

THE 2019/2020 ANNUAL REPORT OF THE NEBRASKA COMMISSION ON PUBLIC ADVOCACY



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Commission History

In 1995, the Nebraska Legislature enacted the "County Revenue Assistance Act." Neb. Rev. Stat. §§ 29-3919, *et seq.* (Reissue 2016). Among other things, the Legislature found: "Property tax relief in the form of state assistance to the counties of Nebraska in providing for indigent defense services will ... lessen the impact on county property tax payers of the cost of a high profile first-degree murder case which can significantly affect the finances of the counties[.]" Neb. Rev. Stat. § 29-3920 (5) (Reissue 2016). To achieve the goal of county property tax relief, the Legislature created the Commission on Public Advocacy (Commission) "to provide legal services and resources to assist counties in fulfilling their obligation to provide for effective assistance of counsel for indigent persons." Neb. Rev. Stat. § 29-3923 (Reissue 2016).

The Legislature established the following five divisions within the Commission: the first-degree murder litigation division; the appellate division; the violent crime and drug defense division; the DNA testing division (established in 2001); and the major case resource center. Neb. Rev. Stat. § 29-3930 (Reissue 2016). Over the years, the Legislature has required the Commission to provide other services which will be addressed in this report.

The Commission is governed by nine Commission members who are appointed by the Governor. A member is appointed from each of the six state Supreme Court judicial districts, and three members are appointed at large. The Governor designates one member to be the chair. Information concerning Commission members who served during fiscal year 2019/2020 is appended to this report. Commission members must have substantial experience in criminal defense work and in civil matters that commonly

affect low-income people. Prosecutors, law enforcement officials, and judges are not eligible to serve as members. Commission members serve six year terms. Neb. Rev. Stat. § 29-3924 (Reissue 2016). Commission members are responsible for appointing a chief counsel. Neb. Rev. Stat. § 29-3928 (Reissue 2016). The chief counsel's responsibilities include providing direct legal services to indigent defendants and overall supervision of the Commission. Neb. Rev. Stat. § 29-3929 (Reissue 2016).

In February of 1996, the Commission members appointed James Mowbray to be the Commission's chief counsel. By August of 1996, the Commission was fully staffed and providing indigent defense services throughout the state. Information regarding Commission employees during fiscal year 2019/2020 is appended to this report. Initially, the Commission received general funds and some grant money. The Commission was also required to bill the counties which received our services for one-third of the Commission's actual costs of the defense.

The DNA testing division was created in 2001, pursuant to the DNA Testing Act. Neb. Rev. Stat. §§ 29-4116 (Reissue 2016). The Commission is required to accept appointment of cases pursuant to the DNA Testing Act unless we have a conflict of interest or the appointment would exceed caseload standards. If the Commission does not accept the appointment, the court is required to appoint other qualified counsel. The court will order the Commission to pay the fees and expenses of the appointed counsel. Irrespective of whether the Commission accepts appointment in a DNA case, the Commission is required to pay the cost of any DNA testing ordered by the court.

In 2003, the Commission became cash-funded. The Commission on Public Advocacy Operations Cash Fund was created and the Legislature expressed its intent

that the Commission would be funded solely from our operations cash fund. Neb. Rev. Stat. § 29-3921 (Reissue 2016). Thus, the Commission was no longer required or allowed to bill the counties for our services. Instead, an "indigent defense fee" was created. The fee is taxed as court costs in all cases, except small claims cases, filed in Nebraska's courts. The State Treasurer transfers the fee to the Commission's Operations Cash Fund. In 2003, the fee was \$2.75. In 2005, it was increased to \$3. Neb. Rev. Stat. § 33-156 (Reissue 2016).

The Commission is still funded solely from its operations cash fund and without reliance on any state general funds. The indigent defense fee is paid by those who use Nebraska's courts and has not increased since 2005. The Commission provides indigent criminal defense services at no cost to the counties. The Commission is a very unique state government program in that we provide tax relief to the counties which use our services without any reliance on general funds.

James Mowbray retired on August 31, 2015. The Commission members appointed Jeff Pickens to replace Mowbray as chief counsel. Section 29-3929 requires the chief counsel to present an annual report to the Commission. This is the report for fiscal year 2019/2020.

Fiscal Year 2019/2020 Review

The Commission began its twenty-third year of operation in 2019. Despite a nearly \$100,000 reduction in revenue from the previous fiscal year and an over \$500,000 reduction from fiscal year 2008/2009, the Commission effectively represented indigent defendants charged with first degree murder and other serious felony crimes at trial, on direct appeal, and in postconviction, while providing property tax relief to the

counties that used our services. The Commission performed all of our other statutory functions as well.

Case Guidelines

Subject to the caseload standards established by the chief counsel, the Commission can accept appointments in the types of cases identified in the following paragraphs.

Trial Level

At the trial level, the Commission can accept appointments in the following cases:

1. In any case in which a violent felony offense constituting a Class IIA felony or greater is charged;
2. In any case in which a charge of use of a weapon to commit a felony accompanies a charge of a violent felony irrespective of the class of felony; and
3. In any case in which a drug offense alleging distribution or possession with intent to distribute is charged and the offense constitutes a Class IIA felony or greater.

Direct Appeal

On direct appeal, the Commission can accept appointments in the following cases:

1. In any case in which the Commission represented the defendant at trial;

2. In any case in which the defendant was convicted after a trial of a charge that the Commission could have accepted at the trial level. The Commission will not accept appointment of a case on direct appeal if the only issue is excessive sentencing; and
3. In any case in which the defendant was sentenced to death or life imprisonment.

Postconviction and State Habeas Corpus

The Commission can accept appointments of cases on postconviction or in state habeas corpus if the defendant was convicted of first degree murder or second degree murder, or if the defendant received a sentence of life imprisonment. The chief counsel has discretion to accept appointments in other cases after considering the crime of conviction, the sentence imposed, the issue(s), and the availability of counsel.

DNA Cases

Pursuant to Neb. Rev. Stat. § 29-4122 (Reissue 2016), "Upon a showing by the person that DNA testing may be relevant to the person's claim of wrongful conviction, the court shall appoint counsel for an indigent person" This section requires the court to first contact the chief counsel for the Commission to inquire if the Commission is able to accept appointment. The Commission will accept the appointment unless we have a conflict of interest or the appointment would exceed the Commission's caseload.

Civil Rights Actions

The Commission can accept appointments in a civil rights action to represent inmates on death row who are challenging the protocol, procedure, or drug(s) to be used in their execution.

Juvenile Court

The Commission can accept appointments in juvenile court if the petition charges the juvenile with offenses that are the type of offenses the Commission accepts at the trial level as set forth above, but only if the juvenile was originally charged in adult court and the case was transferred to juvenile court. If the Commission accepts an appointment in juvenile court, we will represent the juvenile only through disposition and appeal.

Probation Revocation

The Commission will not accept appointments on motions to revoke probation unless the case for which revocation is sought qualifies as a companion case.

Companion Cases

If the Commission has accepted an appointment to represent a defendant and the defendant is charged in a separate/companion case with a crime that does not meet the Commission's guidelines for acceptance, the chief counsel has discretion to accept an appointment in the other case.

Counties with Public Defender Offices

If a public defender requests assistance in defending a case that meets the Commission's guidelines, the Commission can accept appointment as co-counsel with the public defender. If the Commission is appointed as co-counsel, we will pay for expenses, such as depositions, investigators, and expert witnesses.

Cases Open in Fiscal Year 2019/2020

In fiscal year 2019/2020, the Commission's six lawyers provided services in the five divisions established by the Legislature; to wit: the first-degree murder litigation

division; the appellate division; the violent crime and drug defense division; the DNA testing division; and the major case resource center.

First Degree Murder Litigation Division

The First Degree Murder Litigation Division handles first degree murder cases at the district court level. In fiscal year 2019/2020, this division handled 20 first degree murder cases.¹ In one case – *State v. Bailey Boswell*, Saline County – the State gave notice that it intended to seek a death sentence. The cases litigated during the fiscal year include:

State v. Bailey Boswell, Saline County:

On June 12, 2018, the Commission was appointed to represent Bailey Boswell in Saline County. She was charged with one count of first degree murder and two other felony offenses. The Information gave notice of an aggravating circumstance. Trial commenced on September 23, 2020 (fiscal year 2020/21). Venue was changed to Dawson County. On October 14, 2020, Boswell was convicted as charged.

Boswell's co-defendant, Aubrey Trail, was also charged with first degree murder and two other felony offenses. He was represented by court-appointed counsel. Trail was found guilty after a jury trial in Saline County. He waived jury trial for aggravating circumstances. His aggravation trial and other death penalty hearings are scheduled for December 15, 2020.

¹ *State v. Boswell*, Saline County; *State v. Chen*, Dakota County; *State v. Keadle*, Nemaha County; *State v. Castaneda-Morejon*, Madison County; *State v. Tilley*, Lancaster County; *State v. Ramirez-Buzo*, Dawson County; *State v. Surber*, Dakota County; *State v. Dominguez*, Sarpy County; *State v. Valgora*, Sarpy County; *State v. Long*, Lancaster County; *State v. Davis*, Sarpy County; *State v. Glenn*, Deuel County; *State v. Grant*, Sarpy County; *State v. Friedrichsen*, Hall County; *State v. German*, Chase County; *State v. Martinez*, Lincoln County; *State v. Allen*, Lincoln County; *State v. Mason*, Hitchcock County; *State v. Gomez*, Phelps County; *State v. Jack Harris*, Lancaster County.

As of November 3, 2020, Saline County paid Trail's two court-appointed lawyers approximately \$275,000. The county paid around \$5,300 for a defense investigator. The district court authorized Trail's lawyers to spend up to \$50,000 for a mitigation expert/investigator. Saline County will continue to spend a considerable amount of money for Trail's efforts to avoid the death penalty. And, whether or not he is sentenced to death, there will be a direct appeal to the Nebraska Supreme Court for which Trail will require court-appointed counsel.

Saline County will not have to pay anything for the Commission's defense of Boswell.

State v. Joshua Keadle, Nemaha County:

On November 14, 2017, Joshua Keadle was charged with first degree murder of Tyler Thomas in Nemaha County, with a date of offense of December 3, 2010. The Commission was appointed to represent Keadle. Venue was changed to Gage County for trial. The case was challenging because it was tried ten years after the alleged victim went missing, and because her body was never discovered.

Shortly before trial, the prosecution and the defense each had an important witness become unavailable to travel to Beatrice for the trial. We agreed to travel to Lenexa, Kansas to take a trial deposition of the prosecution witness and then onto Texarkana, Arkansas to take a trial deposition of the defense witness, who was in jail there. To save money, Jeff Pickens drove a rental car on the 1300 mile trip rather than driving his own vehicle and requesting reimbursement at \$.575 per mile. Pickens invited Assistant Attorney General Doug Warner to ride with him. We left Nebraska at 8 a.m. on January 9, 2020 and returned at 12:30 a.m. on January 11, 2020. The weather was

hazardous on the return trip. There were tornado, severe storm, and flash flood warnings across Arkansas. From St. Joseph, Missouri to Nebraska there were blizzard conditions and the roads were ice covered. Visibility was extremely poor during much of the return trip. Warner used an app on his phone to navigate for Pickens, which made the trip considerably less dangerous.

The rental car cost \$186. Fuel, lodging, and meals for Pickens cost \$294. The deposition for the defense witness cost \$176. The deposition for the prosecution witness cost \$103. If Warner had traveled separately, he would have been entitled to reimbursement for his mode of transportation, and that expense would have been paid by Nemaha County. So, Nemaha County saved additional taxpayer dollars when Warner rode with Pickens.

Jury trial began on January 27, 2020. On February 13, 2020, a jury found Keadle guilty of second degree murder.

To save money, Pickens and co-counsel Matt McDonald commuted from their homes to Beatrice using rental cars. Thus, we incurred no expenses for mileage, lodging, or meals. It would have been much more expensive had we stayed in Beatrice for the three week trial.

Total expenses in fiscal year 2019/2020 for travel, expert witnesses, depositions, and other things for this case were approximately \$18,000. The Commission paid for all of those expenses. The Commission also provided the services of two lawyers at no cost to Nemaha County. Because Nemaha County used the Commission's services, it enjoyed at least tens of thousands of dollars in property tax relief.

On July 15, 2020, Keadle was sentenced to 71 years to life imprisonment. We will handle Keadle's appeal to the Nebraska Supreme Court.

The Commission represented Keadle in two prior cases. In 2010, the Commission was appointed as co-counsel to the Nemaha County Public Defender in a case that charged three counts of first degree sexual assault, three counts of use of a firearm to commit a felony, false imprisonment, and terroristic threats. The alleged victim was identified as "KJ" and the alleged date of offense was October 31, 2010. The Commission deposed KJ in Wisconsin on November 28, 2011, at which she was confronted with a transcript of Facebook messages she sent Keadle after they parted on the morning following the alleged sexual assaults. The messages were inconsistent with forced sex and what she had reported to the FBI. The State dismissed all of the charges on November 30, 2011.

In June of 2011, Keadle was charged with first degree sexual assault in Dodge County. The alleged victim was identified as "SI" and the alleged date of offense was late December 2008. The Commission was appointed to represent Keadle. Following a jury trial, Keadle was found guilty on March 15, 2012. On April 25, 2012, Keadle was sentenced to 15 to 20 years' imprisonment.

State v. Sadie Grant, Sarpy County

Sadie Grant was charged with first degree murder and three other felonies in Sarpy County. After pretrial motions were litigated, a plea agreement was negotiated. On November 27, 2019, Grant pled no contest to attempted burglary and misdemeanor theft. On January 7, 2020, she was sentenced to three years' imprisonment.

State v. Susan Glenn, Deuel County

Susan Glenn was charged in Deuel County with first degree murder, first degree assault, and use of a weapon to commit a felony. She pled no contest to first degree assault and second degree assault. On February 3, 2020, she was sentenced to two consecutive terms of ten to 20 years' imprisonment.

Appellate Division

In fiscal year 2019/2020, the Appellate Division handled 11 cases at the appellate level, including the following cases²:

State v. Anthony Garcia, Douglas County:

In August of 2013, Anthony Garcia was charged in Douglas County with four counts of first degree murder and four counts of use of a weapon to commit a felony. The information gave notice of aggravating circumstances for each murder count. A burglary charge was later added. Garcia's family retained three lawyers from Illinois, who were admitted pro hac vice. Various Omaha lawyers were retained as associated counsel for the Illinois lawyers. In March of 2016, the Omaha lawyers withdrew from the case because of the unethical behavior of one of the Illinois lawyers, and all three

² *State v. Pollard*, Pierce County (Attempted 1st degree sexual assault of a child); *State v. Pollard*, Pierce County (Child abuse); *State v. Reyes*, Nemaha County (4 counts 1st degree sexual assault of a child); *State v. Harris*, Douglas County (1st degree murder, use of a weapon); *State v. Schroeder*, Johnson County (1st degree murder, use of a weapon); *State v. Garza*, Scotts Bluff County (2 counts of Possession of meth with intent to deliver, Possession of meth, 3 counts of Possession of a firearm by a prohibited person); *State v. Garcia*, Douglas County (4 counts of 1st degree murder, 4 counts of Use of a weapon, 1 count of attempted burglary); *State v. DeGunia*, Gage County (Intentional child abuse); *State v. Said*, Hall County (2nd degree murder, Use of a weapon); *State v. Pope*, Douglas County (2 counts of 1st degree murder, 2 counts of Use of a firearm, 1 count of Possession of a firearm by a prohibited person); *State v. Olson*, Cuming County (2nd degree murder, 2nd degree arson)

Illinois lawyers lost their pro hac vice status. Two of the three Illinois lawyers were subsequently readmitted pro hac vice with different local associated counsel.

On October 26, 2016, a jury found Garcia guilty of all charges. It was reported that Garcia slept through much of his guilt/innocence trial. Garcia refused to attend his aggravation trial. On October 28, 2016, the jury found aggravating circumstances were proven for all four murders.

On March 7, 2017, Garcia's counsel moved the court for funds to retain expert witnesses for the mitigation hearing. The district court determined Garcia was indigent. On March 30, 2017 – at the request of the county attorney – the Commission was appointed as co-counsel to the Illinois lawyers and their associated counsel. Garcia's lawyers filed an interlocutory appeal from the order appointing the Commission. The Nebraska Supreme Court dismissed the appeal on July 31, 2017. On September 1, 2017, Garcia's Illinois lawyers were allowed to withdraw from the case and the Commission became Garcia's sole counsel. Prior to the withdrawal, Garcia had not spoken with the Illinois lawyers or associated counsel for months. Garcia also refused to communicate with his family members.

Garcia's prior counsel did not prepare for the mitigation hearing. However, the Commission received some materials relevant to sentencing from prior counsel. From those materials and from speaking with Garcia's parents and brother, it was apparent Garcia had received medical and mental health treatment in the states in which he attended college, medical school, and various residencies, as well as the states in which he worked. Thus, we looked for records in at least seven states: California, Utah, New York, Nebraska, Louisiana, Illinois, and Indiana.

Because of the amount of work required to prepare for the mitigation hearing and other sentencing hearings, three Commission lawyers and a paralegal were assigned to Garcia's case. We were hampered in our effort to gather mitigation evidence – including Garcia's mental health records – because Garcia refused to communicate with the Commission's lawyers, paralegal, and expert witness. Ordinarily, our clients are a good source of information regarding their history for receiving medical and mental health treatment. Through our own investigation, we learned of many places where Garcia received medical care, mental health treatment, and medications. We obtained many of Garcia's records through use of a power of attorney Garcia gave his brother before he stopped communicating with family.

We retained a forensic psychologist to conduct a psychological evaluation of Garcia and testify at the mitigation hearing. Garcia would not participate with the evaluation so the psychologist conducted the evaluation by reviewing the available records and interviewing Garcia's family members.

The mitigation hearing and other sentencing hearings were held on June 13, 14, and 15, 2018. At the start of the mitigation hearing, we advised the presiding judge that we had not been able to communicate with Garcia and were concerned about his competency. The presiding judge responded that the competency issue had already been resolved.

Garcia was present in court for the mitigation hearing but did not communicate with anyone. Corrections officers extracted Garcia from his bed in the morning, placed him in a wheelchair, and wheeled him to court. Garcia sat in the wheelchair all day and appeared to sleep.

The psychologist we retained testified that Garcia suffered from mental illness since high school. At the time of the murders in 2008 and 2013, Garcia suffered from, Paranoid Personality Disorder, Major Depressive Disorder, and Alcohol Abuse Disorder, Severe. The psychologist's bill for services rendered in fiscal year 2017/2018 was \$47,150. This was paid by the Commission.

We also retained an expert witness to testify at the mitigation hearing about medications Garcia took at pertinent times. In fiscal year 2017/2018, the Commission paid this expert witness \$4,954 to review records and testify.

At the conclusion of the sentencing hearings, the parties were given time to submit sentencing briefs. Sentencing was scheduled for September 14, 2018.

On September 14, 2018, Garcia was sentenced to four death sentences and an aggregate sentence of 137 years, eight months to 145 years. Nebraska law requires an automatic direct appeal to the Nebraska Supreme Court when a death sentence has been imposed. The court reporter requested extensions to prepare and file the bill of exceptions. It was filed with the district court on July 23, 2019. The bill of exceptions is enormous. Since the filing of the bill of exceptions, we have made several requests to extend the brief's due date. At the conclusion of fiscal year 2019/2020, the brief had not been filed.

State v. Patrick Schroeder, Johnson County:

In April of 2017, Patrick Schroeder was charged with the first degree murder of his cellmate at the Tecumseh State Correctional Institution in Johnson County. The Information gave notice of aggravating circumstances. Schroeder was serving a life sentence for a 2006 murder in Pawnee County. The Commission also represented

Schroeder for the Pawnee County murder. The Pawnee County murder trial resulted in a hung jury in March of 2007. Venue was then changed to Richardson County, where a jury found Schroeder guilty of first degree murder and other offenses in June of 2007. The Commission represented Schroeder on direct appeal. The convictions were affirmed in January of 2010.

For the Johnson County prison murder, the Commission was appointed to represent Schroeder on April 24, 2017. On July 28, 2017, Schroeder moved to represent himself because he did not want to introduce mitigation evidence, and Commission lawyers believed they were ethically bound to introduce such evidence. The district court granted the motion and appointed the Commission as standby counsel. That same day, Schroeder pled guilty with no plea agreement. He also waived his right to a jury trial on aggravating circumstances. On April 19, 2018, evidentiary hearings regarding aggravation, mitigation, and proportionality were held before a three-judge panel. Schroeder presented no evidence or argument against the imposition of a death sentence. On June 1, 2018, Schroeder was sentenced to death.

On May 6, 2019, the Commission submitted its brief to the Nebraska Supreme Court, and argued Schroeder's case October 30, 2019. On April 17, 2020, the Nebraska Supreme Court affirmed Schroeder's death sentence. On July 29, 2020, the Commission filed a petition for a writ of certiorari with the U.S. Supreme Court. The petition was denied on October 19, 2020.

State v. Jack Harris, Douglas County:

Jack Harris was convicted of first degree murder and use of a weapon to commit a felony in 1999. His convictions were affirmed on direct appeal in 2002. In June of

2002, the District Court of Douglas County appointed the Commission to represent Harris in postconviction. We have represented him ever since. This is the most complicated case the Commission has handled. Since 2002, we litigated in the district court: several motions for postconviction relief; at least three motions for new trial; a motion for a writ of error coram nobis; a motion for absolute discharge, and a motion for a writ of habeas corpus. Throughout the litigation, four different district court judges presided over the case. Two of the four judges recused themselves and one judge retired. Ultimately, the entire Douglas County District Court bench recused itself. A Lancaster County District Court judge presently presides over the case.

From the motions litigated by Commission lawyers, we filed with the Nebraska Supreme Court four appeals and a cross-appeal. The Supreme Court issued decisions for those appeals in 2004, 2007, 2015, 2017, and 2020. The orders denying Harris' motions were reversed in 2004, 2015, and 2017. With each reversal, the case was remanded with directions for additional litigation.

Litigation was protracted because of the reversals and because through the course of the litigation, newly discovered evidence came to light on at least three separate occasions. Some of the new evidence suggests the possibility of prosecutorial misconduct or other constitutional violations most appropriately raised in postconviction proceedings, while other new evidence was best raised with motions for a new trial.

After the 2017 Supreme Court reversal, the Commission filed a third amended motion for postconviction relief and a motion for new trial based on newly discovered evidence on June 15, 2017. On September 21, 2017, the district court granted the motion for new trial and dismissed the postconviction motion. From the order granting a

new trial, the State filed a motion for reconsideration but did not request a hearing on the motion. The State then filed a notice of appeal. On March 28, 2018, the State's appeal was dismissed for lack of jurisdiction because the motion for reconsideration was still pending in district court.

On May 22, 2018, the Commission filed a motion for absolute discharge because of the State's failure to bring Harris' case to trial within six months from the order granting a new trial. The district court granted the motion on January 30, 2019. From that order, the State filed two appeals and the Commission filed one cross-appeal. The Commission submitted briefs to the Supreme Court on July 9, 2019 and September 5, 2019. The case was argued on October 29, 2019.

On September 25, 2020, the Supreme Court vacated the district court's order granting a new trial because the order was beyond the scope of the Supreme Court's mandate that returned jurisdiction to the district court and void. The Supreme Court also vacated the order granting absolute discharge and remanded the case with directions to reinstate Harris' conviction and sentence. On October 5, 2020, the Commission filed a motion for rehearing. It was denied on November 13, 2020.

