\$ 840.00	\$500 - \$1,500
Expert Witness Fees-Per Hour	\$ 154.17	\$150 - \$200
Expert Witness Fees-In Court-Per Hour	\$ 147.17	\$125 - \$150
Expert Witness Fees-Out of Court-Per Hour	\$ 111.20	\$50 - \$150
Exp. Wit. Fee-Waiting to Testify-Court-Per Hour	\$ 71.33	\$50 - \$75
Exp. Wit. Fee-Waiting to Testify-Depo.-Per Hour	\$ 66.83	\$50 - \$75
Expert Witness Fees-Travel-Per Hour	\$ 63.50	\$50 - \$75
Expert Witness Fees-Per Case (B)	\$ 1,580.00	\$1,500 - \$2,000
Psychological Exams-Per Exam	\$ 246.88	\$150 - \$400
Psychologist-In Court/Testify-Per Hour	\$ 136.60	\$125 - \$150
Psychologist-Waiting to Testify-Per Hour	\$ 84.80	\$50 - \$75
Medical Doctors-In Court or Deposition-Per Hour	\$ 156.43	\$150 - \$200
Medical Doctors-Out of Court-Per Hour	\$ 128.33	\$100 - \$125
Other Pre-Trial Expert-In Court-Per Hour	\$ 102.67	\$75 - \$100
Other Pre-Trial Expert-Out of Court-Per Hour	\$ 77.00	\$50 - \$75

(A) For conflict counsel only

(B) Limits may be exceeded with authorization from the court

(C) Average of all Administrative Orders specifying a fee for this category

(D) Ranges tentatively adopted by the Expert Witness Subcommittee 10/28/03

APPENDIX B-1

Administrative Orders - ISAB Expert Witness Fee Range - Circuit Comparison																								
	ISAB-Avg.	ISAB-Ran.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20		
Investigators - Per Hr.	\$37.86	\$30-50	50				35		30-50	30-50	50	50	40	40			CT		38	50				
Investigators - Per Case	840	500-1,500		1,500	500	500	350	500-1,500	500-1,500	500-1,500	500		500	800	1,000				840					
Expert Witness Fees - Per Hour	154.17	150-200	150						150-200	150-200		150		150		150			150	75				
Expert Witness Fees - In-Court - Per Hr.	147.17	125-150	100				75-125				158-250	100-150							100-150	158-200	200			
Expert Witness Fees - Out-of-Court Per Hr.	111.2	50-150									250	75	75	100					77-110					
Exp. Wit Fee Waiting to Testify/Court Per Hr	71.33	50-75	50-75				50-75				125-131	75							70	131	200			
Exp Wit. Fee Waiting to Testify/Depo Per Hr	66.83	50-75	50				50				79	50	25						70	79				
Expert Witness Fees Travel Per Hr.	63.5	50-75					75				129	50								125				
Expert Witness Fees Per Case	1,580.00	1,500-2,000	600						1,500-2,000			1,000												
Psychological Exam Per Exam	246.88	150-400	125						500	300-500	275	120		150				350	250				300	
Psychologist - In Court/Testify Per Hr.	136.6	125-150	150				150		150	150-200		150		150					140	175-200	200	200		
Psychologist - Waiting to Testify Per Hr.	84.8	50-75	50					60				75	75	150					85	75-85	75			
Medical Doctors - In Court or Depo. Per Hr.	156.43	150-200									170	200	150	175					150	175	400			
Medical Doctors - Out of Court Per Hr.	128.33	100-125									145	150-200	100	100					130	175	300			
Other Pre-Trial Expert - In Court Per Hr.	102.67	75-100																	100					
Other Pre-Trial Expert - Out of Court Per Hr.	77	50-75																	77					
Effective as of 12/1/2004																								

APPENDIX C

INDIGENT FOR COSTS

ISSUE

Whether the State should pay costs when a defendant in a criminal proceeding has been determined by the court to be “indigent for costs” even though the defendant has an attorney who is not a court-appointed attorney?

ANALYSIS

"Indigent for costs" is a designation the courts use when an indigent person has a private attorney paid for by themselves, someone else, or perhaps a pro bono attorney. It appears that this declaration by the court is common and statutorily permissible, as s. 27.52 permits someone to apply for the appointment of a public defender or private attorney *or any other due process services*. Reading s. 29.007, F.S., it does appear that the definition of "court-appointed counsel" is not limited to an attorney, but also includes various due process costs. Section 29.001, F.S. states, “Court-appointed counsel are defined to include the enumerated elements for counsel appointed to ensure due process in criminal and civil proceedings in accordance with the state and federal constitutional guarantees.”

Section 27.52(4)(b)(3), F.S. states, if an applicant has retained private counsel immediately before or after filing the application for indigence, then it creates a presumption for the Clerk that the applicant is not indigent. It then goes to a judge for determination. The Clerk will likely find that the applicant is not indigent. The court must then decide if the denial is pursued by the defendant. Of course a court can make inquiry and determine a person NOT to be indigent. An appeal might then follow.

