



THE RIGHT TO COUNSEL ON GUAM

Evaluation Of Trial-Level Indigent Defense
Representation In Adult Criminal Cases

MARCH 2024

The Right to Counsel on Guam: Evaluation of Trial-Level Indigent Defense Representation in Adult Criminal Cases

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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://6AC.org>.

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Prepared for

The Guam Public Defender Service Corporation requested this evaluation.

This report solely reflects the opinions of the authors and does not necessarily reflect the views of the Guam Public Defender Service Corporation.

Executive Summary

In 1963, the U.S. Supreme Court declared it an “obvious truth” in *Gideon v. Wainwright* 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.” *Gideon* holds that the provision of the Sixth Amendment right to effective assistance of counsel for the indigent accused is an obligation of the states under the due process clause of the Fourteenth Amendment. The *Organic Act of Guam* requires that the Sixth Amendment and the Fourteenth Amendment due process clause apply on Guam and shall have the same force and effect there as in the United States. Therefore, the right to counsel is an obligation of Guam under the *Organic Act*.

The Guam legislature created the Public Defender Service Corporation (PDSC corporation) “to provide effective legal aid and assistance to those persons in Guam who are unable to afford counsel.” The PDSC corporation requested the Sixth Amendment Center (6AC) to conduct this evaluation.

6AC is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. 6AC evaluates indigent defense systems through four basic components: legal research and analysis; data collection and analysis; court observations; and criminal justice stakeholder interviews.

The first step in evaluating right to counsel services in any jurisdiction is to understand the broader criminal justice system within which the indigent defense system operates. Because the people of Guam did not have the freedom to govern themselves for most of the past 400 years, Guam’s history is important to understanding the development of its justice system. Chapter II through V explains that history and the broader criminal justice system. Chapters VI through IX contain our findings, and Chapter X contains our recommendations.

Guam’s justice system is relatively young, and its indigent defense system is even younger. As such, since its inception, the Judiciary of Guam has assumed the responsibility of overseeing the provision of the right to counsel on Guam. Members of the judiciary expressed the position that judicial oversight of indigent defense services was necessary in the earliest stages of growth to ensure its proper development and evolution. Nonetheless, Guam must ensure the independence of right to counsel services.

The findings from our evaluation reflect, at root, an indigent defense system that lacks independence. The question for Guam’s policymakers is how best to provide effective assistance of counsel to indigent people, as required by the Sixth Amendment, under Guam’s unique circumstances. There is no uniform “cookie-cutter” indigent defense services delivery model that jurisdictions *must* apply. Our recommendations suggest one way for restructuring Guam’s indigent defense system to achieve independence.

RECOMMENDATION 1: Guam should vest the authority to oversee all indigent legal services in an independent right to counsel commission.

Guam should give an equal number of commission member appointments to the executive, legislative, and judicial branches of government, so that no single branch of government can usurp power over or exert outsized influence over the delivery of indigent defense services.

RECOMMENDATION 2: Guam should empower the right to counsel commission to promulgate and enforce standards applicable to all indigent defense system attorneys.

The right to counsel commission must be statutorily required to promulgate and enforce binding standards applicable to all indigent defense system attorneys, including: attorney qualifications; attorney performance; attorney supervision; time sufficiency; continuity of services whereby the same attorney provides representation from appointment through disposition; client communications; data collection; and indigency determination.

RECOMMENDATION 3: Guam should empower the right to counsel commission to collect, analyze, and report on data needed to ensure effective representation.

The commission should collect and evaluate on an on-going basis all information necessary to ensure that a sufficient number of qualified attorneys are available to be appointed and that adequate resources are available to ensure effective assistance of counsel can be provided to each person who is entitled to public counsel under the *Organic Act*, the Sixth Amendment, and Guam law.

RECOMMENDATION 4: Guam should authorize and fund the right to counsel commission to create an office of indigent legal services to carry out the day-to-day duties of the commission.

The commission should have statutory authority to select a senior attorney to serve as executive director of the office of indigent legal services. The executive director should be hired for a fixed term that is subject to renewal and should not be removed from office absent good cause shown through due process.

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EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE
REPRESENTATION IN ADULT CRIMINAL CASES

MARCH 2024

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CHAPTER I

Introduction

A. The right to counsel on Guam

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”¹ In 1963, the U.S. Supreme Court declared it 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.”² The U.S. Supreme Court held in *Gideon v. Wainwright* that providing the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is an obligation of the states under the due process clause of the Fourteenth Amendment.³

The *Organic Act of Guam* is the controlling law of Guam,⁴ established by and subject to amendment by the U.S. Congress.⁵ The *Organic Act* contains a “Bill of Rights” that provides: “In all criminal prosecutions the accused shall have the right . . . to have the assistance of counsel for his defense.”⁶ It also requires that the Sixth Amendment of the United States Constitution and the Fourteenth Amendment due process clause⁷ apply on Guam and “shall have the same force and effect there as in the United States or in any State of the United States.”⁸ Therefore, the right to counsel is an obligation of Guam under the *Organic Act*.

Since *Gideon v. Wainwright*, 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 them in all federal courts and the courts of Guam (just as in all state courts) whenever that person is facing the potential loss of liberty and is unable to afford an attorney.⁹ Moreover, the appointed lawyer needs to be more than merely a

1 U.S. CONST. amend. VI.

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

3 *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

4 48 U.S.C. §§ 1421 *et seq.* (2022). The *Organic Act* establishes the government of Guam as its three branches with those powers given to them by the *Organic Act*, and it places Guam “under the general administrative supervision of the [U.S.] Secretary of the Interior.” 48 U.S.C. § 1421a (2022)

5 Guam is not afforded a voting member of Congress. Instead, since 1972 Guam has a non-voting delegate to the U.S. House of Representatives. 48 U.S.C. § 1711 (2022).

6 48 U.S.C. § 1421b(g) (2022).

7 The Fourteenth Amendment’s second sentence of section 1 is commonly referred to as the “due process clause” and states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

8 48 U.S.C. § 1421b(u) (2022).

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

warm body with a bar card.¹⁰ The attorney must also be effective,¹¹ subjecting the prosecution's case to "the crucible of meaningful adversarial testing."¹²

The U.S. Supreme Court has expressly held that the Sixth Amendment requires the appointment of counsel for the indigent in felonies, jailable misdemeanors,¹³ misdemeanors with suspended sentences,¹⁴ direct appeals,¹⁵ and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.¹⁶ Children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty.¹⁷

All crimes on Guam are either a felony, misdemeanor, or petty misdemeanor, and they all carry possible imprisonment as a sentence upon conviction.¹⁸ Guam guarantees by statute that: "In any criminal action, the defendant is entitled . . . [t]o defend in person and with counsel. Every defendant accused of a crime who is financially unable to employ counsel shall be entitled to have counsel assigned at public expense to represent him at every stage of the proceedings from his initial appearance before the court through appeal, unless he waives such appointment."¹⁹ Guam's court rules make clear that this guarantee applies to both adults and children.²⁰

Under the *Organic Act, I Liheslaturan Guåhan* (the Guam legislature)²¹ is free to enact greater protections for its people than those required by federal law, so long as the laws enacted do not contravene the

10 As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."

11 *McMann v. Richardson*, 397 U.S. 759, 771 n.14 ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those "reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

12 *United States v. Cronin*, 466 U.S. 648, 656 (1984).

13 *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

14 *Alabama v. Shelton*, 505 U.S. 654 (2002).

15 *Douglas v. California*, 372 U.S. 353 (1963).

16 *Halbert v. Michigan*, 545 U.S. 605 (2005).

17 *In re Gault*, 387 U.S. 1 (1967).

18 9 GUAM CODE ANN. § 1.18(a) (2022). See 8 GUAM CODE ANN. § 5.50 (2022).

A felony is an offense that carries a sentence of imprisonment in excess of one year. 9 GUAM CODE ANN. § 1.18(b) (2022). There are three degrees of felonies: a) first degree felony – sentence of not less than 5 years and not more than 20 years; b) second degree felony – sentence of not less than 3 years and not more than 10 years; and c) third degree felony – sentence of not more than 5 years. There are lesser sentences of imprisonment available for first felony convictions and greater sentences including up to life imprisonment available in various aggravating circumstances. 9 GUAM CODE ANN. §§ 1.19, 80.30, 80.31, 80.32, 80.37, 80.37.1, 80.37.2, 80.37.3, 80.38, 80.42 (2022).

A misdemeanor is an offense that carries a maximum sentence of imprisonment of not more than one year, with a greater sentence of up to three years imprisonment available in various aggravating circumstances. 9 GUAM CODE ANN. §§ 80.34, 80.36, 80.37.3, 80.40, 80.42 (2022). See 9 GUAM CODE ANN. § 1.18(c), (d) (2022).

A petty misdemeanor is an offense that carries a maximum sentence of imprisonment of not more than 60 days. 9 GUAM CODE ANN. § 80.34 (2022). See 9 GUAM CODE ANN. § 1.18(e) (2022).

19 8 GUAM CODE ANN. § 1.11 (2022). For the definition of and laws applicable to a "criminal action," see 7 GUAM CODE ANN. §§ 1106, 1112 (2022); 8 GUAM CODE ANN. § 5.45 (2022).

20 GUAM SUPER. CT LOCAL R. MR 1.1.1.(a).

21 Under Guam statutory law, "The legislature created by the Organic Act of Guam shall be known and designated as, 'I Liheslaturan Guåhan.' . . ." 2 GUAM CODE ANN. § 1101 (2022).

Organic Act or other U.S. laws to which Guam is subject,²² and so long as the U.S. Congress does not annul them.²³ Guam *requires* courts to appoint counsel in certain involuntary mental health proceedings and *allows* the courts to appoint counsel for those financially unable to obtain representation in certain other circumstances.²⁴

B. This evaluation

The Guam legislature created the Public Defender Service Corporation as a public corporation “to provide effective legal aid and assistance to those persons in Guam who are unable to afford counsel.”²⁵ The Guam Public Defender Service Corporation requested this evaluation.

The scope of this evaluation is limited to the provision of counsel in adult criminal cases in the Guam trial courts. However, throughout Guam the same indigent defense system must provide representation when appointed in all case-types for which Guam provides a right to counsel. As a result, many of the same indigent defense system lawyers appointed to represent adults in trial-level criminal cases are also appointed in criminal appellate cases, civil cases in the trial and the appellate court, juvenile delinquency cases, and some other civil matters. For this reason, it is impossible to segregate the provision of services in adult criminal trial-level cases on Guam from the other services provided by Guam’s indigent defense system, as explained when necessary throughout this report.

The Sixth Amendment Center (6AC) conducted this evaluation beginning in November 2022.

Methodology. 6AC uses Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. 6AC evaluates indigent defense systems through four basic components:

- *Legal research and analysis.* Every state and land that is part of or associated with the United States has its own substantive and procedural law through its constitution, statutes, rules, regulations, and case law. 6AC independently researches the relevant law of the jurisdiction and the courts operating within it and analyzes its internal interactions and its interactions with federal law and national standards, in order to understand and explain the workings of the indigent defense system being evaluated.
- *Data collection and analysis.* Information about how a jurisdiction provides right to counsel services

22 48 U.S.C. § 1423a (2022). “States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,” but they cannot provide less. *California v. Ramos*, 463 U.S. 992, 1014 (1983). See, e.g., *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights of their citizens.’”); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (“There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.”).

23 48 U.S.C. § 1423i (2022).

24 10 GUAM CODE ANN. § 82301 (2022); 19 GUAM CODE ANN. § 13308 (2022); GUAM SUPER. CT LOCAL R. MR 1.1.1.(b).

25 12 GUAM CODE ANN. § 11103 (2022).

exists in a variety of forms, from statistical information to policies and procedures. The Supreme Court and the Superior Court of Guam, the Judicial Council, the Public Defender Service Corporation, and many individuals provided information critical to this evaluation. 6AC obtained and analyzed extensive amounts of hard copy and electronic information from all of these sources.²⁶

- *Court observations.* Right to counsel services involve interactions among at least three critical processes: (1) the process a defendant experiences as their case advances from accusation through disposition; (2) the process the appointed attorney experiences while representing each person at the various stages of a case; and (3) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. 6AC remotely observed criminal proceedings, including magistrate hearings, arraignments, pretrial conferences, guilty pleas, status hearings, and probation violation hearings. In total, 6AC observed 167 proceedings in front of seven judges/magistrates over ten days during the spring and fall of 2023.
- *Interviews.* No individual component of the justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, 6AC conducted interviews orally and in writing with a broad cross-section of stakeholders throughout the island, including 82 individual judges and magistrates, court clerks, former prosecutors, corrections and probation officials, staff and board of the Public Defender Service Corporation, and private attorneys appointed to represent indigent people.

This report. The first step in evaluating right to counsel services in any jurisdiction is to understand the broader criminal justice system within which the indigent defense system operates. Chapters II through V provide this understanding. Chapter II describes Guam’s judicial system and the prosecution function. Chapter III explains the prevailing caselaw and standards used in the assessment of Guam’s indigent defense services. Chapter IV describes the structure and funding of Guam’s indigent defense system, and Chapter V explains the process of a criminal case throughout which the indigent defense system must effectively represent appointed clients.

Chapters VI through IX contain our findings on: the presence of counsel at critical stages of a case (Chapter VI); qualified, trained, and supervised attorneys (Chapter VII); sufficient time and resources (Chapter VIII); and independence and the oversight of the defense function (Chapter IX).

Chapter X discusses the recommendations for overcoming the issues identified in the preceding chapters.

²⁶ 6AC acknowledges and appreciates the efforts made by Guam’s justice system stakeholders in providing requested information, particularly in light of the difficulties faced by the people of Guam during and after Typhoon Mawar.

CHAPTER II

The Courts & Prosecution

This chapter describes the judicial branch of Guam's government, the courts, and the prosecution function. Because the people of Guam did not have the freedom to govern themselves for most of the past 400 years,²⁷ Guam's history is important in understanding the development of its justice system.

A. Brief history of Guam's justice system

Spain laid claim to Guam in the 1600s, leading to the Chamoru-Spanish War lasting from 1668 through 1695. Spain then governed the island until 1898, when Spain ceded Guam to the United States under the *Treaty of Paris of 1898* at the close of the Spanish-American war, without input from the native inhabitants of Guam.²⁸ Therefore, Spanish law and courts operated on Guam for hundreds of years before the U.S. placed Guam under the control of the U.S. Navy.²⁹

Beginning in 1910, the earliest Guam courts under U.S. naval authority were the Island Court, the Police Court, the Court of Equity, the Higher Court of Equity, and the Special Courts.³⁰ These courts had jurisdiction over the trial-level civil and criminal cases arising under local Guam law, but it was unclear what court if any had appellate jurisdiction. A Court of Appeals was established by 1941 to hear appeals from all of the lower Guam courts.³¹ Then World War II threw everything into disarray.

Japan seized Guam on December 8, 1941.³² There was widespread forced labor, incarceration, torture, and massacre of the Chamorro under Japanese Occupation until July 21, 1944.³³ After the United States recaptured the island in 1944, it returned the control of Guam to the U.S. Navy, and then transferred control to the U.S. Secretary of the Interior on July 1, 1950.³⁴

27 See 3 GUAM CODE ANN. § 21000 (2022) ("It is the intent of *I Liheslaturan Guåhan* to permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Organic Act of Guam to exercise the inalienable right to self-determination of their political relationship with the United States of America. *I Liheslaturan Guåhan* finds that the right has never been afforded the native inhabitants of Guam, its native inhabitants and land having themselves been overtaken by Spain, and then ceded by Spain to the United States of America during a time of war, without any consultation with the native inhabitants of Guam."). The Chamorro people have inhabited the island of Guam for approximately 3500 years. Guam maintains a Chamorro Registry for all persons who are descendants of the people born on the island prior to 1800 or living there on April 11, 1899. 3 GUAM CODE ANN. §§ 18001, 18002, 18003, 18010 (2022).

28 Treaty of Peace, U.S. – Spain, Dec. 10, 1898.

29 U.S. Exec. Order 108-A (Dec. 23, 1898).

30 JUDICIARY OF GUAM, *Judicial History – Historical Review: "Justicia para todo,"* <http://www.guamsupremecourt.com/Judicial-History/Judiciary%20History.pdf>. Many of the judges appointed to these courts were native Chamorro who had served as judges in the Spanish courts.

31 JUDICIARY OF GUAM, *Judicial History – Historical Review: "Justicia para todo,"* <http://www.guamsupremecourt.com/Judicial-History/Judiciary%20History.pdf>.

32 This was the same day that Pearl Harbor was bombed. The U.S. attributes the bombing of Pearl Harbor to having occurred on December 7, 1941, but it was already "tomorrow" in Guam, so Guam attributes the invasion of their island to having occurred on December 8, 1941.

33 July 21, 1944, is celebrated annually as the legal holiday of "Liberation Day." 1 GUAM CODE ANN. § 1011 (2022).

34 U.S. Exec. Order 1077 (Sept. 7, 1949).

The *Organic Act of Guam* was signed into law in August 1950 and created Guam's government anew.³⁵ The First Guam Legislature convened the next year³⁶ and abolished some of the existing local courts and reorganized others, resulting in three courts with trial-level jurisdiction over local law: the Island Court, the Police Court, and the Commissioner's Court.³⁷

In 1974, the Guam legislature again reorganized the Guam courts into much the same form as they exist today, with a single superior court having all trial-level jurisdiction over local law and a single supreme court having jurisdiction over appeals from the superior court.³⁸ It would be another thirty years though before the structure and powers of the local courts of Guam were solidified when the *Organic Act of Guam* was amended in October 2004.³⁹

B. The judicial branch

The *Organic Act of Guam* mandates that the judicial branch of Guam is “a unified judicial system” that includes the Supreme Court of Guam and the Superior Court of Guam. The Guam legislature is authorized to establish additional lower local courts,⁴⁰ although no other lower courts currently exist.⁴¹ Guam law has also created a judicial council with significant administrative authority over the courts and the system for providing the right to appointed counsel.⁴²

1. Judicial Council

The judicial council was created by statute as a policy-making and administrative body for the judicial branch of Guam⁴³ when the First Guam Legislature⁴⁴ created the first Guam government under U.S. authority.⁴⁵ The judicial council has five members,⁴⁶ including all three supreme court justices (the chief

35 Organic Act of Guam of 1950, Pub. L. No. 81-630, 64 Stat. 384.

36 2 GUAM CODE ANN. § 1117 (2022).

37 Judiciary Act of 1951, Guam Pub. L. 1-17.

38 Court Reorganization Act of Jan. 16, 1974, Guam Pub. L. 12-85.

39 Act of Oct. 30, 2004, Pub. L. 108-378, 118 Stat. 2206 (amending the Organic Act of Guam to clarify the local judicial structure).

40 48 U.S.C. § 1424 (2022). The congressionally established District Court of Guam continues with jurisdiction over federal law, but its operations and proceedings are not the subject of this evaluation.

41 7 GUAM CODE ANN. § 3101 (2022). See 5 GUAM CODE ANN. § 3201 (2022).

42 7 GUAM CODE ANN. §§ 2101(a), 5101, 5102 (2022).

43 7 GUAM CODE ANN. §§ 5101, 5102 (2022).

44 Under Guam statutory law, “The legislature created by the Organic Act of Guam shall be known and designated as, ‘*Liheslaturan Guåhan*.’ . . .” 2 GUAM CODE ANN. § 1101 (2022).

45 Judiciary Act of 1951, Guam Pub. L. 1-17. At that time, the judicial council served as a sort of collaborative body to improve the practice, procedure, and administration of and in the courts, and the members at that time were the judge of the District Court of Guam, the chief judge of the Island Court, the chairman of the legislature's Committee on the Judiciary, the Attorney General of Guam, and the president of the Bar Association of Guam. Judiciary Act of 1951 §§ 121 - 124, Guam Pub. L. 1-17.

46 7 GUAM CODE ANN. § 5101(a), (c) (2022); Guam Judicial Council, *Rules of Conduct and Operation* arts. 1.02, 2 (adopted Nov. 20, 2003, and signed Dec. 11, 2003). The chief justice designates judicial branch employees to serve as secretary and assistant secretary, attending meetings and recording the activity during meetings. Guam Judicial Council, *Rules of Conduct and Operation* art. 2.05 (adopted Nov. 20, 2003, and signed Dec. 11, 2003).

justice is the chairperson) and two superior court judges (the presiding judge and one other judge appointed by the presiding judge for a three-year term). At least three votes are necessary for action by the judicial council.⁴⁷

The judicial council is responsible for, among other things:⁴⁸

- making policies for the courts;
- making policies and rules for the operations of the courts (including personnel, procurement, facilities & property, travel, and finances);
- reviewing and approving the budget for the courts;
- determining the compensation of classified and unclassified employees in the judicial branch;
- adopting court filing fees and other court fees, and garnishing tax refunds for court-ordered obligations;
- establishing rules & regulations for claims brought by classified employees of the courts;
- overseeing claims of judicial misconduct.

The judicial council also appoints the administrator of the courts, who is responsible for the general supervision of all judicial branch employees other than the judges, judicial officers, and their immediate staff.⁴⁹

2. Supreme Court of Guam

Despite the establishment of a supreme court in 1974, the current Supreme Court of Guam is a more recent development.⁵⁰

47 7 GUAM CODE ANN. § 5101(d) (2022). Despite the statutory requirement that three votes are necessary for action, the judicial council's self-made rules allow for action by only two votes whenever there is a vacancy on the supreme court. Guam Judicial Council, *Rules of Conduct and Operation* art. 1.08 (adopted Nov. 20, 2003, and signed Dec. 11, 2003).

48 7 GUAM CODE ANN. § 5102 (2022); Guam Judicial Council, *Rules of Conduct and Operation* art. 4 (adopted Nov. 20, 2003, and signed Dec. 11, 2003).

49 7 GUAM CODE ANN. § 7103(c) (2022).

50 The U.S. Supreme Court decided in *Guam v. Olsen* that the Guam legislature lacked authority under the *Organic Act* to “transfer” any appellate jurisdiction from the District Court of Guam, including for appeals from the local Guam trial courts, and that only the U.S. Congress had that power. *Guam v. Olsen*, 431 U.S. 195 (1977). This abolished the Guam Supreme Court.

In 1984, the U.S. Congress amended the *Organic Act* to expressly allow the Guam legislature to establish an appellate court and give it jurisdiction to hear appeals from the local Guam courts. Act of Oct. 5, 1984, §§ 801 - 803, Pub. L. 98-454, 98 Stat. 1732 (among other things, amending sections 22 and 24 of the *Organic Act* of Guam). This left the Guam legislature with the power to establish (and to control the powers of or subsequently abolish altogether) Guam's highest local court.

Through a bill passed January 14, 1993, the Guam legislature again restructured its judicial branch and established the Supreme Court of Guam as “the highest court of Guam” with jurisdiction over appeals from the superior court. Frank G. Lujan Memorial Court Reorganization Act of 1992, Guam Pub. L. 21-147 (Jan. 14, 1993). The justices of the supreme court were sworn into office in March 1996. See Guam Judicial Council Resolution No. JC04-008, *Relative to Supporting an Amendment to the Organic Act of Guam to Clarify the Local Judicial Structure of Guam* (adopted Apr. 30, 2004 and signed May 6, 2004). Two things stood in the way of the supreme court coming fully into its operations and authority: a) Before the supreme court could begin exercising its appellate jurisdiction, it would have to certify that it was “fully ready to accept the jurisdiction conferred upon it;” and, b) the Guam governor, legislature, and courts did not always fully agree about what it meant to be “the highest court of Guam,” particularly in the exercise of administrative authority over the judicial branch of government.

Almost immediately, the Guam legislature amended the law in April 1996, altering the respective administrative authority of the supreme court and of the judicial council and changing the composition of the judicial council. See, e.g., Act of Apr. 19, 1996, Guam Pub. L. 23-86 (relating to the composition, duties, and powers of the judicial council).

Following a somewhat difficult decade among the three branches of Guam's government, after overriding a gubernatorial veto, on October 31, 2003, the legislature again reorganized the judicial branch “as the third co-equal and independent branch of

The Supreme Court of Guam is the island's highest court.⁵¹ It has jurisdiction over all appeals arising out of the lower courts of Guam.⁵² The supreme court has supervisory jurisdiction over all local Guam courts and is responsible for governing the administration, practice, and procedures in all Guam courts, as well as governing the practice of law on Guam.⁵³ Guam statutes provide that the supreme court has “supervisory, but not administrative authority” over all other local courts, which must be exercised “in accordance with rules and regulations promulgated by” the judicial council,⁵⁴ and the supreme court is required to enact certain types of rules for the operations of the superior court.⁵⁵

The supreme court has three full-time justices, who are each appointed by *I Maga'låhen Guåhan* (the governor)⁵⁶ with advice and consent of the legislature to an initial 10-year term and then stand for additional terms through retention elections.⁵⁷ The three justices choose one among themselves to serve as chief justice for three years, with the position rotating every three years.⁵⁸

3. Superior Court of Guam

The superior court is the only trial court of Guam.⁵⁹ It has all jurisdiction over Guam law that is not given to the supreme court.⁶⁰ While there is only one superior court, it operates several specialized divisions,⁶¹ in addition to exercising its general trial-level jurisdiction.

government.” Act of Oct. 31, 2003, Guam Pub. L. 27-31 (relative to the judiciary and its operations). On the one hand, the bill stated the intent “to recognize and empower the Supreme Court of Guam as the highest Court of Guam with oversight over the Judicial Branch.” Act of Oct. 31, 2003, § 2, Guam Pub. L. 27-31 (relative to the judiciary and its operations). On the other hand, the bill stated that “[w]ith the passage of this Act, the Judicial Council of Guam shall serve as head of the Judicial Branch of government for Guam.” Act of Oct. 31, 2003, § 1, Guam Pub. L. 27-31 (relative to the judiciary and its operations).