On July 9, 2019, the Commission filed a habeas action in Lancaster County District Court because Harris was not released from custody after the judge granted his motion for absolute discharge. That matter was put on hold pending the appeals to the Nebraska Supreme Court. It remains on hold pending a petition for a writ of certiorari to the U.S. Supreme Court.

State v. James Reyes, Nemaha County

On May 17, 2019, a jury found James Reyes guilty of four counts of first degree sexual assault of a child. Each count was a Class IB felony, punishable by 20 years to life imprisonment. On August 12, 2019, he was sentenced to three consecutive terms of 20 to 40 years' imprisonment and to a consecutive sentence of 20 to 40 years' imprisonment. On August 23, 2019, after perfecting the appeal, Reyes' court appointed counsel moved to withdraw, citing a potential conflict of interest that could arise on appeal. On August 26, 2019, the district court granted the motion to withdraw and appointed the Commission to represent Reyes.

The Commission submitted an 80 page brief with the Court of Appeals on January 31, 2020. We submitted numerous assignments of plain error and ineffective assistance of counsel for prosecution witnesses testifying that the alleged victim told the truth about being sexually assaulted by Reyes, as well as ineffective assistance of counsel and prosecutorial misconduct for offering evidence and arguing that Reyes invoked his right to silence when officers attempted to interrogate him.

On April 10, 2020, the Attorney General filed a suggestion of remand. The Attorney General conceded reversible error because of ineffective assistance of counsel for failing to object to testimony regarding the alleged victim's truthfulness.

On July 24, 2020, the Court of Appeals sustained the suggestion of remand and reversed the convictions because of counsel's failure to object. The mandate was filed on August 26, 2020. The Commission now represents Reyes in Nemaha County District Court.

Violent Crime and Drug Defense Division

In fiscal year 2019/2020, the violent crime and drug defense division handled 27 cases³. Crimes charged in the cases included second degree murder, manslaughter, attempted first degree murder, child abuse, child abuse resulting in death and serious bodily injury, sexual assault, sexual assault of children, first and second degree assault, terroristic threats, weapons offenses, and drug offenses.

The cases handled by this division in fiscal year 2019/2020 include:

State v. Alexander Romero, Kimball County

On April 3, 2019, Alexander Romero was charged in Kimball County Court with intentional child abuse resulting in serious bodily injury, a class IB felony, which is punishable by 20 years to life imprisonment. The alleged victim was his infant daughter. On that same day, the Commission was appointed to represent Romero. The next day, the charge was amended to child abuse resulting in death. Prosecutors from the

³ *State v. Alexander Romero*, Kimball County (child abuse resulting in death); *State v. Michael Grieser*, Brown County (sexual assault of a minor); *State v. Michael Grieser*, Keya Paha County (2 counts sexual assault of a minor); *State v. McClean Christiansen*, York County - 3 cases (6 counts sexual assault, strangulation); *State v. Erika Beeken*, Kimball County (sexual assault of a child); *State v. Michael Heairet*, Cheyenne County (sexual assault); *State v. Blaynne Rohde*, Kimball County (sexual assault); *State v. Allen Dedrick*, Seward County (5 counts sexual assault, 3 counts incest, 3 counts child abuse, habitual offender enhancement); *State v. Joshua Ballew*, Johnson County (2nd degree murder); *State v. Larry Derrera*, Keith County (2nd degree murder, manslaughter, 2nd degree assault, accessory to 2nd degree murder, accessory to manslaughter, use of a knife to commit a felony); *State v. James Brown*, Lancaster County (13 counts drug related charges); *State v. Charles Burr*, Gage County (3rd degree assault, terroristic threats); *Charles Burr*, Gage County (conspiracy to distribute drugs); *State v. Donald Cole*, Kimball County (Sexual assault of a child); *State v. DeChelly Ramsey*, York County (2 counts sexual assault of a minor); *State v. Richard Haak*, Box Butte County (2nd degree assault); *Richard Haak*, Box Butte County (Possession of controlled substance); *State v. James Albrecht*, Morrill County (1st degree sexual assault of a child, 10 counts of child abuse); *State v. Jason Smith*, Box Butte County (Attempted 2nd degree murder; Use of a weapon); *State v. George Smith*, Box Butte County (2nd degree murder, Use of a deadly weapon); *State v. Jerry Gilbert*, Jefferson County (2nd degree murder, Use of a firearm, Tamper with evidence); *State v. Hector Medina-Baldovinos*, Dakota County (4 counts Sexual assault of a child); *State v. Richard Hastings*, Dakota County (2 counts Sexual assault of a child); *State v. Molly Raymer*, Garden County (Manslaughter, DUI, Willful reckless driving); *State v. Trey Cheyney*, Perkins County (Intentional child abuse, 1st degree assault).

Attorney General's Office were appointed to act as special deputy county attorneys. The order appointing the special deputy county attorneys provided they would not receive attorney fees from the county, however, any prosecution or investigation expenses would be paid by the county. Thus, lodging, meals, depositions, and expert witnesses would be paid by the county.

Jury trial commenced in Kimball County on March 2, 2020. The alleged victim suffered a closed head injury, which caused her death. The only contested issues at trial were the cause/mechanism of the injury and whether the injury was the result of an intentional or accidental act. Both parties needed to retain medical experts to address the issues. The State's expert witnesses included an ophthalmologist, a child abuse pediatrician, and a forensic pathologist, all from Colorado. The Commission's expert witnesses included an emergency room physician and biomechanical engineer, both from Utah.

Following closing arguments on March 9, the jury began deliberations. On March 10, a mistrial was declared after the jurors announced they were deadlocked and could not reach a verdict.

On May 5, 2020, pursuant to a plea agreement, Romero pled no contest to one count of negligent child abuse resulting in death and one count of attempted intentional child abuse. Both offenses are class IIA felonies, which are punishable by a maximum of 20 years' imprisonment and no minimum penalty. On July 7, 2020, Romero was sentenced to consecutive terms of 15 to 20 years' imprisonment.

