

THE RIGHT TO COUNSEL IN INDIANA

EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES

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The Right to Counsel in Indiana: Evaluation of Trial Level Indigent Defense Services

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PREPARED FOR

The Indiana Indigent Defense Study Advisory Committee (IDSAC) is composed of a representative of the Indiana Supreme Court, members of both chambers of the Indiana legislature, the state bar association, the Indiana Public Defender Commission, the Indiana Public Defender Council, the Indiana Prosecuting Attorneys Council, the judges' association, and the Indiana Association of Criminal Defense Lawyers.

PREPARED BY

The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide competent counsel at all critical stages of a case to the indigent accused who is facing the potential loss of liberty in a criminal or delinquency proceeding.

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DISCLAIMER

This report reflects solely the opinions of the 6AC and does not necessarily reflect the views of the IDSAC, NACDL, Koch Industries, or the FCJ.

EXECUTIVE SUMMARY

Under U.S. Supreme Court case law, the provision of Sixth Amendment indigent defense services is a state obligation through the Fourteenth Amendment. In Indiana, however, counties are responsible in the first instance to fund and administer services. Although it has not been held unconstitutional for a state to delegate its constitutional responsibilities to its counties, in doing so the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.

Part I of this report (*see infra* pages 3 to 92) assesses whether Indiana meets this constitutional demand and determines that the State of Indiana's ability to monitor county indigent defense systems is either entirely absent or severely limited, depending on the type of case.

FINDING #1: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in misdemeanor cases in any of its courts, including city and town courts.

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 severe. Going to jail for even a few days may result in a person losing professional licenses, being excluded from public housing and student loan eligibility, or even being deported. 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. Despite this, the State of Indiana and the Indiana Public Defender Commission (IPDC) do not exercise any authority over the representation of indigent people charged with misdemeanors and facing the possibility of time in jail.

Indiana counties may, if they so choose, receive a partial state reimbursement of their indigent defense costs for non-misdemeanor cases in exchange for meeting standards set by the IPDC. However, counties are free to – and do – forgo state money in order to avoid state oversight. The “Indiana Model” for right to counsel services

both institutionalizes and legitimizes the counties' choice to not fulfill the minimum parameters of effective representation. What many Indiana counties have realized is that they can contract with private counsel on a flat fee basis for an unlimited number of cases for less money than it would cost them to comply with state standards (even factoring in the state reimbursement).

FINDING #2: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in felony and juvenile delinquency cases, at both the trial level and on direct appeal, in counties and courts that do not participate in the IPDC reimbursement program.

Thirty-seven of Indiana's 92 counties (40%) choose not to participate in the state's non-capital case reimbursement program as of June 30, 2015. The Commission has no authority whatsoever over the representation of indigent people in the courts located in these counties, and the courts and public defense attorneys do not have to abide by the Commission's standards. Additionally, by statutory exception, Lake County is allowed to limit its request for reimbursement to certain courts and case types. Most of Lake County's courts in which indigent representation is provided do not participate in the reimbursement program. Together, the non-participating counties and courts have trial level jurisdiction over nearly one-third of the population of Indiana.

Although the Indiana Model for indigent defense could potentially work to ensure that counties uphold the state's Sixth and Fourteenth Amendment obligations to provide effective representation in counties that do participate in the IPDC reimbursement program(s), two things have hindered those efforts. First, state funding for the reimbursement plan has not always kept pace with its intended purpose of reimbursing 40% of non-misdemeanor costs. For example, reimbursements to counties for non-capital representation dropped to a low of only 18.3% in 2006. The inconsistency in reimbursements, in part, resulted in a number of counties leaving the program.

Second, although the state is obligated to ensure effective representation to the indigent accused facing a potential loss of liberty in its five appellate districts, 91 circuit courts, 177 superior courts, and 67 city and town courts, for most of its history, IPDC operated with only a single staff member. In 2014, another staff position was added. No two people, no matter how talented, could ever possibly ensure compliance with standards in so many jurisdictions.

FINDING #3: The State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in capital cases for which counties do not seek state reimbursement.