The State is responsible for payment of due process costs of indigent defendants in Florida. “The fact that an indigent defendant is represented by a private attorney retained by his family or his friends, rather than by a public defender or other counsel appointed by the court, provides no basis for departing from the statutory requirement that the county pay the reasonable costs of defense” *Florida Jurisprudence, Second Edition, §2535, by Joseph Basano, J.D., et al, citing Thompson v. State, 525 So. 2d 1011 (Fla. 3d DCA, 1988) and Santil v. Snyder, 417 So. 2d 784 (Fla. 3d DCA, 1982).*

The statutory section (939.15) that required the counties to pay was repealed effective July 1, 2004, with nothing in its place. “The right of an indigent to have his court costs, including the cost of his transcript, paid for by the government is not dependent upon the existence of section 939.15, F.S. The defendant has that constitutional right in accordance with the United States Supreme Court’s decision in Griffin v. Illinois, 351 U.S. 12 (1956)...” State of Florida v. Byrd, 378 So. 2d 1231 (Fla. 1979) The court further stated, “The clear intent and purpose of that section was not to grant an indigent defendant a right but to prescribe which governmental entity in the State of Florida must pay the court costs of an indigent defendant in criminal cases.” *Id.*

APPENDIX D

PRO SE INDIGENT FOR COSTS

Indigent individuals may choose to proceed pro se (representing themselves) in criminal, dependency/TPR and other civil cases. If they are otherwise eligible for court-appointed counsel, pro se litigants are entitled to State funded due process costs.

PRO SE

Under the Sixth Amendment to the United States Constitution, a defendant is entitled to self-representation. In order for a defendant to represent himself, he must be made aware of the dangers and disadvantages of self-representation and knowingly and intelligently waive his right to counsel. Faretta v. California, 422 U.S. 806 (1975). Where a defendant does not voluntarily accept representation, counsel may not be forced upon him. Crystal v. State, 616 So.2d 150 (Fla. 1st DCA 1993). Where a defendant clearly and unequivocally requests that he be allowed to represent himself, the trial court is required to hold a Faretta hearing to determine whether the waiver of counsel was voluntary and knowing. Kearse v. State, 605 So.2d 534 (Fla. 1st DCA 1992). The Faretta inquiry is required even where the defendant deliberately uses his right to counsel to frustrate and delay his trial. State v. Young, 626 So.2d 655 (Fla. 1993). Once a court determines that a competent defendant freely has knowingly and intelligently waived counsel, the inquiry is over and the defendant may proceed unrepresented. The court may not inquire further into whether the defendant could provide himself with a substantively qualitative defense. State v. Potts, 718 So.2d 757 (Fla. 1998); State v. Bowen, 698 So.2d 248 (Fla. 1997). If a defendant makes an unequivocal request for self-representation, it is error to deny that request absent of any indication that the defendant's waiver of counsel was not knowing and voluntary. Hughes v. State, 701 So.2d 378 (Fla. 1st DCA 1997).

POST-CONVICTION RELIEF

It is probable that most individuals proceeding pro se will be inmates filing motions primarily under Rule 3.850 F.R.C.P., seeking to have their sentence vacated, set aside or corrected, and secondarily, under Rule 3.800 F.R.C.P., seeking correction, reduction and modification of sentences. In regard to post-conviction remedies (predecessor to Rule 3.850), the Florida Supreme Court has stated:

“...post-conviction remedies of the type under consideration are civil in nature and do not constitute steps in a criminal prosecution within the contemplation of the Sixth Amendment, *supra*. They do not require the application of the standard of absolutism announced by that amendment. Such remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States. This means that in these collateral proceedings there is no absolute right to assistance of a lawyer. Nevertheless, Fifth Amendment due process would require such assistance if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need.” State v. Weeks, 166 So. 2d 892, (Fla. 1964).

Inmates are not entitled to assistance of counsel in preparation of the Rule 3.850 motions nor are they entitled to a copy of the trial transcript at this stage. If a transcript is needed, inmates are "...entitled to have the State furnish a transcript of only that portion of the trial proceeding to which his motion was directed or concerned in the event he seeks an appeal from an adverse ruling." (citations omitted) (Cassoday v. State, 237 So. 2d 146, (Fla. 1970)). The 1st DCA noted: "...for appellant to secure a copy of portions of his trial record at public expense he must first file a 3.850 motion setting forth his alleged grounds for relief. Only then may he secure those portions of the record relevant to his motion..." Dorch v. State, 483 So. 2d 851 (Fla. 1st DCA 1986).

In response to a claim that counsel should have been appointed in a post-conviction proceeding the Court found: "Due process requires that counsel be appointed if a post-conviction motion presents a meritorious claim and involves complex issues..." (citations omitted) Mullis v. State, 864 So2d 1246 (Fla. 5th DCA 2004).

Most Rule 3.850 motions (reportedly, approximately 85%) are denied without a hearing with little cost incurred. The reviewing circuit court may require a transcript of a plea colloquy in a case where there has been a guilty plea. Generally, if there has been a direct appeal of a conviction, the trial transcript and most of the record is already available. If the court determines that a hearing is required on the motion, an attorney is generally appointed. In most instances, this is the Public Defender. If an appeal is taken to the DCA, a transcript of the motion hearing is required. The Public Defender may withdraw if he/she determines that the appeal is frivolous. An Anders brief is not required. "...The authority for appointing counsel to handle post-conviction matters stems from the due process clause of the Fifth Amendment of the United States Constitution, not the Sixth Amendment right to counsel...Accordingly, it is not necessary to follow the procedure set forth in Anders before seeking to withdraw from appeals of orders denying post-conviction relief..." (citations omitted) Mayolo v. State, 714 So.2d 1124 (Fla. 4th DCA 1998).

The U.S. Supreme Court has addressed the requirement to provide transcripts in post-conviction proceedings: "...Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." The court in Lane went on to observe, that Smith had established "...these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state post-conviction proceedings." (citations omitted) Long v. Iowa, 385 U.S. 192, 87 S.Ct. 362 (1966).