The Commission's total expenses for this case during fiscal year 2019/2020 were \$38,209.35, including \$26,200.38 for expert medical witnesses.

State v. Trey Cheyney, Perkins County

Trey Cheyney was babysitting his girlfriend's one-year old child when, according to Cheyney, the child fell out of his highchair and landed on his head. The child was unresponsive when EMS and law enforcement arrived at the home. The child was flown to Children's Hospital in Denver. A CT scan showed the child suffered a closed head injury. The child's skullcap was temporarily removed because of swelling to the brain. A child abuse pediatrician did not believe Cheyney's account and instead believed the child had been thrown or shaken. On September 14, 2018, Cheyney was charged with child abuse resulting in serious bodily injury and first degree assault. On October 3, 2018, the Commission was appointed to represent Cheyney.

We retained a medical expert who reviewed the medical records and investigative reports and opined that the child's injuries were consistent with Cheyney's account. The expert's bill in fiscal year 2018/19 was \$5,250 and in fiscal year 2019/2020 was \$3,750. We provided the expert's report to the prosecution, who was then willing to enter into a reasonable plea agreement. On August 21, 2019, an amended information that charged misdemeanor child abuse was filed in district court. On August 23, Cheyney pled no contest. We provided our expert's report to the probation office for inclusion in the presentence report. At sentencing on December 13, 2019, the judge announced that he agreed with our expert's assessment that Cheyney did not intentionally hurt the child, and sentenced him to probation.

Other Cases

There were other cases in which the counties saved money because the case did not go to jury trial. In those cases, the Commission's experienced lawyers were able

to convince prosecutors to dismiss or reduce charges. In some cases, charges were dismissed or reduced after alleged victims or witnesses were deposed and problems with their testimony were exposed. Such cases include:

State v. DeChelly Ramsey, York County

Two cases were filed against DeChelly Ramsey in York County District Court. In one case, she was charged with three counts of first degree sexual assault of a minor, contributing to the delinquency of a minor, and procuring alcohol for a minor. Venue was changed to Lancaster County. On October 23, 2019, after the victim was deposed, Ramsey pled no contest to contributing and procuring and the other charges were dismissed. The deposition cost the Commission \$265.80.

In the other case, she was charged with five counts of first degree sexual assault, two counts of delivering a controlled substance, attempted strangulation, two counts of third degree assault, contributing, and procuring. Venue was changed to Lancaster County. On October 23, 2019, after the victim in this case was deposed, Ramsey pled no contest to two counts of third degree sexual assault, attempted possession of cocaine, procuring, and contributing, all misdemeanors. The deposition cost the Commission \$393.50.

The depositions in these two cases resulted in a plea agreement in each case. The depositions, which the Commission paid, saved York County the cost of two jury trials.

State v. Blaynne Rohde, Kimball County

On January 21, 2020, Blaynne Rohde was charged in Kimball County District Court with first degree sexual assault. The alleged victim and three witnesses were

deposed on May 13, 2020. The total cost of the four depositions was \$842.55, and the Commission paid for the depositions. The case was dismissed on July 7, 2020. The depositions saved Kimball County the cost of a jury trial which almost certainly would have resulted in an acquittal.

DNA Testing Division

In fiscal year 2019/2020, the DNA testing division handled four cases: *State v. Buckman*, Lancaster County; *State v. Duncan*, Douglas County; *State v. Amaya*, Lincoln County; and *State v. Robbins*, Lancaster County.

Major Case Resource Center

All of the Commission's lawyers regularly take calls for assistance from public defenders, court-appointed lawyers, and pro se defendants. Such assistance ranges from providing citations to pertinent law, providing advice regarding legal issues, providing sample motions and briefs, and conducting research and preparing memoranda regarding such research. Additionally, Commission lawyers give presentations and write articles for publication.

Commission Operations' Cash Fund

On July 1, 2019, the Commission's operations' cash fund had a balance of \$744,156.44.

During fiscal year 2019/2020, the Commission received \$839,313.22 from indigent defense fees and \$15,414.93 from interest earned on the balance in the operations cash fund. Total revenue was \$854,728.15.

The number of case filings in Nebraska's courts has steadily decreased every year since fiscal year 2008/2009, and so has the Commission's revenue. In fiscal year

2008/2009, revenue from the indigent defense fee was \$1,287,413.05 and total revenue was \$1,362,601.48. The Commission's total revenue for fiscal year 2019/2020 was down \$507,873.14 when compared to fiscal year 2008/2009. Compared to the prior fiscal year – 2018/2019 – total revenue for fiscal year 2019/2020 was down \$105,337.06. COVID-19 surely contributed to the decline of case filings in fiscal year 2019/2020.

The Commission's expenditures in fiscal year 2019/2020 totaled \$1,182,595.87. Expenditures were up \$24,694.34 from the previous year, however, expenses in *Romero* totaled \$38,209.35. But for that case, expenses would have been down compared to fiscal year 2018/2019. Otherwise, expenses have been fairly steady for the past several years. The money-saving efforts we introduced in March of 2016, which included taking depositions and using expert witnesses only when necessary, using rental cars instead of driving our own vehicles and claiming mileage reimbursement, and eliminating out-of-state seminars are still in effect. Employee wages and benefits and the Commission's contributions to FICA amounted to \$952,432.73 in fiscal year 2019/2020. A reduction in those expenses would require terminating one or more of the Commission's eight employees. However, that would require us to accept fewer appointments, which would result in less property tax relief to the counties.

In fiscal year 2019/2020, expenditures were \$327,867.72 greater than revenue, which required the Commission to draw from our operations' cash fund. We have

needed to draw from our cash fund every fiscal year since 2014/2015. On June 30, 2020, the operations' cash fund had a balance of \$413,269.23.⁴

Charts showing our operations' cash fund's revenue, expenses, and balances are appended to this report.

