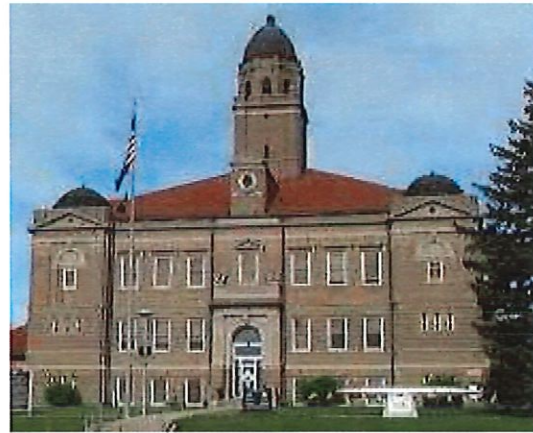


THE 2020/2021 ANNUAL REPORT OF THE NEBRASKA COMMISSION ON PUBLIC ADVOCACY



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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 the Commission members who served during fiscal year 2020-2021 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 2020-2021 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 its 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 it has 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 its operations cash fund. Neb. Rev. Stat. § 29-3921 (Reissue 2016). Thus, the Commission was no longer required or allowed to bill the counties for its 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). Subsequent efforts to increase the Indigent Defense Fee failed. These failures will be more fully addressed later in this report.

During fiscal year 2020-2021, the Commission was still funded solely from its operations cash fund and without reliance on any state general funds. The Commission provides indigent criminal defense services at no cost to the counties. The Commission is a very unique state government program in that it provides tax relief to the counties which use its 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 2020-2021.

Fiscal Year 2020-2021 Review

In 2020, the Commission began its twenty-fourth year of operation. In fiscal year 2020-2021, case filings continued to decline from their highpoint in fiscal year 2008-2009. Consequently, the Commission’s revenue continued to decline. Revenue from

the Indigent Defense Fee was down almost \$500,000 compared to fiscal year 2008-2009. The Commission's revenue issues are more fully addressed later in this report. Notwithstanding the revenue issues, the Commission effectively represented indigent defendants charged with first degree murder and other serious felony crimes at trial, on direct appeal, and in postconviction proceedings, while providing at least hundreds of thousands of dollars in property tax relief to the counties that used its services. The Commission performed all of its 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 it has 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, it 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 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, it will pay for expenses, such as depositions, investigators, and expert witnesses.

Cases Open in Fiscal Year 2020-2021

In fiscal year 2020-2021, 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 2020-2021, this division handled 25 first degree murder cases.¹ Because of COVID, the Commission only tried two murder cases to juries in fiscal year 2020-2021. Those cases are *State v. Boswell* and *State v. Surber*.

State v. Boswell showcases the Commission's value to a county that uses its services. On June 12, 2018, the Commission was appointed to represent Boswell in Saline County. She was charged with one count of first degree murder and two other

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. Friedrichsen*, Hall County; *State v. Martinez*, Lincoln County; *State v. Allen*, Lincoln County; *State v. Mason*, Hitchcock County; *State v. Gomez*, Phelps County; *State v. Harris*, Lancaster County; *State v. Barnes*, Saunders County; *State v. Hernandez*, Dodge County; *State v. Bol*, Lancaster County; *State v. Rush*, Lancaster County; *State v. Decker*, Red Willow County; *State v. Gonzales-Romero*, Dawson County; *State v. Gleaton*, Madison County; *State v. Thomas*, Madison County.

felony offenses. The Information gave notice of an aggravating circumstance. Trial commenced on September 23, 2020, after venue was changed to Dawson County. On October 14, 2020, Boswell was found guilty as charged.

Because of COVID, the case was a challenge to try. Jury selection was conducted in a former grocery store that had been gutted, leaving a very large, open space. Potential jurors were seated at least six feet apart. The judge and lawyers were seated on a platform that allowed them to see the entire room. Everyone was masked and the lawyers never had an opportunity to see the jurors' faces during the selection process. Deputies took everyone's temperature at the building's entrance.

After the jury was selected, the trial was conducted in the courtroom. Jurors were spread out in the gallery. Those who wished to watch the trial did so from the former grocery store via a live video feed.

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. His case was tried first and he was found guilty by a jury in Saline County. He waived a jury trial for the determination of aggravating circumstances. On June 9, 2021, Trail was sentenced to death by a three judge panel. Saline County has paid Trail's court-appointed lawyers over \$300,000.

