THE RIGHT TO COUNSEL IN OREGON

EVALUATION OF TRIAL LEVEL PUBLIC DEFENSE REPRESENTATION PROVIDED THROUGH THE OFFICE OF PUBLIC DEFENSE SERVICES

JANUARY 2019

SIXTH AMENDMENT CENTER
EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright* that it is an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” In the intervening 55 years, the U.S. Supreme Court has clarified that the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, the U.S. Supreme Court said again in *United States v. Cronic* in 1984, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.” Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.

The State of Oregon attempts to fulfill its Fourteenth Amendment obligation in trial courts primarily through an array of contracts let by the Public Defense Services Commission (PDSC), and administered by the Office of Public Defense Services (OPDS), with public defender offices, private law firms, consortia of individual attorneys and law firms, non-profit organizations, and occasionally individual lawyers. In doing so:

1. **The State of Oregon has created a complex bureaucracy that collects a significant amount of indigent defense data, yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel.**

2. **The complex bureaucracy obscures an attorney compensation plan that is at root a fixed fee contract system that: pits appointed lawyers’ financial self-interest against the due process rights of their clients; and is prohibited by national public defense standards.**

These are the two principal findings of the present report, *The Right to Counsel in Oregon*. As explained in Chapter I (pp. 5 – 16), the PDSC contracted the Sixth Amendment Center (6AC) to evaluate adult trial level right to counsel services provided through the OPDS. This study looks closely at a representative segment of services in Clackamas, Douglas, Grant, Harney, Lane, Marion, Morrow, Multnomah, and Umatilla counties.
Chapter II (pp. 17 – 68) sets out in detail the State of Oregon’s role in providing right to counsel services, including the statutory structure and funding of PDSC/OPDS, the contract bureaucracy created by PDSC to provide services statewide, and the specific delivery models employed in the sample jurisdictions.

Chapters III and IV relate the basis of our two principal findings. Chapter III (pp. 69 – 116) looks specifically at the selection, qualification, training, and supervision of attorneys contracted by PDSC to provide indigent defense services. Chapter IV (pp. 117 – 205) assesses the workload capacity and compensation of public defense attorneys.

As stated in the first finding, the complex PDSC/OPDS bureaucracy hides a stunning lack of oversight. For example, although PDSC/OPDS requires all potential public defense providers to submit lengthy and detailed proposals for contracts, the subsequent contracts expressly allow consortium contractors to enter into side agreements and subcontracts, without notice to or oversight by PDSC/OPDS. Furthermore, PDSC/OPDS does not require any of the contractors to explain the manner in which the contractor assigns cases to its constituent individual attorneys. In short, PDSC/OPDS devolves onto its contractors the state’s responsibilities under the Fourteenth Amendment, including the selection of the individual attorneys who provide the right to counsel, how those individual attorneys are appointed to the cases of specific defendants, and how and how much the individual attorneys are paid for their work. That is, PDSC/OPDS does not have any way of knowing who the attorneys are or how many attorneys are providing right to counsel services on any given day. PDSC/OPDS does not require the contracting entities to explain how much money is spent on overhead and what is acquired, how much money is paid to a contract administrator and what services are provided in exchange, or how much money is paid to the constituent individual attorneys and what services those attorneys provide in exchange.

The 6AC explains in great detail the complex “case credit” system devised by PDSC/OPDS. When all is said and done, that system does not allow PDSC/OPDS to know the actual number of cases devolved onto every attorney at any point in time. Thus, PDSC/OPDS has no means of knowing on an ongoing basis whether its contract providers have sufficient attorneys with sufficient time to provide effective assistance of counsel. Not surprisingly, examples of excessive caseloads abound throughout the state. For example, the Metropolitan Public Defender Services, Inc. is a non-profit public defender office with two office locations (Multnomah and Washington Counties). According to OPDS records, one Metropolitan Public Defender Services attorney handled a caseload that under national standards requires at least 4.3 attorneys (e.g., misdemeanor attorneys should handle no more than 400 such cases and nothing else; OPDS data shows this attorney handled 1,265 misdemeanors in 2017). The same lawyer also handled 111 dependencies, 166 probation violations, 110 specialty
court proceedings, and two termination of parental rights cases – all cases types not addressed by the national standards.

