

SUPREME COURT
STATE OF LOUISIANA
NUMBER 2004-KD-1154

STATE OF LOUISIANA
VERSUS
ADRIAN CITIZEN
STATE OF LOUISIANA
VERSUS
BENJAMIN G. TONGUIS

OPPOSITION OF DEFENDANTS CITIZEN AND TONGUIS
TO APPLICATION OF CALCASIEU PARISH POLICE JURY
FOR SUPERVISORY WRIT

FROM THE FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU, STATE OF LOUISIANA
THE HONORABLE ALCIDE GRAY, PRESIDING
CRIMINAL DOCKET NUMBERS 22815-02(CITIZEN) & 10272-02 (TONGUIS)

DEATH PENALTY CASES

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STATEMENT OF THE CASE

The cases of Mr. Citizen and Mr. Tonguis are in no way related. They involve different alleged victims and the crimes are alleged to have occurred on different dates. Indeed, outside of the hearings related to funding, Mr. Citizen and Mr. Tonguis have never even met. What links them and led to the consolidation for the purposes of this writ is that they are both indigent, both are charged with offenses in which the state is seeking the death penalty, and both live in a parish where the Office of the Public Defender does not possess sufficient funds to give them the defense to which they are constitutionally entitled. Undersigned counsel were appointed to represent Mr. Citizen and Mr. Tonguis after the trial court found that the Public Defenders who were representing them were too overburdened to provide them with a constitutionally required defense.

Mr. Citizen was indicted on one count of first degree murder on October 10, 2002. Mr. Tonguis was indicted on one count of first degree murder on April 11, 2002. Each has entered a plea of not guilty to the charges. Each filed a motion to designate a funding source for the defense, and hearing was held before the trial court on January 30, 2004. The Attorney General, the District Attorney, and the Calcasieu Parish Police Jury, among others, were all served with notice of the motion and hearing and had opportunity to be present and be heard. *See* Exhibits A and B to Application of Police Jury.

By stipulation of the State, the Defendants, and the trial court, the trial court received as evidence the complete transcript and exhibits from the funding hearing held October 10, 2001, in State v. Winfree.¹ *See* Exhibit B. The extensive evidence taken at the hearing in Winfree was supplemented by affidavit and testimony at the January 30, 2004 funding hearing in these cases.

The Only Funding for Indigent Defense from the State of Louisiana is the Budget of the Louisiana Indigent Defense Assistance Board (“LIDAB”)

At the hearing in 2001, the Office of Planning and Budget for the State of Louisiana represented that there are no funds appropriated for indigent defense purposes by the State of Louisiana other than the budget for the Louisiana Indigent Defense Assistance Board (“LIDAB”) and that the budget office does not have any funds of its own, nor does it have any independent appropriation authority. Exhibit B, pages 25-26. This testimony was supplemented by affidavit at

¹ The Calcasieu Parish Police Jury, the District Attorney, and the Attorney General were also served with notice of the hearing in State v. Winfree and participated in that hearing.

the 2004 hearing showing that the situation has not changed and there are still no funds provided by the State of Louisiana for indigent defense other than the budget of LIDAB.

There are No Funds Available from LIDAB

Ed Greenlee, Executive Director of the Louisiana Indigent Defense Assistance Board (LIDAB), appeared as a witness in the Winfree hearing. Exhibit B, pages 32-66. The problem faced by LIDAB is that it is a rock from which increasing amounts of water have been squeezed in recent years. The total budget had not increased in seven years.² Exhibit B, page 34. Yet the fiscal obligations of the office continue to grow.

One element of LIDAB's responsibility is the District Assistance Fund, which had dropped to roughly \$2.75 million, but at the time of the Winfree hearing had been set statutorily at no less than \$3 million. Exhibit B, pages 39-40.³ In the meantime, various other obligations have been added to the LIDAB mandate, but no additional funding has been provided.

First, the LIDAB was required to establish the Louisiana Appellate Project, handling all non-capital appeals with a budget of \$1.1 million. Exhibit B, page 35. To this was added a further \$400,000 obligation in the form of the Capital Appellate Project in 2001. Exhibit B, page 36.

