In *Gideon v. Wainwright*, the U.S. Supreme Court declared it 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.” Subsequent caselaw establishes that the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.” The U.S. Supreme Court held in *Gideon* that providing an attorney and protecting the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment.

The Michigan Indigent Defense Commission (MIDC) is a state-level body statutorily authorized to develop and oversee the “implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults in this state.” MIDC’s principal power to carry out its mission rests with its authority to promulgate and enforce binding standards and to make grants of state funding to local governments to aid them in complying with the standards. However, Michigan makes its trial courts responsible in the first instance for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties,” and makes makes local funding units (counties, cities, villages, and townships) responsible at the outset for funding the right to counsel in felony cases in the trial courts.

The Third Judicial Circuit Court is the general jurisdiction court with authority over all felony cases originating in Wayne County (including Detroit). MIDC made a planning grant to Wayne County to, among other things, conduct an assessment of the Third Judicial Circuit’s provision of felony indigent defense services through private attorneys, known locally as the assigned counsel system. Wayne County contracted the Sixth Amendment Center (6AC) to conduct the evaluation.

Chapter I (pp. 5 to 12) provides introductory information on the right to counsel in Michigan. It also explains the study methodology and assessment criteria. Chapter II (pp. 13 to 21) discusses the limited role that the State of Michigan has in oversight and funding of indigent defense representation. It also touches upon the delegation of most program oversight to the trial courts and most funding responsibility to the counties.
Chapter III (pp. 22 to 26) begins the formal assessment of the felony assigned counsel services in the Third Judicial Circuit Court by considering the extent to which the defense function is independent of undue governmental interference. 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.” In the 1979 case of *Ferri v. Ackerman*, the Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” The MIDC Act requires that “[t]he delivery of indigent criminal defense services must be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.” MIDC proposed *Standard 5* is entitled “Independence from the Judiciary,” and, if approved, it will remove from judges the responsibility for selecting, appointing, and compensating attorneys who are provided to represent indigent defendants.

**FINDING 1: The Third Judicial Circuit Court’s assigned counsel services lack independence.**

Although the specifics of the court’s assigned counsel plan have slowly evolved over the past two decades, nearly every aspect of assigned counsel services is subject to judicial influence, because:

- the court sets the qualifications and training required of attorneys to be appointed in felony cases;
- the court selects the attorneys eligible to be appointed in felony cases, and individual judges directly choose the attorney who is appointed in each specific case;
- to the extent any supervision occurs in the representation provided by private attorneys appointed in felony cases, the judges are the supervisors;
- the court determines whether and when attorneys are removed from eligibility to be appointed in felony cases;
- the court sets the compensation paid to attorneys appointed to represent indigent defendants through funds allocated by Wayne County;
- the court determines whether experts and investigators are allowed in each specific felony case and sets the compensation paid to experts and investigators in the felony cases of indigent defendants; and
- the court has established a system that permits assigned counsel to “stand-in” for one another at court proceedings in critical stages of the felony cases of indigent defendants.
To be clear, it is not that the Third Judicial Circuit judges who oversee the indigent defense services are malicious or consciously trying to undermine the basic constitutional right to counsel. Instead, the judges are working within a legal and financial construct that presents them with a series of impossible choices.

The next four chapters explain in detail how the assigned counsel system’s lack of independence in the Third Judicial Circuit negatively affects: the qualifications, training, and supervision of assigned counsel (Chapter IV, pp. 27 to 38); the early appointment of and continuous representation by counsel (Chapter V, pp. 39 to 56); the willingness of attorneys to accept appointed felony cases and the adequacy of resources necessary for effective representation (Chapter VI, pp. 57 to 70); and the sufficiency of time necessary to provide effective representation (Chapter VII, pp. 71 to 77).

**FINDING 2:** The qualifications, training, and supervision required for assigned counsel representing indigent defendants charged with felonies in Wayne County are insufficient to ensure effective assistance of counsel.

Attorneys who are “newly admitted to the Bar” are paired with a mentor and, before being appointed to a case, must “provide written verification” of having: accompanied the mentor “to a pre-exam hearing, an arraignment on information, a plea, sentencing and jail visit,” all within the Third Judicial Circuit; accompanied the mentor “to observe and thoroughly discuss at least two preliminary examinations; and “observed at least one completed Third Circuit Court jury trial.” The only formal continuing education required by the Third Judicial Circuit Court for attorneys who are appointed to represent indigent felony defendants is that they obtain annual CLE certification from the Detroit-Wayne County Criminal Advocacy Program (CAP), by attending six training sessions each year (a total of 12 hours) for attorneys licensed to practice less than 10 years, reducing to four training sessions (a total of 8 hours) for attorneys licensed for 10 years or more. “This must be completed prior to the application for all attorneys. Failure to complete this function requires removal from the appointed counsel list.