PDSC/OPDS’s compensation scheme compounds these caseload problems, because the “case credits” system ultimately pays most contractors a fixed fee per case without regard to how much or how little time the case requires of the attorney. This compensation plan creates an incentive for most contractors and their constituent attorneys to handle as many cases as possible and to do so as quickly as possible, rather than focusing on their ethical duty of achieving the client’s case-related goals. American Bar Association standards specifically state that contracts with private attorneys for public defense services should never be let primarily on the basis of cost. Furthermore, a federal court in 2013 called the use of fixed fee contracts an “[i]ntentional choice[]” of government that purposely leaves “the defenders compensation at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”

In Chapter V (pp. 206 – 228), the 6AC makes two principal recommendations to rectify these deficiencies:

1. **The State of Oregon should require that services be provided free of conflicts of interest, as is constitutionally required, by abolishing fixed fee contracting and other forms of compensation that produce financial disincentives for public defense lawyers to provide effective assistance of counsel.**

2. **With the abolition of fixed fee contracting, PDSC/OPDS should pay private lawyers at an hourly rate that accounts for both actual overhead and a reasonable fee, and/or hire government employed attorneys for trial level services. OPDS should have the appropriate resources to provide oversight of such a private attorney and state public defender employee system.**

It is clear that the contracts currently used in Oregon cause conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendant. Oregon should follow the lead of other states that have recently banned these practices, including Idaho, Michigan, Nevada and Washington. In its place, PDSC/OPDS should determine appropriate hourly rates and/or determine whether effective use of taxpayer resources and other efficiencies call for public defender offices staffed by salaried state employee attorneys.

In order for PDSC to exercise such authority, it is imperative that the statutory language be amended to account for two further findings:
3. The composition of the Public Defense Services Commission does not adhere to national standards, in that all commissioners are appointed by the judiciary, while the legislative and executive branches of government have no equal voice in the commission’s affairs.

4. The Public Defense Services Commission lacks the necessary statutory scope to ensure the state’s Fourteenth Amendment obligation to provide effective Sixth Amendment assistance of counsel in every courthouse in Oregon.

In the 1979 case of *Ferri v. Ackerman*, the United States Supreme Court states that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” Two years later, the Court determined in *Polk County v. Dodson* that states have a “constitutional obligation . . . to respect the professional independence of the public defenders whom it engages.” Observing that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing ‘the undivided interests of the client,’” the Court also noted that “a public defender is not amenable to administrative direction in the same sense as other state employees” because he “works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.” This is confirmed in *Strickland v. Washington*, where the U.S. Supreme Court states that “independence of counsel” is “constitutionally protected” and that “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”

Heeding these admonitions from the Court, national standards call for states to create independent statewide commissions in which members are selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or exert outsized influence over the delivery of public defense services. Instead the power to appoint PDSC members in Oregon rests entirely with the Chief Justice. As the American Bar Association explains, “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.” Currently, the legislative and executive branches of Oregon government are excluded from holding any stake in or responsibility for the success of the public defense system, as are members of the client community, academicians, researchers, minority constituents, and others who might have much to contribute. The Chief Justice certainly could choose to appoint persons from these stakeholder groups, but nothing requires their participation or that their input be considered.
The 6AC therefore recommends that the Oregon legislature amend the PDSC statute to ensure that the commission members are appointed by diverse authorities such that no single branch of government has a majority of appointments. The 6AC offers a number of examples from other states for the legislature’s consideration. Similarly, it is recommended that although PDSC currently has extensive regulatory authority to promulgate and enforce standards, the Oregon legislature should direct PDSC to promulgate and enforce specific right to counsel standards. Chapter V also offers examples from other states on this front.

Finally, Chapter V also explains that the State of Oregon is not upholding its Fourteenth Amendment obligations to provide effective representation in all misdemeanor cases where jail is a possible sanction. All state law misdemeanors adjudicated in justice and municipal courts carry jail time as a possible punishment, as do some county and city misdemeanors offenses. Accordingly, any defendant who cannot afford to hire his own attorney is entitled under both federal and state law to have counsel provided at public expense. Yet the State of Oregon has no mechanism to know whether it is fulfilling its obligation to provide counsel to the poor who face incarceration in the justice and municipal courts, as PDSC has no statutory authority to do so.

Misdemeanors matter. For most people, our nation’s misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry’s confidence in the courts as a whole – their faith in the state’s ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great. Going to jail for even a few days may result in a person’s loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers’ expense.