Boswell's aggravation hearing and sentence determination proceedings commenced on June 30, 2021, the last day of fiscal year 2020-2021. On November 8, 2021, Boswell was sentenced to life imprisonment rather than death. The direct appeal from her convictions is pending. The Commission is handling it as well.

Saline County did not pay anything for the Commission's defense of Boswell. If the Commission had not been available to defend Boswell, Saline County likely would have paid Boswell's court-appointed counsel more than it paid Trail's counsel because of the travel expenses associated with the change of venue.

State v. Surber, was an eight day trial in Dakota County which began on August 25, 2020. Because of COVID, jury selection was done in a large conference room at the Marina Inn in South Sioux City to accommodate the large number of potential jurors and keep them at safe distances from one another. Surber was convicted of first degree murder, use of a firearm to commit a felony, and possession of a firearm by a prohibited person. The Commission also handled the direct appeal.

Some of the other cases this division handled in fiscal year 2020-2021 are discussed in the following paragraphs.

In *State v. Friedrichsen*, Friedrichsen was charged in Hall County with first degree murder and use of a firearm to commit murder. He was 16 at the time of the murder, so the penalty range for him was 40 years to life imprisonment. The Commission retained Dr. Newring to conduct a forensic psychological evaluation. The evaluation cost \$3,200. Friedrichsen pled to second degree murder. On July 31, 2020, he was sentenced to 40 to 45 years' imprisonment.

In *State v. Martinez*, Martinez was charged in Lincoln County with first degree murder and use of a firearm to commit murder. He was also 16 at the time of the murder. Martinez was initially represented by court-appointed lawyers Steve Potter and Patrick Heng. After Potter died, the Commission was appointed to be Heng's co-counsel. The Commission took depositions, litigated suppression issues, and

negotiated a plea agreement. Martinez pled to second degree murder and possession of a stolen firearm. On March 5, 2021, he received concurrent sentences of 40 to 60 years and 15 to 25 years.

In *State v. Mason*, Mason was charged with first degree murder in Hitchcock County. Mason's girlfriend, Samantha Bell, was also charged the first degree murder. The Commission was appointed to represent Mason on January 17, 2019. A private practice attorney from North Platte was appointed to represent Bell. After suppression issues were litigated, the parties reached a plea agreement. On October 19, 2020, Mason pled no contest to second degree murder. On February 10, 2021, Mason was sentenced to 40 to 50 years' imprisonment. After Mason was sentenced, Bell also pled to second degree murder. She received a sentence of 20 to 25 years' imprisonment.

Appellate Division

In fiscal year 2020-2021, the Appellate Division handled 13 cases at the appellate level.² *State v. Garcia* was a challenging case to brief because the Commission had to allege many claims of ineffective assistance of Garcia's counsel at trial and during the aggravation trial. *Garcia* is addressed in the following paragraphs.

²*State v. Harris*, Douglas 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. Said*, Hall County (2nd degree murder, Use of a weapon); *State v. Romero*, Kimball County (Negligent child abuse, Attempted intentional child abuse); *State v. Davis*, Sarpy County (1st degree murder, Conspiracy to commit robbery, Use of a weapon); *State v. Smith*, Box Butte County (Manslaughter, Use of a weapon); *State v. Albrecht*, Morrill County (6 counts of Negligent child abuse); *State v. Keadle*, Gage County (2nd degree murder); *State v. Cerros*, Butler County (Manslaughter); *State v. Surber*, Dakota County (1st degree murder, Use of a weapon, Possession of a firearm by a prohibited person); *State v. Betts*, Nemaha County (2 counts 1st degree sexual assault of a child, Possession of a firearm by a prohibited person, 3 counts of Visual depiction of sexually explicit conduct under 19 years of age); *State v. Betts*, Nemaha County (3 counts of 1st degree sexual assault of a child, 3 counts of Visual depiction of sexually explicit conduct under 19 years of age).

State v. 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 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 Douglas 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, Commission lawyers and staff 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. Commission lawyers and paralegal were hampered in their 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, clients are a good source of information regarding their history for receiving medical and mental health treatment. Through the Commission's investigation, it learned of many places where Garcia received medical care, mental health treatment, and medications. The Commission obtained many of Garcia's records through use of a power of attorney Garcia gave his brother before he stopped communicating with family.

The Commission 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, Commission lawyers advised the presiding judge they 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 retained by the Commission 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. In fiscal year 2018-2019, the psychologist's bill was \$3,500. The Commission paid for all of the psychologist's services.

The Commission 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.

