

## ***Gideon* Reviewed: The State of the Nation 40 Years Later**

In the landmark case *Gideon v. Wainwright*<sup>1</sup>, the U.S. Supreme Court unanimously concluded that states have a constitutional obligation under the Sixth and Fourteenth Amendments to provide counsel to indigent defendants in felony cases. Over the ensuing 40 years, the right to counsel has been consistently extended to any case that may result in a potential loss of liberty.<sup>2</sup>

Despite this, only 22 states administer and fund all indigent defense services at the state level.<sup>3</sup>

The remaining states rely either in part or entirely on local funding and/or court costs to fulfill their constitutional obligation. Local funding, which is primarily derived from property taxes, tends to constrict in inverse proportion to the demand for indigent defense services (i.e., a weakened local economy causes increases in unemployment, worker flight, demands for other county services, and crime), producing instability in funding and wide fluctuations in the quality of indigent defense, as described below:

~~✍~~ As one of only two states that provide *no* state funding of indigent defense services<sup>4</sup>, **Pennsylvania's** counties fail numerous standards relating to attorney performance. Venango County (Franklin) attorneys work in excess of national workload/caseload standards for full-time attorneys despite their part-time status and ability to carry private cases.<sup>5</sup> Similar practices in Allegheny County (Pittsburgh) resulted in a successful class action lawsuit brought by the American Civil Liberties Union alleging indigent defendants do not receive constitutionally guaranteed right to counsel. A 2003 report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias found that this funding structure disproportionately and adversely affects indigent defense services rendered to people of color.

~~✍~~ Counties throughout the state of **Nevada** have been cited for assigning attorneys to serious felony and murder cases for which the attorney is not qualified. Most recently, the 9<sup>th</sup> Circuit Court of Appeals allowed a defendant who was exonerated from death row after fourteen years to sue the Clark County (Las Vegas) public defender administrator for appointing an attorney just out of law school who had never handled a murder case to represent him on capital charges.

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<sup>1</sup> 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963).

<sup>2</sup> *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to: direct appeals - *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation - *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement - *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings - *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment - *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence - *Shelton v. Alabama*, 535 U.S. 654 (2002).

<sup>3</sup> Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maine, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin, and Virginia.

<sup>4</sup> South Dakota is the other.

<sup>5</sup> See *Indigent Defense Services in Venango County*. March 2002. Prepared on behalf of Venango County by NLADA.

- ~~✍~~ In direct violation of the mandate to provide counsel in misdemeanor cases carrying a potential loss of liberty, **Georgia** counties routinely deny counsel to indigent defendants in non-felony cases. Although inappropriate misdemeanor convictions may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse and deportation – factors that tend to foster recidivism.
- ~~✍~~ Counties in **Texas** have been cited for undue judicial influence, including the failure of judges to appoint counsel in a timely manner. Despite national standards calling for the early appointment of counsel (generally with 24-72 hours of arrest), a bill requiring appointment of counsel within 30 days was recently vetoed. In some counties, attorneys are not appointed for three to six months.
- ~~✍~~ Until 2003 when an appellate judge stepped in to order the state of **New York** to pay attorneys representing indigent defendants in New York City a reasonable fee, attorneys received \$25 hour. This rate is below the presumptive \$30 per hour figure that the Alabama Court of Criminal Appeals determined is a “reasonably incurred” expense to cover *overhead* costs in their state alone. By comparison, the State of Alabama now pays attorneys \$90 per hour for in-court work – a figure that equals the U.S. Government’s assigned counsel compensation rate for federal cases.
- ~~✍~~ **North Dakota** relies extensively on flat-fee contracts entered into with attorneys to represent all non-conflict defendants in a given jurisdiction. Since these contracts do not have caps on the number of cases to be represented, attorneys may have a financial incentive to cut corners. Moreover, there are no safeguards regarding when cases are assigned during the contract. Thus, an attorney may be assigned a serious felony on the last day of his/her contract and is expected to continue representation in that case until disposition with no further compensation.
- ~~✍~~ Low salaries of public defenders in **South Carolina** have been cited as a predominant cause of high employee turnover. Many attorneys leave law school with six-digit student loan debt that is difficult to re-pay on \$27,000 per year salaries. High turnover contributes to the inefficient use of limited resources as the office is in constant circle of hiring and training new staff
- ~~✍~~ Despite a statewide, state-funded study of public defender caseloads in **Tennessee** in 1999 that found indigent defense providers carry twice the recommended number of cases and cannot provide constitutionally adequate services, the legislature has not funded the recommended 56 staff attorney positions despite an increase in case filings during the ensuing three years.
- ~~✍~~ **Louisiana** is one of only two states that rely extensively on court costs to fund indigent defense services.<sup>6</sup> Unfortunately, there is no correlation between a parish’s ability to assess/collect court costs and the resources levels needed to ensure adequate, constitutionally-guaranteed right to counsel. A system has therefore developed in that state in which services are rendered only to the degree affordable through court cost revenues. As such, many parishes have instituted assembly-line justice in which a single attorney handles all cases at a single hearing and then passes along the case to another attorney to handle the next hearing. This is called “horizontal” representation and it is strictly forbidden under ABA and NLADA standards.

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<sup>6</sup> Alabama is the other.

✍️ The **Mississippi** legislature created a statewide, district-based public defender system that mirrored the system for prosecutors in the state, but never funded it. Last year, the legislation creating the system was rescinded. Quitman County is currently suing the state for passing its constitutional obligation onto its counties because the county essentially went broke trying to pay for indigent defense services on a serious homicide case.

Even in states that do oversee and fund indigent defense services at the state level, the failure of most to both enact measurable indigent defense standards and to establish methods to monitor compliance therewith has produced indigent defenses systems across the country that deliver unfair justice to those of limited means.

✍️ Though **Wisconsin** funds and administers indigent defense services at the state level, the financial eligibility threshold is set below the Federal Poverty guidelines. This means that a person who is deemed poor enough to be eligible for Medicaid coverage and/or Food stamps may be deemed by the state to be able to fund and mount their own defense in criminal proceedings.

✍️ Despite being recognized as one of the few states that ensures quality indigent defense services through the inclusion of national caseload standards, early appointment of counsel standards, and attorney performance standards, among others, the **Oregon** legislature is in the process of seriously de-funding the system to the point whereby there will be no funds available for the majority of indigent defense clients after this month. If successful, the District Attorneys offices throughout the state have been instructed to only prosecute those individuals charged with the most serious and violent crimes. Since the police will still be making arrests, the whole endeavor calls into question indigent defense clients right to a speedy trial. Public Defender offices across the state anticipate massive lay-offs under this plan.

✍️ **Massachusetts** now holds the distinction of offering the lowest compensation rates to assigned counsel attorneys in the country. A lawsuit challenging the low rates has already been filed.

✍️ Though the State of **Maine** funds 100% of indigent defense funding, services are provided 100% through ad-hoc assigned counsel systems with no state oversight. Attorneys are not provided on-going training or professional development opportunities, and are not monitored for compliance with the most basic attorney performance standards.

✍️ In **Colorado**, indigent defense clients are ordered by the courts to speak to a prosecutor to see if a plea bargain agreement can be reached *before* the client can be assigned a public defender.

✍️ **Virginia** has established presumptive caps on the amount of money an assigned counsel attorney can bill for in indigent defense cases. These caps are so low as to effectively require either pro bono services of indigent defense attorneys or have them provide ineffective assistance of counsel.