

Southern Center for Human Rights

A Report on Pre- and Post-Katrina
Indigent Defense in New Orleans

Southern Center for Human Rights
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The Southern Center for Human Rights

The Southern Center for Human Rights is a non-profit, public interest law firm in Atlanta, Georgia dedicated to enforcing the civil and human rights of people in the criminal justice system in the South. Since 1976, the Center's legal work has included representing prisoners in challenges to unconstitutional conditions and practices in prisons and jails; representing people facing the death penalty who otherwise would have no representation; and challenging systemic failures in the legal representation of poor people in the criminal courts.

On January 2, 2005, Georgia went from a hodgepodge system of indigent defense, where each of the state's 159 counties chose and was responsible for funding its own method of providing counsel, to a state-funded, statewide public defender system. The same day, a capital defender office opened with responsibility for defending people accused of the death penalty. The Center played a major role in bringing about the creation of the statewide public defender system by issuing reports, filing and prosecuting half a dozen class action indigent defense lawsuits, providing information to the media, and working with the Georgia Bar, a commission appointed by the Chief Justice of Georgia and other organizations in seeking a comprehensive system.

Introduction

On August 29, 2005, Hurricane Katrina swept across southern Louisiana, hitting St. Bernard, Plaquemines, and Orleans Parishes, which comprise the entirety of the jurisdictions within Louisiana's Fourth Circuit Court of Appeal.¹ The hurricane left almost complete devastation of civil infrastructures, including hospitals, schools, and the justice system. The storm also bared massive pre-existing deficiencies, *inter alia*, poverty, policing, and the justice system, where a great number of the 8500 detainees (pre and post-trial) ultimately evacuated from the region were indigent, and held on minor offenses without contact or support from their public defender.

When the levees in New Orleans broke on August 30, 2005, there were approximately seven thousand men and women awaiting trial in New Orleans who were too poor to afford a defense attorney. Almost five thousand of these pre-trial detainees were locked up in Orleans Parish Prison when the city flooded, and were evacuated to prisons and jails throughout Louisiana. Most of these indigent defendants, along with new post-Katrina arrestees, remain locked up with no access to counsel.

At the invitation of and in partnership with Safe Streets/Strong Communities, a citizens group working to reform New Orleans' criminal justice system, the Southern Center for Human Rights (SCHR) conducted a preliminary investigation into the crisis involving the evacuated prisoners, meeting over a hundred detainees, talking to scores of attorneys, and reviewing thousands pages of documentation. What SCHR discovered was not just that none of the indigent detainees had seen a lawyer since Katrina—within the last six months—but that the vast majority of the defendants interviewed had not seen a public defender outside of Court in the six months prior to Hurricane Katrina. Moreover, SCHR discovered that the agency tasked with representing these detainees did not know whom it now ostensibly represents.

More than six months after Katrina, a majority of those men and women remain behind bars, where they have languished on average *for over a year* without any communication with a defense attorney. There is an urgent need to immediately staff and mobilize an indigent defense system that can effectively and ethically represent the thousands of individuals who are currently facing their criminal charges without assistance of counsel.

¹ Louisiana has 64 parishes, divided into 41 judicial districts, which fall within five appellate circuits. See: http://www.lasc.org/about_the_court/maps_of_jd.asp.

Methodology

This report is based primarily on court transcripts, public databases, interviews with criminal defense attorneys who practice in New Orleans, court records, studies and reports, observations of criminal court sessions, and interviews with individuals who were detained in Orleans Parish before Katrina and remain incarcerated over six months after their evacuation from Orleans Parish Prison.²

At the invitation of and in partnership with Safe Streets/Strong Communities, a citizens group working toward a reformed criminal justice system in New Orleans, a team of eight investigators and attorneys interviewed over 100 men and women in late February 2006. The individuals interviewed were scattered throughout Louisiana in 13 facilities, some of them over 400 miles (7 hours drive) from New Orleans. To the extent possible, court dates and other facts reported by the pre-trial detainees were cross-checked and confirmed with online databases.

This report uses interviews with the men and women who are detained and awaiting trial as a primary source because it is with these men and women that the constitutional rights to counsel, to equal protection under the law, and to due process rest.

² Part of this report and provisional findings were published previously in another form, as Safe Streets/Strong Communities, *Who Pays the Price for Orleans Parish's Broken Indigent Defense System? A Summary of Investigative Findings*.

The Right to Counsel

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court ruled that the state was obligated to provide an attorney to an indigent person if it sought to take away his liberty, that lawyers were not mere trappings for the rich but an essential component of our justice system. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court recognized that defense counsel must be appointed in any criminal prosecution, whether classified as petty, misdemeanor, or felony, that "actually leads to imprisonment." The United States Supreme Court in 2002 clarified that the right to counsel obligated states to provide poor people with attorneys whenever there is the possibility of imprisonment, even if the term of imprisonment is suspended. *Alabama v. Shelton*, 535 U.S. 654, 657 (2002).

Louisiana has struggled to fulfill the promise of *Gideon*, often saddling the poor with lawyers too encumbered to provide real representation. In 1992, the Louisiana Supreme Court addressed some of the systemic dysfunction of the justice system, holding that lawyers must be presumed ineffective if their case-loads reached certain limits—at that point 70 pending cases and several hundred cases per year. *State v. Peart*, 621 So. 2d 780, 785 (La. 1993). When courts attempted to resolve the indigent defense crisis by appointing bankruptcy and tax lawyers, the Louisiana Supreme Court noted that trial courts were obligated to determine whether funds exist to cover the anticipated expenses, investigative and expert costs, and overhead to reimburse non-volunteer counsel. *State v. Wigley*, 624 So. 2d 425, 426 (La. 1993). As the problem continued to burgeon out of control, the Court held that prosecution must be stayed—stopped indefinitely—until funding is provided to defense counsel. *State v. Citizen*, 898 So. 2d 325 (2005). The Court in *Citizen* further noted that it was the Legislature's responsibility to fund indigent defense, that it had previously failed that responsibility, and that the Court was watching to determine whether the Legislature, and the Blue Ribbon Task Force it had adopted, quickly addressed that issue.