On September 14, 2018, Garcia received four death sentences and an aggregate sentence of imprisonment 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: 75 volumes, which includes 7,514 pages of testimony and argument and 1,213 exhibits. The Commission represents Garcia on direct appeal.

Because different counsel represented Garcia at trial, the Commission was required to raise claims of trial counsel's deficient performance in addition to errors appearing on the record. Due to the length of the record, the extent of trial counsel's deficient performance, the need to preserve all issues, and the amount of legal analysis required to develop the assignment of errors, appellate counsel needed additional time to complete the brief and more pages than the 50 page limit allowed by the Nebraska Court Rules of Appellate Practice.

On June 16, 2021, Garcia's counsel filed a 704 page brief containing 130 assignments of error and a motion to extend the brief page limit to 800 pages, anticipating the need for a reply brief. On July 19, 2021, the Nebraska Supreme Court partly sustained Garcia's motion to extend the brief page limit. The Court struck from the appellate record the June 14th brief, but allowed Garcia to file a 150 page brief. The Court gave counsel until September 1, 2021 to file the brief.

On September 1, 2021, Garcia's counsel filed a 443 page brief and a request to extend the page limit to 450 pages. On September 13, 2021, the Nebraska Supreme Court again partly sustained Garcia's motion to extend the brief page limit. It struck the September 1st brief, but allowed Garcia to file a 250 page brief by December 1, 2021. Opposing counsel from the Attorney General's office recognized the problems that

could arise in subsequent litigation if Garcia was not allowed to present all of his issues and joined in Garcia's requests for more pages. Nonetheless, the request was denied by the Nebraska Supreme Court.

On December 1, 2021, Garcia's counsel submitted a 245 page brief alleging 97 assignments of error. Counsel also submitted another motion to extend the brief page limit. Attached to the motion was the September 1st brief, which contained 130 assignments of error. On December 9, 2021, the Nebraska Supreme Court ordered the Nebraska Attorney General's office to respond to Garcia's motion to extend the brief page limit by December 14, 2021. On December 14, 2021, the Nebraska Attorney General's office filed a three page response in which it stated it had no objection to Garcia's requested page limit increase and noted that appellants should exhaust as many state remedies as possible while the case is on direct appeal. On December 15, 2021, the Nebraska Supreme Court sustained Garcia's request to extend the brief page limit. It allowed Garcia's counsel to file a brief of not more than 510 pages by December 22, 2021. On December 22, 2021, Garcia's counsel filed a 463 page brief which alleged 130 assignments of error.

Violent Crime and Drug Defense Division

In fiscal year 2020-2021, the violent crime and drug defense division handled 29 cases³. The cases included charges of second degree murder, manslaughter,

³ *State v. Dedrick*, Seward County (5 counts sexual assault, 3 counts incest, 3 counts child abuse, habitual offender enhancement); *State v. Ballew*, Johnson County (2nd degree murder); *State v. 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. Haak*, Box Butte County (2nd degree assault); *State v. Haak*, Box Butte County (Possession of controlled substance); *State v. Albrecht*, Morrill County (1st degree sexual assault of a child, 10 counts of child abuse); *State v. Smith*, Box Butte County (Attempted 2nd degree murder; Use of a weapon); *State v. Smith*, Box Butte County (2nd degree

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. Because of COVID, fewer cases were tried to juries.

State v. Cerros was tried to a jury in Butler County in May of 2021. Cerros was charged with unlawful act manslaughter (reckless driving), motor vehicle homicide while under the influence of drugs, driving under the influence of drugs, and possession of marijuana. He was convicted of manslaughter and acquitted of the other charges. On June 16, 2021, he was sentenced to eight to 12 years imprisonment. The Commission also represented Cerros on direct appeal.

The counties that use the Commission's services always save money when the Commission is appointed. In some cases, the counties would experience a true

