

**Associated Counsel for
the Accused**

**Northwest Defenders
Association**

**Society of Counsel
Representing
Accused Persons**

**The Defender
Association**

December 5, 2012

Hon. Larry Gossett
President
King County Council
516 3rd Avenue, 12th Floor
Seattle, WA 98104

Hon. Kathy Lambert
Law, Justice, Health & Human Services Committee Chair
King County Council
516 3rd Avenue, 12th Floor
Seattle, WA 98104

Re: proposed re-organization of the King County public defense function

Dear Council President Gossett and Councilmember Lambert:

Just two years ago, King County spent \$200,000 for a national expert to review King County's public defender program. The County's consultant observed that "[t]he provision of indigent defense services in King County has historically been seen as among the finest in the nation," and concluded that "King County has rightfully earned a fine reputation for the quality of public defense."¹

On Thursday November 29, 2012 the Director of the King County Office of Public Defense informed us that, effective July 1, 2013, King County would no longer contract with our offices, and instead, would handle the public defense function through an as yet undefined in-house system. This announcement purportedly was driven by the County's efforts to settle the lawsuit filed against it in *Dolan v. King County*, which requires that public defender employees be allowed to enroll in the state Public Employee Retirement System (PERS).

We write to outline our position regarding the King County Executive's proposal to change the fundamental structure of public defense in King County. As the directors of the non-profit law offices that have provided public defense services to the County over the past four decades, we appreciate your personal dedication, and that of the King County Council over the years, to a strong public defense system.

¹ The Spangenberg Project, "King County, Washington Public Defender Case-Weighting Study/Final Report," April 30, 2010, pp. 1, 78.

Re-structuring is not required by Dolan decision, and not necessary to ensure public defenders receive fair pension and medical benefits

Both the Executive and the lead plaintiff in the *Dolan v. King County* litigation -- which found that public defender employees in King County should receive the same retirement benefits as are enjoyed by prosecutors and court employees -- have suggested that an in-house defender system is a necessary result of settling the *Dolan* lawsuit. But the Washington Supreme Court held in *Dolan* only that public defenders *for purposes of eligibility for the state retirement system* must be treated as if we were employees of King County. The court's decision does not say that the County cannot continue to contract with the existing offices—simply that it must pay equivalent benefits regardless of how public defense is structured. The decision to move to an in-house program is a choice – a choice with sweeping policy and budget implications that have not been publicly discussed -- not a move required by the *Dolan* decision.

Any settlement negotiated by the County's lawyers will be a voluntary agreement between the County and the plaintiffs. The settlement should not condition fair benefits for defenders on those defenders working directly for King County—and it need not. That is a policy choice outside the scope of the *Dolan* litigation.

Along with our employees, we are members of the plaintiff class. We will ask the attorneys who represent us and the other plaintiffs not to agree to any settlement that would effectively end our nationally recognized independent public defense system, because those questions can and should be decided separately. Direct employment by King County is not necessary in order for the *Dolan* plaintiffs to receive appropriate benefits.

Employees of an independently governed organization can participate in PERS and receive the same benefits as public employees. Our employees are participating in PERS now and have been since April 2012, though they are still working for independently directed offices. Employees of the Washington State Bar Association, which is independently governed, participate in PERS. Staff of the Public Defender Service in the District of Columbia receive federal benefits but are explicitly not federal employees.²

² "The Public Defender Service is a federally funded, independent organization that provides legal representation to indigent individuals who are charged in the District of Columbia with criminal offenses and are facing a loss of liberty. PDS has approximately 217 employees located at the main office at 633 Indiana Avenue, NW, Washington, DC. DC residency is not a requirement for employment. There are approximately 125 attorneys at PDS. Social workers, investigators, administrative and technical staff work with the legal staff to advance the PDS mission. PDS is funded by federal appropriations and all employees are entitled to federal benefits to include health and life insurance, federal retirement, and the Thrift Savings Plan. Transferring employees will receive recognition of creditable federal service for leave accrual and retirement purposes. Employment at the Public Defender Service is not federal employment." (Emphasis added.) <http://www.pdsdc.org/Employment/JobOpportunities.aspx>.

Whether it is better to continue as is, or eliminate an efficient and well regarded system of independent defender offices in favor of an in-house program, is a question on which there may be legitimate differences of opinion. It is not a choice that is dictated by either the Supreme Court's decision, nor need it – nor should it be -- be tied to the voluntary settlement in the *Dolan* case. It is not necessary for defenders to work directly for King County to receive the same pension and health benefits as public employees.

Any such change should be the subject of public discussion and full and transparent financial analysis, which is exactly what the Council called for in the budget proviso it included in the 2013 budget adopted only two weeks ago.

Decision without any public process

The Council budget proviso requested that the Executive consult with the bar, the union and the existing defender agencies before proposing to change the fundamental structure of the County's public defense system. Instead, the Executive has announced a final decision that, in the next six months, he will create an in-house public defense system adequate to serve more than twenty thousand clients a year and will add more than 300 employees to the King County payroll. Prior to his announcement, there was no discussion with the bar, public defense experts, other justice system stakeholders, community groups representing the interests of low-income King County residents, or our offices and staff, about the impact of such a change on the quality of defense services, on the interests of employees, and on the County's budget.

Serious implications

The implications of this decision are breathtaking, and appear not to have been weighed adequately before the Executive announced his in-house plan. According to the Seattle Times, the County public defense contract administrator has said every public defense employee is "guaranteed" a job with King County. We do not see how this is possible absent astronomical cost, unless these are "jobs for a day" without seniority or job security.

The plan is likely to increase conflicts of interest, at a high cost to the County. Every time an attorney represents a client, the Rules of Professional Conduct, which define the attorney-client relationship, create duties of confidentiality and loyalty. These duties often come into conflict with obligations to other clients and cases. King County's four separate defender agencies have allowed the County to manage conflicts of interest at low cost.

Each lawyer brings with him or her individual conflicts of interest arising from representation in former cases. We understand as yet there is no firm plan for handling such conflicts. Without completely separate law firms to handle ongoing conflict cases, those cases must be assigned to attorneys in private practice on the

assigned counsel panel, which typically costs more than representation by the existing agencies.

Without a specific plan in place, there is no way to project the ongoing cost of doing away with the agencies, sending conflict cases to assigned counsel, and hiring all current agency employees who want a job. The County's greater overhead costs and the cost implications of managing conflicts of interest suggest that an in-house program is likely to be more costly than the current model. Committing to creating an in-house system without an understanding of the cost, in a time of continuing revenue challenges, poses a puzzling and unnecessary fiscal risk.

The Executive's plan also cuts against the value of independence in public defense practice. Six weeks ago Richard Mitchell (President of the King County Bar Association Board of Trustees) and John Strait (former prosecutor and now Seattle University School of Law professor) wrote in the KCBA Bar Bulletin that any plan in response to the *Dolan* litigation must preserve the independence that characterizes King County public defense. Their article (attached) detailed numerous instances in which independence has been critical to ensuring the viability of public defense here in King County. They also point to the American Bar Association's Ten Principles of a Public Defense Delivery System, among which is that the public defense function must be independent of political influence. The Executive's announced plan makes no provision to ensure such independence.

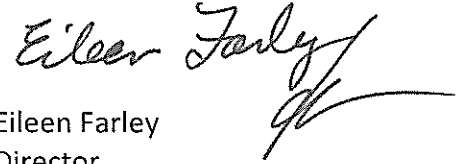
Our request

We ask that the County Council decline to approve any settlement in *Dolan* that conditions fair benefits for our staff on those staff working directly for King County. We also ask that the Council convene a workgroup, much like the group it appointed in 2010 to evaluate King County's public defense system, to consider the Executive's proposal to end the independent public defender agencies and create an in-house program. The implications of the Executive's proposal are sweeping and require a public discussion, accurate assessment of the costs of various options, and a fair consideration of different possible approaches going forward. As part of that work group, we will remain committed to the goal that King County have the best and most cost-efficient public defense system possible.

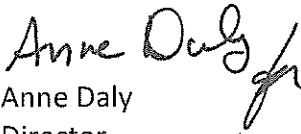
Very truly yours,



Donald Madsen
Director
Associated Counsel for the Accused
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Eileen Farley
Director
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Anne Daly
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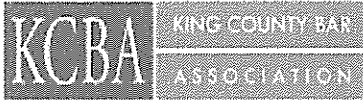
Floris Mikkelsen
Director
The Defender Association

attachment

cc:

King County Councilmember Reagan Dunn
King County Councilmember Bob Ferguson
King County Councilmember Jane Hague
King County Councilmember Joe McDermott
King County Councilmember Julia Patterson
King County Councilmember Larry Phillips
King County Councilmember Pete Von Reichbauer
King County Executive Dow Constantine
SEIU Local 925
Hon. Richard McDermott, Presiding Judge, King County Superior Court
Hon. Corinna Harn, Chief Presiding Judge, King County District Court

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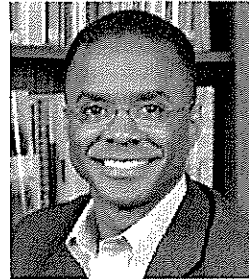
Presidents Page



Public Defense in King County

By Richard Mitchell

With Prof. John Strait¹



The U.S. Supreme Court's decision in *Gideon v Wainwright*,² the decision that said no one should be forced to answer a felony in state court without the assistance of counsel, will be 50 years old in 2013.