In 1999, the legislature added another mandate, the provision of capital post-conviction counsel, *La. R.S. § 15:149.1*, with a \$1.3 million price tag. Exhibit B, page 33. The Legislature did nothing to pay for it. To date, that has been funded out of the \$7.5 million to the tune of \$780,000.

Meanwhile, the budget available for capital conflict cases at the trial court level has remained at roughly \$1.7 million. Exhibit B, page 37. This budget is able to deal with only "a very small proportion of the cases state-wide." Exhibit B, page 38. Indeed, the numbers of conflict cases vary from more than ten per year in Caddo Parish, up to twenty in Baton Rouge, and (at one time) over fifty in New Orleans, Exhibit B, page 38, to mention only three of the parishes. There is, at any

² In 2001, the LIDAB budget was approximately \$7.8 million dollars. Of this \$7.5 million is the normal budget. The only addition to the LIDAB budget came in the shape of funds in a consent decree aimed at enforcing the rights of juvenile clients, approximately \$300,000, but the LIDAB only acted as a conduit for these funds to their intended object, the Juvenile Justice Project of Louisiana. Exhibit B, pages 34-35.

³ The statutory restriction has now been removed although LIDAB has already paid \$2,755,000 to the districts in the current fiscal year (July 1, 2003 - June 30, 2004) and its budget envisages paying an additional \$245,000 prior to its year end.

given time, a backlog of roughly 50 conflict cases across the state. Exhibit B, page 64. These cases can cost upwards of \$100,000 each, Exhibit B, page 55, with some requests being as much as \$160,000, Exhibit B, page 56, which would mean that the total budget for capital trials could only fund a dozen cases.

The remainder of the LIDAB budget – a relatively small amount – includes \$100,000 for juvenile justice,⁴ Exhibit B, page 40, and then the administrative costs of the LIDAB itself, which amount to a little less than \$400,000,⁵ Exhibit B, page 41.

LIDAB has not rested in its efforts to find creative solutions to the problem either, yet these efforts have frequently been thwarted by the State. Indeed, the Louisiana Commission on Law Enforcement has effectively vetoed LIDAB's efforts to secure *federal* funding through Byrne grants, Exhibit B, pages 48-49, preferring to try to secure that money for law enforcement. At the same time, the Louisiana Bar Foundation has looked unfavorably on funding requests. Exhibit B, page 49.

Neither has the State been willing to provide additional funds. Each year, LIDAB's request for a larger budget has been turned down by the Governor, who has refused to even make the request of the legislature. At the same time, an assistant attorney general, appearing on behalf of the State of Louisiana, denied that it had "appropriation power" to provide additional funds, Exhibit B, page 25, even through the Interim Emergency Board (*IEB*). Exhibit B, page 26. The *IEB* has specifically refused to help defray the costs even of extraordinary and unanticipated capital cases. Exhibit B, page 48. This was confirmed by Mr. Rudie Soileau, a member of the Fourteenth JDC Indigent Defender Board, who testified that requests for such funding by the 14th JDC IDB had been rebuffed. Exhibit B, page 126).

The testimony of Ed Greenlee from 2001 was supplemented by affidavit admitted as evidence at the hearing on January 30, 2004. Although more than two (2) years had passed since his testimony in Winfree, Mr. Greenlee and LIDAB's position is exactly the same - - that LIDAB "does not have the funds to pay for any expert witness fees or attorney fees in any individual case,"

⁴As Mr. Greenlee observed, juvenile justice has been a major area of concern to the Supreme Court. Exhibit B, page 41.

⁵Paradoxically, LIDAB has to budget for Mr. Greenlee traveling around the state telling trial judges that he has no money for them. Exhibit B, pages 59 and 60.

including the defense of Mr. Tonguis or Mr. Citizen.

The current catastrophe in the Office of the Calcasieu Public Defender

The trial court was more than justified in holding that the local IDB could not afford to pay for Mr. Citizen and Mr. Tonguis' defense. Rudie Soileau, a member of the 14th JDC Indigent Defender Board, testified in 2001 to the dire financial prognosis of the Calcasieu Parish PDO at that time.

