THE RIGHT TO COUNSEL IN ILLINOIS

EVALUATION OF ADULT CRIMINAL TRIAL-LEVEL INDIGENT DEFENSE SERVICES

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SIXTH AMENDMENT CENTER
The Right to Counsel in Illinois: Evaluation of Adult Criminal Trial-Level Indigent Defense Services
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Prepared by
The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. See SIXTH AMENDMENT CENTER, https://sixthamendment.org/.

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Executive Summary

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright* that it is an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” In the intervening 58 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 in all federal and state courts 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.

1. **The State of Illinois delegates to its county boards and circuit court judges most of its constitutional obligation to ensure the provision of effective assistance of counsel to indigent criminal defendants in the trial courts. Yet the state does not have any oversight structure by which to know whether each county’s indigent defense system has a sufficient number of attorneys with the necessary time, training, and resources to provide effective assistance of counsel at every critical stage of a criminal case for each and every indigent defendant.**

This is the first of three findings of this report. As explained in chapter I, this report is the result of a statewide evaluation of the provision of the right to counsel in adult criminal cases at the trial level, conducted at the request of the Illinois Supreme Court. Through data collection and analysis, interviews with criminal justice stakeholders, and courtroom observations, the evaluation assessed indigent defense services against national standards and Sixth Amendment caselaw that establish the hallmarks of a structurally sound indigent representation system, which include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel. This evaluation focuses closely on the practices of nine counties – Champaign, Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, Schuyler, and Stephenson – which taken together illustrate the wide variations among Illinois county governments and courts in their efforts to fulfill the Sixth Amendment right to counsel.
The State of Illinois delegates to its counties and trial court judges the responsibility for providing and overseeing attorneys to effectively represent indigent defendants, and it delegates to its counties nearly all of the responsibility for funding the right to counsel of indigent defendants. When a state chooses to delegate its federal constitutional responsibilities to its local governments and courts, the state must guarantee not only that these local bodies are capable of providing effective representation but also that they are in fact doing so. Yet Illinois is one of just seven states that do not have any state commission, state agency, or state officer with oversight of any aspect of trial-level indigent representation services in adult criminal cases.

Chapter II details the framework that Illinois has established for its county-level criminal justice systems and how that framework has been implemented in the nine sample counties. The indigent defense systems in the nine representative counties of this evaluation vary greatly. With 102 counties in the state, it is likely that any or all of those counties present even greater variations in their indigent defense systems.

Without oversight, the State of Illinois cannot accurately say how many people or cases, and of what case types, require appointed counsel nor by whom the representation is being provided, if at all, and the State of Illinois cannot know how much the provision of indigent representation should cost nor how to provide it effectively in all 102 counties. Instead, policy decisions about indigent defense systems are left to anecdote, speculation, and potentially even bias.

Chapters III through VII comprise the substantive assessment, which relate the basis of our second and third findings:

2. The state’s limited framework for how county boards and circuit court judges are to establish and implement the indigent defense system in each county institutionalizes political and judicial interference with the appointed attorneys’ independence to act in the stated legal interests of their indigent clients. This lack of independence causes systemic conflicts of interest that interfere with the provision of effective assistance of counsel.

3. The indigent defense systems established in Illinois’ counties lack oversight and accountability that can result in a constructive denial of the right to counsel to at least some indigent defendants, and in some instances can result in the actual denial of the right to counsel to at least some indigent defendants.

An indigent defense system’s effectiveness must be measured by the representation it provides to its appointed clients. The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.” For this to occur, U.S. Supreme Court case law provides that an indigent person must be represented by a qualified and trained attorney, who is appointed early in the case, and who has sufficient time and resources to provide effective representation under independent supervision.
Chapter III looks specifically at the qualifications required for and manner of selecting the attorneys who provide right to counsel representation, along with the training and supervision they receive. Among the nine counties studied for this evaluation, the qualifications, training, and supervision required of and/or provided to indigent defense system attorneys are inadequate to ensure effective assistance of counsel. Some attorneys may be assigned to represent indigent clients in every type of case (criminal and civil) of all levels of complexity and severity and yet have little to no prior experience in criminal defense. The inadequacy of training requirements and the absence of supervision in most counties mean indigent defense attorneys may lack competency to handle the cases to which they are appointed.

Chapter IV contains a detailed discussion of the funding provided for necessary expenses in the cases of indigent defendants and the overhead and compensation of the attorneys appointed to represent them. The funding provided is frequently inadequate to ensure effective assistance of counsel, and the manner in which compensation is paid to indigent defense system attorneys often creates a conflict of interest that results in the constructive denial of the right to counsel. Some counties do not provide overhead or necessary case-related expenses for the effective representation of indigent defendants, instead requiring the indigent defense system attorneys to pay for such costs out of their fee. For example, in Hardin, Mercer, and Schuyler counties, any overhead and necessary administrative support comes out of indigent defense system attorneys’ fees. Similarly, Gallatin County provides its contract part-time public defender a stipend of $100 per month to cover overhead, but any additional expenses beyond the first $100 per month must be paid by the public defender personally. LaSalle County provides the public defender with limited office space, but it is inadequate for the four part-time assistant public defenders who must share a single desk.

