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Memorandum

To: Chief Public Defenders
Cc: Kendra Montgomery-Blinn, Executive Director, NC Innocence Inquiry Commission
Chris Mumma, Executive Director, NC Center on Actual Innocence
From: Thomas Maher, IDS Director
Danielle Carman, IDS Assistant Director/General Counsel
Re: Implementing the Right to Counsel in Innocence Inquiry Commission Proceedings
Date: Updated September 2009

This memorandum discusses the right to appointed counsel in proceedings before the Innocence Inquiry Commission and outlines IDS' plan for implementing that right.

I. INTRODUCTION:

The Innocence Inquiry Commission has authority to review claims of actual innocence by persons who have been convicted of felonies, both capital and non-capital. There is no requirement that a convicted person exhaust direct appeal or other remedies before seeking review, so cases will be at a variety of stages when they reach the Innocence Inquiry Commission, such as before appeal, during appeal, after appeal, during state post-conviction, or after state post-conviction. Thus, in some cases, particularly capital cases, there will already be an appointed attorney representing the defendant in other pending proceedings.

The basic phases of the Innocence Inquiry Commission proceedings are as follows:

1. Case screening and initial review by the North Carolina Center on Actual Innocence;
2. Waiver of the convicted person's procedural safeguards and privileges with respect to the claim of innocence, including the attorney-client privilege with past and current counsel;¹
3. Formal inquiry and investigation by the Innocence Inquiry staff;

¹ Counsel appointed to represent a defendant in proceedings before the Innocence Inquiry Commission should be aware that the Commission has interpreted the statutorily mandated waiver of the attorney-client privilege to include waiver of the privilege between the defendant and the current appointed counsel with respect to the defendant's claim of innocence. However, the waiver of the privilege does not apply to matters unrelated to the claim of innocence, including evidence of unrelated wrongdoing. In addition, defense counsel does not have an affirmative duty to disclose evidence of guilt discovered by counsel. See Innocence Inquiry Commission Rules and Procedures, Article 5, Rule B.3. (Rev. May 20, 2008). If counsel discovers evidence of guilt during the course of appointment, counsel should advise the defendant not to execute the waiver of procedural safeguards and privileges and move to withdraw.

4. Non-adversarial presentation of the case by the Innocence Inquiry Executive Director to the full Innocence Inquiry Commission; and
5. If the Commission finds sufficient evidence of innocence to merit judicial review (5 of 8 Commissioners in not-guilty plea cases and all 8 Commissioners in guilty plea cases), an evidentiary hearing before a special panel of 3 superior court judges to be appointed by the Chief Justice.

IDS anticipates needing counsel for the initial rights waiver in a relatively small number of cases each year (fewer than 100). Kendra Montgomery-Blinn, the Innocence Inquiry Executive Director, estimates that 30-50 cases per year will reach the formal inquiry stage and about 10 cases per year will be presented to the Innocence Inquiry Commission. If those estimates prove accurate, a handful of cases, if that, may reach a 3-judge panel each year. The first 3 cases reached the rights waiver and formal inquiry phases in August 2007, and the first case was presented to the Commission in early December 2007.

II. THE STATUTORY RIGHT TO COUNSEL:

The Innocence Inquiry Act, G.S. 15A-1460 *et seq.*, establishes a right to appointed counsel during 3 phases of the proceedings: 1) prior to and at the execution of an agreement waiving the convicted person's procedural safeguards and privileges, G.S. 15A-1467(b); 2) throughout any formal inquiry that is conducted by the Commission, G.S. 15A-1467(b); and 3) in any proceedings before a 3-judge panel, G.S. 15A-1469(d) and (e).

The role of defense counsel during the formal inquiry is unclear, although we can envision cases where an attorney might advise the client to stop cooperating and file a motion for appropriate relief ("MAR") based on the evidence disclosed during the formal inquiry. *See* G.S. 15A-1468(d) (favorable evidence uncovered during formal inquiry shall be disclosed to the convicted person and defense counsel; evidence of criminal acts or other wrongdoing uncovered during formal inquiry shall be referred to the appropriate authority). *But cf.* Innocence Inquiry Commission Rules and Procedures, Article 5, Rule B.3. (Rev. May 20, 2008) (counsel appointed to represent the convicted person does not have an affirmative duty to disclose evidence of criminal acts and wrongdoing). The presentation of the case to the Innocence Inquiry Commission is a non-adversarial proceeding, and the defendant and his counsel do not have a right to be present.

The Act does not reference the Office of Indigent Defense Services or provide that the appointment and compensation of counsel shall be in accordance with IDS Rules. Despite those omissions, the Innocence Inquiry Commission has asked IDS to provide and pay for counsel for these proceedings and the IDS staff agrees we should bear that responsibility.