At the time of the Winfree hearing, the PDO's office had \$55,000 in their operating account and \$123,000 in their savings. Exhibit B, page 121. The Board was operating at a deficit because the approximate monthly operating cost of the PDO was \$100,000, yet their monthly receipts ranged only between \$50,000 to maybe \$100,000, for an average of \$75,000. Exhibit B, pages 121-122. In their best month, they only break even. Mr. Soileau testified that, over the preceding 6 months, they had lost on average \$10,000 every month. Exhibit B, page 133. The PDO should, under prudent accounting practices, retain at least three months' operating expenses in the bank. Exhibit B, page 131. This is because, unlike a private law firm, the PDO is forbidden from deficit spending; while a private lawyer may borrow his way through a financial trough, a public entity cannot. Thus, the PDO should have roughly \$300,000 on hand. Exhibit B, page 132.

Board Member Soileau also testified to the solutions the Board had attempted to minimize or resolve their budgetary problems. Exhibit B, pages 118 *et seq.* For example, the PDO requested free office space from the Police Jury that might have freed up \$100,000 per year for other causes. This was turned down. Exhibit B, pages 129-31.

The Fourteenth JDC IDB set up a separate capital defense fund, designating a specific percentage of receipts to be dedicated to that fund. They did this in a effort to minimize the debilitating effect that capital defense was having on the operations of the PDO generally. Ron Ware, Chief Public Defender in Calcasieu Parish, testified at the hearing held January 30, 2004. Exhibit C. The capital defense account was receiving approximately \$5,553.00 per month. Exhibit C, page 15. On January 30, 2004, there was only \$3,883.00 in the capital defense fund, but there were outstanding invoices for approximately \$50,000.00. Exhibit C, pages 15 and 13. At the status conference held on April 14, 2004, Mr. Ware provided updated information to the trial court. As of April 14, 2004, there was \$30,002.42 in the capital defense fund, but there were outstanding

obligations of approximately \$35,000 for expenses previously incurred in the Reeves case and \$12,000 for expenses previously incurred in the Rideau case, resulting in a negative balance of \$-16,997.58. Mr. Ware advised that there were currently 6 indigent capital defendants in Calcasieu Parish, each of whom must have 2 capitally certified defense attorneys and each of whom must have sufficient funds for fees, overhead, and experts.

**The Financial Surpluses for Every Other
Aspect of the Lake Charles Judicial System**

The inequity of the plight of the capital accused is set in stark relief by the lush state of the other accounts in Lake Charles. There are various local funds where there is plenty of money to pay for these cases.

The December 31, 2000 Auditor's Report for the District Attorney's office was admitted in evidence at the Winfree hearing and was made a part of the record in these proceedings. Exhibit B, page 16. This Report explains that it contains information "only on the funds maintained by the district attorney and do[es] not present information on the police jury." Thus, this Report reflects funds in the hands of the District Attorney which it receives from sources other than the Police Jury. Exhibit B, page 102. At 2000 year end, the District Attorney's office had \$1,517,067 in *unreserved and undesignated* funds. At the January 30, 2004 hearing in these cases, the 2002 year-end Auditor's Report was admitted and it showed that the *unreserved and undesignated* funds had grown to \$2,017,044. Over just 2 years, the amount of money held by the District Attorney, for which it had no use at all, had grown by \$499,977.

Mark McMurray, administrator for the Calcasieu Parish Police Jury, testified at both the Winfree hearing in 2001 and the present hearing in 2004. Exhibit B, pages 68 *et seq.*; Exhibit C. The Calcasieu Parish Police Jury administers the funds of the Consolidated Criminal Court Fund. Exhibit B, page 70. This fund is made up of various sources of revenue, of which the Ad Valorem Tax is the largest (generating 2.3 million in fiscal year 2000). Exhibit B, page 70-71. The entire proceeds of this fund are divided, with 20% going to the "Jury and Witness Fee Fund" and 80% going to the District Attorney and District Courts. Exhibit B, page 71. The 80% portion is divided, with 40.5% of that going to the District Courts and 59.5% going to the District Attorney. Exhibit B, page 71. The 20% portion designated to the Jury & Witness Fee Fund is taken "off the top."

Exhibit B, page 71. At 2000 year end, the remaining 80% of the Criminal Court Fund contained total *undesignated cash* assets of \$2,937,000.⁶ Exhibit B, page 80. The general trend had been for this surplus to rise, by \$750,000 since 1995. Exhibit B, page 103. Of this, roughly \$1.8 million belonged to the District Attorney and \$1.1 million to the District Courts. Exhibit B, page 80.