Legal Aid and Services Fund

In 1997, the Legislature created the Legal Aid and Services Fund (LASF). Neb. Rev. Stat. § 25-3002 (Reissue 2016). For fiscal year 2019/2020, a legal services fee of \$6.25 was taxed as costs in all cases filed in Nebraska state courts, except for cases filed in small claims court. The fees were remitted to the State Treasurer, who credited them to the LASF. Neb. Rev. Stat. § 33-107.01 (Reissue 2016). The Commission administers the LASF.

On July 1, 2019, the LASF had a balance of \$1,246.84. On December 7, 2019, nominal awards totaling \$2,158,940 were made to 15 qualifying entities at a meeting of the Commission's members. The awards were considered nominal because of the unlikelihood that credits to the LASF would be sufficient to pay out the full amount of the awards due to decreased case filings. As fees were credited to the LASF, monthly *pro rata* disbursements were made to the entities during the 2020 calendar year. During the 2019/2020 fiscal year, filing fees were credited to the LASF in the amount of \$1,848,340.43. The LASF earned \$1,701.01 in interest during the fiscal year.

⁴ This is the amount one would obtain if one made a balance inquiry on the State Accounting's system (Enterprise One) for June 30, 2020. However, if one did the math using the beginning balance for FY2019/2020 (\$744,156.44), plus total revenue (\$854,728.15), minus expenditures (\$1,182,595.87), one would obtain an ending balance of \$416,288.77. State Accounting advised the Commission that the \$3,019.49 difference is explained by: "other agency revenue to be journalized"; "revenue received but not vouchered on June 30, 2020"; and "accounts payable due to vendor on June 30, 2019."

In fiscal year 2019/2020, \$1,851,566 was disbursed to entities as follows:

Catholic Charities	\$33,238.00
Center for Legal Assistance	\$56,342.00
Central Mediation Center (Kearney)	\$3,954.00
Concord Mediation Center (Omaha)	\$3,954.00
Heartland Family Services	\$18,026.00
Immigration Legal Ctr (Justice For Our Neighbors)	\$74,354.00
Legal Aid of Nebraska	\$1,252,143.00
Lutheran Family Services	\$43,220.00
The Mediation Center (Lincoln)	\$3,954.00
Mediation West (Scottsbluff)	\$3,954.00
Ne Appleseed Center	\$117,399.00
Nebraska Mediation Center (Fremont)	\$3,954.00
NSBA Volunteer Lawyers Project	\$187,788.00
The Resolution Center (Beatrice)	\$3,954.00
Women's Center for Advancement	\$45,332.00

On June 30, 2020, the fund had a balance of \$434.78.

Civil Legal Services Fund

In 2006, the Legislature created the Civil Legal Services Fund (CLSF). In 2009, the Legislature transferred operation of the fund to the Commission. Neb. Rev. Stat. §§ 25-3007, *et seq.* (Reissue 2016) (Laws 2009, LB35). The sole purpose of the CLSF is to “expand the capacity to provide civil legal services to eligible low-income persons equally throughout the state.” Neb. Rev. Stat. § 25-3005 (Reissue 2016). To be eligible

for a grant under the CLSF, a civil legal services provider must be a recipient of financial assistance pursuant to the federal Legal Services Corporation Act, 42 U.S.C. 2996, *et seq.* Neb. Rev. Stat. § 25-3008 (Reissue 2016). A fee of \$1 is taxed as costs in each criminal proceeding, including traffic infractions and misdemeanors, filed in Nebraska's state courts. The fee is remitted to the State Treasurer and then credited to the CLSF. Neb. Rev. Stat. § 25-3010 (Reissue 2016).

On July 1, 2019, the CLSF had a balance of \$78.69. On December 7, 2019, the Commission members awarded all disbursements from the CLSF in calendar year 2020 to Legal Aid of Nebraska because it is the only eligible civil legal services provider. In fiscal year 2019/2020, \$158,859.25 was credited to the CLSF. The fund earned \$160.59 in interest. The Commission disbursed \$159,092 to Legal Aid in fiscal year 2019/2020. On June 30, 2020, the fund had a balance of \$6.53.

Legal Education for Public Service and Rural Practice Loan Repayment Assistance Fund

The Legal Education for Public Service Loan Repayment Assistance Fund was created in 2008, but it was not funded. In 2014, the Legislature amended the fund and created the Legal Education for Public Service and Rural Practice Loan Repayment Assistance Fund. Neb. Rev. Stat. §§ 7-201, *et seq.* (Cum. Supp. 2016). The Commission, Commission members, and the chief counsel have various statutory duties with respect to this fund. On July 11, 2014, the Legislature transferred \$500,000 to the loan repayment assistance fund, and appropriated \$150,000 for awards in fiscal year 2014/2015 and \$150,000 for awards in fiscal year 2015/2016. Awards were made in fiscal years 2014/2015, 2015/2016, and 2016/2017.

The legislature did not initially appropriate any money for the loan repayment assistance program for fiscal year 2017/2018. On July 3, 2017, the loan repayment assistance fund's balance of \$114,795.87 was transferred to the general fund. On April 6, 2018, \$125,000.00 was transferred back to the loan repayment assistance fund and appropriated for disbursement for fiscal year 2017/2018. However, there was not sufficient time to operate the program before the end of the fiscal year. Awards were made in fiscal year 2018/2019.

For fiscal year 2019/2020, the legislature did not provide any funding, but appropriated \$150,000 for the program. The fund's balance of \$62,329 was disbursed to 37 recipients. Two recipients returned their awards because they changed jobs and were no longer qualified to receive assistance. One recipient failed to provide proof that he applied his award to his student loan principal. After many attempts to get the applicant to comply with the terms of the agreement, the Commission filed a lawsuit against the applicant. The recipient then confessed to a judgment for \$6,000 and agreed to make regular payments until the debt is satisfied. For the recipients who remained in the program, reporting requirements showing continuous qualifying employment and loan status documentation were received from recipients. The fund's balance on June 30, 2020 was \$5,607.32.