Guam’s delegate to the U.S. Congress, with support of Guam policymakers, repeatedly asked Congress to amend the *Organic Act* to clarify the local judicial structure of Guam. See Guam Judicial Council Resolution No. JC04-008, *Relative to Supporting an Amendment to the Organic Act of Guam to Clarify the Local Judicial Structure of Guam* (adopted Apr. 30, 2004, and signed May 6, 2004). On October 30, 2004, the U.S. Congress amended the *Organic Act of Guam* to declare the structure and jurisdiction of the local courts of Guam. Act of Oct. 30, 2004, Pub. L. 108-378, 118 Stat. 2206 (amending the Organic Act of Guam to clarify the local judicial structure). Going forward, the existence, jurisdiction, and powers of the Supreme Court of Guam could no longer be altered by the Guam legislative and executive branches of government.

51 48 U.S.C. § 1424-1 (2022); 7 GUAM CODE ANN. §§ 1101.1, 2101(a), 3102 (2022).

52 48 U.S.C. § 1424-1 (2022); 7 GUAM CODE ANN. §§ 3107, 3108 (2022).

53 48 U.S.C. § 1424-1 (2022); 7 GUAM CODE ANN. § 3107 (2022).

54 7 GUAM CODE ANN. §§ 2101(a), 3107 (2022).

55 7 GUAM CODE ANN. § 4101 (2022).

56 Under Guam statutory law, “The Governor of Guam, created by the Organic Act of Guam, shall be known, and designated as, ‘*I Maga'låhen Guåhan*.’ . . .” 5 GUAM CODE ANN. § 1510 (2022).

57 7 GUAM CODE ANN. §§ 3103(a), 3109(a), 6101 (2022). All justices must be a U.S. citizen, a resident of Guam for at least five years, and in the active practice of law for at least 10 years. 7 GUAM CODE ANN. § 3109(c) (2022). Justices may not practice law privately while holding office nor be in partnership with a practicing attorney. 7 GUAM CODE ANN. § 3109(d), 6110 (2022).

58 7 GUAM CODE ANN. § 3103(a), (i), (j) (2022).

59 48 U.S.C. § 1424 (2022); 7 GUAM CODE ANN. § 2101 (2022).

60 48 U.S.C. § 1424-1(d) (2022); 7 GUAM CODE ANN. § 3105, 4101(b) (2022).

61 7 GUAM CODE ANN. § 2101 (2022). The specific jurisdiction of each of these individual divisions of the superior court is established by statute, and the superior court has appellate jurisdiction over certain cases heard at the trial level in its traffic division and its small claims division. 7 GUAM CODE ANN. § 4102 (2022). The supreme court is expressly authorized to create other divisions of the superior court. 7 GUAM CODE ANN. § 2101(a) (2022).

There are eight full-time judges in the superior court,⁶² who are each appointed by the governor with advice and consent of the legislature to an initial seven-year term and then stand for additional terms through retention elections.⁶³ At some future time, the judges will elect one among themselves to serve as presiding judge for three years, with the position rotating every three years. However, the current presiding judge has held that position since July 1988, and will continue to do so for so long as he is retained as a superior court judge every seven years and remains in office.⁶⁴ In addition to judges, other judicial officers can be appointed to serve the superior court.⁶⁵ There are two magistrate judges,⁶⁶ one family court referee,⁶⁷ and one administrative hearing officer.

62 From 1993 to 2023, the superior court had seven judges, in accordance with statutory law. 7 GUAM CODE ANN. § 4101(a) (2022). It is up to the judicial council to decide when more judges are needed for the superior court and then request the governor to appoint the additional number necessary. 7 GUAM CODE ANN. § 4101(b) (2022). Likewise, a vacant judgeship can remain vacant for so long as the judicial council determines it is not necessary to fill it. 7 GUAM CODE ANN. § 4101(c) (2022).

The eighth superior court judge was added on March 1, 2023, seven years after the judicial council, through the chief justice, first and then repeatedly requested the governor to appoint an additional judge to the court. Guam Judicial Council Resolution No. JC16-006, *Relative to the Need to Appoint an Eighth Judge to the Superior Court of Guam* (adopted Apr. 7, 2016 and signed May 3, 2016) (noting the last superior court judgeship was created in 1993); Guam Judicial Council Resolution No. JC18-002, *Relative to Affirming the Continuing Need to Appoint an Eighth Judge for the Superior Court of Guam* (adopted Jan. 11, 2018 and Jan. 17, 2018); Guam Judicial Council Resolution No. JC19-004, *Relative to Affirming the Continuing Need to Appoint an Eighth Judge for the Superior Court of Guam* (adopted Feb. 21, 2019 and Mar. 7, 2019).

63 7 GUAM CODE ANN. §§ 3103(a), 3109(a), 4101(a), 6101(b) (2022). All judges must be a U.S. citizen, a resident of Guam for at least five years, and in the active practice of law for at least seven years. 7 GUAM CODE ANN. § 3109(c) (2022). Judges may not practice law privately while holding office nor be in partnership be a practicing attorney. 7 GUAM CODE ANN. § 3109(d), 6110 (2022).

64 7 GUAM CODE ANN. § 4101(a) (2022).

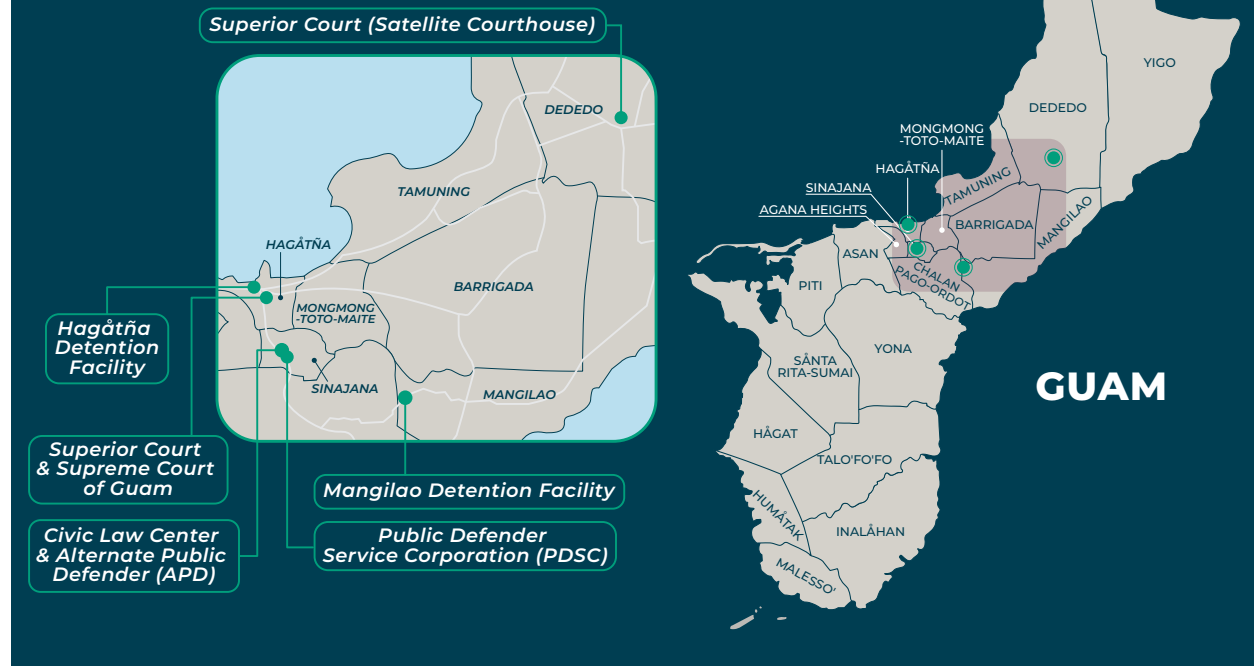
65 7 GUAM CODE ANN. § 4401 (2022) (magistrates). 7 GUAM CODE ANN. §§ 7119, 7119.1 (2022); 19 GUAM CODE ANN. § 5113 (2022) (referees).

66 A magistrate must meet the qualifications required for a judge (be a U.S. citizen, a resident of Guam for at least five years, and in the active practice of law for at least seven years, 7 GUAM CODE ANN. § 3109(c) (2022); and may not practice law privately while holding office nor be in partnership be a practicing attorney, 7 GUAM CODE ANN. § 3109(d), 6110 (2022)), and be at least 30 years old, never convicted of a felony or a misdemeanor involving moral turpitude, and not related to a judge or justice at the time of initial appointment. Magistrates are appointed to a four-year term (removable for cause) by the chief justice with the approval of the governor, from a list of three candidates submitted by the Guam Bar Association. Magistrates cannot be paid more than 90% of the salary paid to judges. 7 GUAM CODE ANN. § 4401 (2022).

67 A referee must be a licensed Guam attorney. Referees are approved by the judicial council on nomination of the chief justice, and the judicial council establishes their duties and compensation. 7 GUAM CODE ANN. §§ 7119, 7119.1 (2022); 19 GUAM CODE ANN. § 5113 (2022).

Courthouses

There are two Guam courthouses. The supreme court and the superior court both hold sessions at the main courthouse in Hagåtña, known as the Guam Judicial Center. All of the superior court judges and judicial officers except for one magistrate sit only at the Hagåtña courthouse. The Northern Court Satellite opened in Dededo in 2014. The only cases heard there are civil, traffic, debt, and magistrate hearings/first appearances. Only one of the two magistrates conducts proceedings at the satellite courthouse, while all other judges and judicial officers only preside at the main courthouse in Hagåtña.



C. Prosecution

The attorney general, elected island-wide to a four-year term, is the chief legal officer of the government of Guam and the head of the Office of the Attorney General.⁶⁸ The attorney general establishes the budget for the office, administers any federal funding and programs, approves its expenditure of funds, and selects the personnel employed by it.⁶⁹ The attorney general is responsible for the prosecution of all offenses (both crimes and violations) against the laws of Guam.⁷⁰ The attorney general also, among other things, represents the government of Guam in all civil actions, is legal counsel for the mayors' council, and defends officers and employees of the government against damages for performance of official acts.⁷¹

68 48 U.S.C. § 1421g(d) (2022); 5 GUAM CODE ANN. §§ 3102, 30101(a) (2022). The attorney general must be at least 30 years old, a U.S. citizen and resident of Guam, a licensed Guam attorney for at least five years, and never convicted of a felony or suspended from the practice of law for a violation of ethical rules. 5 GUAM CODE ANN. § 30101(b) (2022). While in office, the attorney general cannot defend or assist in the defense of any criminal action. 5 GUAM CODE ANN. § 30112 (2022).

69 5 GUAM CODE ANN. §§ 30106, 30109(h), (i), (j), (k), 30121.1, 30121.2 (2022).

70 5 GUAM CODE ANN. §§ 30104, 30109(a) (2022).

71 5 GUAM CODE ANN. §§ 30102, 30108, 30109(c), 30117 (2022).

Funding for the office is primarily through an annual legislative appropriation.⁷² The Department of Administration must distribute to the office no less than 1/12 of the appropriated budget each month, which is deposited to the “Office of the Attorney General Operations Fund.”⁷³

Beginning in January 2023, the attorney general's office is divided into six divisions.⁷⁴ Each division has a car, mostly used by investigators but sometimes by attorneys. The attorney general's office has various support staff, such as victim advocates, investigators, a process officers unit (to do court runs, obtain documents, serve notices to appear, and subpoena witnesses), accountants, project coordinators (to assist in federal grants), paralegals, secretaries, legal clerks, office clerks, and receptionists.

All attorneys employed by the office are prohibited from the practice of law outside of their employment (subject to minor exceptions).⁷⁵ Attorneys who serve as prosecutors are entitled to “special pay” of an additional 15% beyond their regular wage rate,⁷⁶ so prosecuting attorneys are paid 15% more than the attorneys employed by the Public Defender Service Corporation.

In 2023, the attorney general's office experienced an attorney shortage, and as a result attorneys within the office who do not have criminal law experience are being required to prosecute. In addition, to make up for the shortage of attorneys, the attorney general's office reportedly is contracting with private attorneys to serve as part-time prosecutors in criminal cases, which appears to contravene the statutory requirement that attorney general's office attorneys may not practice law outside of the attorney general's office.⁷⁷

72 5 GUAM CODE ANN. § 30118 (2022).

73 5 GUAM CODE ANN. § 30118.1 (2022). General appropriation funds that are unspent at the end of the fiscal year, referred to as “lapsed funds,” are retained by the office.

74 The divisions are: a) administrative: responsible for office functions and budgets; b) general crimes: prosecutes adult criminal and juvenile delinquency cases; c) consumer protection: prosecutes matters of consumer fraud and handles matters of restitution at the close of a criminal case; d) victims services: supports victims by providing information about cases in which they are victims (e.g., when the defendant in the case is getting released from jail) and informing victims of their rights; e) civil: defends the government against lawsuits filed against the government and provides legal advice and representation to the government; and, f) child support: assists parents with obtaining child support payments and court orders for financial support.

Under the previous attorney general's administration, there were separate divisions for family (which included juvenile delinquency and mental health matters) and prosecution, which are now merged into the general crimes division. There were also separate divisions for civil litigation and civil solicitor, which are now merged into the civil division.

75 5 GUAM CODE ANN. § 30113 (2022).

76 5 GUAM CODE ANN. § 30104.1 (2022).

77 5 GUAM CODE ANN. § 30113 (2022).

CHAPTER III

Assessment Criteria

The Sixth Amendment Center independently and objectively evaluates indigent defense systems using U.S. Supreme Court caselaw and national standards for right to counsel services as the uniform baseline measurements for providing attorneys to indigent defendants.⁷⁸ The use of standards as a basis for evaluation of government services is familiar to most governmental officials. After all, for many decades policymakers have ordered minimum safety standards in all proposals to build a new courthouse, provide a fleet of city buses, or construct a new state highway overpass. Our Constitution demands that the threat of taking an individual's liberty is given at least the same level of concern and care.

The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within them come primarily from two U.S. Supreme Court cases that were decided on the same day and which taken together describe the tests used to determine the constitutional effectiveness of right to counsel services: *United States v. Cronin*⁷⁹ and *Strickland v. Washington*.⁸⁰

Strickland is applied after a criminal case is final to determine retrospectively whether the lawyer provided ineffective assistance of counsel, applying a two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* is applied at the outset of a criminal case and explains that, if certain factors in an indigent defense system are present (or necessary factors are absent), then a court should presume that ineffective assistance of counsel will occur.

The U.S. Supreme Court explains in *Cronin* that a deficient indigent defense can cause any lawyer – even the best lawyer – to perform in a non-adversarial way. The Court calls this a “constructive” denial of counsel.⁸¹ The overarching principle in *Cronin* is that the process must be a “fair trial” in which the defense function must put the prosecution's case to the “crucible of meaningful adversarial testing.”⁸² If a defense attorney is either incapable of challenging the state's case or barred from doing so because of a structural impediment, a constructive denial of counsel has occurred.

78 This, along with the requirements of other Sixth Amendment case law and other relevant federal and local laws.

79 466 U.S. 648 (1984).

80 466 U.S. 668 (1984).

81 *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

82 *United States v. Cronin*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

Cronic explains that the requirement of a fair fight does not necessitate one-for-one parity between the prosecution and the defense. Rather, the adversarial process requires states to ensure that both functions have the resources they need at the level their respective roles demand. As the Court notes: “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”⁸³

U.S. Department of Justice application of assessment criteria. The United States Department of Justice (DOJ) urges this application of *Cronic*.

In September 2014, the DOJ filed a Statement of Interest in a class action lawsuit, *Hurrell-Harring v. New York*,⁸⁴ brought by the New York Civil Liberties Union alleging a systemic denial of counsel in five upstate New York counties.⁸⁵ The Statement of Interest provides DOJ’s expertise to the court on what constitutes a “constructive” denial of counsel under the Sixth Amendment. The DOJ statement establishes that a court does not have to wait for a case to be disposed of and then try to unravel retrospectively whether a specific defendant’s representation met the aims of *Gideon* and its progeny. If it is shown at the outset of a case that state or local governments create structural impediments that make the appointment of counsel “superficial” to the point of “non-representation,” a court can presume prospectively that the representation is ineffective.

Structural impediments enunciated in the DOJ Statement of Interest include (but most assuredly are not limited to): “a severe lack of resources,” “unreasonably high caseloads,” “critical understaffing of public defender offices,” and/or anything else making the “traditional markers of representation” go unmet (i.e., “timely and confidential consultation with clients,” “appropriate investigations,” and adversarial representation, among others).⁸⁶

83 United States v. *Cronic*, 466 U.S. 648, 657 (1984) (quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

84 Statement of Interest of the United States, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. filed Sept. 1, 2014), available at <https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0010.pdf>.

85 In March 2015, the case settled on the eve of trial with the State of New York agreeing to pay 100% of all indigent defense costs in the counties that were named defendants. Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, No. 8866-07 (N.Y. Sup. Ct. filed Oct. 21, 2014). The state agreed to pay \$5.5 million in attorneys’ fees and costs to the NYCLU and the law firm representing the plaintiffs. The lawsuit settlement has sparked greater advocacy for the state to pick up 100% of all indigent defense costs in the remaining upstate counties.

86 A trial court denied a motion to dismiss the lawsuit, but an intermediate court granted the dismissal. In 2010, the New York Court of Appeals reinstated the lawsuit. (*Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010)). The court found that the complaint alleged claims of both outright denial of the right to counsel and constructive denial of counsel where attorneys were appointed in name only but were unavailable to assist their clients, thus “stat[ing] cognizable Sixth Amendment claims.” “These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.”

Quoting *Strickland*, the Court went on to note that “[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” The Court held that the allegations contained in the class action lawsuit “state claims falling precisely within this described category. . . . Given the simplicity and autonomy of a claim for non-representation, as opposed to one truly involving the adequacy of an attorney’s performance, there is no reason . . . why such a claim cannot or should not be brought without the context of a completed prosecution.” Further, the court observed: “the right that plaintiffs would enforce – that of a poor person accused of a crime to have counsel provided for his or her defense – is the very same right that *Gideon* has already commanded the States to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide.” *Hurrell-Harring*, 930 N.E.2d at 227.

After seven years of litigation, the lawsuit settled by agreement in October 2014 and was approved by the trial court on March 11, 2015 (Stipulation and Order of Settlement, *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. Ct. App. 2010) (No. 8866-07)). Under the settlement, the state was required to: (1) pay 100% of the cost in the five named counties; (2) ensure that all

In another Statement of Interest, filed in August 2013 in *Wilbur v. City of Mount Vernon*,⁸⁷ the DOJ comments specifically on the issue of indigent defense attorneys having sufficient time to provide adequate representation. At the heart of the *Wilbur* case was the issue of how excessive appointed caseloads of indigent defense attorneys resulted in deficient representation under the Sixth Amendment to the U.S. Constitution.⁸⁸ At the time the original complaint was filed in 2011, the cities of Mt. Vernon and Burlington, Washington, jointly contracted with two private attorneys to represent indigent defendants in their municipal courts in exchange for a flat annual fee out of which they had to provide all “investigative, paralegal, and clerical services” without any additional compensation. In other words, the more work and non-attorney support they dedicated to their clients’ cases, the less each attorney took home in pay. Each private attorney handled between 950 and 1,150 appointed cases each year, in addition to maintaining a healthy private practice on the side. With such heavy caseloads, the private attorneys were alleged to “regularly fail to return calls” or “meet with” or “interview” their clients and “rarely, if ever, investigate the charges made against” their clients. The cities’ failure to adequately “monitor and oversee” the system the attorneys operated in amounted to a “construct[ive] denial of the right to counsel” as guaranteed under *Gideon*.⁸⁹

The DOJ has twice filed amicus briefs furthering their position on constructive denial of counsel. In September 2015, the DOJ filed an amicus brief in *Kuren v. Luzerne County* in the Pennsylvania Supreme Court.⁹⁰ The *Kuren* class action lawsuit alleged that the county so poorly funded right to counsel services as to constructively deny counsel to the indigent accused. The DOJ amicus brief makes clear that a civil constructive denial of counsel claim is an “effective way for litigants to seek to effectuate the promise of *Gideon*,” and “[p]ost-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders.”⁹¹

indigent defendants are represented by counsel at their arraignment; (3) establish and implement caseload standards for all attorneys; and (4) assure the availability of adequate support services and resources.

87 Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., filed Aug. 14, 2013), available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

88 “The notes of freedom and liberty that emerged from *Gideon*’s trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right.” *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013). Thus concluded U.S. District Judge Robert Lasnik in the court’s decision granting injunctive relief against the Washington cities of Mount Vernon and Burlington for “regularly and systematically” providing deficient right to counsel services to the indigent accused. Announcing that “adversarial testing of the government’s case” was so infrequent as to be a “non-factor in the functioning of the Cities’ criminal justice system,” the court found the appointment of counsel in Mount Vernon and Burlington to be “little more than a formality,” resulting in plea bargains having almost nothing to do with the individualized nature of each case. Importantly, the court found the cities culpable because this lack of adversarial testing of the prosecution’s cases was “natural, foreseeable, and expected,” given the deficient structure of indigent defense services.

89 Pointing to the *ABA Ten Principles of a Public Defense Delivery System*, the DOJ urged the court to consider that every jurisdiction should have caseload controls, but that:

caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement of a careful analysis of a public defender’s *workload*, a concept that takes into account all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.

Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., filed Aug. 14, 2013).

90 Brief for the United States as Amicus Curiae in Support of Appellants, *Kuren v. Luzerne County*, Nos. 57 MAP 2015 (Pa., filed Sept. 10, 2015), available at <https://www.justice.gov/opa/file/769806/download>.

91 In 2016, Pennsylvania’s high court ruled that indigent defendants have the right to prospectively challenge “systemic violations

Most recently, in May 2016, DOJ filed an amicus brief in the Supreme Court of Idaho in *Tucker v. Idaho*,⁹² in which the American Civil Liberties Union of Idaho alleged systemic denial of counsel for the indigent accused. As in *Hurrell-Harring*, the DOJ states in *Tucker* that a “constructive denial of counsel violating *Gideon* occurs where the traditional markers of representation are frequently absent or significantly compromised as a result of systemic, structural limitations.”⁹³

of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender’s office,” at the outset of a case before having to suffer from denial of counsel. (*Kuren v. Luzerne County*, 146 A.3d 715, at 718.) The court said it was “obvious” that “the mere existence of a public defender’s office and the assignment of attorneys by that office” was not sufficient to satisfy the right to counsel, because “[i]t is the defense itself, not the lawyers as such, that animates *Gideon*’s mandate.” *Kuren v. Luzerne County*, 146 A.3d 715, at 735.) If the appointed lawyers cannot provide a defense, “the promise of the Sixth Amendment is broken.” The court observed that “*Strickland* does not limit claims asserting Sixth Amendment violations to the post-conviction context,” and it found that the *Strickland* test of ineffective assistance of counsel should be used by courts in evaluating post-conviction claims, but that “[a]pplying the *Strickland* test to the category of claims at bar would be illogical.” (*Kuren v. Luzerne County*, 146 A.3d 715, at 746).

92 Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *Tucker v. Idaho*, No. 43922-2016 (Idaho, filed May 11, 2016), available at <https://www.justice.gov/crt/file/851311/download>.

93 On April 28, 2017, the Supreme Court of Idaho found that indigent defendants “suffered ascertainable injuries by being actually and constructively denied counsel at critical stages of the prosecution, which they allege are the result of deficiencies in Idaho’s public defense system.” (*Tucker v. Idaho*, No. 43922 at 18.) The alleged injuries are “fairly traceable” to the state and the public defense commission, since the state “has ultimate responsibility to ensure that the public defense system passes constitutional muster.” (*Tucker v. Idaho*, No. 43922 at 9.) Importantly, the court explained that the two-pronged ineffective assistance of counsel test of *Strickland* “is inapplicable when systemic deficiencies in the provision of public defense are at issue. The issues raised in this case do not implicate *Strickland*.” (*Tucker v. Idaho*, No. 43922 at 7.) Instead, the court held the appropriate standard is that of *United States v. Cronin*: “[a] criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice.” *Tucker v. Idaho*, No. 43922, at 7).