The *Ad Valorem* Tax and “The Jury & Witness Fee Fund”

Unique among the parishes of Louisiana, in Calcasieu Parish there is a Criminal Justice *ad valorem* tax that was first established for ten years in 1985, and then renewed for ten years in 1995. Exhibit B, page 70. This tax is the largest source of revenue going into the Consolidated Criminal Court Fund, and in 2000 it generated roughly \$2.3 million. Exhibit B, page 70. As explained above, 20% of the Criminal Court Fund receipts goes into a “jury and witness fund.”⁷ During calendar year 2000, the funds deposited to the Jury and Witness Fund were \$693,331. Exhibit B, page 90. After paying all expenses from the Fund in 2000, there was a surplus of \$442,862. Exhibit B, page 91. Mr. McMurry testified that the Fund always generates a surplus and, over 7 years that surplus averaged \$450,000 per year. Exhibit B, page 91. This \$450,000 surplus is then divided 50/50, by agreement, between the District Courts and the District Attorney. Exhibit B, page 91. All of the above information was also borne out by the Financial Report of the Calcasieu Parish Police Jury for fiscal year ended 2000, which was admitted as an exhibit at the Winfree hearing in 2001 and made a part of this record.

At the 2004 hearing, Mr. McMurry again appeared, accompanied by Mr. Allen Smith, attorney for the Police Jury. The 2002 Financial Report of the Police Jury was admitted as evidence at the 2004 hearing. That report and the testimony of Mr. McMurry show that the surplus in the Jury and Witness Fee Fund continues. Due to changes in the fees that must be paid to jurors, it is anticipated by the Police Jury that the surplus at the end of 2004 will be somewhat less, but it is still anticipated that the surplus will be at least \$300,000.

There was extensive discussion at the January 30, 2004 hearing regarding the Police Jury, the District Judges, and the District Attorney attempting to reach an agreement that would allow the

⁶ This consisted of \$5,563,000 in cash assets and liabilities of \$2,626,000 as of December 31, 2000. Exhibit B, page 79.

⁷ The other eighty percent is divided up with 59.5% going to the District Attorney and 40.5% going to the District Judges. (Winfree Tr. 10/10/2001 at 71).

surplus funds in the Jury and Witness Fee Fund to be used for indigent capital defense in Calcasieu Parish. Mr. Allen Smith, attorney for the Police Jury, explained:

You see, the position of the Police Jury is that this is public money from a tax that's allocated to the justice system. And the parties, the judges on the one hand, and the District Attorney on the other hand, by agreement, share in any excess funds at the end of the year. The Police Jury does not have – you know, doesn't mind allocating those funds towards capital indigent defense. But the truth is it requires the agreement of the two parties who are the recipients, the judges on the one hand and the District Attorney on the other.

Exhibit C, pages 9-10. The Police Jury proposed that the funds for indigent capital defense “be allocated out of the excess experienced at the end of this last December, from the ‘03 operations.”

Exhibit C, page 12. The trial court prudently took the matter under advisement, to allow time for the District Judges and the District Attorney to meet and attempt to reach an agreement that the surplus Jury and Witness Fee funds could be used for this purpose. Unfortunately, the Judges and the District Attorney could not reach any such agreement.

On April 27, 2004, the trial court issued its *Order Designating Source of Funds*. Exhibit C to Application of Police Jury. The trial court found that “there are surplus and undesignated/unreserved funds available, from the Jury and Witness Fee Fund in Calcasieu Parish, sufficient to cover the anticipated expenses and overhead for the defense of Mr. Citizen and Mr. Tonguis.” Exhibit C to Application of Police Jury, page 4. The trial court held that La. R.S. §§ 15:304 and 15:571.11 are unconstitutional and violate Article 1, Sections, 2, 3 and 13 of the Louisiana Constitution of 1974 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, to the extent that those statutes “create an absolute bar to this Court ordering the use of undesignated, unreserved surplus parish funds for the defense of indigent capital defendants where there are no other funds available to the Court to discharge its constitutional obligations.” Exhibit C to Application of Police Jury, pages 5-6.