In short, under the Third Judicial Circuit’s qualification requirements, an attorney who has just recently been admitted to practice law can be appointed to represent indigent defendants in any and every non-capital felony case as soon as the attorney can complete the necessary observations (all of which are capable of being completed in a single week) and complete 12 hours of CAP training (which can be completed in approximately three months). The Third Judicial Circuit Court does not require any monitoring or regular assessment of the representation provided by private attorneys appointed to represent indigent felony defendants in Wayne County.
FINDING 3: Although indigent defendants charged with felonies in Wayne County are appointed counsel typically within 24 hours of their first appearance before a magistrate, the attorney appointed following first appearance does not always represent an indigent defendant from appointment through disposition of the case, and, in some instances, an indigent felony defendant may be represented by a series of different attorneys at each proceeding in the case. When inconsistent representation occurs, it creates the potential to deny an indigent felony defendant the right to effective assistance of counsel.

If a defense attorney is appointed early in the criminal process, that attorney can effectively represent a client if given the time, training, and resources to do so. Yet, early appointment of counsel will not result in effective representation if a different lawyer shows up to represent the defendant during each of the various critical stages of the case.

In theory, once an attorney is appointed to represent a felony defendant, that same attorney should continue to represent that defendant through disposition of the defendant’s case. However, given the size and multiple courts involved in criminal case processing throughout Wayne County, scheduling conflicts caused by a given attorney being appointed to represent defendants whose cases are pending in up to 20 district courts and four municipal courts and up to 23 circuit courtrooms mean that attorneys not infrequently fail to appear in court on behalf of the defendants they are appointed to represent. Sometimes appointed attorneys make arrangements with another attorney to “stand-in” for them at a court proceeding. Sometimes appointed attorneys simply fail to appear at scheduled court proceedings for indigent defendants, resulting in the court appointing a different attorney to begin representing the defendant.

Further, judicial control of which attorney is appointed to represent each defendant creates conflict between the appointed attorneys’ fiscal interests and the case-related interests of the defendants whom they are appointed to represent. Under the Third Judicial Circuit Court’s procedures for appointing attorneys to represent indigent felony defendants in Wayne County, an attorney can be on the list of attorneys who are eligible to be appointed and yet never be appointed in a single case. There is nothing in the court’s procedures that requires each attorney to receive a certain or any number of case appointments. Instead, whether and how many case appointments are made to each attorney is almost entirely within the control of the judges, with few limitations, resulting in assigned counsel attorneys being beholden for their livelihood to the judges.

FINDING 4: The Third Judicial Circuit’s assigned counsel compensation plan creates economic disincentives or incentives that impair defense counsel’s ability to provide effective representation.
The Third Judicial Circuit Court pays assigned counsel on a per-event basis for their work on all felony cases. For example, attorneys are paid a set amount for a jail visit, for a preliminary examination, and for an arraignment on the information.

To understand why compensating attorneys by event rather than by reasonable hourly rate is problematic, consider the payment structure for jail visits. To visit a client in jail, attorneys report that it can take three to six hours to drive to the jail and get through security, wait for the client to be brought up by jail staff, sit and review body camera footage with the client, and get back out of the jail and drive home. There could be a dozen officers on a case who each have body camera footage to review. For all this work, the attorney is paid $50. Compounding the situation, the Third Judicial Circuit fee schedule only authorizes an attorney to be paid for one jail visit for felonies carrying a potential sentence of 20 years or less, and a max of two jail visits per capital felony case.

Furthermore, because attorney compensation fees are almost exclusively paid for events that occur inside the courtroom, attorneys are not compensated at all for much of the work that is necessary to provide effective representation. For example, an attorney is not compensated for meeting with a defendant in the office or at the courthouse, or anywhere outside of the jail. The attorney is not compensated for speaking to the defendant’s family to inform them about the case. Other than the extremely limited flat fee of $110 to $270 for “investigation & preparation,” attorneys are not compensated for reviewing discovery produced by the prosecution, interviewing witnesses, conducting legal research, seeking out sentencing alternatives and social services, or for any time spent in trial preparation, no matter that an attorney can easily spend 10 to 15 hours just to prepare for a trial.

Although an assigned counsel attorney may petition the Third Judicial Circuit for extraordinary fees in cases in which the attorney feels the work on a particular case significantly exceeded the allowable compensation under the existing fee schedule, few attorneys ever do so. The average fee paid for felony cases in Wayne County is excessively low. The average per-case compensation, excluding probation violations, for all assigned counsel in the Third Judicial Circuit from 2014 through 2018 was $453.53.

Because attorneys are paid exactly the same amount for an event, no matter how few or how many hours they devote to carrying out that event, and because attorneys are not paid for most time outside of court that they devote to providing effective assistance of counsel, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case. The low compensation attorneys receive creates an incentive for attorneys to handle too many cases.
FINDING 5: The Third Judicial Circuit’s assigned counsel system has no workload controls. A significant number of attorneys work in excess of national public defense workload standards.