The financial commitment that the state made to reimburse counties for a portion of their defense costs in indigent death penalty cases, though laudable, does not benefit Indiana's 92 counties equally and some not at all. From February 1991, when the first capital case reimbursements to counties were approved, through September 2014, only 43 of Indiana's 92 counties have received some amount of state reimbursement for capital case indigent defense. The amounts by which counties have benefitted vary greatly, with Hancock County claiming a single reimbursement of \$2,064 back in 1991, while Lake and Marion counties have sought reimbursement in almost every year of the program's existence and have recouped \$1,755,070 and \$3,830,027 respectively (together, 47% of the total capital reimbursement made by the state to counties over 25 years).

In 1992, the Indiana Supreme Court adopted a binding court rule ("Rule 24") that sets out the procedures all trial courts must follow when appointing and compensating public counsel in death penalty cases. A trial court must, for example, appoint two attorneys (rather than just one) to represent the defendant, and the attorneys must have specific training and experience beyond that required in non-death cases. The rule places strict numerical limits on the number of other cases a salaried or contract public defender can handle at the same time as a death penalty case, in an effort to ensure that the attorney has adequate time to provide effective representation. Though Rule 24 is binding on all jurisdictions, there is no mechanism for the state to ensure that the rule is being met unless a county chooses to seek reimbursement from the IPDC for up to 50% of the cost of defending a capital case.

Further, a county can choose to apply for reimbursement in one death penalty case and choose not to apply in another; a county can choose to apply for reimbursement in a death penalty case this year and choose not to apply in a case next year; and a county can choose to apply for reimbursement of expenditures incurred for only a given period of time in a particular death penalty case and then forgo seeking reimbursement later in that same case. If the county does not want to be subjected to the Commission's scrutiny, the county simply does not apply to the Commission for reimbursement.

FINDING #4: The State of Indiana has only limited capacity to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in counties that participate in the reimbursement programs. The ability of the Indiana Public Defender Commission (IPDC) to ensure effective representation at the local level is hindered by the State's failure to properly fund and adequately staff the IPDC at a level sufficient for it to conduct verification audits and evaluations in participating counties.

Inadequate funding and the lack of sufficient staffing prevent IPDC from properly assessing compliance with all of its standards. One topical area has understandably consumed the greatest portion of the IPDC's attention: limiting attorney workloads. If an attorney is assigned an excessive number of cases, he cannot perform effectively in each and every case.

Counties can and do circumvent the IPDC workload standards by asking for reimbursement in only certain cases. For example, in 2006 a judge explained that the Miami County public defender office attorneys typically reached their maximum caseloads in October of each year. To handle the rest of the cases from October through December and stay within the IPDC caseload standards, the county would have to hire three more attorneys. Instead, Miami County decided to contract at an hourly rate with the same attorneys who worked in the public defender office to handle the remaining October to December caseload, but not include these county expenditures on the reimbursement request to the Commission. Since the county did not seek reimbursement for the money spent on those cases, the county was not held to the Commission standards for those cases. But, of course, the attorneys were still carrying a caseload that far exceeded the IPDC's standards for effectiveness.

The problem of compliance with IPDC standards is exacerbated by the fact that the IPDC is limited to trying to entice counties to meet standards only through the promise of partial state reimbursement. Because counties are always free to simply leave the program, the IPDC is in the difficult position of deciding whether to allow non-compliant counties to stay in the program and receive reimbursement in the hope they will work toward meeting standards, or to not pay the counties and lose the ability to work with them toward the goal of future compliance. This structural flaw led the IPDC to make exceptions to standards that limit attorneys' workloads, thereby undercutting the goal of giving attorneys sufficient time to fulfill the state's obligation to provide effective representation.

Of course, the lack of state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not mean that all right to counsel services provided by all county and municipal governments are constitutionally inadequate. But it does mean that the state has no idea

whether its Fourteenth Amendment obligation to provide competent Sixth Amendment services is being fulfilled.

Part II of this report (*see infra* pages 93 to 198) examines the adequacy of services as actually provided. At the invitation of an Indiana Indigent Defense Study Advisory Committee, the Sixth Amendment Center (6AC) conducted a statewide assessment of trial level public defense services in Indiana. The Advisory Committee is a bipartisan committee composed of judges, legislators, prosecutors, defense attorneys, and other state criminal justice stakeholders. The 6AC is a non-partisan, non-profit organization that provides policymakers with indigent defense assessments and other technical assistance with indigent defense services.

To avoid the possibility of cherry-picking either the best or the worst indigent defense systems, the Advisory Committee selected eight counties as a representative sample of Indiana's diversity in population size, geographic location, rural and suburban and urban centers, types of indigent defense service models used, and participation or non-participation in the state's indigent representation reimbursement program. The selected counties are Blackford, Elkhart, Lake, Lawrence, Marion, Montgomery, Scott, and Warrick. Site work in the eight sample counties began in February 2015 and finished in October 2015, consisting of courtroom observations, data collection, and interviews with judges, prosecutors, public defense providers, and other criminal justice stakeholders.

In *United States v. Cronin*, 466 U.S. 648 (1984), the U.S. Supreme Court determined that if certain right to counsel systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur. Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys with sufficient time and resources to provide competent representation under independent supervision. The absence of any of these factors indicates that a system is presumptively providing ineffective assistance of counsel.

FINDING #5: The State of Indiana’s constitutional obligation to provide counsel at all critical stages of a criminal proceeding is not consistently met on the local level, where some counties encourage defendants to negotiate directly with prosecutors before being appointed counsel, accept uncounselled pleas at initial hearings, and/or use non-uniform indigency standards to deny counsel to defendants who would otherwise qualify in another county. These are all examples of actual denial of counsel under *United States v. Cronic*.

Lawrence County’s history exemplifies this finding. In 2010, Lawrence County was mired in a public defense crisis. Four private defense lawyers who had been providing services in an unlimited number of cases for a single flat fee decided they could no longer provide effective representation under such a financial arrangement. Each moved to decline new appointments. The county turned to the IPDC for assistance and formed a public defender office.

The first chief defender realized early on that public defenders in Lawrence County historically had not staffed initial hearings and many cases were resolved by prosecutors entering into plea deals with uncounselled defendants in direct violation of Sixth Amendment case law. Lawrence County was caught in a quandary. To meet the dictates of the Sixth Amendment, the defender office needed to either: a) exceed IPDC caseload standards by providing representation to all indigent defendants beginning at the initial hearings (thus risking the loss of state reimbursement); b) increase the number of staff attorneys (thereby increasing the county’s public defense cost); or c) turn a blind eye to a blatant constitutional violation.

Fearing that a new budget battle might jeopardize the entire public defender office, the chief public defender came up with a half-measure. The office began staffing all initial hearings, but only as a “friend of the court” to answer questions a defendant might have about the prosecutor’s plea offer. By not being formally appointed to the cases, the office does not have to report the workload to the IPDC (even though the staff attorneys spend significant hours at initial hearings), giving the appearance that the office complies with the IPDC caseload standards when it does not. The county continues to receive reimbursement from the IPDC, and the county does not incur the increased cost of hiring more attorneys to handle the greater caseload, as it would be required to do if the cases were reported.

The problem is that the defendants who plead guilty at initial hearings think they have a lawyer when in fact they do not. The lawyer is not securing discovery from the state, interviewing witnesses, examining evidence, reviewing statutes, or negotiating directly with the prosecutor on behalf of the defendant – all of the things lawyers must do to determine if the plea offer is good or bad. This is the very definition of “providing an attorney in name only” that triggers what *Cronic* calls a “constructive denial of counsel” violation.

In a number of courts, judges do not appoint public counsel to any defendant who posted bond, in direct violation of Indiana Supreme Court case law stating “[t]he fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.” For example, in all the criminal division and county division courts in Lake County, the judges find every defendant who has posted bond to be *ineligible* for a public defender. The courts consider it irrelevant whether the defendant made bond with his own resources or whether someone else posted bond for the defendant. Lake County judges were observed to warn defendants who are in custody at the time of their initial hearing that, even if appointed an attorney at the initial hearing, if they subsequently post bail they have to try to hire their own attorney and their public defender may be removed from their case. One Lake County defender explained that he advises in-custody defendants it is better for them to stay in jail, because if they post bond they will have to pay for their own attorney. This, of course, needlessly increases the cost to taxpayers to house defendants who are neither a risk to public safety nor at risk of flight.

FINDING #6: The State of Indiana does not consistently require indigent defense attorneys to: a) have specific qualifications to handle cases of varying severity; or, b) have training to handle specific non-capital case types. This is a constructive denial of counsel under *United States v. Cronic*. Counties and courts outside of the reimbursement programs do not have to abide by Commission standards at all. To the extent that participating counties must adhere to Commission attorney qualification and training standards, the Commission’s ability to ensure compliance is limited because of inadequate funding and insufficient staffing.

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy. Specialties must be developed. Just as you would not go to a dermatologist rather than a heart surgeon for heart surgery, despite both doctors being licensed practitioners, a real estate or divorce lawyer cannot handle a complex felony case competently.

Every county has some process for selecting and retaining the attorneys who provide public defense. In Blackford, Lake county and juvenile divisions, and Warrick, the judges control that process, and attorneys can be dismissed at the whim of a judge. However, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer’s representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot

provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. But judges choosing the attorneys create conflicts, because the attorney takes into account what he needs to do to please the judge in order to secure the next contract or appointment instead of advocating solely in the stated interests of the indigent accused.

Of further concern is the lack of training and supervision in most of the sample counties. In Blackford, Elkhart, Lake county and juvenile divisions, Lawrence, Scott, and Warrick, there is simply no training provided for or required of the public defense attorneys and no supervision over their work.

FINDING #7: The public defense systems in many Indiana counties have undue judicial interference, undue political interference, flat-fee contracts, or all three, that produce conflicts between the lawyer's self-interest and the defendant's right to effective representation. These conflicts result in public defense attorneys throughout Indiana carrying excessive caseloads and spending insufficient time on their public cases. To the extent that participating counties must adhere to Commission caseload standards, many counties have found and implemented methods that, while giving the appearance of compliance, impede rather than enhance effective assistance of counsel. The ability of the Commission to ensure compliance with standards is limited because of inadequate funding and insufficient staffing. This results in the constructive denial of counsel under *United States v. Cronin*.

The public defense contracts currently used in many Indiana counties cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant. Many counties pay a lawyer a single flat fee to handle an unlimited number of cases, meaning that the lawyer makes more money the quicker he disposes of cases. By not spending sufficient time on cases, lawyers handle an excessive number of cases.

The estimated number of cases assigned to each Elkhart County public defender office attorney in 2014, applying the Commission *Standards* for attorneys without adequate support staff, are startlingly high – in some instances more than 5 times the maximum allowed for an attorney in a year.

In the Lake County courts that are not in the IPDC reimbursement program, attorneys who devote approximately only 20% of their professional hours to indigent clients are carrying caseloads far in excess of that allowed under any possible measure for a full-time attorney.

In 2014, one Marion County attorney handled 1,333 cases in a single 12-month period. This is more than three times the maximum annual caseload allowed for misdemeanors under national standards.

The Sixth Amendment right to counsel is a right of individuals. It does not matter if government provides effective representation to the first co-defendant, if not to the second; or to people charged with felony offenses, if not to those charged with misdemeanors; or to those charged in certain courts, if not to those charged in other courts. It does not matter even if government *generally* provides adequate counsel to *most* people. If indigent defense services are structured so as to actually deny counsel to defendants, or to constructively give the accused a lawyer in name only because the lawyer has too many cases or operates under too many financial conflicts to be effective, the system itself is constitutionally deficient. Yet, this is an apt description of the constitutional right to counsel in Indiana today.

Part III of this report (*see infra* pages 199 to 212) asks Indiana policymakers, in conjunction with criminal justice stakeholders and the broader citizenry of the state, to make informed decisions about how best to implement the following recommendations:

Recommendation 1: Indiana must require all courts in all counties to meet the parameters of effective indigent defense systems as defined in *United States v. Cronin*. At a minimum, binding standards must be promulgated and applicable at trial and on direct appeal for all adult criminal and juvenile delinquency cases, including conflict cases, related to: a) presence of counsel at all critical stages of a criminal proceeding; b) indigency determination; c) attorney performance; d) attorney qualification, training, and supervision; and, e) attorney workload.

Recommendation 2: The State of Indiana must create a comprehensive and mandatory training and supervision system for all indigent defense providers based on standards.

Recommendation 3: The State of Indiana must create an independent system to evaluate compliance with, and enforce adherence to, all standards (capital and non-capital).

Recommendation 4: The State of Indiana must prohibit contracts that create financial disincentives for attorneys to provide effective representation.

Recommendation 5: The State of Indiana should create a statewide appellate defender office as a check against inadequate trial-level representation.