The Calcasieu Parish Police Jury and the Office of the District Attorney have both sought review of this Order, but have done so in different courts and using differing procedural mechanisms. The Police Jury for Calcasieu Parish simultaneously filed writ applications in both the Supreme Court and the Third Circuit. The Third Circuit denied the Police Jury's writ on May 14, 2004, stating: “[w]hen a statute is declared unconstitutional, exclusive jurisdiction to review the

correctness of the lower court's ruling lies with the supreme court. *See* La. Const. art. V, § 5(D). Thus, this court is without jurisdiction to consider this issue." Exhibit A. The Police Jury writ to this Honorable Court was filed on May 10, 2004. This Opposition is therefore timely filed (La. Supreme Court Rule X, § 6). The Office of the District Attorney filed a notice of appeal on April 29, 2004, and the return date for the appeal to the Louisiana Supreme Court was set for May 17, 2004. Exhibit D.

ARGUMENT

The overarching issue is, simply stated: where there are undesignated and unreserved surplus funds in a parish account, particularly an account whose source of funds is a "Criminal Justice tax", and where there are no other funds available to the trial court to discharge its constitutional obligation to provide effective assistance of counsel to an indigent capital defendant, may the legislature constitutionally prohibit the use of those surplus parish funds for the defense of the indigent capital defendant. If the answer is yes, then there are *no funds* with which to provide a defense to Mr. Tonguis and Mr. Citizen. If the State is going to seek the death penalty, there must be funds with which to pay for capital defense.

At present, no money is available for capital defense in Lake Charles, yet the prosecution and the parish appear to be extremely wealthy. The responsible parties cannot simply avoid responsibility by designating their money as one fund or another. *State v. Craig*, 93-2515 (La. 5/23/94); 657 So.2d 437, 443. As the Court held in *Peart*, "[i]f legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel." *State v. Peart*, No. 92-KA-0907, 92-KD-1039 (La. 07/02/93); 621 So.2d 780, 791 (citations omitted).

Both federal and state constitutions require that an indigent defendant is entitled to the effective assistance of counsel. Mr. Tonguis and Mr. Citizen are indigent. The Court must provide them with counsel and the assistance of necessary experts. Those attorneys and experts must be compensated. The only available funds are held in the bank accounts of the Calcasieu Parish Police Jury - and those accounts have at least \$300,000 in unreserved, undesignated funds. Any statute

purporting to preclude the use of those funds for the defense of Mr. Citizen and Mr. Tonguis violates the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 2, 3, and 13 of the Louisiana Constitution.

A. ASSIGNMENTS OF ERROR BY THE CALCASIEU PARISH POLICE JURY

1. Assignment of Error I

The Police Jury's first assignment of error is that the trial court erred in declaring La. R.S. 15:304 and La. R.S. 15:571.11 unconstitutional. In argument the Police Jury states that "[t]he amendments [to La. R.S. 15:304 and La. R.S. 15:571.11] have done nothing to remove, impinge upon or thwart the constitutionally guaranteed rights of the defendants. The amendments do not declare that indigent defense costs will not be paid; the amendments simply shift that burden squarely upon the shoulders of the state." Application of Police Jury, page 13.

With respect, the police jury is squarely wrong on this issue. There are no other funds available to the trial court to provide for the defense of Mr. Tonguis and Mr. Citizen. Adrian Citizen has languished in jail for almost two (2) years. He does not have a trial date set, has not had a motion hearing on the merits of his case, and can expect to sit in jail indefinitely unless funds can be identified for his defense. Benjamin Tonguis has lived for over 2 years with the opprobrium of being charged with killing his infant child. As of yet, he has not hope of obtaining his day in court to show his innocence. Moreover, the families of the alleged victims are left without closure, wondering whether they will ever learn what caused the death of their loved ones. La. R.S. 15:304 and La. R.S. 15:571.11 have operated so as to deprive Mr. Citizen and Mr. Tonguis of the one source of funds that are available to them.

The U.S. Supreme Court has

long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake v. Oklahoma, 105 S.Ct. 1087, 1092 (1985). The trial court found that the sole source of funds that can be identified to provide for Mr. Citizen and Mr. Tonguis' defense is the Jury and Witness Fund. None of the parties have argued that there is another alternative. None of the parties have

argued that payment of said expenses out of the Jury and Witness Fund will cause a financial hardship to any of the parish entities.