The DOJ has also made clear that its *Cronic* analysis applies equally to juvenile delinquency proceedings, through its Statement of Interest in *N.P. v. Georgia*, filed March 13, 2015. Statement of Interest of the United States, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct. filed Mar. 13, 2015). In that case, the Southern Center for Human Rights filed the class action lawsuit alleging that children were regularly denied their right to counsel and instead treated to “assembly-line justice” in the Cordele Judicial Circuit. The lawsuit alleged that children regularly appeared in court without lawyers, and those who did receive representation were assigned lawyers who did not have time to talk with them before court. The suit claimed that the Cordele Circuit Public Defender Office was structurally unable to provide meaningful representation due to chronic underfunding and understaffing. The DOJ statement provides the trial court with a *Cronic* framework to evaluate the claims.

A month after the DOJ filed its statement of interest, on April 20, 2015, the defendants in the class action lawsuit – the Georgia Public Defender Standards Council, the Cordele Circuit Public Defender, and the four counties in the circuit – agreed to settle the matter. Consent Decree, *N.P. v. Georgia*, No. 2014-CV-241025 (Ga. Super. Ct. filed Apr. 20, 2015). The approved consent decree seeks to address a number of structural flaws. Specifically, it will: increase the size of the public defender’s office staff; require public defenders to meet with clients (a) within three days of their detention to determine indigency, and (b) within three days of assignment to their case; and require defenders to receive training, including specific training for juvenile defenders. The consent decree requires public defenders to advise juvenile defendants who seek to waive their right to counsel about what a lawyer could do for them and also requires the public defender office to comply with the terms of the Georgia Indigent Defense Act of 2003 including by creating a specialized juvenile division.

Finally, the DOJ has taken action to enforce the four main principles enumerated in *Cronic*. On April 26, 2012, the DOJ Civil Rights Division delivered a report, *Investigation of the Shelby County Juvenile Court*, to officials in Shelby County (Memphis), Tennessee, stating that the juvenile court of Memphis and Shelby County (JCMSC) “fails to ensure due process for all children appearing for delinquency proceedings” in direct violation of the U.S. Supreme Court’s ruling in *In re Gault*, 387 U.S. 1 (1967). An agreement was reached requiring the county and JCMSC to ensure, among other things, that “juvenile defenders have appropriate administrative support, reasonable workloads, and sufficient resources to provide independent, ethical, and zealous representation to children in delinquency matters” at “all stages of the juvenile delinquency case, including pre-adjudicatory investigation, litigation, dispositional advocacy, and post-dispositional advocacy,” for as long as a case is active. The agreement additionally requires “the promulgation and adoption of attorney practice standards” and the “supervision and evaluation” of defense attorneys “against such practice standards.” United States Department of Justice, Civil Rights Division, Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County (Dec. 17, 2012).

CHAPTER IV

Guam's Indigent Defense System

The structure of Guam's indigent defense system is complex. To simplify the discussion and to explain the intricacies of the current system and recommendations for future structural changes, this report uses terminology that is different than that typically used locally on Guam.

Indigent defense system terminology as used in this report

- "PDSC corporation" – the statutorily-created corporation that is required to defend indigent people who face the potential loss of liberty in criminal or delinquency proceedings, assist in federal land-taking claims, and represent poor people in civil law matters, except where the PDSC corporation attorneys have a conflict of interest.
- "PDSC board" – the statutorily-created board of trustees that is required to oversee the PDSC corporation.
- "PDSC administration" – that portion of the PDSC corporation, including staff and resources, that provides at least some administrative services (e.g., fiscal, human resources, and IT/case management systems) to all divisions of the PDSC corporation.
- "primary division" – a division of the PDSC corporation that includes only the attorneys and non-attorney staff and resources allocated to the representation of appointed clients with whom the primary division attorneys do not have a conflict of interest; this division is what most people on Guam think of as being signified whenever anyone refers to the "PDSC."
- "alternate division" – a division of the PDSC corporation, referred to locally as the "Alternate Public Defender" or the "APD," that includes only the attorneys and non-attorney staff and resources allocated to the representation of appointed clients with whom the primary division attorneys have a conflict of interest and with whom the alternate division attorneys do not have a conflict of interest.
- "PAP standing committee" – the committee created by court rules to oversee the panel attorneys.
- "panel attorneys" – the private attorneys who have agreed to be appointed to represent indigent defendants in certain types of cases when both the primary division and the alternate division have a conflict of interest; referred to locally as the "Private Attorney Panel" or the "PAP."
- "non-panel attorneys" – the private attorneys who are appointed by the courts to represent indigent defendants but who have not agreed to be appointed.

A. Structure of the indigent defense system

There are only two ways in which the government of Guam provides attorneys to represent indigent people in Guam's courts. All appointed attorneys in adult criminal cases are either governmental employees of the Public Defender Service Corporation or they are private attorneys who are appointed by the courts on a case-by-case basis.⁹⁴ While the legislature has mandated these two methods of providing counsel, the legislature left it almost entirely up to the judicial branch to decide how to carry this out.

1. Governmental employees

PDSC corporation. The Guam legislature created the Public Defender Service Corporation as a public corporation “to provide effective legal aid and assistance to those persons in Guam who are unable to afford counsel.”⁹⁵ The PDSC corporation is *required* by statute to:⁹⁶

- “defend indigent persons charged in criminal cases before the courts of Guam” when appointed by the courts;
- “assist and represent in court or otherwise persons who” have federal land takings claims and who meet certain statutory criteria;⁹⁷ and
- “render legal aid and assistance to those persons in Guam, who, . . . are in the greatest economic and social need of legal assistance and representation,” under rules established by the PDSC board of trustees – in other words, to provide representation to the poor in civil law matters both in and out of court.⁹⁸

94 12 GUAM CODE ANN. § 11104 (2022) (“It shall be the duty of the [Public Defender Service] Corporation to defend indigent persons charged in criminal cases before the courts of Guam. . . .”); 8 GUAM CODE ANN. § 45.40 (2022) (“In any criminal action in which a defendant is entitled to be represented by counsel at public expense and the court finds that because of conflict of interest or other reason that the public defender has properly refused to represent the defendant, the court shall appoint private counsel for the defendant and order that counsel receive a reasonable sum for compensation and necessary expenses to be paid by the Treasurer of the Territory.”).

95 12 GUAM CODE ANN. § 11103 (2022).

96 12 GUAM CODE ANN. §§ 11104, 11104.1, 11105, 11106, 11115 (2022).

97 This is a narrow area of civil law matters that arise out of Guam's unique place in history and its relationship to the U.S. federal government. Over decades, many Guam people were deprived of title to real property that they had owned. In some instances, the U.S. government took title to land through judicial condemnation proceedings, but in other instances people were defrauded out of their property titles in some fashion. Between 1944 and 1963, the federal district court on Guam ruled on a number of claims brought by people of Guam regarding their real estate, then in 1977 the U.S. government allowed the decisions in those cases to be reopened to ensure that people were paid fair compensation for their property. See Omnibus Territories Act of 1977, Pub. L. 95-134 § 204, 91 Stat. 1159, 1162 (Oct. 15, 1977) (current version at 48 U.S.C. § 1424c). By the time decisions about those claims were made, many of the original landowners to whom awards were due were deceased and any award would pass to their heirs and assigns. The process of claiming these settlement awards often involves title searches as well as knowledge of probate and inheritance law, and Guam has established some special procedures for addressing some of these awards. See 15 GUAM CODE ANN. §§ 4901 through 4912 (2023).

98 Until late in the 20th century, the PDSC board allowed the PDSC corporation to represent indigent people in a wide array of civil cases, including, for example, immigration, bankruptcy, divorce, probate, eviction, etc. At least as early as 1995, the PDSC board began to limit the types of civil matters that the PDSC corporation could take on because the caseloads of its attorneys had become excessive. Over the years, the PDSC board lifted and reimposed moratoriums on civil matters many times, with each moratorium applying to varying types of cases for varying amounts of time. See, e.g., Guam Public Defender Service Corporation Resolution No. PDSC 96-01, *Lifting the Temporary Limitation of Caseload in Civil and Domestic Cases of the Public Defender Service Corporation* (adopted Mar. 15, 1996); Guam Public Defender Service Corporation Resolution No. PDSC 97-01, *Limiting the Caseload of the Public Defender Service Corporation Temporarily* (adopted Mar. 31, 1997); Guam Public Defender Service Corporation Resolution No. PDSC

The PDSC corporation must accept all the criminal case types in which the courts are required to appoint counsel to represent indigent people unless it has a conflict of interest.⁹⁹ Additionally, Guam courts are allowed in their discretion to appoint counsel to represent indigent people, and the PDSC corporation must accept those appointments if it does not have a conflict of interest in: civil or criminal contempt proceedings where a person faces loss of liberty; proceedings seeking collateral relief from judgment in a criminal matter; and proceedings of any type where a person's rights under the *Organic Act* or the U.S. Constitution “may be substantially infringed without the appointment of counsel.”¹⁰⁰

PDSC board. The PDSC board of trustees oversees the PDSC corporation. The five-member board consists of:¹⁰¹

- the chief justice of the Supreme Court of Guam, who is the chairperson;
- the presiding judge of the Superior Court of Guam, who is the vice-chairperson;
- the president of the Guam Bar Association; and
- two members appointed by the chief justice¹⁰² for a three-year term (who cannot be the attorney general or member of the attorney general's staff and cannot be employees of the PDSC corporation).

The PDSC board approves the budgets for the PDSC corporation and its individual divisions.

Members of the PDSC board explain that their role is “not to interfere or micromanage” but rather to “set policy and guidelines” for the PDSC corporation to ensure it fulfills its legislative duties, including establishing standards for PDSC corporation divisions and rules and regulations regarding employees of the PDSC corporation, including their selection, retention, and compensation.¹⁰³

99-06(2), *Limiting the Caseload of the Public Defender Service Corporation Temporarily* (adopted Nov. 9, 1999); Guam Public Defender Service Corporation Resolution No. PDSC 02-03, *Moratorium Involving Civil and Domestic Cases Due to Budgetary Constraints* (adopted June 3, 2003); Guam Public Defender Service Corporation Resolution No. PDSC 13-12, *Continuation of a Moratorium Involving Civil and Domestic Cases* (adopted Aug. 28, 2012); Guam Public Defender Service Corporation Resolution No. PDSC 05-20, *Lifting a Moratorium Involving Civil and Domestic Cases* (adopted July 28, 2020).

It is difficult to know the types of civil matters that the PDSC corporation is accepting at any particular moment, because the PDSC board typically only identifies particular types of cases that it is prohibiting during a moratorium rather than ever explicitly stating the types of civil matters that it authorizes the PDSC corporation to accept. See, e.g., Guam Public Defender Service Corporation Resolution No. PDSC 13-12, *Continuation of a Moratorium Involving Civil and Domestic Cases* (adopted Aug. 28, 2012) (the PDSC Board imposes “an indefinite continuation of the previous moratorium involving non-criminal cases (with certain exceptions)” and “recogniz[ing] that certain exceptions (i.e., uncontested guardianships, burial of expired bodies, and domestic cases involving violence or the threat of violence) exist,” allows PDSC to continue to accept “[c]ases of this nature” through December 31, 2012, “whereupon this matter will be reviewed for further action”). As of February 2023, the PDSC corporation accepts at least the following types of civil matters: protective orders, guardianships over minors, civil commitments, person in need of services cases involving Child Protective Services a/k/a/ PINS cases, cases where a parent is alleged to be unable to effectively supervise their children a/k/a beyond control cases, name changes, and writs of habeas corpus.

99 GUAM SUPER. CT LOCAL R. MR 1.1.1(a).

100 GUAM SUPER. CT LOCAL R. MR 1.1.1(b).

101 12 GUAM CODE ANN. § 11107 (2022). Three members of the board constitute a quorum. 12 GUAM CODE ANN. § 11107 (2022); *By-laws, PUBLIC DEFENDER SERVICE CORPORATION*, arts. 1.06, 1.08 (as amended through Oct. 27, 2016).

102 Each chief justice is free to use their own approach in determining whom to appoint to these positions. For example, the current chief justice asked at least one former PDSC board member for recommendations before making appointments in 2023, and that same board member had “applied” to serve on the board when they were appointed by a different chief justice several years earlier.

103 4 GUAM CODE ANN. § 4105 (2022); 12 GUAM CODE ANN. § 11110 (2022).

PDSC administration. The PDSC corporation provides administrative services for all its divisions through a single administrative office, including fiscal services, human resources, and information technology/case management services.

At the head of the PDSC administration is the PDSC corporation executive director. The PDSC board is statutorily required to appoint a PDSC corporation executive director, who then serves at the pleasure of the PDSC board.¹⁰⁴ The only qualification established by Guam statutes is that the person appointed must have at least five years' experience practicing law at the time of appointment to the position.¹⁰⁵ There is no formalized or written procedure for how the PDSC board goes about appointing the executive director.¹⁰⁶ When a vacancy occurs, the members of the board at that time decide how the vacancy will be filled.¹⁰⁷

As of fiscal year 2023,¹⁰⁸ the other PDSC administration staff are the deputy director, the administrative director and one administrative assistant, one program coordinator, one human resources person, the chief fiscal officer and one account technician, and two management information systems staff.

The PDSC administration is housed at the primary division location and the employees working in the PDSC administration are designated as employees of the primary division.

PDSC corporation divisions. The PDSC corporation has three separate divisions within its corporate structure, only two of which have direct relevance to this evaluation.¹⁰⁹

104 12 GUAM CODE ANN. § 11108 (2022). Guam Public Defender Service Corporation Resolution No. PDSC 13-16, *Reappointment of Attorney Stephen P. Hattori as the Executive Director of the Public Defender Service Corporation* (adopted June 27, 2016). Guam's statutes direct that the executive director is to hold a classified position. 12 GUAM CODE ANN. § 11108 (2022). Despite this requirement, the current executive director holds an unclassified position.

105 12 GUAM CODE ANN. § 11108 (2022).

106 Between 1981 and the present, there have been five PDSC corporation executive directors, whose terms of office were: 1981 through 2003; 2003 through 2008; 2008 through 2011; 2011 through 2016; and the current executive director's term of 2016 through the present. Guam Public Defender Service Corporation Resolution No. PDSC 06-03, *Forming Search Committee for the Selection of a New Director of the Public Defender Service Corporation* (adopted Aug. 19, 2003); Guam Public Defender Service Corporation Resolution No. PDSC 08-03, *Appointment of Attorney Kathleen E. Maher as Director of the Public Defender Service Corporation* (adopted Nov. 18, 2003); Guam Judicial Council Resolution No. JC08-022, *Relative to Commending Kathleen E. Maher for Her Service as the Director of Public Defender Service Corporation* (adopted Sept. 18, 2008); Guam Public Defender Service Corporation Resolution No. PDSC 08-11, *Relative to Extending Our Profound Gratitude to Executive Director Mike Ancheta Nisperos, Jr. for His Outstanding Service to the Public Defender Service Corporation* (adopted July 26, 2011); Guam Public Defender Service Corporation Resolution No. PDSC 12-16, *Relative to Extending Our Profound Gratitude to Executive Director Eric Donn Miller for His Dedicated Service to the Public Defender Service Corporation* (adopted Feb. 25, 2016); Guam Public Defender Service Corporation Resolution No. PDSC 13-16, *Appointment of Attorney Stephen P. Hattori as the Executive Director of the Public Defender Service Corporation* (adopted Feb. 25, 2016); Guam Public Defender Service Corporation Resolution No. PDSC 13-16, *Reappointment of Attorney Stephen P. Hattori as the Executive Director of the Public Defender Service Corporation* (adopted June 27, 2016).

107 For example, when the position of executive director became vacant during 2003, the board formed a five-member search committee that was charged to announce the opening, solicit applicants, receive applications, interview applicants, and "present a list of the three most qualified applicants" to the full board within 30 days. When the position of executive director was last filled in 2016, it is believed that there were four or five applicants for the position, and members of the board at that time recall questioning applicants during interviews.

108 The fiscal year for Guam government (and all entities involved in this evaluation) is October 1 through September 30. 5 GUAM CODE ANN. § 4102.1 (2022).

109 The third division is the civil division, referred to locally as the "Civil Law Center" or "CLC." The PDSC corporation first began referring to this civil division as the Civil Law Center in early 2023. See Public Defender Service Corporation, Fiscal Year 2024 Budget Request at pp. 25, 97-106 (Apr. 26, 2023). Today, the civil division encompasses two subdivisions – The Advocacy Center (TAC), and the Elder Justice Center (EJC) – both of which pre-existed the new naming of the division, and outside of the two subdivisions it provides additional civil legal services including war claims probate, legal guardianship, and burial of expired bodies.

- *Primary division.* The primary division of the PDSC corporation must provide representation in all appointed cases unless the primary division has a conflict of interest. This division is what most people on Guam think of as being signified whenever anyone refers to the “PDSC.”

Both the PDSC corporation executive director and the PDSC corporation deputy director are part of the PDSC administration, with administrative responsibilities for all of the divisions within the PDSC corporation. They are, however, also the managing attorneys for the primary division, and both directly represent defendants to whom the primary division is appointed. For fiscal year 2023, the primary division is authorized to have 17 full-time attorneys, including the executive director and deputy director of the PDSC corporation. As of March 10, 2023, the primary division had only 13 attorneys.

As of April 2023, the primary division also had 31 non-attorney staff: six investigators; one social worker; one law clerk (a “soon-to-be attorney” who has graduated law school but is awaiting their bar exam results); one paralegal; 12 legal secretaries; four legal clerks; three general office clerks; and three process division employees.

- *Alternate division.* Guam’s statutes do not make any mention of the alternate division. This division, known locally as the “Alternate Public Defender (APD),” was created within the PDSC corporation in 2004 through the joint agreement of the judicial council and the PDSC board.¹¹⁰ Guam’s court rules require that the alternate division must be appointed in all cases in which the primary division has a conflict of interest, unless the alternate division also has a conflict of interest.¹¹¹

TAC was originally a single employee of the PDSC corporation who, beginning some time prior to 2011, provided services to victims and survivors of violence (such as obtaining protective orders and restraining orders) as part of a U.S. federal grant known as the “Stop Violence Against Women Program” that today requires some funding from the Guam government. Until early 2023, the PDSC corporation referred to this as the “domestic violence program.” See Guam Public Defender Service Corporation Resolution No. PDSC 01-11, *Advancement of Public Defender Service Corporation’s Operations Fund to the Domestic Violence Program to Cover Program Expenses Pending the Release of Federal Funds* (adopted Feb. 23, 2011); Guam Public Defender Service Corporation Resolution No. PDSC 06-12, *Funding Advance for the Domestic Violence Program* (adopted Dec. 20, 2011); Guam Public Defender Service Corporation Resolution No. PDSC 16-16, *Funding Advance for the Domestic Violence Program* (adopted Apr. 26, 2016); Guam Public Defender Service Corporation Resolution No. PDSC 12-17, *Use of Lapsed Funds for Funding of the Domestic Violence* (adopted Aug. 22, 2017).

EJC was established in 2021 as its own separate division within the PDSC corporation, having begun in 2020 as a six-month pilot project, to provide civil legal services (such as preparing wills or powers of attorney) as part of a pre-existing program operated by the Guam Department of Public Health and Social Services and funded in part by a U.S. federal grant and in part through funds from the Guam government. Guam Public Defender Service Corporation Resolution No. PDSC 06-20, *The Creation of the Elder Justice Center Pilot Program* (adopted July 28, 2020); Guam Public Defender Service Corporation Resolution No. PDSC 01-22, *Establishing the Elder Justice Center as a Permanent Division* (adopted Oct. 26, 2021); Guam Public Defender Service Corporation Resolution No. PDSC 01-23, *Establishing the Elder Justice Center as a Permanent Division* (adopted Oct. 25, 2022).

The entire civil division provides civil representation only (of only certain types to certain categories of clients). The courts do not appoint civil division attorneys to represent indigent defendants. The work of the civil division and its two subdivisions is outside the scope of this evaluation, and further information about the civil division is contained in this report only to the extent that it affects the provision of counsel by the primary division and/or the alternate division attorneys.

110 See “Agreement to Provide Attorney Services for Indigent Defendants,” between the Judicial Council and the Public Defender Service Corporation (June 15, 2004); Guam Judicial Council Resolution No. JC04-009, *Relative to Approving the Proposal of the Public Defender Service Corporation to Create the Alternate Public Defender Office* (adopted Apr. 30, 2004, and signed May 6, 2004) (attaching as Exh. A the PDSC “Proposal For The Establishment Of The Office Of The Alternate Public Defender (rev’d Apr. 20, 2004); and attaching as Exh. B proposed budget for the APD’s first year of operation); Guam Public Defender Service Corporation Resolution No. PDSC 08-04, *Establishment of the Office of the Alternate Public Defender* (adopted Apr. 21, 2004).

111 Court rules require the courts to appoint counsel in the order of: “(1) The Public Defender Service Corporation; (2) The Alternative Public Defender Office; (3) The Private Attorney Panel; and (4) Active members of the Guam Bar Association.” GUAM SUPER. CT LOCAL R. MR 1.1.3.(a); Promulgation Order 06-006-01, *Adoption of the Guam Rules of Civil Procedure and Local Rules of the Superior Court of Guam* (Guam May 3, 2007) (attaching as Exh. A the “Guam Rules of Civil Procedure” and attaching as Exh. B the “Local Rules of the

From October 2004 through September 2020, a series of annually renewed contracts between the judicial council and the PDSC corporation established the alternate division anew each year. These written contracts established all of the terms under which the alternate division operated, including but not limited to defining its duties, the terms under which it would be appointed, how it was funded, and who held responsibility for the representation it provided to indigent people.¹¹² Beginning with fiscal year 2021, the judicial council and the PDSC corporation stopped entering into contracts regarding the alternate division.¹¹³ Today, the alternate division's existence and its operation is governed by informal agreement.

The substantive work of the alternate division is overseen by the alternate division's managing attorney (and not by the PDSC corporation's executive director).¹¹⁴ The PDSC board appoints the managing attorney of the alternate division.¹¹⁵ Guam law does not establish any qualifications that a person must have to be appointed as the managing attorney of the alternate division. There is no formalized or written procedure for how the PDSC board goes about appointing the alternate division's managing attorney.¹¹⁶

Superior Court of Guam"). From October 1, 2004, through September 30, 2020, a series of annually renewed contracts between the judicial council and the PDSC corporation each contained a provision stating:

Any case that has been appointed to the PDSC by a Judge or Justice pursuant to the Rules for the Appointment of Counsel for Indigent Defendants which the PDSC reasonably believes it must reject due to a legitimate conflict of interest shall be transferred by the PDSC to the APDD upon the court's approval of the PDSC's written motion to withdraw or, under exigent circumstances, withdrawal may be sought orally while on the record if allowed by the assigned judge or an ex parte judge. APDD shall be appointed directly by the court on cases where the court is aware that PDSC has a conflict of interest at the time of appointment. In the event that a legitimate conflict of interest prohibits the APDD from accepting a case, the APDD shall immediately file a notice to the appointing Judge or Justice indicating its conflict and the case will be further assigned under the Rules for Appointment of Counsel for Indigent Defendants.

See, e.g., "Agreement Between the Judicial Council of Guam and the Public Defender Service Corporation" §1 (Oct. 1, 2019).

¹¹² See, e.g., "Agreement to Provide Attorney Services for Indigent Defendants," between the Judicial Council and the Public Defender Service Corporation (June 15, 2004); "Agreement Between the Judicial Council of Guam and the Public Defender Service Corporation" (Oct. 1, 2019).

¹¹³ There is no indication as to what prompted this change after nearly two decades, and there is no formal memorialization that this change has occurred (no statutory amendment, no judicial council resolution, no PDSC board resolution).

¹¹⁴ From October 1, 2004, through September 30, 2020, the annually renewed contracts between the judicial council and the PDSC corporation each contained provisions stating:

APDD is an independent division of the PDSC. The APDD acts independently for the purposes of case management. The Executive Director ("ED") of the Public Defender is normally in charge of both the PDSC and the APD, however the ED is not involved in the day-to-day operations of the APDD and does not initiate any promotional or disciplinary actions. Only upon specific recommendations of the APDD supervising attorney may the ED of the PDSC make changes in the salary or working conditions of persons working at the APD. Although the APDD is formally a branch of the PDSC, it operates autonomously, with a separate supervising attorney who is responsible for directing, coordinating, and evaluating the work of attorneys and staff employed by the APD;

and

the supervising attorney in charge of the APDD reports to the Board of Trustees in conjunction with the ED of PDSC and personnel decisions affecting the APDD supervising attorney are reviewed by the Board of Trustees directly. The two offices remain physically apart, the attorneys and staff have no access to each other's files and the MIS computer case management system is completely separate from the main PDSC. Employees of the main PDSC shall not have keys to each other's offices and do have separate office letterheads. The PDSC and the APDD adhere to a well-known policy and this agreement's Standard Operating Procedure (SOP) of keeping all legal activities completely separate;

See, e.g., "Agreement Between the Judicial Council of Guam and the Public Defender Service Corporation" recitals F, G (Oct. 1, 2019).

¹¹⁵ It is a commonly held, but incorrect, belief that the chief justice makes the appointment individually.

¹¹⁶ For example, when the position of the alternate division's managing attorney most recently became vacant in 2007, there was no application process and no selection process, and there does not appear to be any publicly available documentation of the

For fiscal year 2023, the alternate division was authorized to have six full-time attorneys including the managing attorney, but, as of April 2023, the alternate division had 4.5 attorneys (of the six authorized).¹¹⁷ As of the same date, the alternate division also had nine non-attorney staff: two investigators; one management officer; one administrative assistant; one computer operator; two legal secretaries; and two legal clerks.

2. Appointed private attorneys

Under Guam's statutes, if the PDSC corporation is unable to represent a defendant who is entitled to appointed counsel in a criminal case, then the court must appoint a private attorney to represent that defendant.¹¹⁸ The judicial branch has developed two separate mechanisms for appointing private attorneys: panel attorneys and non-panel attorneys.

Panel attorneys. Court rules first authorized the creation of panels of private attorneys to be appointed to represent indigent defendants in 1981.¹¹⁹ Today, "panel attorneys" are private attorneys who have agreed to be appointed to represent indigent defendants in certain types of cases, in exchange for which the attorney is paid an hourly rate but with the possible compensation capped based on the type of case.¹²⁰

Court rules intend for the panel to have five categories of case types (felony; misdemeanor; juvenile, including juvenile delinquency and person in need of services cases; guardian ad litem in juvenile cases; and appellate), with 10 to 15 private attorneys available for appointment in each category.¹²¹

appointment having been made.

¹¹⁷ The part-time attorney is retired from Guam government and, as allowed by Guam statutes, is officially considered a contractor in the alternate division so that he can continue to receive retirement benefits.

¹¹⁸ 8 GUAM CODE ANN. § 45.40 (2022) ("In any criminal action in which a defendant is entitled to be represented by counsel at public expense and the court finds that because of conflict of interest or other reason that the public defender has properly refused to represent the defendant, the court shall appoint private counsel for the defendant and order that counsel receive a reasonable sum for compensation and necessary expenses to be paid by the Treasurer of the Territory:").

¹¹⁹ In 1981, the judicial council adopted rules for "Appointment of Counsel for Indigent Defendants" in cases in the superior court. See *Superior Court of Guam – Appointment of Counsel for Indigent Defendants*, GUAM BAR JOURNAL, vol. 3 & 4, Rainy Season – 1981, at 88; GUAM SUPER. CT LOCAL R. MR 1.1 note.

After the Supreme Court of Guam was established, in 2002 the supreme court repealed those earlier rules and enacted what was known as Rule 13, which provided for a "Private Attorney Panel" to eventually be created. Promulgation Order 02-009, *Amendments to the Rules for Appointment of Counsel for Indigent Defendants* (Guam Nov. 19, 2002). Several steps were necessary before the panel could be established, and until that time "the priority of appointment shall be: Public Defender, court contracted law firms or lawyers, active members of the Guam Bar." Promulgation Order 02-009, *Amendments to the Rules for Appointment of Counsel for Indigent Defendants* (Guam Nov. 19, 2002). In 2004, the supreme court authorized the chief justice to establish an "Interim Private Attorney Panel," from which private attorneys could be appointed as needed, until such time as the "Private Attorney Panel" was created. Promulgation Order 04-003, *Amendments to the Rules for Appointment of Counsel for Indigent Defendants* (Guam Feb. 27, 2004). The first "Interim Private Attorney Panel" of attorneys was designated by the supreme court on January 18, 2007. Promulgation Order 07-001, *Interim Private Attorney Panel* (Guam Jan. 18, 2007).

On May 3, 2007, Rule 13 was recodified into the Local Rules of the Superior Court of Guam, as Miscellaneous Rule 1.1. Promulgation Order 06-006-01, *Adoption of the Guam Rules of Civil Procedure and Local Rules of the Superior Court of Guam* (Guam May 3, 2007) (attaching as Exh. B the "Local Rules of the Superior Court of Guam"). The court rules require the existence of a "Standing Committee" to receive and review applications from private attorneys who want to serve on the panel, so the standing committee had to be established before the panel could be created. See GUAM SUPER. CT LOCAL R. MR 1.1.3.(b). The first standing committee convened at some point between May 2007 and May 2017. The earliest information made available to the Sixth Amendment Center about the existence and members of the standing committee begins on May 12, 2017.

¹²⁰ GUAM SUPER. CT LOCAL R. MR 1.1.3., 1.1.5 (as amended effective Apr. 1, 2023).

¹²¹ GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2)(G).

As of September 2023, there were 14 panel attorneys.¹²² The table below shows the number of panel attorneys, in total and for each case type, for fiscal years 2019 through September of fiscal year 2023.¹²³

NUMBER OF ATTORNEYS ON PRIVATE ATTORNEY PANEL OCT. 5, 2018 THROUGH SEPT. 20, 2023							
FISCAL YEAR	DATE OF LIST	TOTAL # OF ATTYS	FELONY # ATTYS	MISDEMEANOR # ATTYS	JUVENILE # ATTYS	GAL # ATTYS	APPELLATE # ATTYS
FY19	October 5, 2018	18	8	8	8	6	8
	October 23, 2018	18	7	7	8	6	8
	November 13, 2018	17	6	6	8	6	8
	April 17, 2019	21	8	9	10	7	8
	May 9, 2019	20	8	8	9	7	8
FY20	March 12, 2020	18	8	8	8	6	7
	April 24, 2020	19	8	8	8	6	8
FY21	August 10, 2021	18	7	7	8	6	8
FY22	March 18, 2022	17	6	6	8	6	8
	March 22, 2022	16	5	5	8	6	8
	April 8, 2022	16	5	5	7	5	8
	April 11, 2022	15	4	4	6	5	8
	May 19, 2022	15	4	4	5	5	8
	August 16, 2022	14	4	4	5	5	7
FY23	October 18, 2022	13	3	4	5	5	6
	December 28, 2022	11	2	3	3	4	6
	January 31, 2023	11	2	3	4	4	6
	April 5, 2023	13	2	3	4	4	8
	April 19, 2023	14	2	4	5	4	8
	September 20, 2023	14	3	3	4	4	8

As the table shows, the number of panel attorneys accepting criminal appointments has decreased over the past four years. Because so few private attorneys are willing to serve as panel attorneys for felony and misdemeanor cases, the supreme court temporarily suspended (from November 17, 2023 through May 17, 2024) appointments to panel attorneys for felony and misdemeanor cases.¹²⁴

¹²² One of these attorneys is now deceased, two of the attorneys have become employees of the primary division, and two of these are organizations rather than individual attorneys (the Guam Legal Services Corporation and the Micronesian Legal Services Corporation). Only the now-deceased attorney accepted appointments in all types of cases; the other 13 attorneys (11 individual attorneys and 2 organizations) accept cases in only one or two categories. GUAM SUPER. CT LOCAL R. MR 1.1, app. B (as of Sept. 20, 2023).

¹²³ During this evaluation, the Sixth Amendment Center was provided the lists of the panel attorneys beginning with October 5, 2018, however it is uncertain whether all changes to the lists were provided and in particular whether there may have been additional changes between April 19 and September 20 of 2023. The most current list is usually available on the judiciary's website (see e.g., <http://www.guamcourts.org/Indigent-Defense/images/2023-10-24-PAP.pdf>), but past lists are not publicly available.

¹²⁴ Promulgation Order 06-006-25, *Amendments to Miscellaneous Rule 1.13. of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (Guam Nov. 17, 2023).

PAP standing committee. The court rules require the supreme court to “create a Standing Committee to oversee the Private Attorney Panel.”¹²⁵ The PAP standing committee is made up of five voting members, required to be attorneys who possess “experience and interest in the local criminal justice system.”¹²⁶ The PDSC corporation executive director is a permanent member, and the chief justice appoints four members to two-year terms.¹²⁷ There are also three ex officio, non-voting members: the clerks of the superior and supreme courts, and the chair of the judiciary’s “subcommittee on indigent defense.”¹²⁸

From May 2017 to the present, a total of six private attorneys and the PDSC executive director served on the PAP standing committee while also being panel attorneys who receive court appointments.¹²⁹

Non-panel attorneys. When the PDSC corporation divisions both have a conflict of interest with an indigent person’s case, and there is no panel attorney available to be appointed, the court rules provide that the court can appoint any active member of the Guam Bar Association.¹³⁰

B. Funding of the indigent defense system

All funding for providing the right to counsel of indigent people on Guam comes from one of three sources:

- legislative appropriation;
- fines/fees assessed by the Guam courts on users of the Guam judicial system (collected and deposited into the judicial branch’s “Judicial Client Services Fund”); and
- U.S. federal funds, typically provided in the form of grants.

These funds are used: to compensate all of the attorneys who are appointed to represent indigent people and also the attorneys who provide representational services authorized by statute but for which courts do not appoint counsel; to cover the costs of these attorneys’ overhead to some extent; and to pay for the case-related expenses necessary to the representation of individual appointed clients to the extent that the courts allow.

The following table shows the sources and amounts of all funds expended for Guam’s indigent representation services for fiscal years 2018 through 2022, to the extent that information was available at the time of this report.¹³¹

125 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(1)(A).

126 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(1)(A).

127 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(1)(A), (B), (C).

128 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(1).

129 See Letter[s], from Supreme Court of Guam Chief Justice to [individual attorney] (various dates of: May 12, 2017; Feb. 18, 2020; Feb. 17, 2023).

All four of the appointed voting positions on the standing committee were vacant between May 12, 2019, and February 18, 2020 (i.e., the chief justice had not made the necessary appointments).

For the appointments made May 12, 2017, and February 18, 2020, the chief justice appointed all four members to two-year terms, as required by the court rules; for the appointments made February 17, 2023, the chief justice appointed two members to one-year terms and two members to two-year terms, which differs from the requirements of the court rules. GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(1)(C).

130 GUAM SUPER. CT LOCAL R. MR 1.1.3.(a).

131 The information shown in this table is from the following sources:

SOURCES & AMOUNTS OF ALL EXPENDITURES FOR GUAM INDIGENT REPRESENTATION SERVICES, FISCAL YEARS 2018 THROUGH 2022								
Purpose Of Expenditures	PDSC Corporation, Excluding Alternate Division			Alternate Division		Appointed Private Attorneys	Case-Related Expenses	Total ¹
	Source Of Expenditures	"Other Sources"	U.S. Federal Funds	Legislative Appropriation	Judicial Client Services Fund	Judicial Client Services Fund	Judicial Client Services Fund	
Fiscal Year								
FY 2018	***	\$14,422	\$4,223,344	\$0	\$2,160,171	\$801,463	unknown	\$7,199,399
FY 2019	\$92,551	\$44,752	\$4,142,960	\$0	\$1,470,873	\$903,548	unknown	\$6,654,685
FY 2020	\$0	\$50,420	\$4,459,158	\$0	\$3,125,008	\$767,327	unknown	\$8,401,913
FY 2021	\$0	\$114,665	\$4,743,135	\$1,187,412	\$0	\$886,768	unknown	\$6,931,980
FY 2022	\$0	\$426,150	\$4,805,963	\$1,187,343	\$0	\$779,454	unknown	\$7,198,910

1 This does not include the unknown amounts expended for case-related expenses.

Legislative appropriations. The Guam legislature appropriates the largest portion of the funding for the right to counsel on Guam. Funds for the right to counsel are appropriated to the PDSC corporation and may be appropriated to the judicial branch's "Judicial Client Services Fund." Appropriated funds unspent at the end of the fiscal year, referred to as "lapsed funds," are retained by the body to which they were appropriated.¹³²

The PDSC corporation receives legislative appropriations from the general fund, and the funds are deposited into the "Public Defender Service Corporation Fund."¹³³ Beginning in fiscal year 2021 and continuing through

for the PDSC corporation:

- expenditures from other sources and from U.S. federal funds are the actual receipts as shown in the PDSC corporation's *Citizen Centric* reports. For FY 2018, the PDSC corporation reported receiving \$1,110,501 from the "Judiciary of Guam," but it is unclear whether this is duplicative of or in addition to the amount shown as having been paid from the Judicial Client Service Fund for the alternate division. Because it could be duplicative, it is excluded here out of caution.
- expenditures from legislative appropriations are the actual expenditures as shown in the budget requests to the legislature.
- for the alternate division:
 - expenditures from legislative appropriations are the actual expenditures as shown in the budget requests to the legislature.
 - expenditures from the Judicial Client Services Fund are from the Guam judiciary's expense ledgers for "Court Appointed Fees / Pro Temp" (one of five line items within the Judicial Client Services Fund). These expenditures reflect the year in which the judiciary made the payment and *not* the year in which the services were provided.
 - for appointed private attorneys:
 - expenditures from the Judicial Client Services Fund are from the Guam judiciary's expense ledgers for "Court Appointed Fees / Pro Temp" (one of five line items within the Judicial Client Services Fund). These expenditures reflect the year in which the judiciary made the payment and *not* the year in which the services were provided.
 - for case-related expenses:
 - there was no source of information available to determine the amounts paid for case-related expenses in appointed cases (i.e., for experts, investigators, and interpreters, as authorized by GUAM SUPER. CT LOCAL R. MR 1.1.4).

¹³² The PDSC corporation was first allowed to retain and carry over its lapsed funds beginning with FY 2000. 12 GUAM CODE ANN. § 11113.1 (2022). See Guam Public Defender Service Corporation Resolution No. PDSC 99-05, *Requesting Legislative Approval for the Carry-over of any Lapsed Funds from Each Fiscal Year Budget to the Following Fiscal Year* (adopted June 29, 1999) (noting: "for previous fiscal years, the Corporation was the only entity within the judiciary branch of our government that was not authorized to carry-over unexpended funds from one fiscal year to the next").

¹³³ 12 GUAM CODE ANN. § 11113 (2022).

the present, the PDSC corporation uses these funds for the PDSC administration as well as the operations of each of its three divisions.

The PDSC corporation and the alternate division each prepare their respective budget requests, and each presents separately to the PDSC board for its approval. The PDSC board has reportedly never declined a budget request. In the view of one board member, that is because 80-90% of the budget request is for personnel “so we don’t have much wiggle room.”

After the PDSC board approves the two budget requests, they are presented to the Guam legislature. The alternate division’s managing attorney is interviewed by the legislature about the budget request for the alternate division, and the PDSC corporation’s executive director is interviewed by the legislature about the PDSC corporation’s budget request for all funding requested *other than* for the alternate division. From fiscal year 2021 and continuing through the present, the PDSC corporation receives one lump sum appropriation from the legislature, but the legislature directs that a specific amount of the appropriated funds can be spent only for the alternate division.

“Judicial Client Services Fund.” Guam statutes established the “Judicial Client Services Fund” within the judicial branch of government under the stewardship of the judicial council.¹³⁴ There are two sources of deposits to this fund:¹³⁵

- any general appropriation authorized by the legislature and designated to be deposited into the fund; and
- “[a]ll increase in fees, fines or revenues . . . collected by the [c]ourts . . . over and above the fees schedule in existence as of September 12, 2002, for the filing of documents, or imposition of fines [except as laws provide for the Guam Law Library and the Criminal Injuries Compensation] . . .”

The judicial council is required to submit a report to the legislature each fiscal year containing “full statements of accounts of all money received and expended out of the account or accounts of the Judicial Client Services Fund.”¹³⁶

One of the statutorily required purposes for the fund is “Appointment of Counsel of Indigent Defendants including, but not limited to, attorney fees, investigator fees, interpreter fees, expert fees, jury fees, and any other related expenses approved by the Superior Court of Guam or the Supreme Court of Guam.”¹³⁷ Court personnel explain that, while most of the expenditures from the Judicial Client Services Fund are for indigent representation in court-appointed cases,¹³⁸ the fund also supports the salaries of judiciary staff providing interpreter services and forensic evaluations in court appointed cases.

134 7 GUAM CODE ANN. §§ 9600, 9602 (2022).

135 7 GUAM CODE ANN. §§ 9601, 9602, 9604 (2022).

136 7 GUAM CODE ANN. § 9603 (2022).

137 7 GUAM CODE ANN. §§ 9600, 9602, 9604 (2022).

138 In addition to funding costs of appointed attorneys in adult criminal cases, funds are also provided for appointed attorneys in juvenile delinquency cases, appointed attorneys for parents in juvenile PINS cases, guardian ad litem for minor children in juvenile PINS cases, and appointed attorneys in special proceedings.

The judiciary's budget request documents submitted to the legislature show five types of expenditures made from the Judicial Client Services Fund:

- “contractual services” includes interpreter services for indigent cases (and presumably the fees of authorized experts in indigent cases) and services for an access and visitation site for domestic custody cases;
 - “travel/off-island escort;”
 - “miscellaneous - CAF /pro temp”¹³⁹ pays the private attorney invoices submitted to and approved by the court (and was used to pay for the operations of the alternate division prior to fiscal year 2021);
 - “miscellaneous - interpreters” - it is unclear what interpreter services are paid for from this line item;
- and
- “miscellaneous - investigator claims.”

U.S. federal funds. A relatively small portion of the funding for the right to counsel on Guam comes from U.S. federal funds, provided to the PDSC corporation in the form of grants. The PDSC corporation holds a separate bank account for each federal grant that it receives, and the funds in each account can only be used for the purposes authorized under the grant. All federal grant funds received by the PDSC corporation today are used to operate its civil division, which is outside the scope of this evaluation.¹⁴⁰ Federal grant funds are currently *not* used to provide representation in adult criminal cases.

139 This is the judiciary's general ledger account number 25-01-21-21-G 5293. “CAF” stands for “court appointed fees.”

140 The civil division today encompasses two subdivisions - the “TAC” or The Advocacy Center; and the “EJC” or Elder Justice Center.

The TAC subdivision of the civil division originated in approximately FY 2011 as a single employee of the PDSC corporation - a “Family Violence Program Specialist” - who provided services to victims and survivors of violence (such as obtaining protective orders and restraining orders) as part of a U.S. federal grant known as the “Stop Violence Against Women Program.” The PDSC corporation was a sub-grantee under the federal grant that was administered by the office of the governor. Until early 2023, the PDSC corporation referred to this as the “domestic violence program.” See Guam Public Defender Service Corporation Resolution No. PDSC 01-11, *Advancement of Public Defender Service Corporation's Operations Fund to the Domestic Violence Program to Cover Program Expenses Pending the Release of Federal Funds* (adopted Feb. 23, 2011); Guam Public Defender Service Corporation Resolution No. PDSC 06-12, *Funding Advance for the Domestic Violence Program* (adopted Dec. 20, 2011); Guam Public Defender Service Corporation Resolution No. PDSC 16-16, *Funding Advance for the Domestic Violence Program* (adopted Apr. 26, 2016); Guam Public Defender Service Corporation Resolution No. PDSC 12-17, *Use of Lapsed Funds for Funding of the Domestic Violence* (adopted Aug. 22, 2017) (noting: for FY 2017 the PDSC corporation will have to fund 50% of the personnel cost for the Family Violence Program (FVP) Specialist).

The EJC subdivision of the civil division began in July 2020 as a six-month pilot project by the PDSC corporation to provide civil legal services (such as preparing wills or powers of attorney) as a sub-grantee under a pre-existing program operated by the Guam Department of Public Health and Social Services and funded in part by a U.S. federal grant and in part through funds from the Guam government. Today, the grant funding pays for one attorney and a project coordinator, along with a small number of supplies and equipment. Guam Public Defender Service Corporation Resolution No. PDSC 06-20, *The Creation of the Elder Justice Center Pilot Program* (adopted July 28, 2020); Guam Public Defender Service Corporation Resolution No. PDSC 01-22, *Establishing the Elder Justice Center as a Permanent Division* (adopted Oct. 26, 2021); Guam Public Defender Service Corporation Resolution No. PDSC 01-23, *Establishing the Elder Justice Center as a Permanent Division* (adopted Oct. 25, 2022).

The PDSC corporation received approximately \$1.5 million passed through by the Guam government from the American Rescue Plan Act federal funding provided as a result of the covid-19 pandemic. The PDSC corporation used this funding to pay for some overhead expenses of the civil division, including rent, a case management system, and the internet.

CHAPTER V

Process of a Criminal Case

In 2008, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”¹⁴¹ For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”¹⁴² without regard to whether a prosecutor is aware of the arrest.¹⁴³ For all defendants (both those who are arrested and those who are not), the commencement of prosecution, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,” signals the beginning of formal judicial proceedings.¹⁴⁴

In accordance with these requirements, Guam guarantees by statute that: “In any criminal action, the defendant is entitled . . . [t]o defend in person and with counsel. Every defendant accused of a crime who is financially unable to employ counsel shall be entitled to have counsel assigned at public expense to represent him at every stage of the proceedings from his initial appearance before the court through appeal, unless he waives such appointment.”¹⁴⁵

The Court in *Rothgery* carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant. “Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings . . .”¹⁴⁶ In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel. Arraignments,¹⁴⁷ plea negotiations,¹⁴⁸ and sentencing hearings,¹⁴⁹ for example, are all critical stages of a case. If an indigent defendant is actually deprived of counsel at a

141 *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

142 *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

143 *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

144 *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

145 8 GUAM CODE ANN. § 1.11 (2022). For the definition of and laws applicable to a “criminal action,” see 7 GUAM CODE ANN. §§ 1106, 1112 (2022); 8 GUAM CODE ANN. § 5.45 (2022).

146 *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

147 *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).

148 *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

149 *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

critical stage, the U.S. Supreme Court says that is unfair and so likely to prejudice the accused that “no amount of showing of want of prejudice would cure it.”¹⁵⁰

This chapter details the process of a client’s criminal case, focusing on the early stages that occur from arrest through arraignment.

A. Arrest

A person can be arrested on Guam for any felony or misdemeanor, with or without a warrant.¹⁵¹ Law enforcement officers report that most criminal cases on Guam begin with the warrantless arrest of a suspect at the scene of a crime.

When a person is arrested, with or without a warrant, the officer making the arrest must take the person before a judge “without unnecessary delay” and always within 48 hours after the arrest.¹⁵² However, there are a few circumstances in which an officer may release an arrested person instead of taking the person before a judge within 48 hours.

Release with no further proceedings – “station house release.” The officer may release the defendant if the defendant is arrested without a warrant *and*: the officer is satisfied that there are insufficient ground for requesting a criminal complaint against the person; *or* the person was arrested for “intoxication only, and no further proceedings are desirable;” *or* the person was arrested “only for being under the influence of a narcotic drug, or restricted dangerous drug” and is “delivered to a facility or hospital for treatment and no further proceedings are desirable.”¹⁵³ This is referred to on Guam as “station house release,” and according to law enforcement officers it is “sparingly used” and most often occurs when the attorney general’s office tells police to let someone go. Typically, nothing further will happen in the criminal proceeding, although the police report is sent to the attorney general’s office.

Release with written notice to appear – “booked and released.” If the defendant was arrested on a warrant and the court that issued the warrant set conditions for the defendant’s release, an officer may “accept and approve any bond or deposit required by the warrant” and release the defendant subject to the conditions of the warrant.¹⁵⁴

If the defendant was arrested without a warrant and “does not demand to be taken before a judge,” the officer may release the defendant (except for certain felony offenses).¹⁵⁵ Guam law enforcement officers historically had almost total discretion about whether to release or detain a person who was arrested

150 United States v. Cronin, 466 U.S. 648, 658-59 (1984) (quoting Davis v. Alaska, 415 U.S. 308, 318 (1974)).

151 8 GUAM CODE ANN. § 20.15 (2022).

152 8 GUAM CODE ANN. § 45.10 (2022). If an arrestee is not taken before a judge within 48 hours, the government bears the burden of demonstrating that “a bona fide emergency or an extraordinary circumstance existed.” 8 GUAM CODE ANN. § 45.10 (2022).

153 8 GUAM CODE ANN. § 20.60 (2022).

154 8 GUAM CODE ANN. § 15.50 (2022).

155 8 GUAM CODE ANN. §§ 20.60, 25.10 (2022).

without a warrant. Prior to January 2023, all people arrested without a warrant on a misdemeanor charge were released as a matter of policy, because Guam's detention facilities are overpopulated and because of pandemic-related dangers of detention. Since January 2023, law enforcement contacts the attorney general's office to determine whether to release or detain the person in all cases (both misdemeanor and felony), and the attorney general's policy has been to request cash bail or detention in all cases.

Both of these situations are referred to on Guam as “booked and released.” A defendant who is booked and released must sign a written notice to appear in court on the date and time contained in the notice, which must be at least five days after the arrest.¹⁵⁶ The date on which the person is required to appear in court will be their arraignment, sometimes referred to locally as “first appearance.”¹⁵⁷

A person who is booked and released on a misdemeanor is typically ordered to appear for their arraignment approximately 364 days after their arrest, while a person who is booked and released on a felony is typically ordered to appear just shy of three years after arrest. The reason that these arraignment dates are set so far into the future after arrest is because the attorney general has one year following commission of a misdemeanor and at least three years following commission of a felony to commence the prosecution upon which the defendant will be arraigned.¹⁵⁸

Not released – “booked and confined.” If not otherwise released (referred to locally as “booked and confined”), a person who is arrested must be taken before a judge “without unnecessary delay” and always within 48 hours after the arrest.¹⁵⁹ The date on which the person is taken before a judge is referred to locally as their “magistrate hearing.”

B. Proceedings before a judicial officer

The next step, after a person is either “booked and confined” or “booked and released,” is for the defendant to appear in court before a judicial officer. The Guam courts have assigned magistrates (rather than judges) to preside over all of these initial appearances by defendants in criminal cases.¹⁶⁰

The initial appearance by an in-custody defendant (a person who was “booked and confined”) must be held within 48 hours after the arrest,¹⁶¹ and the proceeding is referred to locally as a “magistrate hearing.” The

¹⁵⁶ 8 GUAM CODE ANN. § 25.20 (2022). A person who is released by law enforcement prior to appearing before a judge is not subject to any conditions of release nor are they required to post bail of any sort. If the person fails to appear as ordered in the notice to appear that they signed at the time of their release from custody, a bench warrant for their arrest can be issued, although stakeholders report that a bench warrant is usually not issued until after a defendant's second failure to appear.

¹⁵⁷ Occasionally, prosecution is initiated against a defendant (either by grand jury indictment or by a complaint) after they are released but before the date they are required to appear in court according to their signed notice to appear. When this occurs, the defendant is supposed to be personally served with a summons to appear in court.

¹⁵⁸ 8 GUAM CODE ANN. §§ 10.20, 10.30, 10.70 (2022).

¹⁵⁹ 8 GUAM CODE ANN. § 45.10 (2022).

¹⁶⁰ GUAM S.CT. ADMIN. R. 20-001, Exh. A, p. 7.

¹⁶¹ 8 GUAM CODE ANN. § 45.10 (2022). If an arrestee is not taken before a judge within 48 hours, the government bears the burden of demonstrating that “a bona fide emergency or an extraordinary circumstance existed.” 8 GUAM CODE ANN. § 45.10 (2022).

Magistrate hearings occur at 3:00 p.m. six days per week, Monday through Saturday, except when a holiday falls on Monday

initial appearance by an out-of-custody defendant (a person who was “booked and released”) is likely to be approximately 364 days after their arrest for a misdemeanor or just shy of three years after their arrest for a felony, and the proceeding is the arraignment which is sometimes referred to locally as a “first appearance.” During the time between an indigent defendant’s arrest and their initial appearance, they are rarely ever represented by an attorney.¹⁶²

Whether a defendant is in- or out-of-custody, this initial appearance before a judicial officer is the proceeding on Guam that triggers the attachment of the right to counsel under *Rothgery v. Gillespie County*.¹⁶³ From that moment forward, every indigent defendant has the right to be effectively represented by appointed counsel during every critical stage of their case, unless they make an informed and intelligent waiver of their right to counsel.

1. Magistrate hearing

Participants in magistrate hearings are the magistrate (and other court staff),¹⁶⁴ a probation officer, interpreters, a prosecutor,¹⁶⁵ a primary division attorney,¹⁶⁶ an alternate division attorney,¹⁶⁷ and the defendant.¹⁶⁸ Prior to 2016, indigent defense system attorneys were not present at magistrate hearings.

For each defendant who is scheduled to appear at a magistrate hearing, the attorney general’s office must file a complaint, referred to locally as the “magistrate’s complaint.” Along with the magistrate’s complaint, the attorney general’s office also files an affidavit or declaration of probable cause.

A probation officer meets with each defendant who is scheduled for court that day and attempts to interview them, although the defendant is allowed to decline the interview. There are no attorneys present during these interviews. If the defendant consents to the interview, the probation officer obtains

then the weekend session is held on Sunday rather than Saturday. The court rules allow the magistrate hearing to be conducted in person, with all of the participants physically present in the courtroom, or through the use of video technology, with various of the participants physically present at different locations. GUAM SUPER. CT LOCAL R. MR 3.1. Primarily as an outcome of the pandemic, all magistrate hearings are now conducted by video conference.

162 Any person who has received a notice to appear can walk in to the primary division office or the alternate division office to apply for an appointed attorney right away, and if they meet the eligibility requirements the division will assign an attorney to represent them right away rather than waiting until after the arraignment to do so, however this occurs only very rarely and there is no formal mechanism to advise people who have been arrested and released that this possibility exists.

163 *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

164 The two superior court magistrates alternate monthly in presiding over magistrate hearings. One of the magistrates participates by video from his chambers, while his court staff are physically present in the courtroom. The other magistrate is physically present in the courtroom along with his court staff.

165 Prior to 2023, a prosecutor was physically present in the courtroom, but beginning in 2023 the prosecutor usually participates by video from the attorney general’s office. The prosecutor is allowed to be physically present in the courtroom if they prefer to do so.

166 The primary division attorneys take turns staffing the magistrate hearing dockets, with one attorney responsible for appearing at each docket. The primary division attorney participates by video, usually from the primary division office, although they are allowed to be physically present in the courtroom if they prefer to do so.

167 The one part-time alternate division attorney handles all magistrate hearings and participates by video, usually from the alternate division office, although they are allowed to be physically present in the courtroom if they prefer to do so.

168 Defendants appear by video from the department of corrections.

the defendant’s contact information and length of residence, other information to add to a risk assessment, and the defendant’s financial information. Regardless of whether the defendant is interviewed, the probation officer gathers the defendant’s local record and NCIC record. The probation officer assembles all of this information into the “magistrate summary report,” for the use of the magistrate during the hearing.

The primary division attorney assigned to that day’s magistrate hearing docket receives, throughout the day prior to the hearings beginning, documents related to each defendant, including the magistrate’s complaint, the affidavit of probable cause, the defendant’s financial declaration if one was prepared, and the magistrate summary report compiled by the probation officer. The indigent defense system attorneys do not typically speak to the defendants prior to the hearings – there is no opportunity to do so – so whatever representation they provide to any defendant at the magistrate hearing is generally based solely on the paperwork they receive from the prosecutor and probation officer.¹⁶⁹

At the magistrate hearing, the magistrate determines whether the defendant needs an interpreter¹⁷⁰ and, for a warrantless arrest, determines whether there was probable cause for the arrest.¹⁷¹ For a person arrested without a warrant, in *County of Riverside v. McLaughlin*,¹⁷² the United States Supreme Court held that a judge must make a probable cause determination within 48 clock hours of a warrantless arrest, or the government risks being held responsible for an illegal detention. It is not necessary for there to be an actual hearing, and a judge can make this determination without ever seeing the defendant. Instead, the court can review the paperwork signed under oath by the officer.

Guam law accordingly requires that a court make a probable cause determination at or before an in-custody defendant’s magistrate hearing following a warrantless arrest, which must occur within 48 hours, but the

Proceedings by video conference

The superior court may use video conferencing technology to conduct magistrate hearings, first appearances, arraignments, bail determination hearings, pretrial conferences, criminal trial settings, and other pretrial motion hearings. The technology used must allow all participants to “see, hear and communicate with each other simultaneously” and to “see, hear and otherwise observe any physical evidence or exhibits.”

“Each location must provide parties with a means of communicating fully and confidentially with counsel.” During magistrate hearings conducted by video conferencing, “if the detainee has retained counsel who wishes to be present during the hearing, counsel has the option of appearing in either the courtroom or at DOC.”

All magistrate hearings are conducted by video conference, and at least some of the participants in arraignments appear by video conference. All other hearings are presided over by the superior court judges, and each judge makes their own decision about whether the participants must appear in person or can participate by video or phone, but there is a trend toward more in-person appearances. For trials, all participants always appear in person.

169 The indigent defense system attorneys also use the documents received prior to the magistrate hearing to determine whether their respective divisions have a conflict of interest with representing the defendant in their case.

170 GUAM S.CT. ADMIN. R. 13-004, Attach I - “Registered Court Interpreter Program for Indigent Criminal Defense”.

171 8 GUAM CODE ANN. § 45.20 (2022).

172 500 U.S. 44 (1991).

defendant does not have to be present during the probable cause determination.¹⁷³ If 48 hours pass without a detained person being brought before the court, the person will be released from custody. To determine whether there was probable cause for the warrantless arrest, the magistrate reviews the declaration or affidavit of probable cause that is filed by the prosecutor along with the complaint. If the magistrate finds that there was not probable cause for the arrest, the case is dismissed and the defendant is released from jail; if the magistrate finds that there was probable cause for the arrest, the case continues against the defendant.

Next, the magistrate:¹⁷⁴

- informs the defendant of the charge(s) against them, as contained in the complaint and any supporting affidavit (or the indictment in a felony case if one has already been filed at the time of the magistrate hearing), and ensures that the defendant has received a copy;
- informs the defendant of their right to retain counsel and to request appointment of counsel if they are unable to secure their own attorney, then if the defendant does not have an attorney, the magistrate determines whether the defendant meets the eligibility criteria and appoints counsel for any defendant found to be eligible;
- determines whether and under what conditions the defendant can be released from custody pending disposition of the charge(s) against them;
- informs the defendant that they are not required to make a statement, while any statement they make may be used against them; and
- in felony cases, informs the defendant of their rights to indictment and to preliminary examination.

The defendant is not asked to enter a plea at the magistrate hearing.¹⁷⁵ Defendants are never asked to speak with a prosecutor before an attorney is appointed, and pleas are rarely discussed and never taken at a magistrate hearing.

a. The right to counsel

Although both a primary division attorney and an alternate division attorney are present at all magistrate hearings, those attorneys have not yet been appointed to represent any defendant scheduled for a hearing. Instead, their role at the magistrate hearing is primarily: to aid the court in determining whether a defendant meets the financial eligibility guidelines to receive appointed counsel; to advise the court whether their office has a known conflict of interest in representing an eligible defendant in the case against them; and for any defendant who appears at their magistrate hearing without an attorney (without regard to the defendant's financial status), to represent that defendant *only during the magistrate hearing* for purposes of the pretrial release determination.

The magistrate informs each defendant, directly and individually, of their right to counsel and to have counsel appointed at no cost to them if they meet the financial eligibility standards. A defendant who is

¹⁷³ 8 GUAM CODE ANN. § 45.20 (2022).

¹⁷⁴ 8 GUAM CODE ANN. § 45.30 (2022).

¹⁷⁵ 8 GUAM CODE ANN. § 45.30 (2022).

accused of an offense for which incarceration is a possible punishment has three choices about the right to counsel. The defendant can: have or intend to obtain their own private attorney; request that counsel be appointed to represent them; or waive their right to counsel altogether and choose to self-represent.¹⁷⁶

Waiver of the right to counsel. A defendant has a Sixth Amendment right to waive counsel and self-represent, but a judge must determine that the defendant’s choice to waive the right to counsel and represent themselves is made knowingly, voluntarily, and intelligently.¹⁷⁷ There is no entity on Guam that is responsible for knowing how many defendants in criminal cases waive their right to counsel and whether those defendants are indigent.¹⁷⁸

Requesting appointed counsel & indigency determination. If a defendant appears in a criminal proceeding without an attorney, the court must ask if the defendant “desires the assistance of counsel.”¹⁷⁹ At magistrate hearings, the magistrates do not require an unrepresented defendant to affirmatively request appointed counsel; rather, for any defendant who appears without an attorney, the magistrate determines whether the defendant meets the financial eligibility guidelines that allow them to receive an appointed attorney.

The court rules require that a defendant who wants an appointed attorney must complete and sign under penalty of perjury a written “Financial Declaration.”¹⁸⁰ For most defendants, a probation officer has prepared this document and provided it to the magistrate in advance of the hearing. Without regard to whether a financial declaration has been completed by a defendant, the magistrate questions the defendant about their income and household size.

The court applies financial eligibility guidelines established by the PDSC board to the defendant’s financial information (whether provided in a financial declaration, or orally, or both) to determine whether the defendant has the financial ability to secure their own attorney.¹⁸¹ The financial eligibility guidelines established by the PDSC board were most recently amended on October 24, 2023, and they are:¹⁸²

PERSONS IN FAMILY/HOUSEHOLD	100%	200%	
	ANNUAL	ANNUAL	HOURLY
1	\$16,770	\$33,540	\$16.13
2	\$22,680	\$45,360	\$21.81
3	\$28,590	\$57,180	\$27.49
4	\$34,500	\$69,000	\$33.17
5	\$40,410	\$80,820	\$38.86
6	\$46,320	\$92,640	\$44.54
7	\$52,230	\$104,460	\$50.22
8	\$58,140	\$116,280	\$55.90
For families /households with more than 8 persons, add \$11,820 for each additional person.			Annual Wage / 2080 hours

176 Faretta v. California, 422 U.S. 802 (1975).

177 Faretta v. California, 422 U.S. 802 (1975).

178 Anecdotal, justice system stakeholders report that it is extremely rare for a defendant to waive their right to counsel; so rare that one judicial officer could only recall a single defendant having waived their right to counsel over the past seven years.

179 8 GUAM CODE ANN. § 45.30(b) (2022).

180 GUAM SUPER. CT LOCAL R. MR 1.1.2. and app. A.

181 GUAM SUPER. CT LOCAL R. MR 1.1.2.

182 Guam Public Defender Service Corporation Resolution No. PDSC 02-24 (adopted Oct. 24, 2023). See Board Meeting Packet, Guam Public Defender Service Corporation Board of Trustees’ Regular Scheduled Meeting (Oct. 24, 2023). The amendment to the eligibility guidelines was approved October 3, 2023, subject to receiving additional input from members of the Guam bar. Minutes, Guam Public Defender Service Corporation Board of Trustees’ Regular Scheduled Meeting (Oct. 3, 2023).

If a defendant's income, given their household size, is less than the amount shown in the chart above as 200% annual (or the equivalent hourly rate), then the court is statutorily required to appoint an attorney at no cost to the defendant upon the defendant's request.¹⁸³

Even with the fairly straight-forward criteria for eligibility, there is occasionally disagreement among judicial officers and indigent defense system attorneys about whether a defendant is eligible for an appointed attorney.¹⁸⁴ For example, some believe that the term “household” means only the defendant and their dependents who live with them, others believe that it includes the defendant and dependents whom they are legally obligated to support, and still others believe that it includes all individuals living in the same home as the defendant (for example including elderly parents, grandparents, aunts and uncles, cousins, etc.).

There is no mechanism in Guam's statutes or court rules for a defendant to appeal from a court's decision that they are not financially eligible to receive appointed counsel; however, each time that a defendant appears in a criminal proceeding without a lawyer, the presiding judicial officer must again ask if the defendant wants an appointed attorney and determine their eligibility to receive one,¹⁸⁵ and if a defendant's financial status changes at any stage of the proceedings then the court can appoint or withdraw counsel accordingly.¹⁸⁶

Appointment of counsel. For all defendants who want an appointed attorney and whom the magistrate has found financially eligible to receive one, the magistrate appoints either the primary division or the alternate division or a private attorney.¹⁸⁷ In most circumstances, the defendant leaves their magistrate hearing not knowing the identity of the specific attorney who will represent them, and most often no specific individual attorney has yet been assigned to their case. The process of assigning a specific attorney to represent a specific defendant takes time, during which the indigent defendant is not actively represented by any attorney.

183 8 GUAM CODE ANN. § 45.30(b) (2022) (“The court shall assign counsel at public expense if the defendant desires counsel and is financially unable to employ counsel.”).

184 Under the guidelines that were in effect prior to October 24, 2023, the value of household assets was also considered in determining eligibility, giving rise to frequent disagreements between magistrates and indigent defense system attorneys about whether a defendant met the criteria. Guam Public Defender Service Corporation Resolution No. PDSC 04-14, *Adoption and Approval of the Updated PDSC Eligibility Guidelines* (adopted Jan. 14, 2014). Under these earlier guidelines, the primary division attorneys would sometimes move to withdraw from representing a defendant to whom they had been appointed, on the basis of having learned that the defendant appeared to have assets (such as a savings account or an interest in real estate) that had not been considered at the time of the original eligibility determination. The newly amended guidelines appear to eliminate consideration of assets, which should reduce the grounds for denial of appointed counsel.

185 8 GUAM CODE ANN. § 45.30(b) (2022).

186 GUAM SUPER. CT LOCAL R. MR 1.1.2.(c).

187 Prior to November 17, 2023, the courts were required to appoint counsel in the following order: “(1) The Public Defender Service Corporation; (2) The Alternate Public Defender Office; (3) The Private Attorney Panel; and (4) Active members of the Guam Bar Association.” GUAM SUPER. CT LOCAL R. MR 1.1.3(a) (prior to amendment of Nov. 17, 2023). Because so few attorneys have been willing to serve as panel attorneys for felony and misdemeanor cases, on November 17, 2023, the supreme court temporarily suspended (from November 17, 2023, through May 17, 2024) the making of appointments to panel attorneys for felony and misdemeanor cases. Promulgation Order 06-006-25, *Amendments to Miscellaneous Rule 1.1.3 of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (Guam Nov. 17, 2023).

Each and every defendant has a right to effective representation that is free from conflicts of interest.¹⁸⁸ As the United States Supreme Court stated in *Glasser v. United States*: “‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”¹⁸⁹

As recognized by the *Guam Rules of Professional Conduct*, a conflict of interest can arise in basically three ways:¹⁹⁰

- when a lawyer represents, at the same time, two clients who have conflicting interests;
- when a lawyer’s current client has interests that conflict with those of the lawyer’s former client or a third person with whom the lawyer has a relationship; and
- when the lawyer’s own personal interests conflict with those of the lawyer’s client.

Generally, unless a client gives “informed consent, confirmed in writing,” a lawyer cannot represent a client if the lawyer has a conflict of interest.¹⁹¹ Under the *Guam Rules of Professional Conduct*, in most instances, if one lawyer in a law firm is disqualified from representing a client due to a conflict of interest, then all of the lawyers in that same law firm are also disqualified from representing that client.¹⁹²

When the magistrate is aware at the time of a magistrate hearing that two or more eligible defendants are being prosecuted for a single course of conduct (co-defendants), then the magistrate appoints the primary division to represent the first co-defendant, the alternate division to represent the second co-defendant, and different private attorneys to represent each additional co-defendant. While conflicts of interest in a multi-defendant case are fairly easily seen at the time of a defendant’s magistrate hearing, in a single-defendant case an attorney may not realize that other types of conflicts of interest exist until they learn more about the facts of the case through discovery and investigation.

Primary division. The primary division is required by statute to accept every appointment made by a judicial officer in every case of a financially eligible defendant unless the primary division has a conflict of interest.¹⁹³

In 2014, the PDSC board adopted standard operating procedures to guide all of the divisions of the PDSC corporation in determining when they must decline an appointed case because of a conflict of interest. The PDSC board’s conflict of interest policy prohibits a division of the PDSC corporation from representing an appointed defendant when: (1) the defendant newly appointed to the division is a victim or witness in another case currently being handled by the same division; (2) a victim, witness, or co-defendant in the case of the defendant newly appointed to the division is currently a client of the appointed division in another

188 See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

189 *Glasser v. United States*, 315 U.S. 60, 70 (1942).

190 GUAM R. PROF’L CONDUCT r. 1.7, 1.9.

191 GUAM R. PROF’L CONDUCT r. 1.7, 1.9.

192 GUAM R. PROF’L CONDUCT r. 1.10.

193 12 GUAM CODE ANN. § 11104 (2022).

case; or (3) an employee of the appointed division is a victim or witness in the case of the defendant newly appointed to the division.¹⁹⁴

If neither the magistrate nor the participating indigent defense system attorneys are aware of any conflict of interest with the primary division, then the magistrate will appoint the primary division (but the defendant does not know which primary division attorney will defend them and no specific attorney has been assigned at that point). If the primary division is aware at the time of the magistrate hearing that it has a conflict of interest, then the magistrate will appoint the alternate division or a private attorney.

Alternate division. In any case in which the primary division has a conflict of interest, the alternate division accepts the appointment unless the alternate division has a conflict of interest. If neither the magistrate nor the participating indigent defense system attorneys are aware of any conflict of interest with the alternate division, then the magistrate will appoint the alternate division (but the defendant does not know which alternate division attorney will defend them and no specific attorney has been assigned at that point, though it will definitely not be the alternate division attorney who is participating in the defendant's magistrate hearing). If the alternate division is aware at the time of the magistrate hearing that it has a conflict of interest, then the magistrate will appoint a private attorney.

Appointed private attorneys. Prior to November 2023, in any case in which both the primary division and the alternate division had a conflict of interest, the magistrate would rotate alphabetically through the panel attorneys on the appropriate list (felony or misdemeanor) and each of those attorneys was required to accept the appointment unless they had a conflict of interest (or was otherwise unavailable "due to scheduling conflicts, workload, or other good cause"), in which circumstance the magistrate would appoint the next panel attorney unless and until all panel attorneys were determined to be unavailable.¹⁹⁵

If no panel attorney is available (and from November 2023 through at least May 2024 in all criminal cases without regard to whether a panel attorney is available), the magistrate appoints, rotating alphabetically, the next non-panel attorney "from a membership list as approved by the Supreme Court."¹⁹⁶ All of the court clerks have access to the spreadsheet of non-panel attorneys who are eligible to be involuntarily appointed. Whenever a judicial officer makes a new appointment or allows an appointed attorney to withdraw, the chamber clerk for that judicial officer emails the clerk of court and the chief deputy clerk, and the spreadsheet is immediately updated. Some judicial officers say there is an unwritten internal agreement among the judicial officers of the superior court to only appoint non-panel attorneys in felony cases who have been licensed to practice law for more than seven years, while others say there is no such agreement.

194 Guam Public Defender Service Corporation Resolution No. PDSC 03-14, *Approval of the Public Defender Service Corporation's Standard Operating Procedures (SOP) for Conflicts of Interest* (adopted Jan. 4, 2014) (attaching as Attachment "A" the Standard Operating Procedures for "Conflicts of Interest (Withdrawals from Cases due to Conflicts)").

195 GUAM SUPER. CT LOCAL R. MR 1.1.3(b) (4)(A). Despite the plain language of the court rule, many indigent defense system attorneys believe that panel attorneys cannot refuse or "pass" cases on the basis of a scheduling conflict or an excessive number of cases.

196 GUAM SUPER. CT LOCAL R. MR 1.1.3(a) (as amended Nov. 17, 2023); Promulgation Order 06-006-25, *Amendments to Miscellaneous Rule 1.1.3. of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (Guam Nov. 17, 2023).

When the magistrate appoints a private attorney (either a panel attorney or a non-panel attorney), the magistrate states the name of the attorney who is being appointed, but the defendant is not provided contact information for the appointed attorney, and the attorney is not at that point aware that the appointment has been made¹⁹⁷ nor have they had an opportunity to determine whether they have a conflict of interest in accepting the case.

b. Pre-trial release or detention

Next, the magistrate determines whether and under what circumstances the defendant can be released from custody pending disposition of the charge(s) against them.¹⁹⁸ The magistrate first asks the prosecution for their bail request (whether they are seeking to confine or release the defendant), then asks probation about the defendant's prior history and risk assessment, and finally asks the defense attorney for their request and argument. Since January 2023, the attorney general's office reportedly seeks continued pretrial confinement for all in-custody defendants, without regard to the details of the case or the defendant.

If a private attorney (panel or non-panel) was appointed to represent the defendant, that defendant's pretrial release determination will most likely be continued to the next scheduled magistrate hearing docket, so that the appointed private attorney can be present to represent the defendant. Some justice system stakeholders question the wisdom of requiring a defendant to sit in jail for additional time awaiting their attorney, rather than allowing the judicial officer to rule on the defendant's release.¹⁹⁹

If the primary division or the alternate division was appointed to represent the defendant, then the attorney from the relevant division who is present for that day's magistrate hearing docket will represent the defendant *solely for the pre-trial release decision*.²⁰⁰ The indigent defense system attorneys typically ask for a personal release bond for every defendant.²⁰¹ As discussed above, the indigent defense system attorneys do not usually speak to the defendants prior to the magistrate hearing (nor do they have confidential conversations with defendants during the hearing). This means that the advocacy they can provide about pretrial release for any defendant is almost entirely limited to making arguments based on the information contained in the charging documents prepared by the prosecutor and the magistrate's summary report prepared by the probation officer. Some justice system stakeholders question whether any attorney can provide meaningful representation under these circumstances.

197 There are only rarely any private attorneys present (physically or virtually) during magistrate hearings.

198 8 GUAM CODE ANN. § 45.30 (2022).

199 The U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when "formal judicial proceedings have begun," but that this is distinct from whether that proceeding is a "critical stage" at which counsel must be present as a participant. *Rothgery v. Gillespie County*, 554 U.S. 191, 211-12 (2008). The U.S. Supreme Court has not addressed whether the decision to release or detain a defendant pre-trial is a critical stage in a criminal case. This is a developing area of the law.

200 The indigent defense system attorneys who are present for the day's magistrate hearing docket also represent, *solely during the magistrate hearing and for the limited purpose of the pre-trial release determination*, every non-indigent defendant who appears at their magistrate hearing without an attorney. This type of appearance by the indigent defense system attorneys is referred to locally as a "limited entry."

201 A personal release bond means that the defendant is released from confinement without posting any cash bail, but if the defendant fails to appear in court as ordered then they will be required to pay a set amount of money.

c. Next steps

At the conclusion of the magistrate hearing, the case is allotted to a courtroom (and by that allotment, to a specific superior court trial judge).²⁰²

The next in-court proceeding following the magistrate hearing is either preliminary examination (only available for a felony pre-indictment) or arraignment, neither of which can occur unless an attorney represents the eligible defendant and actively participates in the proceedings.

2. Preliminary examination (felonies only, pre-indictment)

At the magistrate hearing for a felony defendant, the magistrate schedules a preliminary examination, unless the defendant waives the right to have one.²⁰³ The preliminary examination is statutorily required to be held within 10 days of the magistrate hearing for a defendant who remains in custody and within 20 days for a defendant who was released from custody.²⁰⁴

The purpose of the preliminary hearing is for the magistrate to determine whether there is probable cause to believe that the alleged offense has been committed and that it was committed by the defendant, and both the prosecutor and the defense attorney can examine witnesses and introduce evidence at the hearing.²⁰⁵ If the magistrate finds no probable cause, the defendant is discharged (although the prosecutor may still seek an indictment from a grand jury); if the magistrate finds probable cause, the magistrate enters an order holding the defendant to answer to the charge (which will happen at arraignment) and the prosecutor is required to file an information in the superior court within 15 days.²⁰⁶

However, according to justice system stakeholders, as a practical matter, preliminary examinations never take place on Guam. This is because the preliminary examination will not be held if an indictment has been returned,²⁰⁷ and in practice the prosecutors *always* obtain an indictment before a preliminary examination can be held. Not a single primary division attorney could recall a preliminary examination ever having occurred. When an indictment is returned, a marshal serves the defendant with a copy of the indictment and a summons to appear in court for arraignment.

3. Arraignment

Arraignment is a critical stage in a criminal case; during which the indigent defendant has the right to counsel and for their appointed attorney to be present as an active participant in the proceedings.²⁰⁸ Plea

202 See GUAM S.CT. ADMIN. R. 23-002, Exh. A - "Amended Trial Court Case Assignment Procedures."

203 8 GUAM CODE ANN. §§ 1.17, 45.50 (2022). A defendant can waive the preliminary examination and be held over to court for arraignment on an information. 8 GUAM CODE ANN. § 45.50 (2022).

204 8 GUAM CODE ANN. § 45.50 (2022).

205 8 GUAM CODE ANN. §§ 45.60, 45.80 (2022).

206 8 GUAM CODE ANN. § 45.80 (2022).

207 8 GUAM CODE ANN. § 45.50 (2022).

208 Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961).

negotiations and the entry of a guilty plea (which can occur at arraignment) are also critical stages of a criminal case, during which the defendant has the right to “effective assistance of competent counsel.”²⁰⁹

An arraignment cannot take place until prosecution is commenced, for a misdemeanor by the filing of a complaint, and for a felony by the filing of an information or an indictment; and once prosecution is commenced then the arraignment is to be held “promptly.”²¹⁰

- For a defendant who was “booked and released” at the time of their arrest (and also for a defendant who received a summons or citation instead of being arrested), this is the first time they appear in court before a judicial officer; and for most of those defendants who are indigent, it is the time when they request²¹¹ and first receive an appointed attorney. The arraignment on a misdemeanor typically occurs approximately 364 days after the person was arrested, while the arraignment on a felony typically occurs just shy of three years after arrest.²¹² At the conclusion of the arraignment, the case is allotted to a courtroom (and by that allotment, to a specific superior court trial judge) for all further proceedings.²¹³
- For a defendant who was “booked and confined” at the time of their arrest and therefore had a magistrate hearing, this is at least their second appearance before a judicial officer; and for most of those defendants who are indigent, they received an appointed attorney as part of their magistrate hearing. The arraignment on a misdemeanor typically occurs approximately 20 days after the magistrate hearing (because that was when the attorney general filed the complaint), and on a felony typically occurs 30 to 40 days after the magistrate hearing (because either an indictment was returned or the defendant waived their right to an indictment within that time).

An arraignment on Guam is almost an exact replica of the proceedings that occur at a magistrate hearing, with all of the same participants appearing in the same ways²¹⁴ (including being presided over by one of the two magistrates, rather than a judge), but there are a few important differences including choices that the defendant must make.

At the arraignment, the court reads the charging instrument to the defendant and calls on them to plead: not guilty; not guilty by reason of mental illness, disease, or defect; guilty; or nolo contendere with the consent of the court.²¹⁵ The defendant is required to enter a plea to the charge. Most defendants plead not guilty at arraignment, but magistrates have the authority to take guilty pleas and impose sentences in misdemeanor cases.

209 *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

210 8 GUAM CODE ANN. § 60.10 (2022).

211 Any person who has received a notice to appear can walk in to the primary division office or the alternate division office to apply for an appointed attorney right away, and if they meet the eligibility requirements the division will assign an attorney to represent them right away rather than waiting until after the arraignment to do so, however this occurs only very rarely and there is no formal mechanism to advise people who have been arrested and released that this possibility exists.

212 For both misdemeanors and felonies, the arraignment for a “booked and released” defendant can occur sooner if the prosecutor files the charging document and has the defendant served with a summons to appear.

213 See GUAM S.Ct. ADMIN. R. 23-002, Exh. A - “Amended Trial Court Case Assignment Procedures.”

214 In-custody defendants appear by video from the department of corrections. Out-of-custody defendants are usually required to be physically present in the courtroom, but one of the magistrates occasionally allows a defendant to appear by video from another location if the defendant has a conflict or is unable to get transportation to the courthouse.

215 8 GUAM CODE ANN. §§ 60.10, 60.40 (2022).

The defendant must either assert or waive their right to a speedy trial. If the defendant asserts their speedy trial rights, they are guaranteed a trial within 45 days if they are incarcerated or 60 days if they are not incarcerated, but the trial could happen extremely soon (for example, as early as five days later), leaving little time for investigation or preparation. If the defendant waives their right to a speedy trial, the trial will usually be set for somewhere between 90 days and one year out, depending on the calendar of the particular judge to whom the case is allotted.

The defendant declares whether they desire a bench trial or a jury trial by a specified number of jurors. For a misdemeanor, the defendant can request a jury trial (of six jurors), and absent a request will have a bench trial. For a felony, the defendant can request a jury trial of 12 jurors, and absent a request will have a jury trial of six jurors. If the defendant's attorney fails to request a jury trial at arraignment, in most instances the judiciary will grant the attorney's request made at a later date in the proceedings.

These decisions, about how to plead, whether to assert speedy trial rights, and the type of trial desired, are decisions that must be made by the defendant and cannot be made by the attorney alone.²¹⁶ While the attorney must decide in each case "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence,"²¹⁷ it is the defendant's decision about "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."²¹⁸ As one judge explains, if a defense attorney comes to arraignment and tells the magistrate they have not yet met with their client, the magistrate has to continue the arraignment so that attorney-client communications can occur.

Despite these requirements, most indigent defendants are represented *during their arraignment* by the primary division attorney or the alternate division attorney who happens to be scheduled to handle that day's arraignment docket,²¹⁹ rather than by the specific attorney who will actually be responsible for defending them.

- For indigent defendants who had a magistrate hearing: If a specific private attorney was appointed during the magistrate hearing to represent the defendant, then that appointed private attorney will most likely represent the defendant during the arraignment unless they turned out to be unavailable and a different private attorney needs to be appointed. If the primary division or the alternate division was appointed during the magistrate hearing to represent the defendant, then the specific division attorney who is responsible for defending the client in their case will talk to them in advance of the arraignment, but the defendant will be represented *during the arraignment only* by the relevant division attorney who happens to be handling arraignments on that day and is most often simply relying on notes contained in the appointed defendant's file.

216 See GUAM R. PROF'L CONDUCT r. 1.2(a).

217 *Gonzalez v. United States*, 553 U.S. 242, 248 (2008).

218 *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, No. 16-8255 at 6 (2018); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). See GUAM R. PROF'L CONDUCT r. 1.2(a).

219 The primary division rotates division attorneys to handle arraignment dockets, while the alternate division has one part-time attorney who handles all arraignments.

- For indigent defendants who did not have a magistrate hearing and are appearing in court before a judicial officer for the first time, they will typically be represented *during the arraignment only* by the relevant division attorney who happens to be handling arraignments on that day. For all of these indigent defendants who want an appointed attorney and whom the magistrate finds financially eligible to receive one, the magistrate appoints either the primary division or the alternate division or a private attorney.²²⁰ In most circumstances, the defendant leaves their arraignment not knowing the identity of the specific attorney who will represent them, and most often no specific individual attorney has yet been assigned to their case. The process of assigning a specific attorney to represent a specific defendant takes time, during which the indigent defendant is not actively represented by any attorney.

Nonetheless, the arraignment commences the formal prosecution of a defendant and sets in motion deadlines for the defendant's case. At a later date (but within 90 days) and without input from the attorneys in the case, the judge presiding over the case enters a scheduling order, setting dates for motion hearings, a pretrial conference (typically set for one week before the trial date), and trial.²²¹

220 Prior to November 17, 2023, the courts were required to appoint counsel in the following order: "(1) The Public Defender Service Corporation; (2) The Alternate Public Defender Office; (3) The Private Attorney Panel; and (4) Active members of the Guam Bar Association." GUAM SUPER. CT LOCAL R. MR 1.1.3(a) (prior to amendment of Nov. 17, 2023). Because so few attorneys have been willing to serve as panel attorneys for felony and misdemeanor cases, on November 17, 2023, the supreme court temporarily suspended (from November 17, 2023, through May 17, 2024) the making of appointments to panel attorneys for felony and misdemeanor cases. Promulgation Order 06-006-25, *Amendments to Miscellaneous Rule 1.1.3 of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (Guam Nov. 17, 2023).

221 GUAM SUPER. CT LOCAL R. CR 1.1.

CHAPTER VI

Providing Counsel at Critical Stages

The first factor that triggers a presumption of ineffectiveness is the absence of counsel for the accused, or the “actual” denial of counsel. “Most obvious[ly],” as the U.S. Supreme Court said in *Cronic*, each governing jurisdiction is responsible for ensuring that every indigent defendant who does not choose to self-represent and who faces possible loss of liberty in a criminal case is actually represented by an attorney at every critical stage of the proceeding.²²²

Because all crimes on Guam are either a felony, misdemeanor, or petty misdemeanor, and they all carry possible imprisonment as a sentence upon conviction,²²³ every person charged with a crime who cannot afford to hire their own attorney is entitled under the Sixth and Fourteenth Amendments to have an attorney provided at public expense to represent them.²²⁴

FINDING 1: Guam does not collect, analyze, or report on actual denial of counsel statistics.

No Guam entity is responsible for knowing how many defendants in criminal cases request appointed counsel and then are:

- found to be ineligible for appointed counsel and represent themselves (pro se defendants); or
- found to be ineligible for appointed counsel and obtain their own representation.²²⁵

Without knowing the number of pro se defendants it is impossible to accurately understand the potential effects of possible future criminal justice policy decisions. For example, with the October 2023 change to the

222 United States v. *Cronic*, 466 U.S. 648, 659 (1984). See also *In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

223 9 GUAM CODE ANN. § 1.18(a) (2022). See 8 GUAM CODE ANN. § 5.50 (2022).

224 *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); 725 ILL. COMP. STAT. § 5/113-3(b) (2018) (counsel “shall” be appointed “if the court determines that the defendant is indigent and desires counsel” in every case that carries a penalty other than “fine only”).

225 As explained later in this report, there are various requirements in Guam law for the courts and/or the PDSC corporation to track and report on the cases in which counsel is appointed. This finding focuses on those cases in which counsel is not appointed.

The judiciary’s electronic case management system shows, on a case-by-case basis, whether each defendant was represented by counsel, but the data is not aggregated and reported on so that it can be analyzed. For those defendants who are pro se in the judiciary’s data, there is no mechanism to readily determine whether they voluntarily chose to represent themselves or did so because they were found ineligible for an appointed attorney.

eligibility guidelines, a larger number of defendants are likely projected to receive appointed counsel but how that affects the indigent defense systems is unknown.

FINDING 2: Constructive denial of counsel can occur because a specific unconflicted attorney may not be assigned to represent a defendant for weeks, or sometimes months, after the defendant's arraignment.

The Guam government is responsible for ensuring that, where an attorney is appointed to represent an indigent defendant, that appointed attorney is able to provide effective representation.²²⁶ In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent defense systems can make any lawyer – even the best lawyer – perform in a non-adversarial way that results in a “constructive” denial of counsel.²²⁷

Whether a defendant is in- or out-of-custody, their initial appearance before a judicial officer is the proceeding on Guam that triggers the attachment of the right to counsel under *Rothgery v. Gillespie County*.²²⁸ From that moment forward, every indigent defendant has the right to be effectively represented by appointed counsel during every critical stage of their case, unless they make an informed and intelligent waiver of their right to counsel. The right to counsel guaranteed to an indigent defendant is the right to be represented by an attorney who does not have a conflict of interest.²²⁹

An indigent defendant who was “booked and confined” at the time of their arrest receives an appointed attorney at their magistrate hearing, held within 48 hours of their arrest. An indigent defendant who was “booked and released” at the time of their arrest receives an appointed attorney at their arraignment, which typically occurs approximately 364 days after the person was arrested on a misdemeanor and just shy of three years after the person was arrested on a felony. Regardless of whether counsel is appointed at a magistrate hearing or at an arraignment, the primary division will be appointed unless they or the magistrate are aware at the time of the proceeding that the primary division has a conflict of interest in representing the particular defendant in their particular case.

226 See, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

227 *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (citing *United States v. Cronin*, 466 U.S. 648 (1984): “The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”).

228 *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

229 See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

When the primary division is appointed to represent an indigent defendant, within a day or two the primary division's leadership assigns a specific primary division attorney to defend the appointed client.²³⁰ The specific primary division attorney who is assigned is responsible for determining whether the primary division must withdraw on the basis of a conflict of interest. In some instances, a conflict of interest does not become apparent until discovery is received from the prosecutor and/or until the defense can conduct an independent investigation. In other instances, though, potential conflicts of interest are apparent almost from the moment of appointment. Whenever conflicts of interest become known, the primary division attorneys sometimes ignore these conflicts in the hope of resolving the case without withdrawing.

This practice places the needs of the "system" (attempting to minimize the demands on the alternate division and the appointed private attorneys) over the ethical and constitutional obligations due to appointed clients (the right to conflict-free effective assistance of counsel). Indigent defendants in these circumstances are denied conflict-free effective assistance of counsel at the critical stages of at least their arraignment and during the pre-trial period between arraignment and the beginning of trial, and in some instances during plea negotiations and at the entry of a guilty plea and also at sentencing.²³¹

If the primary division does eventually declare a conflict, then it takes additional time for them to formally withdraw and for the system to sort out who the next appointed lawyer will be and for that attorney to then start actually working. During this time from arrest to appointment of the unconflicted attorney who will actually defend against the charges, defendants' cases can go uninvestigated, exculpatory evidence may be lost, witnesses become unreachable, and crime scenes deteriorate.

230 Primary division attorneys are assigned to a specific courtroom where they represent a portion of the appointed clients whose cases are allotted to that courtroom (and by that allotment, to a specific superior court trial judge). The only exception is that an attorney newly hired into the primary division is not assigned to a courtroom until they have been employed in the primary division for a few months. During their first few months of employment in the primary division, a newly hired attorney is assigned only to the rotation for magistrate hearings and arraignments.

231 See,

- arraignments. *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961).
- during the pre-trial period between arraignment and the beginning of trial. *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *Powell v. Alabama*, 387 U.S. 45, 57 (1932).
- during plea negotiations and at the entry of a guilty plea. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).
- during sentencing. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Glover v. United States*, 531 U.S. 198, 203-04 (2001); *Mempa v. Rhay*, 389 U.S. 128, 134, 137 (1967).

CHAPTER VII

Providing Qualified, Trained, and Supervised Attorneys

In *United States v. Cronic*, the U.S. Supreme Court points to the facts in the case of *Powell v. Alabama*²³² as demonstrating the constructive denial of counsel.²³³ In the *Powell* case, the judge overseeing the defendants' trial appointed as defense counsel a real estate lawyer who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.²³⁴ The *Powell* Court concluded that defendants require the "guiding hand" of counsel,²³⁵ that is, the attorneys a government provides to represent indigent people must be qualified and trained to help those people advocate for their stated legal interests.

Although attorneys graduate from law school with a strong understanding of the principles of law and legal theory and generally know how to think like a lawyer, no law school graduate enters the legal profession automatically knowing how to be a criminal defense lawyer.²³⁶ Expertise and skill must be developed. Just as one would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. Attorneys must know what legal tasks need to be considered in each and every case they handle and must know how to perform all of those tasks.

To ensure that attorneys continue to be competent from year to year to represent indigent defendants in the types of cases they are assigned, national standards require the indigent defense system to provide attorneys with access to a "systematic and comprehensive" training program,²³⁷ at which attorney

232 *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932).

233 *United States v. Cronic*, 466 U.S. 648, 659-60 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.")

234 A retired local Alabama attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

235 *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.")

236 Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) ("[B]ecause legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.")

237 NATIONAL ADVISORY COMM'N ON CRIM. JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), std. 13.16 (1973). See also AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(b) (4th ed. 2017).

attendance is compulsory.²³⁸ Training must be tailored to the types and levels of cases for which the attorney is appointed.²³⁹ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. Ongoing training, therefore, is an active part of the job of being an indigent defense system attorney.

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competency to handle cases over time, and indigent people do not get to choose which attorney is assigned to represent them. National standards require that all indigent defense system attorneys must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent client.²⁴⁰ Implicit within supervision is that the supervisor has authority to ensure an attorney is no longer assigned if they are no longer competent.

For all of these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific type of case to which they are appointed.²⁴¹ As national standards explain, an attorney’s ability to provide effective representation in a criminal case depends on their familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”²⁴² The American Bar Association observed over 30 years ago that “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”²⁴³

FINDING 3: Guam does not have adequate attorney qualification, training, and supervision standards.

PDSC corporation. The PDSC board is responsible for establishing rules and regulations regarding employees of the PDSC corporation, including their selection, retention, and compensation.²⁴⁴ The PDSC corporation’s executive director has the final statutory authority to hire attorneys for all of the divisions within the PDSC corporation and is also responsible for training and supervising them, all in compliance with any rules, regulations, or policies established by the PDSC board.²⁴⁵ In practice, all of these responsibilities are carried out on a day-to-day basis by the PDSC corporation’s deputy director for the primary division and by the alternate division’s managing attorney for the alternate division.²⁴⁶

238 AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 9 & cmt. (2002).

239 AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(c) (4th ed. 2017).

240 See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 10 (2002).

241 See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 6 & cmt. (2002).

242 NATIONAL LEGAL AID & DEF. ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 1.2(a) (1995).

243 AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992).

244 4 GUAM CODE ANN. § 4105 (2022); 12 GUAM CODE ANN. § 11110 (2022). See 4 GUAM CODE ANN. § 6302 (2022). See, e.g., Guam Public Defender Service Corporation Resolution No. PDSC 06-11, *The Gubetnamenton Guahan Competitive Wage Act of 2011 (Public Law 30-196)* (adopted June 7, 2011) (attaching as Exh. A the “Hay Pay Scale” showing intended Oct. 1, 2010, compensation levels for all PDSC employees).

245 12 GUAM CODE ANN. § 11109 (2022).

246 See, e.g., “Agreement Between the Judicial Council of Guam and the Public Defender Service Corporation” recitals F, G (October 1, 2019).

Attorney qualification standards. The only required qualification for a person to be hired as an attorney at the PDSC corporation is that they be an attorney either licensed by Guam (an “active” member of the Guam Bar Association) or admitted to and in good standing in “the highest court of any state, district, commonwealth, territory²⁴⁷ or possession of the United States” (a “temporary active” member of the Guam Bar Association).

The lack of additional mandatory qualifications does not mean PDSC corporation attorneys are unqualified. Indeed, the PDSC corporation actively recruits off-island by distributing job listings²⁴⁸ to the National Association for Public Defense and creates interview panels²⁴⁹ to try to make good hires. The lack of required qualifications means that the quality of attorneys hired may be dependent on the personalities of the people making the hires.

New attorney training standards. While some attorneys have years of experience practicing law when they are hired within the PDSC corporation, other attorneys come to the PDSC corporation straight out of law school with no practice experience at all. There is no formal or standardized training program for attorneys newly hired at either the primary division or the alternate division. Instead, less experienced attorneys within each division are encouraged to watch more experienced division attorneys in court and seek guidance from them.

The more senior primary division attorneys typically “try to take on a new hire” and “show them the ropes,” such as how to provide advice to clients about immigration and deportation, which motions to file in specific situations, and how to make an effective bail argument.

For newly hired attorneys at the alternate division, the alternate division’s managing attorney determines on a case-by-case basis what training that attorney needs. For example, if a newly hired alternate division attorney is new to Guam, then the attorney will be specifically assigned to shadow another alternate division attorney and the managing attorney second-chairs a few of the new attorney’s court proceedings.

On-going training standards. All Guam attorneys are required to obtain ten hours of continuing legal education each year, of which at least two hours must be legal ethics or professionalism.²⁵⁰ Guam’s statutes

247 The Sixth Amendment Center respectfully acknowledges Guam’s prohibition against the use of the term “territory” and uses it in this report only when quoting directly from legal documents or the writing of others. See 1 Guam Code Ann. § 420 (2022) (“In the interest of promoting self-respect and in recognition of the necessarily pejorative, diminishing and colonial aspects of the term *territory* within the context of American law, the term *territory of Guam* or its derivatives, such as *territorial*, shall not be used in direct titular association with the island, people, or government of Guam or for the purposes of direct self-description, in any government document or otherwise as part of any government title.”).

248 To apply for an open attorney position, an applicant must, in response to a job posting, submit an employment application packet to the government of Guam. The application packet includes the applicant’s resume, transcript, bar license, and character & standing or fitness reports. As part of the PDSC administration’s duties on behalf of all of its divisions, the sole human resources specialist within the PDSC administration receives and reviews each application and directs it to whichever division is hiring for the attorney position.

249 The interview panels are made up of: an equal employment opportunity representative, whose only role is to ensure that the process complies with Guam’s equal employment opportunity laws; the division’s supervising attorney (at the primary division, either the executive director or the deputy director; at the alternate division, the managing attorney); and some number of additional attorneys from the division. Ahead of each interview, the interview panel prepares a written “interview plan” containing the questions they will ask of an applicant. None of the divisions within the PDSC corporation have any formal or written criteria to determine whether to hire or reject an applicant for an attorney position.

250 GUAM RULE GOVERNING MANDATORY CONTINUING LEGAL EDUCATION.

and court rules do not establish any further or more specific training requirements for attorneys who are appointed to represent indigent people, for example, related to the types of cases in which they represent indigent people.

Even within the PDSC corporation, none of the divisions have any requirements for their attorneys to receive training related to the types of cases to which they are appointed. No person within the PDSC corporation is formally assigned responsibility for ensuring that PDSC corporation attorneys receive the on-going training they need to provide effective assistance of counsel.

The PDSC corporation does not have a budget line item dedicated to the costs of training appointed attorneys (nor for training of non-attorney staff). From January 2014 through November 2017, the PDSC board regularly approved the expenditure of the PDSC corporation's lapsed funds to provide training for some number of PDSC corporation attorneys and non-attorney staff.²⁵¹ There is no apparent indication that the PDSC board has approved any training expenditures from December 2017 through the present, so it is unclear whether the PDSC corporation (or any of its individual divisions) has spent any funds to provide training during those years.

To the extent that each attorney who represents indigent people on Guam voluntarily chooses to obtain training relevant to that representation, they face greater barriers to doing so than attorneys in most of the jurisdictions that provide a Sixth Amendment right to counsel. This is because Guam attorneys must obtain training either on-island or off-island, and both have limitations.

The training available on-island in the types of cases that carry a right to appointed counsel is provided by either the PDSC corporation or by some aspect of the Guam legal community. By far the greatest portion of Guam's attorneys who practice in the areas that have a right to counsel are the attorneys employed with the PDSC corporation, so there is little need or desire for the broader Guam legal community to provide or receive training in these practice areas. As a result, unless the PDSC corporation provides it, there usually is not any on-island training for the skills, procedures, and substantive law that appointed attorneys need.

From time to time, the PDSC corporation provides in-house training (open to all PDSC corporation attorneys and to all appointed private attorneys, and usually certified for continuing legal education credits) that focuses on current issues of indigent defense system attorneys in representing their appointed clients. Occasionally, the PDSC corporation brings national defense experts to Guam to provide training, and it makes these training programs available to all of Guam's indigent defense system attorneys (both PDSC corporation attorneys and appointed private attorneys). When PDSC provides in-house training, the PDSC corporation attorneys are required to attend unless they must be in court, while attendance is optional for appointed private attorneys. Many attorneys take advantage of every training opportunity offered. From

251 See, e.g., Guam Public Defender Service Corporation Resolution No. PDSC 06-14, *The Use of Alternate Public Defender Lapsed Funds to Cover Costs Associated With Attorney Eric R. Overton's Attendance at the California Attorneys for Criminal Justice (CACJ) Annual Fall Criminal Defense Seminar* (adopted Jan. 14, 2014), through Guam Public Defender Service Corporation Resolution No. PDSC 04-18, *The Use of Lapsed Funds for PDSC/APD Attorneys & Investigator to Attend a Trial Clinic With Trainers Laurie Shanks, Terry Kindlon & Faheemah Downs January 17-19, 2018 Tumon, Guam* (adopted Nov. 28, 2017).

time to time, the Guam judiciary sponsors on-island training for specialty court teams and stakeholders that include primary division and alternate division attorneys.

There is a wealth of training available off-island in every type of case and every aspect of providing representation, but it is a significant expenditure of both time and money for any Guam attorney to attend these training programs in person. It is increasingly possible and common for attorneys to virtually attend training programs being presented anywhere, but this seldom allows for the hands-on skills training and case development workshops that are a large part of the training needed by appointed trial attorneys.

The PDSC corporation attorneys report being authorized to travel outside of Guam for training opportunities from time to time, and the PDSC corporation pays for the costs of the attorneys to attend these off-island programs. The off-island training programs attended by PDSC corporation attorneys allow the attorneys to obtain extensive and focused, hands-on training, geared toward the types of cases they are appointed to defend; including, for example, programs offered by the National Association for Public Defense, bring-your-own-case criminal defense appellate training, specialty court training for the entire team (sometimes sponsored by the Guam judiciary), youth defender advocacy, and training on national standards for public defense attorneys. In addition, there are off-island training opportunities offered by the Pacific Judicial Council.

The primary division attorneys meet all together every weekday morning at 8:30 a.m. (to discuss who will cover which courtrooms, any current issues, and any updates on policy change), meet informally with one another every day, and hold “brainstorming sessions” about their cases every other month. Every attorney in the primary division has an “open-door policy,” and primary division attorneys say their questions never go unanswered - “we are spoiled by our culture” where the primary division attorneys help each other out and closely collaborate with one another.

Attorney performance standards. While there are many national standards for attorney performance in representing defendants charged with crimes, Guam has not through statute, court rule, or policy made any of these standards binding on its indigent defense system attorneys, and it has not promulgated any such standards of its own. As a result, there are no mandatory standards against which to train Guam’s indigent defense system attorneys who are appointed in adult criminal trial-level cases,²⁵² nor are there any mandatory standards against which to measure their performance.

The PDSC board has not approved any standards governing attorney performance in adult representation, so there is no internal standard against which to train PDSC corporation attorneys who are appointed in adult criminal trial-level cases, nor is there any standard against which to measure their performance.

252 In 2018, the PDSC corporation received technical assistance from the Center for Justice Innovation (formerly known as the Center for Court Innovation) through a U.S. Bureau of Justice Assistance grant to develop attorney performance standards and help grow holistic defense capacity by creating a plan for hiring a social worker. Development of the attorney performance standards for representation in adult criminal cases stalled during the pandemic and had not yet been adopted at the time of this report. See PDSC Attorney Performance Standards (draft, as of Mar. 7, 2023).

In July 2022, the PDSC board adopted performance guidelines for juvenile defense representation, which its divisions have begun to use for training in juvenile representation. PDSC Performance Guidelines for Juvenile Defense Represented (rev’d July 20, 2022).

Performance standards adopted by the PDSC board are not binding on appointed private attorneys.

Supervision. These same informal methods of training primary division attorneys (described above) are also the informal methods primarily used to supervise all of the primary division attorneys, in addition to annual performance evaluations conducted by the PDSC corporation's deputy director (or occasionally by the executive director). As one PDSC corporation attorney put it, it is important to supervise PDSC corporation attorneys in a way that does not alienate them, because the attorneys "have plenty of options" for other employment on Guam.

Any on-going supervision of alternate division attorneys is informal and provided "only as needed." For example, no one purports to supervise the part-time alternate division attorney who handles all magistrate hearings and arraignments. The alternate division's managing attorney from time-to-time conducts performance evaluations of alternate division attorneys, but the frequency of performance reviews varies depending on how long the attorney has been at the alternate division and how many years of experience they have as an attorney – ranging from once a year to every 18 months or longer. The most frequent complaint from alternate division clients, received almost daily, is from in-custody clients who feel they are lacking contact with their alternate division attorney, which the alternate division responds to by having its (non-attorney) management officer speak to the client, informing the responsible attorney of the call, and where immediate contact is needed having either the attorney or an alternate division investigator visit the client in detention.

Appointed private attorneys. The judiciary also does not have adequate attorney qualification, training, and supervision standards for appointed private attorneys.

Attorney qualification standards. Under normal circumstances, no one actively recruits attorneys to become a panel attorney. In late 2022, in response to the lessening number of panel attorneys, the then-chief justice reached out to all the private law firms on Guam asking each one to have at least one of their associate attorneys participate as a panel attorney.

Guam's court rules require that every panel attorney must be a member of the Guam Bar Association, with "when applicable, prior criminal trial experience, significant involvement in serious or complex criminal cases, knowledge of the Rules of Criminal Procedure, and the bail statutes, knowledge of other relevant areas of criminal practice, clinical experience or participation in trial advocacy programs, prior juvenile [or] guardian ad litem and/or appellate experience."²⁵³ Attorneys who want to be a panel attorney are required to submit their "Private Attorney Panel Application" to the Supreme Court of Guam,²⁵⁴ and the court clerk provides copies of each application to the PAP standing committee members.

The PAP standing committee reviews the application to determine "whether the applicant possesses the qualifications required for the PAP."²⁵⁵ Standing committee members assess the qualifications of applicants either to be approved for felonies, misdemeanors, juvenile cases, or appeals, or to be rejected. If the standing

253 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2)(A).

254 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2).

255 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2)(D).

committee determines that an applicant does possess the required qualifications, the standing committee is required by the court rules to approve the application, which is then distributed to all justices and judges to allow them to comment.²⁵⁶ Ultimately, though, it is the chief justice who determines whether each applicant is placed on the panel attorney list and for which case type(s).²⁵⁷ There is no indication that any applicant has been rejected in recent history.

The court rules intend for the panel to have 10 to 15 panel attorneys available for appointment in each of five categories: felony; misdemeanor; juvenile, including juvenile delinquency and person in need of services cases; guardian ad litem in juvenile cases; and appellate.²⁵⁸ At no time during the past five years has there been the intended number of panel attorneys.

Training standards. There is no requirement that private attorneys who are appointed to represent indigent people on Guam (whether panel attorneys or non-panel attorneys) obtain any training in the types of cases to which they are appointed. Whenever the PDSC corporation provides in-house training, including when it brings national defense experts to Guam to provide training, all appointed private attorneys (both panel attorneys and non-panel attorneys) are allowed to attend if they choose to do so, and these training programs are usually certified for continuing legal education credits.

As the number of panel attorneys has decreased and the number of involuntary appointments of non-panel attorneys has increased, the Guam judiciary requested the PDSC corporation to design and provide a training series expressly for the benefit of appointed private attorneys. Beginning February 2023, the PDSC corporation began presenting twice-monthly training programs that are certified for continuing legal education credits - the “Indigent Criminal Defense Series” - designed by the PDSC corporation’s deputy director. Appointed private attorneys are not required to attend, but it is the judiciary’s hope that the existence of this training program will encourage private attorneys to become panel attorneys and will provide them with the skills and knowledge necessary to provide effective representation to their appointed clients.

Attorney performance standards. As stated above, Guam has not through statute, court rule, or policy made any national performance standards binding on its indigent defense system attorneys, and it has not promulgated any such standards of its own. As a result, there are no mandatory standards against which to train appointed private attorneys nor are there any mandatory standards against which to measure their performance.

Supervision. Although the supreme court “create[d] a Standing Committee to oversee the Private Attorney Panel,”²⁵⁹ the court rules do not provide any method or authority by which the standing committee can actually oversee the provision of counsel by panel attorneys who are appointed to represent indigent

256 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2).

257 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2)(F).

258 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(2)(G).

259 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(1)(A).

defendants. There is no mechanism for anyone to evaluate or supervise the private attorneys (panel attorneys and non-panel attorneys) in their representation of appointed clients, other than through court sanctions or referral to the Guam Bar Association for disciplinary proceedings (and no justice system stakeholder can recall any disciplinary referral ever having been made in relation to an appointed private attorney's representation of a trial-level client).

FINDING 4: The courts' practice of appointing non-panel attorneys without determining whether they have the necessary knowledge, skills, and abilities to provide effective representation, and then failing to provide independent supervision of those attorneys, can cause a constructive denial of counsel.

Until early 2023, when the court had to appoint a non-panel attorney, the judge presiding over the case would simply appoint an attorney whom that judge thought would be able to provide effective assistance of counsel in the particular type of case involved. There were no formal qualifications that an attorney was required to have before being appointed in a particular type of case, and there was nothing to ensure that involuntary appointments were distributed equitably among the private attorneys of the Guam bar.

Beginning in approximately February 2023, the courts changed their procedures for the involuntary appointment of non-panel private attorneys. Today, the supreme court compiles and maintains a list of the non-panel attorneys whom a judge can appoint.²⁶⁰ To compile the list, the supreme court clerk begins with the list of all attorneys who are active members of the Guam Bar Association. Then, using the information supplied by the attorneys as part of their licensure requirements, the supreme court clerk removes from the list everyone who is an employee of the federal government, an employee of any Guam governmental body, or an employee of any legal services provider. The resulting alphabetical list of non-panel attorneys contains all attorneys in private practice who maintain an active Guam license even though they may not be actively practicing law or may not be presently living and working on Guam.²⁶¹

The court does not consider the qualifications or experience of the non-panel attorneys in making appointments.²⁶² As a result, the court has at times appointed non-panel attorneys who lack any experience or training in criminal defense to represent indigent defendants facing felony and/or misdemeanor prosecution in the trial court. For example:

- a felony case was assigned to a lawyer who had never in his career been to court;
- a homicide case was assigned to an estate lawyer;
- an environmental lawyer was appointed to a human trafficking case;
- an attorney who works full-time as a teacher was assigned a felony case.

²⁶⁰ See GUAM SUPER. CT LOCAL R. MR 1.1.3(a) (as amended Nov. 17, 2023); Promulgation Order 06-006-25, *Amendments to Miscellaneous Rule 1.1.3 of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (Guam Nov. 17, 2023).

²⁶¹ For example, a Guam attorney with an active license who goes to the United States to care for a family member for six months is not expected to change their address with the Guam Bar Association.

²⁶² Some judicial officers say there is an unwritten internal agreement among the judicial officers of the superior court to only appoint non-panel attorneys in felony cases who have been licensed to practice law for more than seven years, while others say there is no such agreement.

The court has also, at times, appointed non-panel attorneys who are not living or practicing law on Guam. For example, an attorney who works for his law firm in its Japan office was appointed to a case because the court's list does not show office locations.

Non-panel attorneys who are located off-island at the time of appointment or who believe they lack the necessary competence to effectively handle the type of case to which they have been appointed can, and frequently do, file a motion to withdraw. The judges usually grant motions to withdraw that are filed for these reasons, but not always. When an appointed private attorney is allowed to withdraw, the court must appoint another private attorney, and all of this results in greater and greater periods of time during which the indigent person is not being represented in their case.

The court's new process of considering every Guam private attorney as available for the court to appoint has provoked varying views, ranging from the belief that indigent people should not be provided an involuntarily conscripted and unwilling attorney, to the idea that every attorney should willingly accept court-appointed work as a public service.

CHAPTER VIII

Sufficient Time & Resources

The U.S. Supreme Court in *Powell v. Alabama* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the defendants were constructively denied counsel.²⁶³ As one state supreme court observed, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”²⁶⁴

Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob,” the *Powell* Court explained.²⁶⁵ The lack of sufficient time may be caused by any number of things, including but not limited to payment arrangements that create financial incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients, or excessive workloads. Whatever the cause, insufficient time to prepare and present an effective defense for each indigent defendant is a marker of the constructive denial of counsel.

No matter how complex or simple a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. Even in the simplest case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution’s motions;
- prepare for and appear at necessary pretrial hearings, and preserve the client’s rights in those hearings;

263 *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

264 *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

265 *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

SUFFICIENT TIME & RESOURCES

- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepares for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).²⁶⁶

The time an appointed attorney can devote to accomplishing each of these tasks in each defendant's case depends on the total amount of time the attorney has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. This discussion is often framed in terms of "caseloads" or "workloads."

Caseload refers to the raw, quantifiable number of cases an attorney handles during a particular period of time. A lawyer's total annual caseload is the count of all indigent representation system cases in which the lawyer provides representation during a given year, starting with the number of cases the attorney had open at the beginning of the year and adding to that the number of cases assigned to the attorney during the year.

In addition to considering the raw number of cases of each type that an attorney handles, the U.S. Department of Justice has advised, and national standards agree, that "caseload limits are no replacement for a careful analysis of a public defender's *workload* . . ."²⁶⁷ Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public representation cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.²⁶⁸ Further, national standards agree that the lawyer's workload must take into consideration "all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties."²⁶⁹

266 *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, No. 16-8255 at 6 (2018); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). See GUAM R. PROF'L CONDUCT r. 1.2(a); NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

267 Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, ECF No. 322 (W.D. Wash. filed Dec. 4, 2013), <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>; AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002).

268 AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002).

269 Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, (W.D. Wash. filed Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006); NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 5.1 (1976).

FINDING 5: Guam does not collect and analyze the necessary information to accurately determine the caseloads or workloads of indigent defense system attorneys.

Certain information is necessary for policymakers and justice system stakeholders to plan for the future needs of Guam's indigent defense system and to ensure that there are a sufficient number of attorneys with sufficient time to provide effective representation to each indigent defendant. This information includes how much time is actually required to effectively represent each indigent defendant in each type of case, how many cases each indigent defense system attorney is handling in a given year, what other workload responsibilities each indigent defense system attorney has in a given year, and whether each indigent defense system attorney is working with sufficient support to allow them to dedicate adequate time to each indigent defendant's case.

Guam's indigent defense system caseload & workload data. Guam's court rules require the primary division and the alternate division to each prepare and submit to the administrator of the courts monthly reports of the number of court appointments they receive.²⁷⁰ From October 1, 2004 through September 30, 2020, the PDSC corporation was also required by its annually renewed contract with the judicial council to submit to the judicial council "a quarterly report of number and type of cases transferred from [the primary division] to [the alternate division] and cases to which [the alternate division] is appointed by the court directly."²⁷¹ The clerks of the supreme court and the superior court are each required by Guam's court rules to maintain, for their respective courts, "a public record of assignments to the [primary division], [the alternate division], the [panel attorneys], and [non-panel attorneys] as well as current statistical data reflecting the proration of appointments."²⁷²

Guam has in place adequate infrastructure and technology to track, report, analyze, and understand the caseloads and workloads of appointed attorneys,²⁷³ but those mechanisms are not being used effectively.

During this evaluation, the primary division, the alternate division, and the judiciary each independently provided extensive information about the cases assigned to indigent defense system attorneys for fiscal years 2018 through 2022 and a portion of fiscal year 2023.²⁷⁴ Despite the extensive caseload data provided, it has significant limitations.

270 GUAM SUPER. CT LOCAL R. MR 1.1.3.(c)(2).

271 See, e.g., "Agreement Between the Judicial Council of Guam and the Public Defender Service Corporation" § 7 (October 1, 2019).

272 GUAM SUPER. CT LOCAL R. MR 1.1.3.(b)(4)(D). See also GUAM SUPER. CT LOCAL R. MR 1.1.3.(c)(1).

273 The primary division and the alternate division both independently use an Abacus case management system, which allows them to generate reports showing, in theory, how many open cases each division attorney has of each type of case at any given moment. The civil division uses a different Clio case management system.

274 The primary division and the alternate division each independently provided, during this evaluation, data showing the number of cases of each type that each division's attorneys had open at the start of each fiscal year, were assigned during each fiscal year, and disposed during each fiscal year.

The judiciary provided, during this evaluation, data showing the number of cases of each type that were assigned to each private attorney (both panel attorneys and non-panel attorneys) during each fiscal year.

The primary division, the alternate division, and the judiciary do not use the same case types in their data. 6AC obtained from each of the data providers, to the extent possible, the definitions they use for each of their case types and then grouped the data reported into broad case types as shown in the following table.²⁷⁵

Case Type	6AC GROUPING		
	Primary Division	Alternate Division	Courts
Adult	Felony	Felony	Felony
	Misdemeanor	Misdemeanor Veterans Court	Misdemeanor
Juvenile	Delinquency	Juvenile	Juvenile
	Drug Court		
	PINS		
	Proceedings		
	Guardianship		Guardian ad Litem
Appeal	Criminal	Appeal	Appeal
Civil	Civil	Civil	
	Domestic		
	Protective Order	Protective Order	
	Probate		
		Mental Health Court	
	Special Proceedings	Special proceedings	
Miscellaneous	Consultation	Consultation (Court ordered)	
		Pro Bono	
		Other	

For adult criminal cases at the trial-court level (the focus of this evaluation), all of the data providers seem to use the same definition of a “case” (or at least very similar ones). Generally, a criminal case is defined by all of the Guam data providers as all charges against a single defendant that arise out of a single incident.²⁷⁶

If an appointed attorney had zero cases at the beginning of a year, then the number of cases newly assigned to that attorney during that year would be the appointed attorney’s caseload. To calculate the appointed attorney’s actual annual caseload, one must add the number of cases that the attorney already had open at

275 For fiscal year 2020, the primary division broke down their case types of felony and misdemeanor into even smaller categories. Felonies were reported in case types of: assault; adult drug court; arson; burglary; DUI; family violence; forgery; mischief/trespass; robbery; terrorizing; theft; home invasion; CSCC; or general jurisdiction. Misdemeanors were reported in case types of: DWI; family violence; or general jurisdiction.

276 It is important to distinguish between the term “case” for purposes of caseloads and the use of criminal docket numbers in the court’s case management system. It seems that each criminal docket number in the court’s case management system may in theory constitute more than one “case” for purposes of caseloads; for example, it appears that two or more codefendants may be jointly charged under a single docket number, but all of the charges against each codefendant would constitute a separate case for purposes of caseloads. On the other hand, it seems that the judiciary may count as a single case, for purposes of caseloads, two or more criminal docket numbers against the same defendant when they are assigned at the same time to an appointed attorney.

the beginning of the year (sometimes referred to as the “carry-over” from previous years). None of Guam’s three data reporters have accurate data about the “carry-over” caseloads of indigent defense system attorneys:

- For appointed private attorneys, the judiciary does not maintain data on the number of appointed cases that each appointed private attorney already had pending at the start of a year, nor the number of appointed cases that each appointed private attorney closed during a year, so it is impossible to know the “carry-over” caseload of appointed private attorneys on Guam. The judiciary also does not collect or maintain data on the number or types of other non-appointed cases that private attorneys handle during a year, so it is impossible to know the true caseloads carried by appointed private attorneys.
- The primary division and the alternate division both maintain data on the number of appointed cases that each division attorney closed during a year, leading to the number of appointed cases that each division attorney already had pending at the start of the following year, but this data cannot be relied upon. The primary division and the alternate division are aware that their caseload data contains a significant number of cases showing as open at the start of a fiscal year that are in fact no longer open cases within their respective divisions. Sometimes the divisions delay changing the status of a case in their case management system. But the “carry-over” caseloads reflected in their data for each fiscal year show a significant number of theoretically open cases that are attributed to attorneys who have not worked within those divisions in many years; the greatest likelihood is that there is nobody within the two divisions who is responsible for maintaining the accuracy of the caseload data.

The primary division, the alternate division, and the judiciary each maintain data on the number of new cases assigned each year. The three data reporters do not consistently use the same methods for when they count a case as being newly opened in their caseload data, nor for when they count a case as closed, nor is there any coordination among the data reporters to reflect when the *same case* is assigned more than once (for example as a result of a conflict causing a case to move from the primary division to the alternate division and then from the alternate division to an appointed private attorney).²⁷⁷ As a result, the number of new cases assigned each year, as reported by each of the data reporters individually and by all of them collectively, may undercount or may overcount the actual number of new cases.

²⁷⁷ The primary division counts as a newly opened case any matter that comes into the division in any fashion. In criminal cases, for example, when a person walks into the primary division office for *only* a consultation (which occurs rarely and usually involves a person who has received a notice to appear but has not yet been formally charged), the primary division counts that as one new case within the “consultation” case type. If the defendant is formally charged, then a new file is “opened” and the consultation file should be “closed,” but it is unclear when or whether the primary division would ever show a consultation case as closed in their caseload data if the defendant is not charged.

The alternate division does not typically have any consultation cases, and when they do have consultations they do not typically count them as constituting a case. In the six years of caseload data produced during this evaluation, it seems that the alternate division only kept track of consultations during fiscal year 2021 and all consultations opened during that year were also closed during that year.

When a primary division attorney or an alternate division attorney represents a person *only* during a magistrate hearing (referred to locally as a “limited entry”), the divisions do not count that representation as a new case. The division attorneys spend a portion of their available professional hours providing representation to clients during magistrate hearings - this is a part of the divisions’ workload - but this workload is not reflected in the number of cases newly assigned to the division attorneys each year.

The judiciary counts a new case at the moment that it appoints a private attorney (both panel attorneys and non-panel attorneys) to represent a client in that case, so the judiciary’s caseload data accurately reflects the number of cases, by case type, that were assigned to each appointed private attorney during a given year.

The three data providers also maintain data showing the number of those new cases assigned to each attorney. The available reliable data does not show for each attorney the number of cases carried over from the preceding year, so the caseloads of indigent defense system attorneys on Guam during fiscal year 2022 are likely significantly higher for each attorney.

Each indigent defense system attorney on Guam devotes some portion of their available professional hours to performing work that is not reflected in their caseloads. For attorneys in the primary division and the alternate division, this includes for example management responsibilities, providing and/or receiving supervision and training, and appearing on behalf of appointed clients in therapeutic courts and/or at status hearings for appointed clients who are on probation. For the appointed private attorneys, this includes all of the professional hours they spend attending to anything other than their appointed Guam cases. The three data reporters do not maintain data sufficient to determine what portion of the appointed attorneys' professional hours is devoted to their appointed cases and what portion is devoted elsewhere.

FINDING 6: Guam does not have any caseload or workload standards.

Policymakers in many jurisdictions have recognized the need to set their own localized caseload and workload standards. Local standards are able to consider unique demands made on appointed attorneys in the local jurisdiction, such as the travel distance between the court and the local jail, or the prosecution's charging practices. Local caseload standards are also able to address types of cases for which a jurisdiction provides a right to counsel, but that are not contemplated by the national standards.

The PDSC board has not established any caseload or workload limits or standards, either formally or informally.²⁷⁸ The attorneys employed within the PDSC corporation believe that they cannot decline to accept a case, when appointed by a court, based on having an excessive caseload. The PDSC board has, however, frequently *required* the PDSC corporation to cease providing representation in certain *types* of cases because the existing caseloads of the PDSC corporation were higher than would allow its attorneys to provide effective assistance of counsel under the *Guam Rules of Professional Conduct*.²⁷⁹ This makes clear

²⁷⁸ "The PDSC corporation leadership is actively looking for grant funding for the purpose of developing Guam-specific caseload and workload standards.

²⁷⁹ From June 19, 1995 through March 31, 1996, the PDSC board directed the PDSC executive director to "limit the case load of the Public Defender Service Corporation with regard to civil and domestic cases to require that the Corporation only handle domestic and civil cases which involve violence or the threat of violence and need immediate action, and in addition uncontested guardianships" effective June 19, 1995 and continuing "until the case load is substantially reduced to meet the requirements of the Ethics Code, or by the addition of attorneys to help meet the burden." Guam Public Defender Service Corporation Resolution No. PDSC 95-01, *Limiting the Case Load of the Public Defender Service Corporation Temporarily* (adopted June 13, 1995); Guam Public Defender Service Corporation Resolution No. PDSC 96-01, *Lifting the Temporary Limitation of Caseload in Civil and Domestic Cases of the Public Defender Service Corporation* (adopted Mar. 15, 1996).

Effective April 1, 1997, the PDSC board directed the PDSC executive director to "limit the caseload of the Public Defender Service Corporation with regard to civil and domestic cases to require that the Corporation handle only domestic and civil cases which involve violence or the threat of violence and in addition uncontested guardianships primarily for medical insurance purposes" effective April 1, 1997 and continuing "until the caseload is substantially reduced to meet the requirements of the Ethics Code, by the addition of support staff to help meet the burden, or until such time as the Board may direct." Guam Public Defender Service Corporation Resolution No. PDSC 97-01, *Limiting the Caseload of the Public Defender Service Corporation Temporarily* (adopted Mar. 31, 1997).

Effective November 9, 1999, the PDSC board directed the PDSC executive director to "limit the caseload of the Corporation with regard to civil and domestic cases, to require that the Corporation handle only domestic and civil cases which involve violence or the

that the PDSC board believes it has the power to limit the caseloads of the PDSC corporation attorneys, yet the PDSC board has not established any caseload standards, nor has it established any procedures by which the individual attorneys or leadership of the three divisions can bring excessive caseloads to the attention of the board.

Guam's court rules do not establish any caseload or workload limits or standards for the private attorneys who are appointed to represent indigent people. The court rules do expressly allow a panel attorney to declare that they are unavailable to accept an appointment in a specific case "due to scheduling conflicts, workload, or other good cause."²⁸⁰

threat of violence and in addition uncontested guardianships primarily for medical insurance purposes" effective immediately and continuing until the one vacant Attorney I position and the one vacant Attorney II position is filled "or until such time as the Board may direct." Guam Public Defender Service Corporation Resolution No. PDSC 99-06(2), *Limiting the Caseload of the Public Defender Service Corporation Temporarily* (adopted Nov. 9, 1999).

From June 3, 2002 through October 31, 2003, the PDSC board directed the PDSC executive director to "limit the caseload of the Corporation with regard to civil and domestic cases to require that the agency handle only domestic and civil cases which involve violence or the threat of violence, and in addition, uncontested guardianships primarily for medical insurance purposes" effective immediately and continuing until October 31, 2003. Guam Public Defender Service Corporation Resolution No. PDSC 02-03, *Moratorium Involving Civil and Domestic Cases Due to Budgetary Constraints* (adopted June 3, 2003).

From August 28, 2012 through July 28, 2020, the PDSC board imposed "an indefinite continuation of the previous moratorium involving non-criminal cases (with certain exceptions)" and "recogniz[ing] that certain exceptions (i.e., uncontested guardianships, burial of expired bodies, and domestic cases involving violence or the threat of violence) exist" allowed the PDSC corporation to continue to accept "[c]ases of this nature" through December 31, 2012, "whereupon this matter will be reviewed for further action." Guam Public Defender Service Corporation Resolution No. PDSC 13-12, *Continuation of a Moratorium Involving Civil and Domestic Cases* (adopted Aug. 28, 2012); Guam Public Defender Service Corporation Resolution No. PDSC 05-20, *Lifting a Moratorium Involving Civil and Domestic Cases* (adopted July 28, 2020).

280 GUAM SUPER. CT LOCAL R. MR 1.1.3(b) (4)(A). Despite the plain language of the court rule, many indigent defense system attorneys believe that panel attorneys cannot refuse or "pass" cases on the basis of a scheduling conflict or an excessive number of cases.

CHAPTER IX

Independence & Oversight

Perhaps the most noted critique of the defendants in *Powell* was that it lacked independence from governmental interference, specifically from the judge presiding over the case. As noted in *Strickland*, “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.”²⁸¹ In specific relation to judicial interference, the *Powell* Court stated:

[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.²⁸²

In other words, 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, learn the defendant’s 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 should actively seek to learn a judge’s opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just that a judge’s in-court observations of a defense attorney cannot comprise the totality, or even majority, of supervision.

While *Cronic* and *Powell* focus on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case of *Ferri v. Ackerman*, the United States Supreme Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.”²⁸³ 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.”²⁸⁴ Commenting 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 notes in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”²⁸⁵

281 *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

282 *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

283 444 U.S. 193, 204 (1979).

284 454 U.S. 312 (1981).

285 *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981).

The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer's independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.²⁸⁶

FINDING 7: The judiciary exerts undue influence over the indigent defense system.

To be clear, it is not that the justices and judges of Guam who oversee the indigent defense system are malicious or consciously trying to undermine the basic constitutional right to counsel. Rather, when public defense attorneys are provided through a system overseen by judges, defense attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, rather than solely advocating for the stated interests of the defendant as is their ethical duty.

Public defense attorneys in judicially controlled systems understand that their personal compensation along with the resources needed to properly defend an indigent person require the approval of the judges. And so, it does not take a judge to say overtly, for example: "Do not file motions in my courtroom." Fearing loss of income from not pleasing the judge, indigent defense attorneys often take on more cases than they can ethically handle, delay working on cases, and triage their available hours in favor of some clients but to the detriment of others, thereby failing to meet the parameters of ethical representation owed to all clients.

Judicial control of the indigent defense system generally. Guam's chief justice is the chair of the PDSC board that oversees the PDSC corporation, and the chief justice appoints two of the other four members. The superior court presiding judge is the vice-chair of the PDSC board.

One of the associate justices is the chair of the PAP standing committee. The chief justice both appoints the four voting members of the PAP standing committee *and* decides who the panel attorneys are. The supreme court clerk of court is a member of the PAP standing committee.

The judicial council (which is made up completely of justices and judges) controls the sources and expenditures of the "Judicial Client Services Fund" that provides funding for case-related expenses of indigent defendants and compensation of all appointed private attorneys.

All of these provide opportunity for judicial influence over the indigent defense system.

Judicial control of panel and non-panel attorney compensation. From May 2022 through March 2023, the hourly rate paid to appointed private attorneys was \$100 per hour. The hourly rate increased temporarily to \$150 per hour for the period of April through December 2023.²⁸⁷ The court rules also set a cap on the

286 466 U.S. 648 (1984).

287 See GUAM SUPER. CT LOCAL R. MR 1.1.5.(a), as temporarily amended by Promulgation Order No. 06-006-23, *Amendments to Miscellaneous Rule 1.1.5 of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (eff. Apr. 1, 2023).

For comparative purposes, Guam statutes enacted in 2010 require the attorney general's office to, for example, review certain government contracts, for which the attorney general's office is authorized to bill at an hourly rate of \$200 per hour. See 5 GUAM CODE ANN. § 30202 (2022). In setting this hourly rate for the attorney general's office billing in 2010, the legislature observed that "in recent

amount of the fee the courts will pay in each type of case (with the maximum fee including any billing for paralegal hours at not more than \$45 per hour and any billing for attorney hours at the applicable \$100/\$150 hourly rate).²⁸⁸ The court temporarily increased the compensation cap in misdemeanor cases from \$3,500 to \$3,600 for the period of April through December 2023.²⁸⁹

In theory, the administrator of the courts can authorize compensation beyond the established fee cap if the appointed attorney can “demonstrate extraordinary circumstances and good cause to justify an exception.”²⁹⁰ Despite this theoretical possibility, no stakeholder could recall any instance in which an appointed private attorney has requested to exceed the compensation cap and that request was approved by the administrator of the courts.

Absent an approved request to exceed the compensation cap, the maximum fees allowed to an appointed private attorney for representing an indigent defendant, and the compensable attorney hours that capped compensation allows based on the applicable hourly rate (assuming no billing for paralegal hours), are:

COMPENSATION AUTHORIZED TO APPOINTED PRIVATE ATTORNEYS BY GUAM'S COURT RULES				
Type of case	\$100 hourly rate, applicable May 1, 2022, through March 31, 2023		\$150 hourly rate, applicable April 1, 2023, through December 31, 2023	
	Maximum fee	Compensable hours under maximum fee	Maximum fee	Compensable hours under maximum fee
Felony carrying potential life imprisonment	\$25,000	250 hours	\$25,000	166.67 hours
First degree felony carrying less than life imprisonment	\$20,000	200 hours	\$20,000	133.33 hours
Second degree felony	\$10,000	100 hours	\$10,000	66.67 hours
Third degree felony	\$7,500	75 hours	\$7,500	50 hours
Misdemeanor	\$3,500	35 hours	\$3,600	24 hours
Habeas corpus proceeding	\$3,150	31.5 hours	\$3,150	21 hours
Juvenile delinquency	\$3,150	31.5 hours	\$3,150	21 hours
Guardian ad litem or juvenile special proceedings	\$7,500	75 hours	\$7,500	50 hours
Appeal	\$10,000	100 hours	\$10,000	66.67 hours

hearings before [the legislature], witnesses have testified that private law firms currently bill their clients from Two Hundred Dollars (\$200) to Three Hundred Fifty Dollars (\$350 per hour.” 5 GUAM CODE ANN. § 30201 (2022).

288 GUAM SUPER. CT LOCAL R. MR 1.1.4.(f), 1.1.5. (eff. May 1, 2022, through Mar. 31, 2023).

289 GUAM SUPER. CT LOCAL R. MR 1.1.5.(a), as temporarily amended by Promulgation Order No. 06-006-23, *Amendments to Miscellaneous Rule 1.1.5 of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (eff. Apr. 1, 2023).

290 GUAM SUPER. CT LOCAL R. MR 1.1.5.(a).

When an attorney is paid an hourly rate with a cap on the maximum that the attorney can earn in a case, this creates a conflict of interest between the appointed attorney's own financial interests and the legal interests of the indigent defendants they are appointed to represent. This is because the attorney's financial incentive is to devote exactly the maximum number of compensable hours and not a single moment more to each individual defendant's case. While the courts' hoped, by temporarily increasing the hourly rate, to encourage more private attorneys to voluntarily join the panel attorneys list, this temporary change, without also increasing the cap, has the perverse effect of allowing appointed private attorneys to earn money faster while doing less work on behalf of their appointed clients.

Additionally, judges typically do not provide adequate financial oversight to look for trends on attorney billing which may alert the system to potential issues. For example, the judicial branch provided data about the identity of the private attorneys it appointed to represent indigent defendants in trial-level cases during fiscal years 2018 through 2022 and for October 1, 2022 through September 1, 2023 of fiscal year 2023. The court data shows that the courts appointed 139 individual private attorneys or non-profit law firms, but these attorneys all worked in only 93 different law offices (some solo practitioners, some in firms employing multiple attorneys).

Over the almost identical period during which these appointments were made, only 41 law offices submitted invoices to the judicial branch for appointed representation provided by one or more of their attorney employees. It is impossible to determine why 52 private law offices did not bill the court after their attorney employees were appointed to represent an indigent defendant. The court rules require appointed private attorneys to submit their invoice to the court each month,²⁹¹ and while the judicial branch will pay an appointed private attorney's invoice even if it is submitted late, presumptively most Guam attorneys would intend to comply with the Guam court rules. It is possible that although the court appointed the private attorney, the private attorney nevertheless did not provide any representation services to their appointed client or chose to represent the appointed client *pro bono*. Equally possible is that the court appointed the private attorney but then allowed that private attorney to withdraw and appointed a different private attorney.

As mentioned, when an attorney is paid an hourly rate with a cap on the maximum that the attorney can earn in a case, this creates a conflict of interest between the appointed attorney's own financial interests and the legal interests of the indigent defendants they are appointed to represent. This is because the attorney's financial incentive is to devote exactly the maximum number of compensable hours and not a single moment more to each individual defendant's case. The private attorneys whom the court appoints to represent indigent defendants are free to also represent as many privately paying clients as they choose; by billing for each appointed client's case up to but not beyond the compensation cap, the appointed attorney maximizes their earnings from indigent defense cases while remaining free to devote all of their other available working hours to more lucrative privately paying clients. The danger here is that not only will the

291 GUAM SUPER. CT LOCAL R. MR 1.1.5.

appointed private attorney stop representing an appointed client as soon as it is no longer profitable, but that the attorney will also seek to be appointed to represent as many indigent clients as possible so that they can bill up to the maximum allowed compensation in each case.²⁹²

Judicial control of necessary expenses. Appointed private attorneys must ask the judiciary for case-related expenses – necessary expenses that an attorney incurs in providing effective representation to an individual appointed client – while PDSC corporation attorneys do not, creating a disparity among indigent defendants dependent on the type of system attorney who is appointed to represent them. Necessary case-related expenses can include, for example, postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage, and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, costs incurred in obtaining discovery, and the costs of hiring necessary investigators and experts in the case. No one can say how much is expended for case-related expenses of indigent adult criminal defendants on Guam during any fiscal year, nor does anyone know whether all of the necessary case-related expenses are provided.

Guam's court rules provide that a court “may authorize” any attorney who is appointed to represent an indigent defendant “to retain the services of investigators, experts and interpreters upon a showing that such services are necessary for adequate representation of the person.”²⁹³ To obtain authorization from the court, the appointed attorney must apply for the court's approval before retaining the services, and payment for services approved by the court is made from one line item or another of the judicial branch's “Judicial Client Services Fund.” To whatever extent case-related services are provided for indigent defendants on Guam, this is the method by which they are obtained *except* investigators for the cases of defendants represented by primary division attorneys or alternate division attorneys.

The primary division attorneys and the alternate division attorneys do not have to seek and obtain court authorization for investigative services on behalf of their appointed clients, and the only limits on the amount of investigation available is simply the man-hours that the staff investigators can provide. The primary division has six full-time investigators on staff, who provide whatever investigative services are needed in the cases of defendants represented by primary division attorneys. The compensation of these primary division investigators, as well as any expenses they incur in connection with investigating, is paid out of the PDSC corporation's legislative appropriation funding. Similarly, the alternate division has two investigators on staff, who provide the investigative services needed in the cases of defendants represented by alternate division attorneys, and the compensation and expenses of the alternate division investigators are paid out of the alternate division's legislative appropriation funding.

292 The judicial branch's ledgers show the word “CAP” in the description for each invoice where the appointed private attorney has reached the maximum compensation authorized by the court rules. Over the six years of reported payments, one of the 41 law firms that submitted invoices to the court was paid the maximum allowable compensation 123 times, for a total of \$552,886.60 *before* counting the attorney's additional compensation where they did not bill the maximum allowed (the next highest ranking law firm was paid the maximum allowable compensation only 26 times, and 16 of the 41 law firms never submitted an invoice that reached the maximum compensation allowed).

293 GUAM SUPER. CT LOCAL R. MR 1.1.4.(a).

The only method by which an appointed private attorney can obtain investigative services for their appointed clients (other than paying for them out of their own pocket) is by obtaining the advance approval of the court, and the maximum total amount that the court will authorize for all case-related services in a single case is \$1,500 (increased temporarily to \$2,000 for the period of April 1 through December 31, 2023).²⁹⁴ In other words, investigative services for an indigent defendant represented by an appointed private attorney, *along with* expert services and interpreter services, cannot exceed \$1,500 unless the attorney can “demonstrate extraordinary circumstances and good cause” to obtain greater funding from the court.²⁹⁵ Stakeholders cannot recall a single instance in which a court has authorized the expenditure of more than \$1,500 for case-related services on behalf of any indigent defendant. Indigent defendants represented by a primary division attorney, or an alternate division attorney have the full \$1,500 per case available, with court approval, for experts and interpreters.

Guam’s statutes and court rules do not expressly address how an appointed private attorney can be reimbursed for out-of-pocket case-related expenses that the attorney incurs on behalf of appointed clients for necessary expenses such as postage, toll telephone calls, copies, mileage, and parking. Presumably the courts will authorize the attorney to be reimbursed for these expenses, so long as the attorney’s total invoice for fees & expenses does not exceed the maximum allowed compensation for a given case under the court rules and so long as the attorney does not incur more than \$250 in total expenses without first obtaining court authorization.²⁹⁶ Of concern is that appointed private attorneys may forego incurring necessary case-related expenses on behalf of their appointed clients, out of concern that they will not be reimbursed for those expenditures.

294 See GUAM SUPER. CT LOCAL R. MR 1.1.4.(c), as temporarily amended by Promulgation Order No. 06-006-23, *Amendments to Miscellaneous Rule 1.1.5 of the Local Rules of the Superior Court of Guam (Indigent Defense Rule)* (eff. Apr. 1, 2023).

295 GUAM SUPER. CT LOCAL R. MR 1.1.4.(c).

296 See GUAM SUPER. CT LOCAL R. MR 1.1.4.(e) and 1.1.5.

CHAPTER X

Recommendations

Guam's justice system is relatively young, and its indigent defense system is even younger. Members of the judiciary expressed the position that judicial oversight of indigent defense services was necessary in the earliest stages of growth to ensure its proper development and evolution. Nonetheless, Guam must ensure the independence of right to counsel services.

There is no uniform “cookie-cutter” indigent defense services delivery model that jurisdictions *must* apply. The question for Guam's policymakers is how best to provide effective assistance of counsel to indigent people, as required by the Sixth Amendment, under Guam's unique circumstances. The Sixth Amendment Center does not presume that the recommendations below are the *only* way to restructure Guam's indigent defense system, and the examples of statutory language from various states are provided simply as starting points for legislative consideration.

RECOMMENDATION 1: Guam should vest the authority to oversee all indigent legal services in an independent right to counsel commission.

National standards, as compiled in the *ABA Ten Principles of a Public Defense Delivery System*, agree that the best way to protect defense counsel independence is by establishing an independent public defense commission.²⁹⁷ The National Study Commission on Defense Services' *Guidelines for Legal Defense Systems in the United States* explain:²⁹⁸

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

(a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.

²⁹⁷ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 1 (2023) (“To safeguard independence and promote effective and competent representation, a nonpartisan board or commission should oversee the Public Defense Provider.”);

²⁹⁸ NATIONAL STUDY COMM'N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

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- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Commission.
- (d) Organizations concerned with the problems of the client community should be represented on the Commission.
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.

Statutory language establishing the commission should ensure its independence. For example, Connecticut's statute states that its commission is an "autonomous body within the judicial department for fiscal and budgetary purposes only."²⁹⁹

Guam should give an equal number of member appointments to the executive, legislative, and judicial branches of government, so that no single branch of government can usurp power over or exert outsized influence over the delivery of indigent defense services.

In constructing its independent commission, Guam should follow the lead of the increasing number of jurisdictions that prohibit voting members of the commission from being a sitting judge, a current prosecuting attorney, a current law enforcement employee, or a person currently paid to provide public defense services (or any employee of any person in those roles).³⁰⁰ For example, New Mexico's commission statute states:³⁰¹

A person appointed to the commission shall have: (1) significant experience in the legal defense of criminal or juvenile justice cases; or (2) demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department.

The following persons shall not be appointed to and shall not serve on the commission: (1) current prosecutors, law enforcement officials or employees of prosecutors or law enforcement officials; (2) current public defenders or other employees of the department; (3) current judges, judicial officials or employees of judges or judicial officials; (4) current elected officials or employees of elected officials; or (5) persons who currently contract with or receive funding from the department or employees of such persons.

299 CONN. GEN. STAT. § 51-289(l) (2023).

300 The NSC's *Guidelines* direct that an indigent defense system "[c]ommission should not include judges, prosecutors, or law enforcement officials." NATIONAL STUDY COMM'N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976). These prohibitions are only for *sitting* judges and prosecutors; states often find former judges and law enforcement officials to make very good commission members.

LA. REV. STAT. § 15:146(B)(2) (2020).

301 N.M. STAT. ANN. § 31-15-2.2 (2023).

These prohibitions are only on *current* judges, defenders, and prosecutors. Jurisdictions often find former judges, former defenders, and former law enforcement officials to make good commission members.

Many jurisdictions also include one or more voices on their commission from communities affected by the indigent defense function and ensure that the commission reflects the demographic makeup of the community. In addition, Guam can also consider the value that commission members of varying expertise and background can bring, and so might consider sociologists, psychologists, political scientists, historians, and/or accountants.

National standards do not prohibit a commission from having members who work or reside outside of the jurisdiction. Guam can consider allowing commission members to be from other off-island jurisdictions that are subject to the Sixth Amendment.

RECOMMENDATION 2: Guam should empower the right to counsel commission to promulgate and enforce standards applicable to all indigent defense system attorneys.

The right to counsel commission must be statutorily required to promulgate and enforce binding standards applicable to all indigent defense system attorneys. For example, Michigan statutorily requires its commission to promulgate and enforce mandatory statewide standards for, among other things: attorney qualifications; attorney performance; attorney supervision; time sufficiency; continuity of services whereby the same attorney provides representation from appointment through disposition; client communications; data collection; and indigency determination.³⁰²

Specifically, Michigan's statutory language requires its commission to implement minimum standards, rules, and procedures that adhere to the following principles:³⁰³

- Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
- Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.³⁰⁴

302 MICH. COMP. LAWS § 780.991 (2023).

303 MICH. COMP. LAWS § 780.991(2)(a)-(f) (2023).

304 There are no national standards that require indigent defense providers to keep contemporaneous time records. However, it is a practice that 6AC strongly encourages. The benefit of time-tracking is that it allows indigent defense systems to objectively demonstrate when they are at capacity, to set binding caseload standards, and to establish protocols for withdrawing from cases. By continually tracking time, indigent defense systems can change caseload standards as new events require it. For example, if a jail changes practices that affect how long it takes for lawyers to meet with clients, tracking time allows the indigent defense system to show the impact of that decision on the amount of time that must be dedicated to the average case, and potentially to lower a caseload standard. Time-tracking can also account for other factors that may increase or decrease the amount of work and effort attorneys must spend on their appointed cases, including but not limited to: the complexity of cases; the geographical size of the jurisdiction; appropriate access to non-legal support staff, such as investigators, social workers, mitigation specialists, paralegals, etc.; and the prevalence of mental health, developmental disabilities, and/or substance addiction issues in the clients.

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- Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
- The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
- Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.
- Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.

RECOMMENDATION 3: Guam should empower the right to counsel commission to collect, analyze, and report on data needed to ensure effective representation.

National standards call for the right to counsel commission to “collect reliable data on public defense, regularly review such data, and implement necessary improvements” to “ensure proper funding and compliance” with the requirements of the right to counsel.³⁰⁵ The commission should collect and evaluate on an on-going basis all information necessary to ensure that a sufficient number of qualified attorneys are available to be appointed and that adequate resources are available (overhead including support staff, training, supervision, and technology; case-related needs including social workers, investigators, and experts; and fair attorney compensation) to ensure effective assistance of counsel can be provided to each person who is entitled to public counsel under the *Organic Act*, the Sixth Amendment, and Guam law.

Some of this data necessarily comes from other components of the justice system, including law enforcement, prosecutors, and the courts. The commission should coordinate with all justice components to gather information without imposing duplicative, undue, or onerous administrative or fiscal burdens and to do so in a way that protects the privacy and attorney-client privilege of individuals and the privileged work product of prosecutors and defense attorneys.

³⁰⁵ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 4 (2023) (data should be collected on caseloads and workloads; major case events; use of investigators, experts, social workers, and support services; case outcomes; monetary expenditures; and demographic data on employees and clients).

RECOMMENDATION 4: Guam should authorize and fund the right to counsel commission to create an office of indigent legal services to carry out the day-to-day duties of the commission.

As directed by national standards, the commission should have statutory authority to select a senior attorney to serve as executive director of the office of indigent legal services, chosen “on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.”³⁰⁶ The executive director should be hired by the commission for a fixed term that is subject to renewal and should not be removed from office absent good cause shown through due process.³⁰⁷

At minimum, Guam’s office of indigent legal services should reflect the following staffing levels:

- one executive director: primarily the “outward looking” person to interact with the rest of Guam’s government & communities;
- one deputy director: primarily the “inward looking” person to interact with the administration of and heads of the service providers;
- one training/supervision director: to provide and oversee system-wide training and to assess the system attorneys;
- one finance director: to receive, analyze, and oversee all system funding;
- one IT director: to receive, analyze, and oversee all system data (including caseloads, workloads, etc.); and
- and necessary support staff.

The commission should be authorized to decide the best indigent defense delivery systems for Guam, and funding scheme, with the office of indigent legal services administering the system. Importantly, the office of indigent defense legal services should not provide direct representation itself. So, for example, they could continue to have the PDSC corporation with its three existing divisions, and then establish a managed assigned counsel system. Or they might choose to separate the PDSC corporation into three entirely separate entities and add a managed assigned counsel entity.

The office of indigent legal services executive director should hire lawyers to run the day-to-day operations of whatever divisions or separate entities are ultimately created. This includes hiring a manager of the panel attorney system that must be out from under the judiciary. Subsequently, the new managed assigned counsel system must be given the resources to hire the requisite financial staff needed to monitor, approve and pay private attorney vouchers.

³⁰⁶ NATIONAL STUDY COMM’N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.12 (1976).

³⁰⁷ NATIONAL STUDY COMM’N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.12 (1976).

