

STATUS REPORT

RIGHT TO COUNSEL SERVICES IN PHILADELPHIA



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SIXTH
AMENDMENT
CENTER

ABOUT THE SIXTH AMENDMENT CENTER

The Sixth Amendment Center seeks to ensure that no person faces potential time in jail or prison without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. The 6AC does so by measuring public defense systems against established standards of justice. When shortcomings are identified, 6AC help states and counties make their courts fair again in ways that promote public safety and fiscal responsibility.

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BACKGROUND

In the 1963 case of *Gideon v. Wainwright*, the United States Supreme Court made the provision of Sixth Amendment right to counsel services incumbent upon states through the Fourteenth Amendment.¹ Pennsylvania is one of only two states that require local governments to shoulder the entire state burden of funding and administering of indigent defense services.² Though it is not believed to be unconstitutional for a state to delegate its constitutional responsibilities to its counties and cities, the state must guarantee that local governments are not only capable of providing adequate representation, but that they are in fact doing so.³ The Commonwealth of Pennsylvania has no capacity to assess whether its constitutional obligations under the Sixth and Fourteenth Amendments are in fact being fulfilled at the local level.

However, a number of other groups have noted significant deficiencies in the delivery of right to counsel services, including the Joint State Government Task Force on Services to Indigent Criminal Defendants (2011),⁴ and Pennsylvania Supreme Court Committee on Racial and Gender Bias (2003).⁵ If Pennsylvania cities or counties are unable to provide adequate indigent defense services as these studies suggest, the state – as original obligator – remains culpable.

Though Philadelphia is generally considered to be better than other Pennsylvania jurisdictions at meeting the dictates of Sixth Amendment case law, a RAND report published in December 2012

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² The other state is Utah.

³ See: *The Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services*, submitted to the Nevada Supreme Court September 2, 2008, by The American Civil Liberties Union Foundation (ACLU), the Charles Hamilton Houston Institute for Race & Justice at Harvard University Law School, the National Association of Criminal Defense Lawyers (NACDL), the NAACP Legal Defense and Educational Fund, Inc. (LDF), and the National Legal Aid & Defender Association (NLADA): “While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’ *Claremont School Dist. v. Governor*, 147 NH 499, 513 (2002). In other words, the state has an obligation to ensure that the counties are capable of meeting the obligations and that counties actually do so. *Cf Robertson v. Jackson*, 972 F.2d 529 (4Cir. 1992) (holding that although administration of a food stamp program was turned over to local authorities, ‘ultimate responsibility . . . remains at the state level.’); *Omunson v. State*, 17 P.3d 236 (Idaho 2000) (holding that where a duty has been delegated to a local agency, the state maintains ‘ultimate responsibility’ and must step in if the local agency cannot provide the necessary services).” Available at: http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

⁴ <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20Defense.pdf>

⁵ <http://www.deathpenaltyinfo.org/documents/PAFinalReport.pdf>

concluded that this general conclusion did not hold true in cases where the indigent are accused of homicide.⁶ Unlike in most felonies cases in which a non-profit public defender office is appointed as the primary provider of defense representation, the non-profit defender office contractually handles only a small percentage of murder cases leaving the bulk of capital representation to the private bar to handle. The RAND report, however, determined that private lawyers handling murder cases are not insulated from undue judicial interference and lack access to investigators or experts (among other findings).

In 2013, the City of Philadelphia sought to address these deficiencies through the released of an RFP seeking an entity to handle all court appointed cases in the City.⁷ The RFP did not require respondents to meet standards related to defender independence, workload, qualifications or accountability. The use of standards in criminal justice is not a new concept for government officials. After all, for many decades policymakers have ordered minimum safety standards in all proposals to build a brand new courthouse, a new state highway overpass, or even to redo the electrical wiring in one's home. Our Constitution demands that the taking of an individual's liberty is given the same level of concern and care.

In 2002, the American Bar Association (ABA) promulgated *Ten Principles of a Public Defense Delivery System* – a set of ten standards that, in the words of the ABA, “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”⁸ Our nation's top law enforcement officer, Attorney General Eric Holder, states that the ABA “quite literally set the standard”⁹ for indigent defense systems with the *Ten Principles*, calling them the “basic building blocks of a well-functioning public defense system.”¹⁰

No respondent to the 2013 RFP was given the contract. Before another RFP could be issued, Philadelphia City Councilman-At-Large Dennis M. O'Brien sought technical assistance from the U.S. Department of Justice regarding how Philadelphia could best to meet the ABA *Ten Principles* in the provision of conflict services. The Sixth Amendment Center (6AC), under a very limited U.S. DOJ, National Training and Technical Assistance Center (NTTAC) contract, was asked to help the City Council.

⁶ Anderson, James M. and Paul Heaton. *Measuring The Effect of Defense Counsel on Homicide Case Outcomes*. United States Department of Justice, National Institute of Justice (Award Number 2009-IJ-CX-0013). December 2012. Available at: <https://www.ncjrs.gov/pdffiles1/nij/grants/241158.pdf>.

⁷ This is a significant number of cases. In 2013 there were 22,443 court appointments in adult and juvenile court. Unfortunately, the RFP did not require respondents to demonstrate how their proposed services would meet nationally recognized standard of justice.

⁸ American Bar Association. *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciples-booklet.authcheckdam.pdf.

⁹ United States Attorney General Eric Holder. *Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense*. New Orleans ~ Saturday, February 4, 2012. Available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.

¹⁰ United States Attorney General Eric Holder. *Address to the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000-2010*. Washington, D.C., February 18, 2010. Available at: <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>.

FINDINGS

The issues permeating the Philadelphia indigent defense system are many. We highlight two here:

PRINCIPLE 8 (REASONABLE FEES)

The *Ten Principles* requires two things of the indigent defense system when it comes to assigned counsel compensation. *Principle 8* states that “[a]ssigned counsel should be paid a reasonable fee in addition to actual overhead expenses,”¹¹ while specifically banning contract systems that pay a single fee to attorneys¹² – referred nationally as “flat fee” contracting. The method in which Philadelphia assigned counsel are paid violates both of these standards.

Rather than a strict hourly compensation rate, Philadelphia has a somewhat convoluted billing system for private indigent defense counsel. The payment system takes into account both the level of offense and the point at which the case is disposed. For example, an attorney representing a defendant on a non-homicide felony that is disposed of after arraignment, but prior to trial, is paid a flat rate of \$400. If the case goes to trial, the attorney is paid \$175 per day (if under three hours in court) or \$350 per day if over three hours.

A recent report by the ABA in Missouri indicates that the average Felony D case takes 25 hours of attorney time to properly dispose. Using this figure, a Philadelphia attorney would earn \$16 per hour for a case disposed after arraignment, but before trial. Even using national defender workload standards developed in the early 1970s, an attorney would need 13 hours to dispose of a non-homicide felony case appropriately. Using this figure, a Philadelphia attorney would make about \$31 per hour for the same case.

For argument sake, assume for the moment that a Philadelphia defense attorney could dispose of all non-homicide felony cases in eight hours. That is eight hours to open a case file, interview the defendant, investigate the crime scene and witnesses, develop a theory of the case, file any necessary pre-trial motions, appear at any in-court hearings, and engage in plea negotiation, to name a few of the necessary tasks of a felony attorney. The attorney would then make \$50 per hour. Although \$50 per hour may sound like a lot of money to the average person trying to scrape by in hard economic times, it is not given the parameters of Sixth Amendment law. The maintenance costs to operate a law practice in Philadelphia – commonly referred to as “overhead expenses” – are many, including, but not limited to: office rent, telecommunications, utilities, support staff, accounting, bar dues, business travel, and professional liability insurance.

¹¹ Commentary to *Principle 8*.

¹² *Ibid.* “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services.”

As a means of comparison, the Mississippi Supreme Court determined in a case challenging that state's assigned counsel compensation rate that indigent defense attorneys are entitled to a reasonable hourly fee in addition to overhead expenses, and took testimony from the Mississippi State Bar Association that set the average overhead rate at \$34.86 per hour (approximately 70% of the total hourly rate paid in Philadelphia). Consider the cost of living difference between Philadelphia and the Mississippi Delta,¹³ and then consider that the Mississippi case challenging public defense compensation is now nearly 25 years old.

To underscore just how \$50 per hour does not begin to afford both a reasonable fee and coverage of actual overhead expenses, one need only to look at other states that have had their assigned counsel compensation rates challenged in court (most of which have a significantly lower cost-of-living in comparison to Philadelphia):

Kansas: In 1987, the Kansas Supreme Court determined that the State has an "obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses."¹⁴ Testimony was taken in the case that the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour. Kansas now compensates public defense attorneys at \$80/hour.¹⁵

Alabama: The Alabama Court of Criminal Appeals determined in *May v. State*¹⁶ that indigent defense attorneys were entitled to overhead expenses (set at \$30 per hour) in addition to a reasonable fee.¹⁷ When the Attorney General in that state issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying, the issue was litigated all the way to the Alabama Supreme Court (2006). In *Wright v Childree*,¹⁸ the Alabama Supreme Court determined that assigned counsel are entitled to both a reasonable fee in addition to overhead expense.¹⁹ After this litigation, the Alabama Legislature increased the hourly rate to \$70 per hour.²⁰

¹³ The U.S. Census Bureau, *Statistical Abstract of the United States, 2012*, reports that the cost of living in Philadelphia was 26.5% above the national average in 2010, while Tupelo, Mississippi was 11.6% below the same national composite index for the same year. See: <https://www.census.gov/compendia/statab/2012/tables/12s0728.pdf>.

¹⁴ *State ex rel Stephen v. Smith*, 747 P.2d 816 (Kansas S.Ct., 1987).

¹⁵ The U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*Supra*. Note 13) lists four Kansas cities in its statistical abstract. All four have a cost of living index below the national average: Dodge City (-10.7% below national average); Garden City (-10.3%); Hays (-10.6%); and, Salina (13.1%).

¹⁶ *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993).

¹⁷ The U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*Supra*. Note 13) lists four Alabama municipalities in its statistical abstract: Decatur-Hartselle has a cost of living that is -10.8% below national average.; Dothan (-10.2%); Florence (-9.8%); and, Montgomery (-0.8%).

¹⁸ *Wright v. Childree*, 972 So. 2d 771 (Ala. 2006). This was a statutory analysis of a statute that provided: "Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client, to be approved in advance by the trial court." Ala. Code 1975 § 15-12-21.

¹⁹ See, *Attorney's Fee Declaration for cases after 6/14/2011*, at: <http://oids.alabama.gov/Forms/AFD-2%20Adult%20After%206142011%20Rev1.pdf>.

²⁰ Code of Ala. § 15-12-21. provides:

Counsel shall also be entitled to be reimbursed for any nonoverhead expenses reasonably incurred in the representation of his or her client, with any expense in excess of three hundred dollars (\$300) subject to advance approval

Though it is not the result of litigation, it should also be mentioned that in 2000, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour. To ensure that attorneys were perpetually paid both a reasonable fee and overhead, the Court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.” Assigned counsel compensation in the farmlands of South Dakota now stands at \$84 per hour.²¹

Finally, it is not solely state courts that have taken on this issue. State legislatures in a number of states have dealt with fair compensation for court-appointed lawyers. For example, North Dakota (\$75)²² has established assigned counsel rates that far exceed Philadelphia’s and encompass rates that take into account reasonable fee and overhead expenses. This is true despite having a cost of living below that in Philadelphia.²³

Regardless of the profession, the quality of the work being performed under a financial arrangement such as Philadelphia’s will always be questioned. Wherever and whenever the level of compensation creates a financial conflict between a worker’s take home pay and the resources needed to do the job right a number of potential impacts may result. Good workers may leave to take on more profitable endeavors, while those that remain may often cut costs of doing business in an attempt to increase their take home pay.

PRINCIPLE 1 (INDEPENDENCE)

The ABA *Ten Principles* not only requires adequate compensation, it also requires number of structural safeguards. For example, the first of the ABA *Ten Principles* explicitly states that the “public defense function, including the selection, funding, and payment of the defense counsel, is independent.” In the commentary to this standard, the ABA notes that the public defense function “should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel” noting specifically that “[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.”

This *Principle* follows the dictates of U.S. Supreme Court case law. In, *Ferri v. Ackerman*, the Court states that “independence” of appointed counsel to act as an adversary is an “indispensible

by the trial court as necessary for the indigent defense services and as a reasonable cost or expense. Reimbursable expenses shall not include overhead expenses. Fees and expenses of all experts, investigators, and others rendering indigent defense services to be used by counsel for an indigent defendant shall be approved in advance by the trial court as necessary for the indigent defense services and as a reasonable cost or expense. Retrials of any case shall be considered a new case for billing purposes. Upon review, the director may authorize interim payment of the attorney fees or expenses, or both.

²¹ *Memorandum to 1st Circuit Attorneys and County Commissioners, 12/1/12*, at: http://uj.s.sd.gov/media/firstcircuit/COURT_APPOINTED_ATTORNEY_FEES.pdf.

²² N. Dak. Cent. Code §54-61-02(a)(1).

²³ The U.S. Census Bureau, *Statistical Abstract of the United States, 2012* (*Supra*. Note 13) lists one North Dakota city, Minot, North Dakota is marginally below the national cost of living average: (-0.01%).

element” of “effective representation.”²⁴ 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.”²⁵ 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 concluded in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”²⁶

This is confirmed in *Strickland v. Washington*. In that case, the 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.”²⁷ More importantly, *Strickland* should be read in conjunction with another case heard and decided on the same day: *United States v. Cronin*. *Cronin* sets out the systemic deficiencies that may result in a constructive denial of counsel – e.g., the inability of a defender system to subject the state’s case to the “crucible of adversarial testing”²⁸ even when a lawyer is present to represent the indigent accused. To demonstrate the type of systemic deficiencies they mean, the *Cronin* Court points to the systemic deficiencies that occurred in *Powell v. Alabama*.

Powell is the case of the so-called Scottsboro Boys. Though there are a number of issues the Court raises with the defense, I will focus solely on the independence issues. In *Powell*, the Court directly questions the efficacy of judicial oversight and supervision of the defense, asking: “[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.”²⁹

Judicially controlled indigent defense systems often follow or adjust to the needs of each judge in each court, rather than focusing on providing constitutionally effective services for each and every defendant. Fearing the loss of income by not pleasing the judge overseeing their compensation, defenders often take on more cases than they can ethically handle (in violation of ABA *Principle 5*), will delay working on a case (violation of *Principle 3*), and will triage their hours available in favor of some clients but to the detriment of others, thereby failing to meet the parameters of ethical representation owed to all clients. And so, it does not take a judge to say overtly: “Do not file motions in my courtroom.” Defense attorneys will bring into their calculations what they

²⁴ *Ferri v. Ackerman*, 44 U.S. 193 (1979).

²⁵ *Polk County v. Dodson*, 454 U.S. 312 (1981).

²⁶ Justice Burger underscored this point in his concurrence: “I join the Court’s opinion, but it is important to emphasize that, in providing counsel for an accused, the governmental participation is very limited. Under *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial.”

²⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁸ *United States v. Cronin*, 466 U.S. 648 (1984).

²⁹ *Powell v. Alabama*, 287 U.S. 45 (1932).

think they need to do to garner favor with a judge thereby not advocating solely in the interests of a client, as is their ethical duty.

In Philadelphia, judges qualify attorneys to take cases, oversee how much the attorneys are paid, and determine if a request for an expert witness or an investigator has merit and will be funded.

CONCLUSION

Though the Sixth Amendment Center (6AC) has not conducted interviews related to all types of the public counsel cases (e.g. dependency cases), the 6AC concludes that indigent defense services in Philadelphia cannot be adequately provided without either a significant increase in funding or a significant decrease in workload (e.g., if a large number of low level, non-violent crimes were reclassified as infractions without potential jail time). Since either option will require involvement of the state legislature, the 6AC advises the City Council that it is likely necessary to do a more comprehensive evaluation of indigent defense in Philadelphia to understand how the non-involvement of state government impacts the structure and quality of defender services locally.



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