Mr. Citizen and Mr. Tonguis are mere pawns in the systemic under-funding of indigent defense in Louisiana. An indigent person shall “have the assistance of counsel for his defense.”

U.S. Constit. Amend. VI. The U.S. Supreme Court has:

often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system." To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Ake v. Oklahoma, 105 S.Ct. 1087, 1093 (1985) (citing Britt v. North Carolina, 404 U.S. 226, 227 (1971)).⁸ Similarly,

[t]he trial court's anticipation of difficulty in obtaining payment of experts' fees does not obviate the performance of its constitutional duty to determine whether the relator is entitled to such fees, to fix them in the proper amount, and to order payment by the appropriate officer or entity. The relator is entitled to an adequate opportunity to present his claim fairly, and may not be denied the funds necessary.

State ex rel Deboue v. Whitley, 592 So.2d 1287, 1287 (La. 1992).

It is axiomatic to say that the right to counsel and experts can never be more sacred than when someone’s very life is on the line. Any statute that seeks to remove what, in Calcasieu Parish at least, is a very fertile source of funding is unconstitutional. Hence the question becomes: when the legislature does not fulfill its constitutional mandate, what is the court’s responsibility? It is posited that the day foretold in Peart has come: “[i]f legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.” State v. Peart, No. 92-KA-0907, 92-KD-1039 (La. 07/02/93); 621 So.2d 780, 791 (citations omitted). The trial court correctly declared La. R.S. 15:304 and La. R.S. 15:571.11 unconstitutional.

2. Assignment of Error II.

The police jury’s second assignment of error is that the “trial judge exceeded his judicial

⁸ Accord State v. Frank, 803 So.2d 1, 9 (La. 2001); State v. Madison, 345 So.2d 485, 490 (La. 1977); State v. Touchet, 642 So.2d 1213, 1214 (La. 1994).

authority by usurping the fiscal and budgetary affairs and responsibilities of the Calcasieu Parish Police Jury and the Louisiana legislature by allocating payment of specific sums for attorneys' fees, overhead costs, and expert witness expenses, from a specific budgetary item of the Calcasieu Police Jury." (Brief of Police Jury of May 10, 2004, at page 17). While arguing that the maintenance of a minimum balance "could operate to exhaust funds," the police jury makes no mention that historically the juror and witness fund has had a significant surplus of approximately \$400,000.00 every year since its inception. Also conspicuous by its absence is any mention that "it is anticipated that the surplus [from the Jury and Witness Fee Fund] will be at least \$300,000.00 [in calendar year 2004]," an amount which is less than that which the trial court ordered be set aside. Exhibit C to Application of Police Jury, page 4.

The police jury relies almost entirely on State v. Craig, 637 So.2d 437 (La. 1994), in support of its Assignment of Error II. Paradoxically, in Craig this Court recognized that courts have the "power to act in the area of determining the amount, priority, and source of funding where the constitutional rights of an indigent to a proper defense are concerned." Id. at 445-46. The Craig court cited to its earlier decision in State in the Interest of Johnson, 475 So.2d 340 (La. 1985), which held:

The separation of powers by our state constitution establishes an inherent judicial power which the legislative and executive branches cannot abridge. Among the purposes for which inherent judicial power may be exerted are the issuance of needful orders in aid of a court's jurisdiction and the regulation of the practice of law. In aid of these purposes, a court has the inherent power to require an attorney to represent an indigent, with or without compensation, as an obligation burdening his privileges to practice and to serve as an officer of court. The court's power to furnish counsel for indigents necessarily includes the power, when reasonably necessary for effective representation, to issue an order requiring the state, its appropriate subdivision, department, or agency, to provide for the payment of counsel fees and necessary expenses.

Id. at 341-42. (Citations omitted).

In both Craig and Johnson, this Court looked to a list of factors "involving an examination of the structure and scheme of existing legislation which may be applied by analogy, the ability of an entity to budget and finance such expenditures, the entity's responsibility for incurring the need for legal services or for administering the program out of which the need arises, and the existence of any custom or informal practice regarding the payment of such fees." Craig, 637 So.2d at 445.