Chapter V explains how each defendant’s Sixth Amendment guarantee of effective assistance of counsel is fulfilled or impeded throughout the life of a criminal case. In some circumstances, indigent defendants are actually deprived of counsel at a critical stage of their criminal case. In other instances, an indigent defense system attorney is appointed but under circumstances that cause a constructive denial of the right to counsel.

Some in-custody indigent defendants are required to choose between having a timely pre-trial release determination without being represented by counsel or delaying their pre-trial release determination to a later date when counsel can be present. As an example, a circuit court judge in Stephenson County acknowledges that his interpretation of the Illinois statutory right to counsel at bail differs from that of most other judges. Rather than ensuring that public counsel is present to represent the arrestee at the initial bail hearing, the judge permits the defendant the option of either: requesting counsel to be present at a bail hearing held the next court date, or having the judge set their bail without representation that day. The circuit court judge says colleagues have informed him that he is wrong about his application of the bail reform law, but the judge says he will continue until some higher authority tells him otherwise. The county’s public defender, who is appointed by and serves at the will of the circuit court judges, is aware of the practice but has not taken any action to remedy the issue on behalf of indigent defendants in the county.
Some judges require or allow unrepresented indigent defendants to negotiate directly with prosecutors before the defendants are advised of and waive their right to appointed counsel. Prosecutors who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties. As the report of the National Right to Counsel Committee, *Justice Denied*, notes: “Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.” For example, at the initial appearance in LaSalle County on a traffic offense (some traffic offenses are jailable misdemeanors), there does not seem to be any scenario in which a defendant who appears without counsel can avoid talking to the state’s attorney that day. The judge begins the proceedings by addressing all of the defendants who are present in the courtroom, saying: “The prosecutors will call your name. They will talk to you about your case. This is an opportunity for you to decide what you want to do.” Likewise, in Mercer County, before the traffic court proceedings begin, the state’s attorney talks individually to each defendant who is present in court that day without an attorney. There is not a public attorney in the courtroom.

For some indigent defendants who receive appointed counsel, it may be several days or even weeks before they learn the identity of the attorney representing them and/or have an opportunity to speak with that attorney.

Chapter VI assesses the time an appointed attorney must devote to each case and what is known and unknown about the workloads of the indigent defense system attorneys. In some counties, no one keeps track of the caseloads and/or workloads of indigent defense system attorneys; what caseload data is available shows public defense system attorneys’ workloads are excessive.

Assistant public defenders in Champaign County speak openly about their fear of “burnout” from excessive caseloads. One attorney describes having pretrial conferences scheduled with 50 clients at one court date and 100 more clients with pretrial conferences the very next day: “There are a number of people who I haven’t spoken with [by their court date]. So there’s often a line of up to 50 people waiting to speak with me before court.” Similarly, DuPage County public defender attorney workloads are excessive. One attorney estimates he is only able to review about 70% of the discovery in any given case, and worse, “there are days where I only get through about 10% of the discovery in a case.” Another said: “It’s like M.A.S.H. – you’re just triaging things that come in.” In Cook County, excessive caseloads are compounded by the absence of sufficient case-related resources. Assistant public defenders speak of feeling “overwhelmed,” of “crushing depression,” and of being alone “on an island” without adequate support. The pressure is felt by attorneys throughout the public defender office. As one assistant Cook County public defender put it: “We need bodies here. We don’t have time to go to the washroom and drink water. We need people.”

In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[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.” Regarding independence from judicial interference, the U.S. Supreme Court in *Powell v. Alabama* observed that the right to counsel rejects the notion that a
judge should direct the defense. And regarding independence from the executive and legislative branches of government, in the 1979 case of *Ferri v. Ackerman*, the U.S. Supreme Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” Two years later, the Court observed in *Polk County v. Dodson* that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.” Reflecting these commands, national standards state that the public defense function, including the attorneys it provides, must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”

The State of Illinois has a constitutional obligation to protect the independence of the defense function and to ensure that the indigent defense systems established by county boards and circuit court judges are free from conflicts of interest that interfere with appointed counsel’s ability to render effective representation to each indigent defendant. Chapter VII examines the ways in which the indigent defense systems in each of the nine sample counties lack independence from the political and judicial branches of government, leading to systemic conflicts of interest that interfere with the provision of effective assistance of counsel and allow the deficiencies identified in this report to continue.

The county boards and circuit court judges are not maliciously or consciously trying to undermine the basic constitutional right to counsel. Rather, it is the framework established by the State of Illinois that makes all indigent defense system attorneys directly dependent for their jobs on remaining in the good graces of the county board and/or circuit court judges who hire them. Effective assistance of counsel cannot be ensured in an indigent defense system that places appointed attorneys in a position where, often subconsciously, the lawyers respond to power that some third party holds over them, creating a conflict of interest between the interests of the other party and the legal interests of the indigent defense system’s clients.