Cost-effectiveness of the Commission

When the Legislature created the Commission in 1995, its goal was to provide property tax relief to counties that are required to provide effective representation to indigent criminal defendants. Initially, the counties that used the Commission's services were required to pay one-third of the Commission's actual expenses. In 2003, the

Commission became cash funded and the Legislature provided that the Commission would be funded entirely by an indigent defense fee paid by those who use Nebraska's courts. Since 2003, the counties that used the Commission's services paid nothing for our services. The Commission is still funded solely by the indigent defense fee and interest earned on the balance in its operations cash fund. The Legislature has not increased the indigent defense fee since 2005. Because of decreased revenue due to declining court case filings and increased expenditures, the Commission was again required to draw on its cash fund in fiscal year 2019/2020.

Notwithstanding reduced revenue in fiscal year 2019/2020, the Commission effectively represented indigent criminal defendants throughout the state. The Commission continued to provide property tax relief to the counties that used our services without any reliance on the General Fund. Therefore, the Commission met the goal set by the Legislature.

Recommendation for Improvements

The Commission desperately needs additional revenue if it is to continue to serve the purpose for which it was created; to wit: to provide property tax relief to the counties that use our services. In fiscal year 2008/2009, our total revenue was \$507,873.14 greater than total revenue in 2019/2020, while in fiscal year 2019/2020 expenditures were \$154,451.83 greater than expenditures in 2008/2009. In each fiscal year since 2014/2015, our expenditures were greater than our revenue, and we had to draw from our cash fund to pay expenses. In fiscal year 2014/2015, our cash fund's balance was \$1,261,458.55. In fiscal year 2018/2019, the balance was \$744,156.44. In 2019/2020 it was only \$413,269.23. If the Commission's revenue continues to decline

at the pace at which it has been declining, our cash fund balance could be depleted in less than two years.

By statute, the Commission is funded solely by an indigent defense fee that is charged as court costs in cases filed in Nebraska's state courts. Since 2008/2009, case filings have declined every year, and so has the Commission's revenue. The Commission's revenue will increase only if the Legislature increases the indigent defense fee. Since 2005, the fee has been \$3. In January of 2020, Senator Morfeld introduced LB 1082 to increase the indigent defense fee to \$4. Because of COVID-19, the Legislature was shut down for much of the session and LB 1082 died at the end of the session.

Senator Morfeld has agreed to introduce another bill in the upcoming legislative session to increase the indigent defense fee. A \$1 increase in the indigent defense fee should generate enough revenue to cover expenses. The Commission has always employed six lawyers, including the chief counsel. A \$2 increase would ensure the Commission's ability to cover expenses and also allow us to hire another lawyer so we could accept additional court-appointments and provide additional property tax relief.

Jeffery A. Pickens,
Chief Counsel

Appendix A

Commission Members during Fiscal Year 2019/2020

Linsey A. Camplin, Lincoln, District 1
Appointed on May 31, 2018

Michael Ziskey, Nebraska City, District 2
Reappointed on November 4, 2019

Douglas J. Stratton, Norfolk, District 3
Reappointed on November 4, 2015

Thomas P. Strigenz, Papillion, District 4
Reappointed on November 4, 2015

Julie E. Bear, Plattsmouth, District 5
Reappointed on November 4, 2019
Appointed as Chair on June 18, 2019

Nancy S. Freburg, Kearney, District 6
Reappointed on November 4, 2017

Jonathan M. Braaten, Lincoln, At Large
Reappointed on November 4, 2019

Robert P. Lindemeier, North Platte, At Large
Reappointed on November 4, 2015
Chair from 1996 to 2019

Charles D. Brewster, Kearney, At Large
Appointed on May 31, 2018

Appendix B

Staff/Credentials during Fiscal Year 2019/2020

Jeffery A. Pickens

Chief Counsel from September 2015 to present
Agency Legal Counsel from October 2012 to August 2015
Staff Attorney from May 1996 to October 2012
Graduate of University of Nebraska College of Law, 1991

Todd W. Lancaster

Agency Legal Counsel from September 2015 to present
Staff Attorney from May 2007 to August 2015
Graduate of University of Nebraska College of Law, 1998

Robert W. Kortus

Staff Attorney from July 1996 to present
Graduate of University of Nebraska College of Law, 1989

Kelly S. Breen

Staff Attorney from August 1996 to present
Graduate of Creighton School of Law, 1984

Sarah P. Newell

Staff Attorney from January 2013 to present
Graduate of University of Nebraska College of Law, 2005

Matthew J. McDonald

Staff Attorney from September 2015 to present
Graduate of Washington University School of Law, 1997

Rita J. Wesely

Administrative Assistant/Fiscal Officer from July 1996 to present
Graduate of Bellevue University, B.S., 2001

Shara M. Aden

Paralegal from December 2002 to present
Southeast Community College, Criminal Justice, A.D., 2013

APPENDIX D

CASH FUND BALANCE FISCAL YEAR END				
	TRANSFERS OUT	BALANCE		
FY 05-06		\$969,931.44		
FY 06-07		\$1,292,542.63		
FY 07-08	\$250,000.00	\$1,414,013.16		
FY 08-09		\$1,750,175.75		
FY 09-10	\$258,374.00	\$1,712,295.53		
FY 10-11	\$288,247.00	\$1,610,321.73		
FY 11-12	\$200,000.00	\$1,541,794.72		
FY 12-13	\$260,000.00	\$1,333,088.86		
FY 13-14		\$1,334,807.24		
FY 14-15		\$1,261,458.55		
FY 15-16		\$1,147,791.34		
FY 16-17		\$1,051,626.13		
FY 17-18		\$938,080.45		
FY 18-19		\$744,156.44		
FY 19-20		\$413,269.23		
FY 7-8	Study juvenile legal defense with UN-L Public Policy Ctr			
FY 9-10	Transfer to General Fund			
FY 10-11	Transfer to General Fund			
FY 11-12	Supreme Court Education Fund diversion programming to reduce absenteeism and unnecessary involvement with juvenile justice system			
FY 12-13	Court Appointed Special Advocate Fund - Ne State Patrol Cash Fund - sex offender study			