murder, Use of a deadly weapon); *State v. Gilbert*, Jefferson County (2nd degree murder, Use of a firearm, Tamper with evidence); *State v. Medina-Baldovinos*, Dakota County (4 counts Sexual assault of a child; *State v. Hastings*, Dakota County (2 counts Sexual assault of a child); *State v. Reyes*, Nemaha County (4 counts of 1st degree sexual assault of a child); *State v. Reyes*, Nemaha County (3 counts of 1st degree sexual assault of a child); *State v. Heairet*, Cheyenne County (1st degree sexual assault); *State v. Rohde*, Kimball County (1st degree sexual assault); *State v. Ceron*, Dakota County (1st degree sexual assault); *State v. Daniels*, Cheyenne County (Attempted 1st degree sexual assault of a child, 10 counts of Possession of child pornography); *State v. Cerros*, Butler County (DUI - Motor vehicle homicide; DUI 1st, Possession of 1 oz. or less of marijuana, Possession of drug paraphernalia); *State v. Sullivan*, Seward County (Possession of a firearm by a prohibited person); *State v. Sullivan*, Seward County (2 counts of 1st degree sexual assault of a child, 2 counts of 3rd degree sexual assault of a child, 2 counts of Intentional child abuse); *State v. Dwyer*, Sherman County (Intentional child abuse resulting in serious injury); *State v. Moore*, Scotts Bluff County (2nd degree murder, Use of a weapon); *State v. Long*, Gage County (2nd degree murder, Use of a weapon); *State v. Gonzalez*, Jefferson County (Child abuse resulting in death, Terroristic threats); *State v. Hendrick*, Deuel County (Terroristic threats, Strangulation, Possession of methamphetamine, Possession of a controlled substance, 2nd degree assault, 3rd degree domestic assault); *State v. Lile*, Deuel County (Possession of methamphetamine 28-139 grams, Tamper with evidence, No drug tax stamp); *State v. Lile*, Deuel County (Possession of a controlled substance); *State v. Garno*, Hall County (38 counts of Terroristic threats, Threaten explosive use/place fake bomb); *State v. Mendoza*, Dundy County (1st degree sexual assault of a minor, Child abuse, Possession of a firearm by a prohibited person).

financial hardship if the Commission had not been able to accept the appointment. Frequently there are no available, experienced criminal defense lawyers in the county to accept an appointment. Oftentimes the Commission also saves the counties the cost of a jury trial because its experienced lawyers are able to convince prosecutors to dismiss or reduce charges. Sometimes charges are dismissed or reduced after alleged victims or witnesses are deposed and problems with their testimony are exposed. Examples of the foregoing cases are discussed in the following paragraphs.

In *State v. Smith*, Smith was charged in Box Butte County with attempted second degree murder, use of a firearm to commit a felony, and third degree assault. The Commission accepted the appointment on April 29, 2020 because a few months prior to the appointment, the Box Butte County Public Defender was charged with possession of cocaine with intent to deliver and disbarred. The Commission negotiated a plea agreement and Smith pled to attempted second degree assault, terroristic threats, and third degree assault. On December 9, 2020, Smith received an aggregate sentence of zero to three years imprisonment.

State v. Haak is another Box Butte County case the Commission accepted to help ease Box Butte County's financial hardship caused by the need to appoint private practice lawyers to handle criminal cases. Haak was charged with second degree assault for stabbing another man. The Commission negotiated a plea agreement and Haak pled to third degree assault and received a sentence of probation. The Commission also accepted a companion case in which Haak was charged with possession of methamphetamine. Haak was acquitted following a bench trial.

In *State v. Albrecht*, Albrecht was charged in Morrill County with one count of first degree sexual assault of a child and 11 counts of child abuse. The Commission's lawyer learned that the alleged victim previously testified in a case filed against another person that Albrecht never sexually assaulted her. When the judge ruled that the Commission could use the prior testimony at Albrecht's trial, a plea agreement was reached in which Albrecht pled to six misdemeanor counts of negligent child abuse.

In *State v. Rhode*, Rhode – a high school student – was charged in Kimball County with first degree sexual assault of another high school student. The alleged victim claimed Rhode raped her at the fairgrounds. The Commission's lawyer deposed the alleged victim and showed the prosecutor the problems with the victim's story. On July 6, 2020, the prosecutor dismissed the case.

DNA Testing Division

In fiscal year 2020-2021, the DNA testing division litigated two cases in the district courts and in the Nebraska Supreme Court. In *State v. Duncan*, a DNA case from Douglas County, the district court denied relief on July 15, 2020. An appeal was filed with the Nebraska Supreme Court on August 11, 2020. The case was briefed and argued in 2021. The Nebraska Supreme Court affirmed the district court's denial of relief on June 11, 2021. In *State v. Buckman*, a DNA case from Lancaster County, the district court denied relief on April 26, 2021. An appeal was filed with the Nebraska Supreme Court on May 13, 2021. The case was briefed in fiscal year 2021-2022. Oral arguments were held on February 1, 2022.

Expenses for DNA cases in fiscal year 2020-2021 were only \$963.58. The DNA Testing Division is able to minimize expenses because of its experience. District Courts often authorize testing of all items of evidence which may contain DNA. However, the DNA Testing Division will only submit items for testing that are most likely to result in relief, thereby reducing expenses.