In 60 of the state’s 102 counties, the county government decides whether a public defender office exists. At any time, for any reason or no reason, the county board in each of these counties can wholly eliminate the public defender office and all of its employees. In all counties other than Cook, the circuit court judges hire the public defender and can fire the public defender at any time, for any reason or no reason, and the circuit court judges also determine the number (if any) of assistant public defenders and support staff in the public defender office, within the funding allocated and compensation set by the county board. In Cook County, the county board president hires the public defender for a six-year term, during which the public defender can only be removed for good cause or dereliction of duty, but the county board president can choose not to re-hire that public defender for any reason or no reason at the end of the six-year term, and the county board also determines the number (if any) and compensation of any assistant public defenders and support staff. In all counties, to whatever extent private attorneys are appointed, the circuit court judges are responsible for choosing the private attorneys to appoint and for deciding what “reasonable fee” to pay them.
To retain their own livelihoods, the indigent defense system attorneys inevitably, and often without realizing it, take into consideration what they perceive to be the desires of the county board and circuit court judges, rather than advocating solely on behalf of their appointed clients’ legal interests, as is their ethical and constitutional duty. As the public defender in one Illinois county noted, the lack of structural independence from the county and courts is and will continue to be the greatest structural barrier for any indigent defense system, because each appointed public defender risks termination of employment should they seek the funding necessary to effectively represent all appointed clients. For example, one county’s public defender does not ask for additional resources needed by the public defender office to effectively represent its clients, saying “it doesn’t hurt” to get the same budget amount year after year. The public defender fears that his budget will be cut every year and considers it a victory when that does not happen. In a different county, the public defender has not sought an increase in his compensation, because the county is in tough financial times. In a third county, the part-time public defender has not asked for county benefits, despite believing he is entitled to them, because he does not want to appear to rock the boat with regard to county funders.

Because the appointed attorneys in Illinois are first beholden for their livelihoods to the political and judicial branches of government, they:

- fail to advocate for sufficient resources necessary for the effective representation of appointed clients;
- work for fixed fee compensation that pits their own financial interests against the legal interests of their appointed clients;
- pay personally for overhead and/or case-related expenses of their appointed clients’ cases, pitting their own financial interests against the legal interests of their appointed clients;
- handle excessive caseloads and workloads that prevent providing effective assistance of counsel to each individual indigent defendant;
- fail to object when indigent defendants are ordered to pay for costs of their representation;
- fail to advocate for the constitutional and statutory rights of indigent defendants; and
- fail to provide a voice for indigent defendants in the criminal justice system.

In Chapter VIII, the report makes two recommendations to rectify the deficiencies found during this evaluation.

**RECOMMENDATION 1.** The State should statutorily create, and appropriately fund, an independent Illinois public defense commission to oversee trial-level indigent defense services and authorize the public defense commission to promulgate and enforce binding standards.
RECOMMENDATION 2. The Illinois public defender commission should have statutory authority to carry out its duties through the creation of a central office of indigent defense services. The public defender commission should be authorized to hire an executive attorney to employ permanent central office staff to provide training and regional supervision of indigent defense services throughout the state.

Because the constitutional right to counsel is an obligation of state government, the State of Illinois has an affirmative duty to ensure effective public defense representation to each and every indigent defendant facing a potential loss of liberty in a criminal proceeding. National standards first unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.” Second, heeding the U.S. Supreme Court’s admonitions regarding the independence of the defense function, national standards require that “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent.” Third, national standards agree that the best way to protect defense counsel independence and ensure state oversight of right to counsel services is by establishing an independent statewide public defense commission.

Thirty states have created some form of a commission system, and there is no one cookie-cutter model for a commission that must be imposed on each state. At minimum, a commission should be responsible for oversight of trial-level representation throughout the state. The members of the commission should be 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. And the commission should be authorized to establish, implement, and enforce mandatory standards regarding the provision of the right to counsel, within the parameters set by state law. Other states provide examples, explained in this report, of methods to implement an independent oversight structure in compliance with standards, including: establishing a unified state system; providing state funding to local governments to enable compliance; or assessing penalties on local governments for non-compliance.

The State of Illinois has a fiduciary duty to taxpayers to exercise oversight of the system it establishes to provide the Sixth Amendment right to counsel. For this reason, there should be a central office, led by an executive attorney and executive staff, to help oversee all indigent defense services in the state. In order to effectively and efficiently collect and analyze the information needed to accurately project the number and type of attorneys and resources necessary to provide consistently effective representation, the Illinois legislature should appropriate necessary state funds for adequate professional staff positions devoted full time to training, compliance, finance, information technology, and research and data analysis.
Finally, the Illinois legislature should require the commission, through its central office, to submit periodic reports to the legislature regarding the status of right to counsel services statewide on the key indicators of systemic effectiveness under *United States v. Cronic*, which include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision.