

**Report of the Office of
Indigent Defense Services:
Contract with the
Center for Death Penalty Litigation**

Submitted to the North Carolina General Assembly
Pursuant to S.L. 2009-451, Section 15.3

January 17, 2012

CONTENTS

EXECUTIVE SUMMARY	1
REPORT	1
I. Coordination and Consultation Services	2
II. Training and Support.....	3
CONCLUSION	4
 APPENDICES	
Statement of Support and Expenses, IDS Contract Funding, FY 2010-11.....	Appendix A
Compilation Audit Report, FY 2010-11	Appendix B

EXECUTIVE SUMMARY

Section 15.3 of Session Law 2009-451 authorized the Office of Indigent Defense Services to use a portion of the funds appropriated to it by the General Assembly during fiscal year 2010-11 to contract with the Center for Death Penalty Litigation “to provide training, consultation, brief banking, and other assistance to attorneys representing indigent capital defendants.”

This report summarizes the activities funded pursuant to § 15.3 between July 1, 2010 and January 31, 2011 because IDS terminated the contract effective January 31, 2011. In summary, those activities included performing case consultations in capital cases at the trial and post-conviction levels, making recommendations on requests for expert funding in capital cases at the trial level, developing and offering training programs for attorneys representing capital defendants, maintaining an on-line capital trial motions index, running resource groups and training programs for mitigation specialists who are working on capital cases, generating a bimonthly newsletter for attorneys who are appointed to represent indigent capital defendants, and continuing to coordinate the investigation and litigation of claims arising under the Racial Justice Act.

REPORT

Section 15.3 of Session Law 2009-451 authorized the Office of Indigent Defense Services (“IDS”) to use up to \$376,125 of the funds appropriated to IDS by the General Assembly each fiscal year of the 2009-2011 biennium to contract with the Center for Death Penalty Litigation (hereinafter referred to as “CDPL” and “the Center”) “to provide training, consultation, brief banking, and other assistance to attorneys representing indigent capital defendants.” While IDS originally entered into a contract with CDPL for the full 2010-11 fiscal year, IDS terminated the contract effective January 31, 2011 after spending a total of \$264,019 on contract services; thereafter, IDS assumed many of the functions that were previously performed by CDPL’s Trial Assistance Unit. Specifically, starting February 1, 2011, two former CDPL employees (one attorney and one legal assistant) became IDS employees staffing IDS’ new Trial Resource Unit; a second attorney position in CDPL’s Trial Assistance Unit was eliminated. Post-conviction consultations continue to be performed by CDPL on a case-by-case basis with prior IDS approval. As a result of that restructuring, IDS believes that the functions previously performed by CDPL pursuant to the contract are now being provided in a more cost-effective manner.

This report summarizes the activities funded by the contract between July 1, 2010 and January 31, 2011. In addition to IDS’ contract with CDPL, the organization generates other funds through direct client representation in capital cases in state and federal court. Between July 1, 2010 and January 31, 2011, all CDPL employees tracked their itemized time in an electronic database, and labeled each activity as “consultation contract,” “non-contract,” or “unallocated” for services in which billing was to be split proportionately between the consultation contract and non-contract functions. CDPL staff then compiled total hours billed to the contract and non-contract categories to determine their respective proportions of the organization’s total billing. Those same proportions were then applied to the Center’s

unallocated hours and operating expenses to generate contract and non-contract spending figures. A spreadsheet on the Center's use of the general consultation contract funds between July 1, 2010 and January 31, 2011 is attached to this report as Appendix A.

In addition to reporting to IDS on the use of contract funds, CDPL undergoes an annual financial audit by an independent auditor. A copy of the compilation audit report for fiscal year 2010-11 is attached to this report as Appendix B.

I. Coordination and Consultation Services:

Case Consultations in Capital Cases at the Trial Level

Effective May 1, 2003, IDS and the Office of the Capital Defender began requiring mandatory consultations with CDPL's Trial Assistance Unit in all capital cases at the trial level. In all first-degree murder cases where a second attorney has been appointed following a capital declaration at a Rule 24 hearing, or where a second attorney has been appointed based on the prosecutor's indication that the case will be declared capital, the trial attorneys have been required to contact CDPL's Trial Assistance Unit and schedule a consultation within 120 days of the appointment of second counsel. CDPL attorneys have traditionally performed those consultations in their Durham office in all capital cases originating in Prosecutorial Districts 1, 2, 3A, 6A, 6B, 7, 9, 9A, 10, 11, 14, 15A, and 15B. In January 2008, CDPL attorneys began conducting some of these consultations in other locations across the State, so that the appointed attorneys did not have to spend their time and IDS' funds traveling to Durham. For capital cases originating in the remaining Prosecutorial Districts throughout the State, CDPL had consulting contracts with private defense attorneys with extensive experience in capital litigation; those contract attorneys maintained offices in Chapel Hill, Winston-Salem, High Point, Durham, and Spring Hope. Effective February 1, 2011, those consultation functions became the responsibility of the IDS Trial Resource Unit. For consultations that the Trial Resource Unit cannot directly handle, IDS expends limited funds on outside consultants.

Between July 1, 2010 and January 31, 2011, CDPL provided in-house and telephone consultations for attorneys representing 78 defendants awaiting capital trials in North Carolina, 23 of which were new cases opened during that time period. Forty North Carolina counties were served by those consultations. In addition, CDPL attorneys were involved in 35 first-degree murder cases that were proceeding capitally but ended in pleas, rather than a decision to proceed to trial, which saved the State significant money and resources. Based on the average costs of proceeded capital cases that go to trial (\$104,462) compared to those that end in a plea (\$43,699), the 35 pleas in those cases cost the State \$2.13 million less than it would have cost for those cases to go to trial.¹ Similarly, CDPL attorneys were involved in two first-degree murder cases that were proceeding capitally but ended in dismissals. Based on the average costs of proceeded capital cases that end in a dismissal (\$51,767), the dismissals in those two cases saved the State an additional \$105,390.²

¹ See FY07 Capital Trial Case Study, PAC and Expert Spending in Potentially Capital Cases at the Trial Level, available at www.ncids.org.

² See *id.*

Case Consultations in Capital Cases at the Post-Conviction Level

Effective September 1, 2004, IDS began requiring mandatory consultations with CDPL attorneys in all capital cases at the post-conviction level in state court. In all such cases, the attorneys are required to schedule a consultation with CDPL's Post-Conviction Unit within 60 days of their appointment to the case. CDPL attorneys perform those consultations in their Durham office in most cases, but occasionally arrange for other consult sites at mutually agreeable locations. In cases where CDPL has a conflict of interest, CDPL staff refer the appointed attorneys to an appropriate out-of-office attorney to perform the consultation. Between July 1, 2010 and January 31, 2011, the Center provided in-house and telephone consultations for attorneys representing 92 of the 158 defendants on death row in North Carolina. Effective February 1, 2011, CDPL began performing those consultations pursuant to prior case-by-case authorizations from IDS.

Expert Requests in Cases at the Trial Level

On an as-needed basis, CDPL's Trial Assistance Unit screened expert requests in potentially capital cases at the trial level and made appropriate funding recommendations to the Capital Defender. Between July 1, 2010 and January 31, 2011, CDPL made funding recommendations for 51 expert requests in potentially capital cases at the trial level. IDS' Trial Resource Unit assumed that responsibility on February 1, 2011.

Racial Justice Act

Between July 1, 2010 and January 31, 2011, CDPL continued to perform a number of non-case specific tasks to promote statewide coordination of the investigation and litigation by trial, appellate, and post-conviction counsel of issues arising under the Racial Justice Act ("RJA"). For example, CDPL staff continued to conduct and attend meetings about RJA matters, draft and circulate form motions, consult with attorneys handling RJA claims, track RJA motions filed, and coordinate and oversee the efforts of numerous volunteers.

II. Training and Support:

Capital Trial Training

Effective January 1, 2005, IDS and the Office of the Capital Defender instituted a policy requiring all attorneys who have been approved for the statewide capital trial rosters to attend either the Capital College or the North Carolina Advocates for Justice ("NCAJ") Death Penalty Seminar at least once every three years. CDPL co-sponsors the annual Capital College and has spent approximately \$8,000 of its annual contractual funds on expenses for each program; during fiscal year 2010-11, that program was held in November 2010. The Capital College is a three-day hands-on training program where participants work on their own appointed cases. Fourteen attorneys attended the 2010 program. In addition, two CDPL staff attorneys planned and chaired the January 2011 annual NCAJ Death Penalty Seminar. More than 150 defense attorneys and several judges attended the Death Penalty Seminar in 2011.

On-Line Capital Trial Motions Index

CDPL has developed and maintains an index of more than 70 sample trial motions and memoranda that can be used by defense counsel in capital cases at the trial level. The sample motions and memoranda are posted on the IDS website, organized by case phase, and available for free to attorneys who are appointed to represent capital defendants. IDS' Trial Resource Unit will continue to develop and maintain that index.