The Nebraska State Patrol Crime Laboratory will conduct DNA testing at no expense to the Commission. However, the University of Nebraska Medical Center's DNA Lab has been testing DNA much longer than has the NSP Crime Lab. If in a particular case the original DNA testing was conducted at UNMC, any subsequent testing will also be conducted there. UNMC's lab charges \$675 per sample tested.

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, 2020, the Commission's operations cash fund had a balance of \$413,269.23. On June 30, 2021, the cash fund balance was only \$15,296.05. During fiscal year 2020-2021, the Commission received \$795,926.75 from indigent defense fees and \$4,684.13 from investments. Total revenue was \$800,610.88.

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 \$1,286,957 and total revenue was \$1,362,145. The Commission's total revenue for fiscal year 2020-2021 was down \$561,534.36 when compared to fiscal year 2008-2009. Compared to fiscal year 2019-2020, total revenue for fiscal year 2020-2021 was down \$54,117.27. COVID-19 likely contributed to the decline of case filings in fiscal year 2020-2021, but there is no reason to believe case filings will increase in the foreseeable future.

The Commission's expenditures in fiscal year 2020-2021 totaled \$1,198,584.06. Expenditures were up \$15,988.19 from the previous year. Expenditures included the retirement payout of one employee for \$20,837.85. Otherwise, expenses have been fairly steady for the past several years. The money-saving efforts the Commission introduced in March of 2016, which included taking depositions and using expert witnesses only when absolutely necessary, using rental cars instead of driving personal 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 \$994,644.70 in fiscal year 2020-2021. A reduction in those expenses would require terminating one or more of the Commission's eight employees. However, that would require the Commission to accept fewer appointments, which would result in less property tax relief to the counties. The Commission's caseload is at maximum capacity and with some exceptions, the Commission is only accepting appointments in homicide cases.

In fiscal year 2020-2021, expenditures were \$397,973.18 greater than revenue, which required the Commission to draw from its operations' cash fund. The Commission has needed to draw from its cash fund every fiscal year since 2014-2015. Again, on June 30, 2021, the operations' cash fund had a balance of only \$15,296.05.

When an effort to increase the Commission's Indigent Defense Fee in the Legislature in 2021 failed, the Legislature instead included in the Biennial Budget for fiscal years 2021-2022 and 2022-2023 transfers to the Commission's operations' cash fund in the amount of \$520,000 on July 1, 2021, and \$520,000 on July 1, 2022. Without those additional funds, the Commission would not have been able to cover expenses necessary for its continued operation.

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 2020-2021, 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, 2020, the LASF had a balance of \$434.78. On December 5, 2020, nominal awards totaling \$1,835,098 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 2021 calendar year. During

the 2020-2021 fiscal year, filing fees were credited to the LASF in the amount of \$1,747,601.47. The LASF earned \$899.09 in interest during the fiscal year.

In fiscal year 2020-2021, \$1,749,624 was disbursed to entities as follows:

Catholic Charities	\$31,159.00
Center for Legal Assistance	\$52,791.00
Central Mediation Center (Kearney)	\$3,688.00
Concord Mediation Center (Omaha)	\$3,688.00
Heartland Family Services	\$27,143.00
Immigration Legal Ctr (Justice For Our Neighbors)	\$69,663.00
Legal Aid of Nebraska	\$1,172,771.00
Lutheran Family Services	\$44,970.00
The Mediation Center (Lincoln)	\$3,688.00
Mediation West (Scottsbluff)	\$3,688.00
Ne Appleseed Center	\$109,989.00
Nebraska Mediation Center (Fremont)	\$3,688.00
NSBA Volunteer Lawyers Project	\$176,473.00
The Resolution Center (Beatrice)	\$3,688.00
Women's Center for Advancement	\$42,537.00

On June 30, 2020, the fund had a balance of \$205.09.

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, 2020, the CLSF had a balance of \$6.53. On December 5, 2020, the Commission members awarded all disbursements from the CLSF in calendar year 2021 to Legal Aid of Nebraska because it is the only eligible civil legal services provider. In fiscal year 2020-2021, \$145,019.73 was credited to the CLSF. The fund earned \$72.26 in interest. The Commission disbursed \$144,988 to Legal Aid in fiscal year 2020-2021. On June 30, 2021, the fund had a balance of \$5.73.

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, and 2019-2020.