The data provided by the court shows that many of the private attorneys who are appointed to represent indigent felony defendants in the Third Judicial Circuit carry an appointed felony caseload (without considering appointed probation violations) that is far in excess of national standards. In 2016 for example, one attorney was paid for 459 felony cases, while national standards set an absolute annual maximum of 150 felony cases for an attorney who does nothing else and assuming that attorney has adequate support staff.

Even if these attorneys worked nowhere else other than in the Third Judicial Circuit, their caseloads would be cause for concern. But most attorneys on the assigned counsel list either accept appointed cases in other circuits, take appointed cases in district courts, maintain a private practice of retained cases, or most commonly do some combination of all of the above.

The 6AC concludes in Chapter VIII (pp. 78 to 84) that the Third Judicial Circuit’s felony assigned counsel system lacks independence from the judiciary and does not provide meaningful oversight of funding or of the effectiveness of representation. Attorneys work for unreasonably low compensation that creates a financial incentive for them to handle too many cases, provide non-continuous representation, and dispose of cases quickly to the possible detriment of the indigent accused. The system lacks checks and balances to ensure that all appointed attorneys are qualified and trained to handle the cases to which they are appointed. To remedy the systemic deficiencies, the 6AC makes two recommendations.

RECOMMENDATION 1: Terminate the current compensation structure for felony indigent defense representation in the Third Judicial Circuit Court because it creates conflicts between the financial interests of appointed private attorneys and the case-related interests of indigent defendants they represent. Wayne County should apply for adequate compensation from MIDC to create a new compensation plan that: (a) pays private attorneys appointed to felony cases for all reasonably necessary in-court and out-of-court work at an hourly rate of $110 for non-life felonies and $120 for life felonies; (b) provides for annual review of the hourly rates to increase for cost of living; and (c) reimburses counsel for out-of-pocket case-related expenses without judicial interference.

RECOMMENDATION 2: The MIDC Act should be amended to allow for MIDC to administer and fund felony indigent representation in Wayne County.

State funding is called for by national standards in part because local jurisdictions most in need of indigent defense services are often the ones least able to afford them.
In many instances, the circumstances that limit a county’s revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates. In high poverty areas, more people accused of crime are indigent and entitled to public defense services. Further, these counties typically spend more on social services such as public health needs, unemployment compensation, or housing assistance, leaving fewer resources available for protecting people’s rights under the Sixth Amendment. Wayne County fits this profile squarely.

Michigan state law places significant limitations on how counties can raise revenue. This restricts Wayne County’s ability to make the substantial investment required to ensure effective representation under the Sixth Amendment. At the same time, Wayne County generates a very high percentage of the felony prosecutions in the state, and its people live with a significantly higher crime rate than that in the rest of Michigan and in the nation.

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.” The proposed MIDC Standard 8 on attorney compensation states that felony assigned should be paid: “at least . . . $110 per hour for non-life offense felonies, and $120 per hour for life offense felonies. These rates must be adjusted annually for cost of living increases consistent with economic adjustments made to State of Michigan employees’ salaries. Counsel must also be reimbursed for case-related expenses . . ..”

The total estimated cost in the Third Judicial Circuit of paying assigned counsel $110 per hour in non-life felony cases and $120 per hour in life felony cases, based on the number of 2017 felony cases and probation violations, is at least $34,844,480. In 2017, Wayne County spent $5,588,984 to compensate private attorneys handling appointed felony cases and probation violations in the Third Judicial Circuit, meaning that the new compensation plan based on the most conservative interpretation of the available caseload data represents more than a 523% increase in funding. Under existing national standards, the state should bear this obligation.

There are several compelling reasons for the state to administer and fund indigent defense in Wayne County. First, the Fourteenth Amendment requires Michigan, as it does all states, to enforce Sixth Amendment case law. Second, MIDC has the capability to monitor the total workload of Third Judicial Circuit assigned counsel attorneys, including the total number of public cases assigned in all courts at all levels throughout Michigan, whereas Wayne County only has the ability to track cases appointed in the Third Judicial Circuit. Third, under the MIDC Act, the State of Michigan will of necessity appropriate significant funding to the provision of indigent defense services in Wayne County, and such an investment merits direct state oversight.
Moreover, U.S. Supreme Court caselaw makes clear that the Sixth Amendment right to counsel must be independent of undue political and judicial influence. To carry out the constitutional requirement, national standards state that the defense function must be insulated from outside political or judicial interference by a board or commission, whose members are appointed by diverse authorities so that no one branch of government can exert more control over the system than any others. The makeup of the MIDC already satisfies national recommendations for an independent defense commission, negating the financial costs and bureaucratic redundancies of creating an intermediary local commission.

That said, MIDC does not currently have statutory authority to serve as the independent defense commission in Wayne County. This will require statutory amendments to the MIDC Act and other statutes. Michigan statutes still require its trial courts to be responsible in the first instance for establishing the “procedures for selecting, appointing, and compensating counsel who represent indigent parties,” and the trial courts do this through local administrative orders. Similarly, Michigan continues to make its counties responsible at the outset for funding the right to counsel in felony cases in the trial courts.