Structure of Indigent Defense in New Orleans

Men and women accused of misdemeanors and felonies in New Orleans who cannot afford to hire an attorney are represented by Orleans Indigent Defender Program (hereafter OID Program) attorneys. Before Katrina, the OID Program employed 42 attorneys, 6 investigators, and 6 office personnel to provide counsel for indigent defendants in municipal, traffic, juvenile, and criminal district courts.³ The OID Program, post-Katrina, was staffed by 6 attorneys and 1 investigator.⁴

Though the OID Program claims it employs full-time public defenders, attorneys working for the OID Program are permitted to take private cases. In a recent hearing before the Chief Judge, the Chief Defender of the OID Program admitted there was no limit on the number of private, paying cases a public defender could take. By allowing its attorneys to take as many private cases as they wanted, without any limit or reporting mechanism, the OID Program was essentially getting part-time attorneys at full-time pay.

The OID Program is a creation of the Orleans Indigent Defender Board (hereafter OID Board). By state statute each judicial district in Louisiana is required to maintain an Indigent Defense Board.⁵ It is left to each Board, however, to select a system of providing counsel to people accused of felonies and misdemeanors who are unable to afford an attorney.⁶

Before Katrina, the OID Board was made up of private criminal defense lawyers who practiced in front of the same judges before whom public defenders practiced. This may not have been a problem in a system where judges did not interfere with the provision of adequate defense. According to attorneys' reports, however, when a judge disliked a particularly active public defender, OID Board Members would have that public defender re-assigned or terminated. If any OID Board Member had in fact removed any OID Program attorney in order to curry favor with a judge, that would obviously have been a Board Member improperly placing private interests above the public interest in vigorous representation. Additionally, several public defenders purportedly worked for the private law firm of members of the OID Board.

³ *State of Louisiana v. Kenneth Edwards*, Transcript of Court Proceedings at 7 (Feb. 10, 2006).

⁴ *Id.* at 10. As of March 15, 2006, OI DP's staff appears to have been increased to approximately 11 lawyers and one investigator. The investigator, however, is OI DP's only Spanish-speaking employee and spends most of his time working as a translator in traffic, municipal, and magistrate court.

⁵ La. R.S. 15: 144 *et seq.*

⁶ La. R.S. 15:144

Though time did not permit further investigation to verify all of these charges, there is little dispute that while state law specifies that members of the OID Board should be selected from nominees provided by each bar association within the judicial district, the OID Board was not selected from such nominations.⁷

As this Report was being prepared for publication, we learned that at the March 14 OID Board meeting, three OID Board members resigned from their positions. This leaves Frank DeSalvo as the only active member of the OID Board.⁸ A reconstituted OID Board should, obviously, contain members who are able and willing to assert their independence from the judges, and who are committed to the vigorous representation of poor people

⁷ *Id.*

⁸ Mr. DeSalvo is the in-house attorney for the Police Association of New Orleans *See* Police Association of New Orleans website, listing Frank DeSalvo as the PANO attorney "available 24 hours a day." <http://www.pano1544.com/contact.html>

Deficiencies in Indigent Defense Pre-Katrina

Before Katrina, a number of reports documented the rash of systemic problems plaguing indigent defense throughout Louisiana and particularly in New Orleans. The findings from these reports do not need to be rehashed here, but a review of their conclusions confirm that policy-makers had thorough and sufficient notice of the pre-Katrina problems reported by the men and women we interviewed.

In 2004, a report by the National Legal Aid and Defender Association (NLADA) and the National Association of Criminal Defense Lawyers (NACDL) concluded, simply: "Louisiana fails to meet its federal obligations under *Gideon*."⁹ The NLADA study echoed the findings of a study conducted 12 years earlier, when the Louisiana Supreme Court Judicial Counsel's Statewide Indigent Defender Board Commission retained the Spangenberg Group to review the adequacy of counsel to poor people. The report found the system severely under funded throughout the state.¹⁰

When the Spangenberg Group focused its attention in 1997 on the Orleans Indigent Defender Program, the deficiencies were even more pronounced.¹¹ The Spangenberg Group's report noted that the OID Program's culture "condones some attorneys' devoting the minimum amount of time to fulfilling their public defender duties," and recommended prohibiting public defenders from representing private clients because "the temptation to expedite the cases of non-paying clients to focus on private clients is great."¹² The report also concluded that "when trials do occur, attorneys are frequently unprepared," "the program often represents co-defendants until the last moment, which poses a serious threat of conflict of interest," and "expert witnesses are very rarely used, even in capital cases."¹³ After spending a week in the OID Program offices, the researchers concluded that "an underlying philosophy among the staff is that satisfying the judges is extremely important."¹⁴

Nearly a decade later, it appears many of the problems identified by the Spangenberg Group persisted in pre-Katrina indigent defense in New Orleans.

⁹ NLADA and NACDL, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE (March 2004).

¹⁰ Spangenberg Group, STUDY OF THE INDIGENT DEFENDER SYSTEM IN LOUISIANA (1992).

¹¹ Spangenberg Group, THE ORLEANS INDIGENT DEFENDER PROGRAM: AN OVERVIEW (Feb. 1997).

¹² *Id.* at 24, 32.

¹³ *Id.* at 35, 37.

¹⁴ *Id.* at 24.

The pre-trial detainees we interviewed reported significant deficiencies in their pre-Katrina representation starting from the moment of arrest.

- Individuals arrested on criminal charges were brought to court for an initial appearance a day or two after being arrested. Some individuals were brought to magistrate court, where an OID Program attorney was appointed "solely for the purposes of this hearing." These individuals reported that the assigned attorney did not conduct even the most cursory interview to solicit information about an arrestee's ties to community, employment history, charges, or any other information relevant to setting bond. Other individuals were brought to a room where they faced a judge on a video screen. These individuals uniformly reported there was no defense attorney present in the room.
- Bonds in New Orleans were unusually high, yet OID Program attorneys almost never advocated for lower bonds. Paid attorneys routinely and vigorously argued for bond reductions. A number of interviewees reported it was understood among arrestees that if you wanted someone to argue for a reduction in bond, you would have to hire a private attorney because OID Program attorneys seldom or never did so.
- The arrestees too poor to afford bond, and those for whom no bond was set (including those arrested on *capias* warrants), were then returned to jail, where they sat without representation until and unless they were indicted. Poor people accused of felonies and unable to afford an attorney typically sat in jail for more than 60 days before being appointed an OID Program attorney.
- After appointment, the OID Program's attorneys—as a general matter—did not visit the crime scene, did not interview witnesses, did not check out alibis, did not procure expert assistance, did not review evidence, did not know the facts of the case even on the eve of trial, did not do any legal research, and did not otherwise prepare for trial. One interviewee described talking to his attorney for the first time while sitting at counsel table waiting for his trial to begin and, to his dismay, discovering that his attorney could not remember his name and had apparently not talked to his alibi witness.
- Attorneys with OID Program almost never met with their clients outside the courtroom to discuss their cases. The average number of times that each interviewee in our sample group had spoken to his or her OID Program attorney outside the courtroom before Hurricane Katrina hit was zero. Of the 87 pre-trial detainees represented by OID Program attorneys we interviewed, only 3 reported *ever* being visited by their attorney while they were locked up

in Orleans Parish Prison. Among this group of detainees, the average time people had been locked up in OPP before Katrina hit was 5 months.

- Though various motions were filed and ruled on for many indigent defendants, the motions were, as a rule, entirely *pro forma*. Motions to suppress evidence, for example, were filed as a matter of course, often at the Court's own request, in any case involving seized evidence.
- The men and women who could not afford to hire attorneys pre-Katrina and now continue to languish in jail described their appointed attorneys' pre-Katrina performance as "passive," "not interested," and "absent." One public defender is known for spending his days in court solving puzzles rather than talking to clients.
- Both attorneys and pre-trial detainees reported that the normal course of business was for pre-trial detainees to be brought back *en masse* to court every month to 45 days to "see the judge." Defendants with aggressive private attorneys were able to use the court dates to argue for bond reductions or other motions, while those with public defenders generally got sent back to jail until they had done "enough time." One interviewee, charged with unauthorized use of a vehicle and possession of marijuana, 1st offense, had been taken to court approximately 12 times in the year since his arrest. Each time his case was reset for a later court date, without any argument to the court by his public defender.
- There was no continuity of representation, with pre-trial detainees often represented by a number of different public defenders throughout the proceedings. One 59-year-old African-American man who was arrested the day after Christmas in 2004 and charged with possession of crack and marijuana has been represented by 5 different public defenders during the 15 months he has been in incarcerated awaiting trial.
- Appointed counsel did not take calls from the jail, did not respond to letters or other written correspondence, and generally did not take calls or make appointments with family members. The men and women we interviewed uniformly reported that OID Program attorneys did not ask for names of witnesses or facts supporting alibis, did not respond to requests that critical witnesses be interviewed, and often did not know their clients names.

The general lack of vigorous representation in a criminal justice system that is based on an adversarial process hurts the individual clients. Additionally, the general public suffered because of the lack of a strong public defender in New Orleans. Public defender offices that vigorously represent individual clients make it difficult for police officers to take shortcuts. The OID Program and OID Board, by contrast, did little to check the pervasive misconduct and criminality of the New Orleans

Police Department. It is unclear whether the silence by the OID Program and Board were caused by deliberate indifference or some other reason, but it is unlikely to be because the police were particularly clever in covering up their misdeeds.¹⁵

The passivity of the OID Program and Board also allowed patently unfair practices to flourish. "Police sentencing," for example, was prevalent. Because the public defender does not technically represent an accused between the initial appearance (where a public defender enters a limited appearance) and formal charging by the District Attorney's office, many individuals unable to post bond are forced to serve months awaiting appointment of counsel following arrest.¹⁶ Because the OID Program explicitly did not represent people during this time period—perhaps to avoid competing with private attorneys who made their money getting clients released from jail during this period—people too poor to hire an attorney simply sat in jail and waited out this period. The paid attorneys who sought out clients during this period included part-time OID Program attorneys and attorneys employed by members of the OID Board.

Our review of the indigent defense system in Orleans confirmed that it failed almost every one of the American Bar Association's *Ten Principles of A Public Defense Delivery System*, and as well the American Bar Association *Standards for Providing Defense Services*, lacking political independence,¹⁷ full time public defenders,¹⁸ case-load limitations,¹⁹ and defense support services.²⁰

¹⁵ See Sam Howe Verhovek, La. Times, *Policemen's Lawyer Says Tape Shows Fuller Story Charged in a New Orleans beating, the three are 'political whipping boys,' he says*, October 13, 2005, Nation, A-20. See also Michael Perlstein, Times Picayune, *Cop suspended in beating had psychiatric treatment*, October 14, 2005, Metro, B1 ("I know that when you see the arrest, it seems overzealous. But their performance was perfectly within the realm of reason," DeSalvo said, arguing that expressions of shock by Mayor Ray Nagin and other officials don't take into account all the circumstances surrounding Davis' public intoxication arrest."); Susan Finch, Times Picayune, *Judge orders probe into teen's arrest; He says cop lied*, April 16, 2005 B1 (noting police officer's bald-faced misrepresentation of facts in a report); Gwen Filosa, Times Picayune, *DA pins dismissed cases on NOPD: Jordan's office cites poor police work*, Metro B 1, April 6, 2004 ("More than a third of the cases dismissed by Orleans Parish District Attorney Eddie Jordan's office were dropped due to poor police work, including suppressed confessions and evidence, weak testimony and officers failure to show in court, a report released by Jordan's office shows."). See also Michael Perlstein, Times Picayune, *Tape Captures Hardball Tactics*, A1, July 7, 2000 (Caught ignoring a suspect's request for an attorney, and then promising to downgrade charges in exchange for a confession, a police supervisor bemoaned that the officers had been so careless: 'I can't believe these guys were stupid enough to put that stuff on tape,' said one high-ranking police commander who requested anonymity.)

¹⁶ The District Attorney has 45 days in misdemeanor cases and 60 days in felony cases within which to file charges; this time limit may be extended for "good cause." A case must then be allotted to a division of court and an arraignment held, at which a public defender may be appointed, within 30 days after the filing of charges; this time limit, also, may also be extended for "just cause." See, La.C.Cr.P. Art. 701.

Not only does it appear that the OID Program has failed to meet the *ABA Standards for An Indigent Defense Delivery System* and national case-load standards, the Program was also clearly violating the *Louisiana Indigent Defense Assistance Board's Case-Load Standards*, as well as the standards adopted by the *Louisiana Public Defender Association* and *Louisiana Association of Criminal Defense Lawyers* for the provision of effective representation.

Moreover, our interviews with detainees and the transcripts of hearings conducted since Katrina plainly indicate that the system is, and has been, operating at a level that compromises the ethics and professionalism of the attorneys attempting to work within it.²¹

¹⁷ See American Bar Association, Ten Principles, Principle I (“The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”); see also *ABA Standard on Defense Delivery Systems* 5-1.3 **Professional Independence** (“The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.”)

¹⁸ See *ABA Standard* 5-4.2, **Restrictions on Private Practice** (“Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.”) While the Executive Director testified at one recent hearing that all attorneys were full time, no mechanism was put into place to prevent the prevailing practice in which public defenders were allowed or encouraged (sometimes by OIIB members) to maintain part time practices.

¹⁹ See ABA Ten Principles, Principle V (“Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.”)

²⁰ See, e.g., *ABA Standard* 5-1.4, **Supporting Services** (“The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process.”)

²¹ See, e.g., **RULE 1.3. DILIGENCE** (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); **RULE 1.4. COMMUNICATION** (“(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) *keep the client reasonably informed about the status of the matter*; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”)

See also the Bureau of Justice Affairs, *Keeping Defender Workloads Manageable*, Prepared by The Spangenberg Group, January 2001 NCJ 185632 (“The first rule in ABA’s Model Rules of Professional Conduct (as amended through August 1998) requires a lawyer to provide competent

Deficiencies in Indigent Defense Post-Katrina

After Katrina, an *ad hoc* group of attorneys, investigators, and interns stepped in to help the men and women who had been evacuated from Orleans Parish Prison. These attorneys, all working *pro bono*, traveled to over 35 institutions, interviewed over 5000 evacuated prisoners, fought the Louisiana Department of Public Safety and Corrections and Sheriff's office for access and documents, filed a federal 1983 action on behalf of women detainees, made numerous motions for ROR bond and to modify bond, moved to consolidate all habeas writs, vigorously advocated for release of people detained for misdemeanors and ordinance violations, and filed over 2200 habeas petitions. This group, without pay and for many at a moment of personal crisis, attempted to provide some basic help for evacuated individuals, and re-institute a constitutional regime in which Courts made decisions based upon an adversarial process.

By contrast, the OID Program did little more than wait for further instructions. Most of the men and women evacuated from Orleans Parish Prison were pre-trial detainees and were, by and large, OID Program's clients. The OID Program's slow response was due in part to the inappropriately fragile funding sources on which the OID Program relied. Approximately 75% of the funding for the OID Program came from local fines and fees paid in conjunction with traffic and municipal violations.²² As a result, the OID Program shrank from a pre-Katrina staff of 42 attorneys, 6 investigators, and 6 office personnel to a post-Katrina staff of 6 attorneys and 1 investigator.²³ Some other part, however, must be credited to the passivity that characterized the office before the hurricane.

representation to a client. Model Rule 1.3 requires that a lawyer "act with reasonable diligence and promptness." Model Rule 1.4 covers attorney client communication, mandating that a lawyer keep a client reasonably informed about the situation and promptly reply to reasonable requests for information. Model Rule 1.7(b) prohibits attorneys from representing clients "if the representation of that client may be materially limited by the lawyer's responsibilities to another client." Many public defenders fail to acknowledge the conflict of interest that arises when excessive caseloads force them to choose which of their clients will receive the defense to which they are entitled.")

²² See e.g. Henry Weinstein, La. Times, *Evacuated Prisoners Are Captive to Legal Limbo Help in the courts appears to be distant in a system that was strained even before the storm*. October 19, 2005, Nation, A1. See also Redefining Leadership for Equal Justice: Final Report of the National Symposium on Indigent Defense 2000 (Office of Justice Programs/Bureau of Justice Assistance, U.S. Department of Justice, 2001), at 16-17, http://www.nlada.org/Defender/Defender_Standards ("A major problem in New Orleans is the source of the funding, which comes from traffic tickets, noted Tony Gagliano of the Louisiana Supreme Court. The amount of funding depends on collection efforts in each district, which is then dependent on the vagaries of law enforcement. For example, Gagliano noted, if a parish (the state's version of a county) forgot to order traffic tickets one month, funding for that period would be substantially reduced. Traffic citations vary seasonally, also affecting funding.")

²³ *State of Louisiana v. Kenneth Edwards*, Transcript of Court Proceedings at 10 (Feb. 10, 2006).

With basic investigation and advocacy by OID Program attorneys, it is likely that a large group of individuals currently detained could have been safely released on ROR bond months ago. In the entire group of men and women we interviewed, not a single person had been contacted by his or her OID Program attorney after Katrina. Many individuals made repeated efforts to find their attorneys, generally by asking family members to write and call. In the few instances where a family member was able to talk to the OID Program attorney, they were told the attorney no longer worked as a public defender.

There are currently approximately 4500 pre-trial detainees arrested in New Orleans and now scattered throughout Louisiana. Approximately 1000 are post-Katrina arrestees. The remaining have been incarcerated since before the hurricane. Some number of these individuals is now without any representation at all, after two public defenders were permitted last month to withdraw from all but their 200 oldest cases.

Conclusion

In 1997, the Spangenberg Group reported “the Orleans Indigent Defender Program ... lacks both leadership and planning and as a result suffers from a sense of malaise.” The report, almost ten years old, cited the need for professionalism; better case-management, record keeping, case-tracking, supervision; and the need to attend to the constitutional rights of defendants rather than “placate” specific judges and the courts. The report observed that the OIDP had little insight into how many, and for which cases, it actually was responsible. The report further observed that the lack of parity between prosecution and defense undermined the constitutional legitimacy of the system in place.

The problems observed then appear to continue to exist. Indeed, along with burgeoning caseloads and the funding crisis, the lack of independence and advocacy appears to have been exacerbated by the storm.

Our review indicates that the indigent defense system operating in Orleans currently violates both constitutional and ethical mandates, and that an adversarial system of justice is perilously close to non-existent. Indeed, the lack of an independent, vibrant, and constitutionally acceptable indigent defense program plainly undermines the “public trust in the criminal justice system.” However, while deficiencies in the indigent defense laid bare by Hurricane Katrina warrant an expedited response and significant additional resources, the problems cannot be resolved by merely adding funds to the broken system that existed prior to Katrina.

As the Southeast region of Louisiana rebuilds its justice system, it is critical to recognize that an effective indigent defense program is an essential part of that justice system. Structural changes to the current system must be considered and implemented in order to “improve [] services and to improve public trust in the criminal justice system.”²⁴

²⁴ See The Bring Back New Orleans Commission, Infrastructure Final Report Criminal Justice System, 2/22/2006, at www.bringneworleansback.org.

Representative Interviews

AT. AT was arrested on May 12, 2005, for purse snatching. His bond is \$5,000. AT does not have any prior convictions. AT's co-defendant hired a private attorney and was released from jail after Katrina. AT cannot afford an attorney and has now been in jail for 288 days awaiting trial and without any meaningful contact with his public defender.

AK. AK has been in jail and awaiting trial for 404 days on a charge of burglary of an inhabited dwelling. His ex-girlfriend accused him of going into her house and taking \$50 when she wasn't there. During his 400+ days behind bars on this case, his public defender has never interviewed him or otherwise been in communication with him about his case.

BD. BD is a 17-year-old charged with aggravated assault and aggravated battery. He has been in jail since March 27, 2005. He was arraigned on July 12, 2005, where he was appointed a public defender. When he went back to court on August 12, he was appointed a different public defender, who could not tell him what he was charged with and openly noted that she did not have a file on him. He has not been to court since. He has no idea who is working on his case because no one has ever come to the jail to visit him. Next month will make a year in jail, and, because of Katrina, he is being housed in a prison three hours from home.

BJ. BJ was arrested April 26, 2005, on charges of possession of cocaine and prohibited drug paraphernalia. The district attorney refused to accept the drug paraphernalia charge, leaving only the possession charge. BJ was told before the hurricane that he was in jail for violation of parole. BJ's parole ended on June 13, 2005. He has been incarcerated for seven months now.

BE. BE has been sitting for 323 days on a possession of heroin charge.

BP. BP is a 31-year-old man with mental disabilities who was arrested on June 16, 2005, for allegedly engaging in sex with another patient at the psychiatric hospital where he was committed. At BP's lunacy hearing on August 23, the court found him incompetent and remanded him to a forensic mental hospital. A lunacy hearing for re-evaluation was set for October 25, but Katrina hit before BP could be transferred to the mental hospital. He has been raped multiple times during the 250+ days he has been incarcerated. In the six months since the storm, BP has not been able to contact any public defender to ask for help in getting transferred to the mental hospital.

BK. BK bonded out on an aggravated battery with a weapon charge, but was then picked up again before his case was dismissed. BK went home in April 2005. He was picked up on August 28, 2005, on a warrant from the case that had already been

dismissed. He figured the mistake would be corrected, but Katrina hit the next day. BK has no family to advocate for him. He has not been charged nor has he been to court. He does not know why he is in jail. He has written to the Attorney General and has not received a response.

BT. BT is a 32-year-old African-American man who was arrested on February 24, 2005 and charged with unauthorized use of a vehicle and possession of marijuana, 1st offense. He was involved in a major car accident right before his arrest, which involved a three-week stay in the hospital. After his release from the hospital, he was moved to OPP's medical tier. He has been taken to court approximately 12 times since his arrest, but each time his case has been reset for a later court date. BT has been in jail for over a year awaiting trial.

CA. CA was arrested December 10, 2004, for possession with intent to distribute cocaine. He was arraigned February 28, 2005, after which he had his court date reset four or five times. At his August 10 court appearance, his public defender did not show up, and he was told he would be brought back in October 2005. After the Katrina evacuation, CA wrote a letter in January 2006 to the 4th Circuit Court of Appeals explaining he had been sitting in jail for more than a year awaiting trial. The Court wrote on February 8 that if he did not appear in 30 days he should be released. According to the court docket, CA was scheduled for court February 16, 2006, but he was not brought back for that court date.

DR. DR is a soft-spoken 19 year old who is in jail because he stole two six-packs of beer and then got into a fight while in OPP serving his 60 days for stealing beer. DR was arrested on or around May 28, 2005. He pled guilty to stealing two six-packs of beer in municipal court in front of Judge Early and was sentenced to ninety days. While at OPP he was charged with second-degree battery for allegedly having a fight with another inmate. On July 9, 2005, Magistrate Judge Hansen set bond at \$10,000. The last entry in the docket shows that a show cause hearing was scheduled for September 9, 2005. His charges have apparently not been accepted.

DT. DT is a 22-year-old African-American woman. On August 6, 2005, she was late returning a rental car. The police pulled her over and charged her with receiving stolen property, driving without a license, reckless driving, illegal driving across a ditch, no seat belt, two warrants for failure to pay fines and fees, and two probation violations. According to the docket master, Magistrate Judge Hansen threw out the receiving stolen property charge because there was no probable cause. DT remembers that the Judge told her she would have to come back to court on August 31, 2005, to deal with the outstanding fines and fees, at which point he would release her. After Katrina hit, DT was evacuated and has not been back before the judge. She has now been in prison almost seven months for outstanding fines.

DJ. DJ was picked up on charges of possession of marijuana, first offense, in the fall of 2004. The possession charge was *nolle prossed* on March 3, 2005, after DJ had

already been in jail for six months. It appears from the docket master that DJ was then picked up again on August 17, 2005, for failure to appear at an arraignment for the same charges that previously had been dismissed. His next hearing was set for August 29, 2005, the day of Hurricane Katrina. DJ has been sitting in jail for six months now (in addition to the six months prior to the possession charge being *nolle prossed*) on either a clerical mistake or an unresolved possession charge.

EE. EE was arrested on or about August 4, 2005. EE allegedly took about \$160 worth of tools from Lowe's. He was charged with two counts of theft \$100 to \$500, and possession of stolen property \$100 to \$500. The new charge violated his probation; his probationary period ends on March 14, 2006. EE has four children ages 8, 10, 12, and 13. He lived in the Ninth Ward and before arrest he was working and supporting his family. It appears the charges against him have not been accepted.

FF. FF is a 59-year-old African-American man who was arrested the day after Christmas in 2004. He was charged with possession of crack, possession with intent to distribute, and possession of marijuana 1st offense. On February 3, 2005, FF was brought to court for arraignment on the crack charges, but was not appointed counsel. A public defender stood in for the purposes of arraignment only. On March 18, FF was brought back to court, this time for arraignment on the marijuana charge. A public defender, different from the attorney who had stood in for FF's February 3 arraignment, stood in for FF's March 18 arraignment. FF was again not appointed counsel. Over two months passed before FF was brought back to court for a lunacy hearing and yet another public defender appeared as FF's appointed counsel. On June 24, yet another public defender appeared in court for a motions hearing, but FF was not brought to court. This was the fourth or fifth public defender assigned to "represent" FF. The motions hearing was reset for mid-August and then reset again for mid-October. FF has now been incarcerated for nearly 15 months. Of the four or five public defenders who have stood in court during FF's court appearances, none has ever gone to interview FF, none has written him, and none has contacted him in any way regarding his case. FF does not know whether he is represented at this time.

FP. FP was arrested on April 28, 2005, and charged with bank fraud for trying to cash a \$200 check. At his arraignment, he was appointed a public defender. When he went back for his motion day, his public defender was on vacation, and his motion day was reset for August 29. Katrina hit that day, and he has not heard from his public defender since then. FP has now been in jail for 303 days awaiting trial on his bank fraud charge.

GB. GB is a 50-year-old African-American woman who is charged with 2nd degree murder. She has been incarcerated since March 5, 2005. She was not appointed counsel until May 17, 2005, at which point she was appointed JB. But when she returned to court on June 2nd, her lawyer changed to WF, who immediately tried to get her to enter a guilty plea and serve 45 years without having discussed her case at

all. Since refusing to take this deal, she has not seen or spoken with her attorney and does not know if she will. She has written to him and has gotten no response. She will have been in jail for a year without having meaningful contact with an attorney.

GK. GK was arrested on October 25, 2004, and charged with possession of crack cocaine with intent to distribute. He also has a parole hold of some kind. He has been in jail for almost 16 months now awaiting trial. In that time, he has never been interviewed by his public defender about the facts of his case.

IT. IT was picked up on a warrant on August 17, 2005, for failing to appear for his arraignment on a 2002 case of the credit card theft. There were no new charges. IT is openly gay and has been continually harassed while at the facility to which he was evacuated. IT filed his own writ of habeas corpus to the District Court where he is incarcerated. According to IT, at a December 20 hearing, the judge ordered him released if by January 27 the Orleans District Court had not brought charges against him. It appears from the docket master that charges have not been brought against IT, but he is still incarcerated. IT is unable to afford an attorney to represent him, but he has never been contacted by a public defender or even given the opportunity to apply for one.

JW. JW is a 50-year-old man in jail for violation of probation. His history shows many court appearances where he paid fines, and various appearances where he appeared but paid \$0 on his fees. After appearing multiple times without payment and being ordered to pay fees by the next court date, JW missed court dates and has since been imprisoned. JW has a single prior arrest on a minor charge that was not accepted. JW has now been in jail for almost nine months for being unable to pay his fines.

JT. JT was arrested July 23, 2005, for acts of domestic violence. JT had not been arraigned on this charge when Hurricane Katrina hit. He has now been in jail for seven months. The charges have apparently not been accepted. JT has not been contacted by a public defender and does not know how to apply for one. Under the OID Program's pre-Katrina practices, JT is not considered eligible for appointment of a public defender because his charge has not yet been accepted.

JJ. JJ was arrested on May 23, 2005, for begging in the French Quarter, violating his parole. JJ suffers from mental illness, and since being evacuated from OPP in August 2005 his mental illness has not been properly treated. He has now been in jail nine months awaiting adjudication.

JW. JW was arrested on October 13, 2004, for possession of a nickel bag of marijuana. At the time of his arrest, he was on probation for possession of cocaine from 2002. His bond was set for \$500, but he could not afford to pay it. The next time he went to court, he was sentenced to six months probation, a suspended sentence for the marijuana charge, and 10 months prison time for the probation

violation. The two sentences were to run concurrently. He went to court on July 5, 2005, and was told that his fines and fees from the marijuana charge would be dropped. He did his 10 months and was supposed to get out on August 10, 2005. On August 11, 2005, he was told that he was not getting out because he still had fines and fees pending. He was supposed to go back to court on August 11, but his date was reset and then Katrina hit.

KS. KS is a 19-year-old African-American man charged with armed robbery. He was arrested on January 14, 2005, and has had little contact with his public defender. He went to arraignment on March 22, 2005, only to be told that the public defender standing next to him was only going to be his lawyer for that day. He would proceed to go to court for six more court hearings over the course of two months in order "To Determine Counsel." Finally, another public defender was appointed to represent KS on June 14, 2005, but he never spoke with his client. KS never talked with his attorney prior to being evacuated from New Orleans, and has not heard from or seen a public defender since. He has been in jail for over 13 months without speaking to an attorney about his case. He is now incarcerated at a facility about three hours away from New Orleans.

LR. LR was arrested on a misdemeanor possession of marijuana charge on June 12, 2005. He was set for trial August 31, 2005. He has already served more time on the misdemeanor charge than he would have been sentenced to serve if convicted. The charge triggered a parole violation. LR had served 17 years in the DOC and was serving eight on parole when he was arrested. He had been getting his life back together after being homeless for more than two years. His first child was born while he was in jail.

MF. MF has been in jail since July 22, 2004, on a cocaine possession charge. MF was charged on February 28, 2004, released on bond, and then arrested in July for failure to appear in court. His bond of \$5,000 was forfeited and has not been reinstated. MF's trial date was set back nine times, starting in October 2004. His ninth reset was for September 26, 2005, which did not occur due to Hurricane Katrina. He has now been in jail for 19 months without trial and with no contact with his public defender, on a charge with an initial bond of \$5,000.

OT. OT was arrested July 27, 2005, and charged with burglary of an inhabited dwelling. The burglary charge triggered a parole violation. OT reports that his parole ended on November 12, 2005. OT has not been arraigned. Seven months after his arrest, he does not know whether he has a public defender.

RR. RR is a 45-year-old African-American man who was arrested on February 11, 2005, and charged with second-degree battery. He had his bond set that same day during a video bond hearing, where he was told a public defender was "in the room" even though he did not see one. He did not see a judge and was not appointed an attorney until 64 days later. At the arraignment, it seemed the judge could not find

the public defender on RR's case, so he motioned to the defense table for another attorney to represent RR. The public defender talked to RR for about 10 seconds, telling him the next court date and nothing else. When RR was brought back to court on May 5, 2005, his defense attorney told him he was facing 10 years. RR was returned to court three or four times after May 5. Each time, RR's defense attorney either did not speak to him, or spoke to him only long enough to tell him he was facing more and more time. On August 16, RR was brought back to court for trial and his public defender told him he was facing 30 years. RR did not find it credible that he would face 30 years for 2nd degree battery and so would not take the plea. The trial was reset, but Katrina hit before the date. In the six months before Katrina and the six months since Katrina, RR's public defender never visited him in jail, never wrote, and never called. RR does not know whether he is represented at this time. RR has worked all his life installing fences—including the fencing around Templeman and the airport—and would very much like to get out and help rebuild New Orleans. He has now been warehoused for over a year on a 2nd degree battery charge.

SL. SL is a 41-year-old white woman who was arrested for possession of cocaine and on a warrant for failing to appear in court for a paraphernalia charge from March 24, 2005. When she went to court for her paraphernalia charge on August 12, 2005, she was appointed a public defender who immediately tried to get her to plead out to a 40-month prison sentence. She refused to accept the plea deal. She has been sitting in jail ever since and has not seen or spoken with her assigned counsel since her arraignment on that charge. She will have been in jail for a year next month on these possession charges.

WJ. WJ is a 51-year-old African-American woman who was arrested on July 25, 2005, for criminal trespassing. She was walking through the projects and because she was not a resident, she was arrested. She also had a warrant out for her arrest because she failed to attend mental health and drug courts for a 2004 crime against nature (solicitation). WJ has a history of being in and out of jail for failing to report to drug and mental health court. After her arrest on July 25, her judge set her case to be heard in Mental Health Court on August 26, 2005, but because of the hurricane, she never went back to court. WJ has been in jail for seven months on a misdemeanor and failure to appear charge.

WT. WT was arrested on or about July 17, 2005. He is charged with a crime against nature and solicitation. WT's bond was set at \$5,000. According to the docket master, WT had an arraignment set for February 24, 2006, but “did not appear.” He apparently was not transported by the DOC. WT has another arraignment set for March 30, 2006. He has already sat in jail for seven months awaiting trial and without any communication with his public defender.

WB. WB is a 41-year-old woman who was trying to rehabilitate herself at the time of her arrest on August 8, 2005. WB was attending rehab and was trying to get her

Section 8 housing back, which required a police report or background check. When she went to the police department to get these documents, the police arrested her because of an outstanding warrant for missing court on a 2001 paraphernalia charge. She has been in jail ever since and does not know when she will be back in court. She has been in jail for over six months and has had no contact with her public defender.

SCHR Indigent Defense Litigation

Stinson v. Fulton County Board of Commissioners, Civil Action No. 1:94-CV-0240 (N.D.Ga.). Class action filed in the United State District Court for the Northern District of Georgia seeking declaratory and injunctive relief against Fulton County to eliminate the long delays for persons suspected of committing felony offenses in Fulton County. Before the lawsuit, persons detained in the Fulton County Jail could not expect to see an attorney until and unless they were actually indicted, usually months after being taken in custody. The delays in providing counsel amounted to a prejudicial denial of the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. A settlement of the lawsuit resulted in an increase in the staff and responsibilities of Fulton Pretrial Services in order to facilitate prompt contact with indigent persons, to timely pretrial release assessment, and to appointment of the Fulton County Public Defender to represent qualified arrestees. The settlement increased the fulltime staff at the Public Defender office and required the Fulton County Public Defender to make contact with the arrestee within forty-eight (48) hours after appointment by Pretrial Services.

Parks, et al. v. Fennesy, et al., Civil Action No. 1:96-CV-182-3 (M.D.Ga.). Class action filed in 1996 in the United States District Court in the Middle District of Georgia seeking declaratory and injunctive relief against the State Court of Sumter County for failing to inform or advise indigent persons arraigned on misdemeanor charges of the right to counsel. Misdemeanor defendants there were not told they were entitled to a lawyer before deciding to plead guilty. The case was settled in 1998 when the Court agreed to clearly advise indigent persons accused of misdemeanors of their right to counsel.

Foster, et al. v. Fulton County, et al., Civil Action No.1:99-CV-900 (N.D.Ga.). This class action filed in 1999 was originally seeking adequate medical care at the Fulton County Jail. In 2002, the Center warned County officials and the Court that the failure to provide lawyers to people accused of minor crimes was contributing to jail overcrowding as well as violating the right of those people to a lawyer. The judge ordered the County to provide counsel with 72 hours of arrest to all persons accused of minor offenses who could not make bail. The Court also ordered the County to provide within 72 hours of arrest an “All Purpose Hearing” where defendants in minor cases could resolve their cases by entering a plea or receive an individualized bond hearing if they desired to go to trial.

Bowling, et al. v. Lee, et al., Civil Action No. 01-V-802 (Sup. Ct. for Coweta County). In this class action filed in 2001 in the Superior Court of Coweta County, Georgia, plaintiffs sought declaratory, injunctive, and mandamus relief to remedy a count indigent defense program based on the contract defender model. Two contract defenders handled the entire caseload while maintaining private practices, resulting in indigent pre-trial detainees waiting for months before one of the county's two part-

time contract defenders saw them. One judge routinely ordered unrepresented defendants to negotiate pleas with prosecutors. The Coweta litigation was settled after the county set up a public defender office with three full-time attorneys, investigators, and two support staff.

Smith, et al. v. Fulton County Board of Commissioners, Civil Action No. 1:02-CV-2446 (N.D.Ga.). Class action filed in 2002 in the United States District Court for the Northern District of Georgia, where plaintiffs sought declaratory and injunctive relief against all municipalities within Fulton County to make comprehensive changes to the indigent defender system in Fulton County. Municipal courts in 10 municipalities were not meeting constitutional requirements of timeliness of hearings and representation at important stages of defendants' cases. The case was settled after all the courts agreed to hire defense attorneys to represent indigent defendants in their courtrooms.

Hampton v. Forrester, Class action filed in 2003 in the Superior Court of Crisp County, Georgia. People who cannot afford a lawyer were routinely processed through the courts in Ben Hill, Crisp, Dooly, and Wilcox counties in assembly line fashion in violation of the fundamental right to counsel. Center investigators discovered one man who had sat in jail for 13 months without seeing his public defender, including four months *after* all charges against him had been dismissed. A new, circuit-wide public defender office opened in 2004.