III. THE INNOCENCE INQUIRY COMMISSION RULES AND PROCEDURES:

The Innocence Inquiry Commission adopted rules and procedures effective May 25, 2007; those rules were revised August 24, 2007 and May 20, 2008. The rules and procedures contemplate 2 separate appointments of counsel. First, Article 5(A) addresses the convicted person's right to counsel before executing the rights waiver, at the signing of the waiver agreement, and throughout any formal inquiry. Article 5(A) provides that, if the convicted person applies for appointed counsel, the Commission Chair shall determine indigency and, if the person is found indigent, IDS shall assign counsel.

Second, Article 7(D) addresses the right to counsel before the 3-judge panel. Article 7(D) provides that the senior judge on the panel shall determine indigency and, if the person is found indigent, IDS shall assign counsel.

IV. IDS RESPONSIBILITIES:

A. Develop Attorney Rosters:

1. Rights Waiver and Formal Inquiry Roster:

For the initial rights waiver and formal inquiry, IDS plans to rely on the public defender offices to supply counsel. For purposes of attorney training and controlling costs, we would prefer that the offices handle these cases in-house by assigning them to a felony assistant. However, if handling a specific case in-house would be disruptive, offices may occasionally assign this task to a private attorney who is approved for the district's felony list and who consents to the assignment.

All of the chief public defenders in existing offices have agreed to participate and handle these cases during the rights advisement and formal inquiry phases. Thus, we have assigned every prison facility in North Carolina to the nearest public defender office.

2. Three-Judge Panel Roster:

At this time, IDS does not plan to compile a roster of attorneys who will represent defendants before the 3-judge panel. We do not know how many appointments will need to be made, but suspect there will only be a few appointments per year. Our current plan is to recruit qualified attorneys on a case-by-case basis.

B. Attorney Appointments:

1. Rights Waiver and Formal Inquiry Appointments:

As discussed above, Article 5(A) of the Innocence Inquiry Commission Rules provides that, if the convicted person applies for court appointed counsel, the Commission Chair shall determine indigency and IDS shall assign counsel. It is our understanding that the Commission plans to mail defendants the existing form affidavit of indigency (AOC-CR-226), and the Chair (Judge Quentin Sumner) will then determine indigency and appoint IDS to assign counsel on the standard court appointment form (AOC-CR-224). Ms. Montgomery-Blinn will then mail us the affidavit of indigency, the appointment form, and a short summary report about the case, which will include a list of all prior and current attorneys in the case.

If the defendant is already represented by appointed or *pro se* counsel at the time IDS is appointed to assign counsel, IDS will do a separate appointment of the same attorney to handle the Innocence Inquiry matter. If the defendant is not already represented by appointed or *pro se* counsel, IDS will appoint the public defender office that is assigned to the correctional facility where the defendant is housed. If the assigned public defender office has a conflict of interest in a specific case, IDS will refer the case to the next closest office to the facility where the defendant is housed. In any event, IDS will mail the assignment of counsel form to the defendant, the appointed attorney or public defender office, and the Innocence Inquiry Executive Director. IDS will also provide the assigned counsel with the Innocence Inquiry staff's summary case report.

Once a specific attorney is assigned by the public defender, ordinarily the same attorney should continue the representation throughout the rights waiver and any formal inquiry, even if the

defendant is moved to a different correctional facility. In the event that the assigned attorney becomes unable to continue the representation at any point during the formal inquiry, the public defender office that originally supplied counsel may reassign the case in-house or to a private attorney who is approved for the district's felony list and who consents to the assignment. In the unusual event that the public defender office that originally supplied counsel is unable to provide new counsel, that office should contact IDS for reassignment to another participating public defender office or a qualified private attorney.

2. Three-Judge Panel Appointments:

As also discussed above, Article 7(D) of the Innocence Inquiry Commission Rules provides that the senior resident superior court judge shall determine indigency and IDS shall assign counsel. The IDS Director or his designee will recruit a qualified attorney to represent the defendant before the 3-judge panel, and will mail the assignment of counsel form to the defendant, the appointed attorney, the Innocence Inquiry Executive Director, the senior judge on the panel, the local prosecutor, and the local clerk.

C. Attorney Compensation/Case Credit:

1. Private Appointed Counsel Compensation:

For Innocence Inquiry work conducted by private attorneys, compensation will be based on the same standard hourly rates that IDS pays for other work, currently \$75 per hour in non-capital cases and \$95 per hour in capital cases. To enable us to collect data on the cost of this service, we have developed a special fee application form for Innocence Inquiry cases (form IDS-021). The IDS Director or his designee will review all fee claims for this work and set all awards, with a right to seek review from the Review Committee of the IDS Commission in accordance with established procedures. If a private appointed attorney represents a defendant both in an Innocence Inquiry claim and another pending proceeding, the attorney should submit a separate Innocence Inquiry fee application to IDS for that work so we can track expenditures.