Mitigation Specialist Resource Groups

Beginning in February 2004, CDPL began sponsoring a monthly resource group for mitigation specialists who are working on capital cases at the trial and post-conviction levels in state court. The group subsequently evolved into two different levels, for beginning and intermediate mitigation specialists, which meet in Durham and Winston-Salem. In those groups, the mitigation specialists receive training on various topics that are relevant to their work, discuss non-confidential steps they are taking in their individual cases, and brainstorm additional ways to fulfill the capital defense team's constitutional obligation to investigate and discover all reasonably available mitigating evidence. *See Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003). Between July 1, 2010 and January 31, 2011, CDPL held two such meetings with mitigation specialists. A part-time contractor with IDS' Trial Resource Unit assumed this responsibility on February 1, 2011.

Capital Update Newsletter

CDPL staff generate a bimonthly newsletter for distribution to attorneys who have been appointed to represent indigent capital defendants. That newsletter contains information and updates on capital case law from the Supreme Court of North Carolina and the Supreme Court of the United States, the resolution of select capital cases around the State, and North Carolina executions. The Capital Update is currently being provided to 321 subscribers, with 239 receiving physical copies and 82 receiving the Update electronically via email. There are minimal printing and mailing expenses for the subscribers who receive physical copies (\$957 between July 1, 2010 and January 31, 2011).

CONCLUSION

The contractual funding authorized by Session Law 2009-451 enabled CDPL to provide a wide range of consultation, training, and other services that supported attorneys who were appointed to represent indigent capital defendants at the trial and post-conviction levels throughout the State. To accomplish the work funded by the general consultation contract between July 1, 2010 and January 31, 2011, CDPL spent 378 hours of administrative time, 3,623 hours of direct legal time (*i.e.*, actual attorney time spent on contract activities), and 5,299 hours of total legal time (*i.e.*, direct legal time plus the appropriate proportion of previously unallocated legal time), with an overall effective cost of \$48.83 per legal hour. While the Center's services have been of invaluable assistance to IDS in fulfilling its goal of improving the quality of representation afforded to capital defendants in a cost-effective manner, many of the functions previously performed by CDPL are now the responsibility of IDS' Trial Resource Unit.

APPENDIX A

Center for Death Penalty Litigation
Statement of Support and Expenses
IDS Contract Funding
For the Period July 01, 2010 - January 31, 2011

Contract Funds Received July 01, 2010 through January 31, 2011	264,019	
		\$ 264,019
Expenses (Assessed against funds)		
Legal Personnel	200,803	63%
Administrative Personnel	27,914	9%
Non-Personnel Expenses		
Rent	17,200	
Parking	1,813	
Equipment Repairs & Maintenance	2,034	
Equipment Purchases	969	
Office Supplies & Expenses	1,153	
Postage & Meter Rental	514	
Telephone	1,212	
Consulting Expenses	23,248	
Training	8,151	
Research & Publications	2,012	
Outside Services	31,617	
Total Non-Personnel Expenses	\$ 89,923	28%
Total Expenditures	\$ 318,640	100%
Overspent on contract	54,621	

APPENDIX B

Huband & Brown CPA's PLLC

Jane M. Huband, CPA
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NC Association of CPA's
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INDEPENDENT ACCOUNTANTS' COMPILATION REPORT

To the Board of Directors
Center for Death Penalty Litigation
Durham, North Carolina

We have compiled the accompanying statements of financial position of Center for Death Penalty Litigation (a not-for-profit organization) as of June 30, 2011, and the related statements of activities, functional expenses, and cash flows for the year then ended. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or provide any assurance about whether the financial statements are in accordance with accounting principles generally accepted in the United States of America.

Management is responsible for the preparation and fair presentation of the financial statements in accordance with accounting principles generally accepted in the United States of America and for designing, implementing, and maintaining internal control relevant to the preparation and fair presentation of the financial statements.

Our responsibility is to conduct the compilation in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. The objective of a compilation is to assist management in presenting financial information in the form of financial statements without undertaking to obtain or provide any assurance that there are no material modifications that should be made to the financial statements.

The financial statements for the year ended June 30, 2010, were audited by us and we expressed an unqualified opinion on them in our report dated September 22, 2010, but we have not performed any auditing procedures since that date.

Huband & Brown CPA's PLLC

HUBAND & BROWN CPA's, PLLC
Raleigh, North Carolina
December 09, 2011