While there is much to regret about how poorly many jurisdictions have failed to honor this constitutional protection, there is much to celebrate about how the independent public defender agencies in King County and the City of Seattle have fought to give it life.

In many jurisdictions, lawyers are not been provided at critical stages of criminal proceedings, or courts routinely accept invalid or coerced waivers of counsel. Lawyers are assigned caseloads so high that effective representation, including adequate investigation, is virtually impossible. Lawyers who attempted to band together to do something about this and set the terms on which they would accept indigent defense assignments have been pursued for anti-trust violations.³ Surveying the national landscape on the eve of Gideon's 50th anniversary, and even the situation elsewhere in Washington,⁴ shows how easy it is to get public defense wrong.

King County, in contrast, has a strong and vigorous public defense system regarded as one of the best in the country. For the past 40 years, with support from this bar association and others, the County has



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contracted with independent not-for-profit law offices to defend indigent clients. All the public defender offices employ investigators to critically examine the charges brought by the prosecutor. They join with social workers to give the court and prosecutor a complete picture of the client and to develop sentencing alternatives. They have suggested, provided and found funding for programs and policies that improve the criminal justice system.

We believe the strength of our system follows directly from the independence of the agencies. They are not restricted, as are county employees serving at the direction of elected officials, from challenging the assumptions and policies that impact their clients.

Ten years ago, four past presidents of this bar association (Ralph Maimon, Fred Noland, Mary Alice Theiler and Steve DeForest) wrote an op-ed in the Seattle Post-Intelligencer praising King County's nationally acclaimed defender program and calling to maintain it. More recently, in 2010, King County commissioned a \$200,000 expert review of our public defense system in which dozens of justice system stakeholders were interviewed in preparation for assessing defender workloads. The County's nationally regarded consultant observed, "The provision of indigent defense services in King County has historically been seen as among the finest in the nation," and concluded that "King County has rightfully earned a fine reputation for the quality of public defense."⁵

Last year, the Washington Supreme Court held that employees of the public defender agencies are de facto county employees for purposes of eligibility for the state retirement system (PERS).⁶ Since the County must now pay certain benefits for defender agency employees, this decision has raised the question: Should King County abandon the independent agency system of the past four decades?

An essential feature of our strong public defense system has been realistic caseload limits, ensuring that defenders have sufficient time to establish a meaningful attorney-client relationship, research and investigate their cases, and maintain a credible trial capacity. Another has been salary parity with prosecutors, ensuring that defense agencies could recruit and retain lawyers of comparable caliber to opposing counsel. In recent years, the County Council and the defender agencies developed a funding model that established the real cost of running a defender practice and ensures that public defenders have adequate resources.

We believe that these components of a robust public defense system can be traced to a single source: the defender agencies stand independent of political influence. Each of these protections — caseload limits, salary parity and an accurate funding model — was achieved, not through state legislation or mandatory ethical standards, but through advocacy by the independent defender offices. Because the agencies were not under the direction of public officials, they were free to battle for the resources required to effectively and professionally represent

their clients.

Independence is rare and public defense often suffers as a consequence. In recent years, many municipal defender systems incurred damaging funding reductions. Absent an independent voice for public defense, appointed in-house defenders can only make a quiet internal case to the executive branch for sufficient resources. Further public discussion, explanation and disagreement are not permitted.

The American Bar Association long has recognized independence of the public defense function from political influence as the first of its Ten Principles of a Public Defense Delivery System.⁷

Periodically, the idea of converting King County's independent public defender agency structure to an in-house government agency has been considered and rejected. Leaders in the private bar have been in the forefront of making the case to maintain independent nonprofit agencies as the primary providers of public defense services.

In 1980, for example, Bob Moch, chair of the King County Public Defender Advisory Committee, wrote the King County Council urging that it not create a government public defender office, which was under consideration at the time. Moch drew on the Advisory Committee's original 1970 report recommending that public defenders be "entirely separate from the government which has placed them in jeopardy."

In 2000, King County commissioned a national expert on public defense systems to assess the independent contractor structure and report to a multi-agency Public Defense Study Oversight Committee, chaired by Judge Michael Spearman and including representatives from the offices of the King County prosecutor, the Seattle city attorney, King County superior and district courts, the King County executive and the county and city budget departments.

The report observed, "Public defense services in King County are considered among the best of the major urban counties across the country."⁸ The Oversight Committee, after reviewing numerous other possible configurations, recommended the continuation of King County's independent agency structure.⁹

Historically, the King County defender agencies have used their independence to advocate for important criminal justice policy reforms. The agencies often have identified ways to reduce justice system costs while improving the quality of justice in King County courts.

For example, the defender agencies have helped streamline contempt of court proceedings in child support enforcement cases; reduced costs dramatically by reducing their own staffs; and helped design re-licensing programs so clients can negotiate the often-confusing process of regaining their driver's licenses, significantly reducing the number of charges filed by the prosecutor while improving public safety.

One agency, with foundation funding, has developed

policies to reduce racial disparity in the justice system, helping to launch innovative partnerships with local law enforcement and prosecutors to transform drug law enforcement in ways that reduce racial inequality. Another agency created the ROYAL (Raising Our Youth As Leaders) program, striving to prevent justice system involvement for youth of color.

Twice in recent years we have seen instances where, without an independent voice for public defense able to directly and openly advocate for adequate resources, funding for public defense in King County would have been reduced to a level that threatened the quality of representation for indigent clients in our courts.

In 2005, the King County Council developed a public defense funding model, tracing the real costs of providing defense services. The model was created in response to budget proposals from the King County executive that woefully underfunded defense needs. The situation was so dire that a mid-year budget correction appropriating an additional \$1.5 million was required to restore the defender agencies to viable funding levels.

Had the defender agencies not existed to make the case for the necessary resources directly to the Council, it is highly doubtful that the Spangenberg Project could have found in 2010 that King County's defender program continues to be one of the strongest in the nation. An independent voice for the defense function was, and undoubtedly will again be, necessary to prevent underfunding.

In 2009, the defender agencies argued that changes in the King County prosecutor's filing standards meant that the average case handled by public defenders had become much more serious and that reasonable workloads for defenders should be assessed. The King County Council retained an outside expert to study public defender caseloads. The study confirmed the defender agency concerns and the County Council approved funding that recognized the increased difficulty of public defense cases.

Again, if the public defense function were held within the County's executive branch, it is unlikely that this needed reform would have taken place. It came about because independent agencies advocated for public defender clients before the King County Council.

The quality of public defense services we have become accustomed to in King County is directly linked to the independence of the public defender agencies. An independent voice is the key to maintaining effective and vigorous representation.

King County reasonably should, and will, consider ways to limit the cost impact of the recent Dolan decision. However, the political independence and stability of defender offices must be core principles in that analysis, as they have been for the past four decades, to the great benefit of both the County and its residents.

¹ Prof. John Strait is an associate professor of law at Seattle University School of Law. An expert on ethics

issues, he teaches Criminal Law, Criminal Procedure, Professional Responsibility and Trial Advocacy. A special thank goes to Lisa Daugaard for her assistance with this article.

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

3 See, e.g., *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (ruling that boycott by contract public defenders in Washington, D.C., to get the local government to raise compensation rates constituted an illegal restraint on trade under federal antitrust law).

4 Grant County settled a systemic lawsuit alleging ineffectiveness in its felony public defense program by agreeing to establish a new public defender system with caseload limits, salary requirements, investigation and expert services resources, a monitor to report on the system, and \$500,000 in attorney fees. *Best v. Grant County*, Grant County Superior Court No. 04-2-00189-0 (2005). In addition, Grant County paid \$250,000 to settle a separate lawsuit for ineffective assistance in one case. See "Grant County man gets millions for poor defense," at http://seattletimes.com/html/localnews/2008694272_pubdefender01.html.

More recently, U.S. District Court Judge Robert Lasnik denied summary judgment for the cities of Mount Vernon and Burlington in litigation challenging the adequacy of those cities' indigent defense services. Judge Lasnik wrote:

At this early state of the litigation, the evidence ... could support a finding that indigent defendants in Mount Vernon and Burlington are deprived of counsel at critical stages of the prosecution and that the assignment of public defenders is little more than a sham. Order Denying Summary Judgment in *Wilbur v. Mount Vernon*, C11-1100RSL (February 23, 2012).

5 The Spangenberg Project, "King County, Washington Public Defender Case-Weighting Study/Final Report," April 30, 2010, pp. 1, 78.

6 *Dolan v. King County*, 172 Wn.2d 299 (2011).

7 Available at: http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

8 The Spangenberg Group, "King County Public Defense Study/Final Report for the Public Defense Study Oversight Committee," July 7, 2000, p. 7.

9 *Id.*, p. 62.

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