Applying those factors to the case at bar, it is clear that the trial court did not exceed its authority in ordering that the funds for the indigent capital defense of Mr. Tonguis and Mr. Citizen come from the surplus of the Calcasieu Parish Jury and Witness Fee Fund.

a. The structure and scheme of existing legislation.

Following this Court's decision in Craig, the legislature amended La. R.S. §§ 15:304 and 571.11. If, as the Police Jury argues, the legislature intended to exempt parishes from responsibility for indigent defense, then the legislature had and has a constitutional duty to provide funding for indigent defense from some other source, but it has not done so. This Court is generally aware of the indigent defense funding crisis that has existed in this State for several years. Our courts have recognized that there is a "general pattern . . . of chronic underfunding of indigent defense programs in most areas of the state." State v. Peart, 621 So. 2d 780, 789 (La. 1993). As the hearings conducted in these cases demonstrate, the situation has only become worse in the ensuing years. The last eleven years have only eroded what little funding there once was. Originally, \$7.5 million was provided by the State of Louisiana to supplement the local IDB budgets around the State, with much of that earmarked for capital defense at the trial level. Gradually this has been eaten away by other mandates foisted on the Louisiana Indigent Defense Assistance Board ("LIDAB"), yet the Legislature has added not one penny to the LIDAB budget to meet these needs, nor has the Legislature provided any other state funds for indigent defense.

b. The ability of an entity to budget and finance such expenditures.

The testimony and evidence adduced over these past 3 years abundantly shows that the surplus in the Jury and Witness Fee fund is reliable and allows for budgeting and finance of indigent capital defense. As Mr. Smith pointed out at the hearing, the funds are already split between the District Judges and the District Attorney. It is merely a matter of the District Judge and the District Attorney allowing the funds to be used for indigent capital defense.

c. The entity's responsibility for incurring the need for legal services or for administering the program out of which the need arises.

The State of Louisiana, through the office of the District Attorney of Calcasieu Parish, determines when, whom, and how to prosecute offenses purportedly committed within its jurisdiction. Thus, the District Attorney's office decides when it will prosecute Mr. Tonguis and Mr.

Citizen and whether it will seek the death penalty against them. The District Court is responsible for appointment of counsel to represent indigent criminal defendants and serves a gate-keeping function in determining the legitimacy of fees and expenses incurred in the defense of indigents. It is therefore the District Attorney and the District Courts that are responsible for incurring the need for these legal services.

The Calcasieu Parish Police jury merely administers the money of the Consolidated Criminal Court Fund, of which 20% is designated to the Jury & Witness Fee Fund. It is the District Judges and the District Attorney that actually control the money in this Fund.

d. The existence of any custom or informal practice regarding the payment of such fees.

In State v. Winfree, the Calcasieu Parish Police Jury paid the fees and expenses of the four indigent capital defendants who were not represented by the PDO.⁹ By agreement, the Police Jury has provided funds for other indigent capital defendants as well, for example Ricky Langley. But perhaps most importantly to this factor, the Police Jury was willing to designate the surplus funds from the Jury & Witness Fee Fund for the purpose of indigent capital defense – sadly, the judges and the District Attorney could not reach an agreement to do the same.

The trial court did not abuse its authority in ordering that the surplus funds from the Jury and Witness Fee Fund in Calcasieu Parish be used for the defense of Mr. Tonguis and Mr. Citizen.

PRAYER

WHEREFORE, for these reasons, and such others as may be apparent to this Court, the application to this Court for supervisory writs should be *denied*.

Respectfully submitted,

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⁹ The funding of the defense of the Winfree defendants was the subject of writs to this Court in 2001 and 2002.

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BY: _____

STATE OF LOUISIANA
PARISH OF RAPIDES

VERIFICATION

BEFORE ME, the undersigned authority, personally appeared PHYLLIS E. MANN who, after being duly sworn, did state that the allegations contained in the foregoing Opposition of Citizen and Tonguis to Application of Calcasieu Parish Police Jury for Supervisory Writ are true and correct to the best of her information, knowledge, and belief; and that this Opposition of Citizen and Tonguis to Application of Calcasieu Parish Police Jury for Supervisory Writ has been served on the following by first class United States mail with proper postage affixed:

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PHYLLIS E. MANN

SWORN TO AND SUBSCRIBED, before me the undersigned Notary, this 25th day
of May, 2004.

NOTARY PUBLIC