For fiscal year 2020-2021, the legislature appropriated \$150,000 for the program. This was disbursed to 45 recipients. One recipient returned his/her award because he/she moved out of state and was no longer qualified to receive assistance. One recipient was fired from his/her job and had his/her award amount forgiven. 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, 2021 was \$3,804.47.

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 by the Indigent Defense Fee and income from investment of the indigent defense fee. 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 2020-2021.

Notwithstanding reduced revenue in fiscal year 2020-2021, the Commission effectively represented indigent criminal defendants throughout the state. The Commission continued to provide property tax relief to the counties that used its services without any reliance on the General Fund. Therefore, the Commission met the goal set by the Legislature. The Commission carried a maximum caseload in fiscal year 2020-2021 and had to decline some requests for case appointments.

Recommendation for Improvements

Court case filings continue to decline, and so does the Commission's revenue. 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 Commission services. Efforts to increase the Indigent Defense Fee failed during fiscal year 2020-2021. However, the Legislature approved transfers of \$520,000 to the Commission's cash fund in July of 2021 and July of 2022 to fully fund the Commission for those two fiscal years. The Commission needs to continue to seek a long-term, sustainable source of revenue through increases to the Indigent Defense Fee or General Funds or a combination of the two. When efforts to increase revenue

are pursued in the Legislature, the Commission should also seek sufficient revenue to add a seventh lawyer to meet the demand for its services.

Jeffery A. Pickens,
Chief Counsel
May 9, 2023

Appendix A

Commission Members during Fiscal Year 2020-2021

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 during Fiscal Year 2020-2021

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 May 2022

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 April 2021

Graduate of Bellevue University, B.S., 2001

Shara M. Aden

Paralegal from December 2002 to present

Southeast Community College, Criminal Justice, A.D., 2013

Kendra K. Werth

Administrative Assistant/Fiscal Officer from April 2021 to present

Bellevue University

CASH IN - OUT SINCE 05-06		WITH INTEREST	APPENDIX C		
	REVENUE	INTEREST	TOTAL REVENUE	EXPENDITURES	REV-EXP
FY 05-06	\$1,150,704.52	\$36,293.17	\$1,186,997.69	\$936,877.84	\$250,119.85
FY 06-07	\$1,191,200.77	\$53,832.97	\$1,245,033.74	\$922,424.18	\$322,609.56
FY 07-08	\$1,241,119.23	\$72,317.67	\$1,313,436.90	\$942,040.55	\$371,396.35
FY 08-09	\$1,286,956.81	\$75,188.43	\$1,362,145.24	\$1,028,144.04	\$334,001.20
FY 09-10	\$1,234,168.41	\$58,780.95	\$1,292,949.36	\$1,072,731.87	\$220,217.49
FY 10-11	\$1,190,192.55	\$60,450.84	\$1,250,643.39	\$1,064,478.19	\$186,165.20
FY 11-12	\$1,173,523.70	\$41,290.67	\$1,214,814.37	\$1,081,394.36	\$133,420.01
FY 12-13	\$1,092,517.18	\$31,877.98	\$1,124,395.16	\$1,074,421.97	\$49,973.19
FY 13-14	\$1,043,201.40	\$26,946.57	\$1,070,147.97	\$1,068,949.19	\$1,198.78
FY 14-15	\$1,010,728.39	\$26,965.38	\$1,037,693.77	\$1,111,534.46	-\$73,840.69
FY 15-16	\$1,009,425.81	\$28,567.11	\$1,037,992.92	*\$1,152,109.13	-\$114,116.21
FY 16-17	\$997,411.54	\$24,345.77	\$1,021,757.31	\$1,118,044.24	-\$96,286.93
FY 17-18	\$991,969.54	\$23,164.49	\$1,015,134.03	\$1,128,968.71	-\$113,834.68
FY 18-19	\$938,073.21	\$21,992.19	\$960,065.40	\$1,157,901.53	-\$197,836.13
FY 19-20	\$839,313.22	\$15,414.93	\$854,728.15	\$1,182,595.87	-\$327,867.72
FY 20-21	\$795,926.75	\$4,684.13	\$800,610.88	\$1,198,584.06	-\$397,973.18
FY 14-15	Experts	\$63,283			
FY 15-16	Experts	\$57,789			
	* Mowbray leave	\$41,335			
FY 16-17	Experts	\$45,488			
FY 17-18	Garcia case	\$55,595			
FY 20-21	Experts	\$73,286			
	Wesely Leave	\$20,838			

CASH FUND BALANCE FISCAL YEAR END		APPENDIX D
	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 20-21		\$15,296.05
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	