The Innocence Inquiry case fee application form is modeled after the existing AOC fee application forms and the IDS expert fee application form, but is not an official AOC court form. The form is available on the IDS website; go to www.ncids.org, click on "Forms & Applications," then "Fee Applications," and then "Innocence Inquiry Commission Case Fee Application."

2. Public Defender Case Credit/Data Reporting:

For Innocence Inquiry work conducted by public defenders, they will need to complete the same specialized fee application (form IDS-021) for each case to ensure that offices are given appropriate credit for handling these cases and to enable IDS to track attorney time and resources devoted to this process. However, assistant public defenders do not need to report out-of-pocket expenses on the fee application form and should instead complete the regular travel reimbursement form to claim any expenses. The offices will also need to report this work in their weekly disposition reports.

At this time, we plan to assign the same weight to these cases that we do to district court felonies (3.8 misdemeanor units). If and when we develop a more nuanced weighting system by class of felony, we may decide to revise the assigned weight. While we suspect that the work associated with these cases will be less than the work associated with the underlying felony, there could be more attorney travel time associated with these claims.

D. Expert and Support Services:

In cases that have reached the 3-judge panel stage, if an appointed attorney needs the assistance of an investigator or expert, or needs to utilize necessary support services, the attorney should make application to the IDS Director before incurring any financial obligation. The application should be in writing, unless exceptional or extraordinary circumstances necessitate an oral application. Counsel will be required to make at least as specific an application as would be required by a fair but exacting judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny. The IDS Director will maintain the application in a confidential file open only to the IDS Office and the defense team. If the Director finds that the request is reasonable and that the expert or support service is necessary to the defense of the case, the IDS Office will complete a form IDS-023 to approve a specific amount of funds and provide it to counsel via facsimile. See G.S. 7A-454. If funding is approved, the expert should complete form IDS-003 and submit it directly to the IDS Office to get paid for services rendered.

E. Recoupment:

Recoupment of attorney fees in cases before the Innocence Inquiry Commission is not clearly authorized by the Innocence Inquiry Act or the statutes that pre-date that Act. The only reference to costs in the Act appears in G.S. 15A-1469(e), which addresses proceedings before the 3-judge panel and provides that the court may relieve the convicted person of all or a portion of the costs of the proceedings. Unless and until the Legislature directs recoupment in these cases, IDS will not be asking judges to enter civil judgments for the value of attorney fees.

F. Attorney Reference Materials:

IDS has prepared a short on-line reference manual for the attorneys who will be handling these cases, which includes the following materials:

1. Contact information for the North Carolina Innocence Inquiry Executive Director and the North Carolina Center on Actual Innocence;
2. The Innocence Inquiry Act (S.L. 2006-184);
3. The School of Government's summary of the Innocence Inquiry Act (January 2007);
4. The Innocence Inquiry Commission Rules and Procedures;
5. This memo describing IDS' plan for providing counsel in these cases;
6. Guidelines for appointed counsel in Innocence Inquiry cases (prepared by Chris Mumma, the Executive Director of the North Carolina Center on Actual Innocence), which briefly discuss the types of claims that are most suited for review by the Innocence Inquiry Commission, the role of defense counsel at each stage of the proceedings, and the risks a defendant could be taking by seeking review from the Commission;
7. The Innocence Inquiry Commission's waiver of rights agreement;
8. The public defender office prison assignments;
9. IDS' assignment of counsel form in proceedings before the Innocence Inquiry Commission; and
10. IDS' Innocence Inquiry fee application/public defender reporting form.

To access the reference manual, go to www.ncids.org, click on "Other Manuals" and then "Innocence Inquiry Proceedings Manual." Ultimately, we may also add a chapter on Innocence Inquiry proceedings to the North Carolina Defender Manual.

G. Opportunities for MAR Relief in Rejected Cases:

IDS needs to think about what we can and should do about non-capital claims that get rejected somewhere in the Innocence Inquiry process or when the defendant voluntarily decides to opt out of the process, but the appointed attorney believes there is a viable MAR claim. Under current law, if any member of the Innocence Inquiry staff, Innocence Inquiry Commission, or the 3-judge panel believes there is evidence that a non-capital defendant is entitled to some relief other than a declaration of innocence, IDS could write to the senior resident judge in the county of conviction and ask him or her to appoint counsel to file a MAR or refer the matter to North Carolina Prisoner Legal Services. To facilitate this, Article 8(B) of the Innocence Inquiry Commission Rules provides as follows: “If the Executive Director, one or more members of the Commission, or one or more members of the three judge panel determine that a remedy other than that provided for by N.C. G.S. § 15A-1460-1475 may be appropriate; they shall notify the North Carolina Center on Actual Innocence or North Carolina Indigent Defense Services in writing so that they may pursue any appropriate action.”