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### Recommended Citation

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Is Justice Available to All? Indigent Defense in Michigan

By

Barbara K. Lanning

A Thesis Submitted in  
Partial Fulfillment of the  
Requirements of the  
Lee Honors College of  
Western Michigan University

April 2011

## ABSTRACT

Does Michigan's public defense system operate in accordance with the decisions made by the Supreme Court in cases like *Gideon v. Wainwright*, *Powell v. Alabama*, and *Argersinger v. Hamlin*? If not, how can we reform the system? The right to counsel for those accused of a crime in the United States is a constitutional right. After the decision issued in *Gideon v. Wainwright* (1963) the federal government mandated that all states were responsible for providing representation for indigent defendants. The states provide these services either through public defender programs, appointment of court cases to private attorneys, or through contracts with private attorneys. Michigan ranks 44th of the 50 states in public defense funding and makes public defense an unfunded mandate. Unlike other states, Michigan does not have a uniform method of criminal defense. For a variety of reasons, including lack of funding throughout Michigan, speed is emphasized over quality and due process. Many counties in Michigan have public defense systems that are operating far under the standards set by the constitution and Supreme Court Decisions. Historically, there have been several proposed solutions. While some solutions may solve the problems of many individual counties, the disparities between the counties make a statewide solution unrealistic. This study focuses primarily on problems experienced in Southwest Michigan and possible solutions. Through this study, I will first look at the background of the existing problem. Next, I will demonstrate through the review of selected literature and interviews the problems that are specific to Southwest Michigan. Lastly, I will explore proposed solutions that are currently under consideration and provide an evaluation of these solutions.

## INTRODUCTION

Eddie Joe Lloyd was a Detroit man convicted of the rape and murder of an under-aged girl in 1985. Lloyd is one of many victims of the prioritization of speed over due process. Lloyd's case seemed open and shut. There was a taped confession to the police, giving detailed information about the crime. When his case went to trial, it took less than one hour for the jury to come back with a guilty verdict. Eddie Joe Lloyd was sentenced to life in prison without the possibility of parole. However, Eddie Joe Lloyd was innocent. His confession came after he had written a letter to the police from his room in the Detroit Psychiatric Institute suggesting that he had pertinent information about the case. Lloyd was convinced he had supernatural abilities, and this was not the first letter he had written to the police regarding unsolved cases. The police interviewed him at the Psychiatric Institute at least three times, never with an attorney present. The police convinced Lloyd that him confessing would "help smoke out the real perpetrator" while feeding him salient information about the crime. When Lloyd was charged, he was given a court appointed attorney who performed little to no cursory work before the trial, and ultimately withdrew from the case eight days before the trial. The court appointed another attorney who had no ethical problems with taking on the case a week before trial. He called no one to testify on Lloyd's behalf and had a closing argument that lasted less than five minutes. On appeal, Lloyd was assigned a new appellate attorney who never visited with Eddie Joe Lloyd in prison. Eddie Joe Lloyd's story is not unique. Injustices like this one happen all too often in Michigan's Court System. However, unlike many others, Lloyd

got lucky. After losing his appeal, Lloyd's case was taken on by the innocence Project. He enjoyed 17 years of freedom before his untimely death at the age of 54. (National Legal Aid & Defender Association, 2008).

### ***Background of the Problem***

The American legal system is a complex structure comprised of many individual systems. One of the most underrated but most important of these is the public defense system. Public legal representation has evolved and developed substantially in the past century.

In 1932, the U.S. Supreme Court decided the case *Powell v. Alabama* (1932). In the court's ruling, it held that "in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him." (Roberts, 1942) The court cited the 14<sup>th</sup> amendment in its ruling. The decision set the precedent that, in capital cases, indigent defendants have the constitutional right to appointed counsel. However it would be another 31 years before this right would be afforded to defendants in state court. When the Supreme Court decided *Gideon vs. Wainwright* (1963), it explicitly overrode its previous decision in *Betts vs. Brady*. *Gideon* further expanded a defendant's right to court appointed counsel to the state level. Using the 6<sup>th</sup> amendment, the Supreme Court stated that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." (Cranmer,

2006) In another case, *Argersinger v. Hamlin* (1972), the Supreme Court found that “an indigent defendant may not be imprisoned, even for a misdemeanor, unless afforded the right to counsel.” (Harlow, 2000) In 1977, with the case *Brower vs. Williams* (1977), the Supreme Court further defined what the “right to counsel” means. The Supreme Court stated that the right to counsel means “at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment.” (Alito, 2008)

Each year, American trial courts see thousands of defendants come through their courts. Many of these defendants do not have thousands of dollars to retain private counsel. Many states in the U.S. have uniform public defense systems; however, Michigan is not among these states. Michigan uses a mix of public defender and contract/bid systems. This mix of systems creates a great potential for inequality across county lines.

Through the review of selected literature and the interviews of several attorneys involved with public defense systems in Michigan, we are able to examine several of the issues plaguing the Michigan defense system. While there is no cookie-cutter solution for every county, it is important to evaluate and modify the existing proposed solutions to these problems. In coming up with new solutions, it is crucial to recognize that because of extreme size, cultural, and socioeconomic disparities between counties, problems with public defense are going to vary by county. Funding seems to be an issue at the heart of many of the problems Michigan is currently facing. The serious lack of funding for public defense systems is one of many important factors that have to be directly addressed in any proposed solution.

### ***Statement of the Problem***

There are several factors that contribute to Michigan's problem that the justice system is not affording to all people the rights they are entitled to under the 6<sup>th</sup> and 14<sup>th</sup> amendments. Currently, Michigan is among the few states that do not have uniform system of public defense. "Michigan ranks 44<sup>th</sup> of the 50 states in public defense funding." (National Legal Aid & Defender Association, 2008) On average, Michigan spends only \$7.35 per capita, which is 38% less than the national average. Alternatively, Michigan ranks among the highest states in spending for corrections. Additionally, according to the National Legal Aid and Defender Association (NLADA), "Michigan is 1 of 7 states that place the entire burden for funding trial-level public defense on its counties as an unfunded mandate, ignoring the constitutional requirements identified by the United States Supreme Court." (National Legal Aid & Defender Association, 2008). While there are many elements that contribute to the failing system, the most important in Michigan is the lack of funding. Another factor that contributes to Michigan's failing public defense is the level of traffic the system experiences. Because the system has become so over burdened with cases, it has become more concerned with plea deals than with quality defense. Even some both within and outside the system are referring to our current circumstances as the "Mc Justice days."

There have been several evaluations and studies conducted by NLADA and other organizations that have attempted to expose the problems with the current system. One of these studies is the special report on Defense Counsel in Criminal Cases published by the U.S.

Department of Justice, Bureau of Justice Statistics. Another important piece of literature published was the 2009 Report Card issued by the Michigan Campaign for Justice. Potentially the most significant study conducted evaluating Michigan's failing defense system was "A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis" published by NLADA. The problem is so severe even the state legislature has offered some solution. One solution proposed by state legislature is House Bill No. 5676, also known as the Michigan Public Defense Act.

## **BODY**

### ***Review of Selected Literature- Evaluating Public Defense***

The Michigan Campaign for Justice uses information collected by NLADA to put together a report card for Michigan's public defense system. The Campaign uses elements from the Ten and Eleven Principles of a Public Defense Delivery System to rate Michigan's performance. The 2009 report card found that Michigan's public defense system earned D's and F's in all but one category. In the category "Consistency", the state earned a C, but found that "attorneys in some urban counties are overburdened with cases and forced by the system to ask 'stand-in' attorneys to cover for them for hearings." (Michigan Campaign for Justice, 2009)

In the sections Eligibility/Early Appointment, Confidentiality, Competency, Training, and Quality, the state received "D" ratings. In the 3<sup>rd</sup> section, "Eligibility/Early Appointment", researchers found that "Michigan has no uniform screening method to determine eligibility for public defense services, nor does it have eligibility standards that are uniformly applied statewide. (Michigan Campaign for Justice, 2009) Additionally, "there is no statewide



requirement for or enforcement of prompt appointment of counsel. “In the fourth category regarding confidentiality, experts commented that “many attorneys interview their clients in crowded ‘bullpens’ that are located behind courtrooms or in public hallways.” This practice compromises their client’s privilege of confidentiality. In the sixth category, competency, experts found that “there are no consistent statewide qualification standards for public defense attorneys... [even when there are] standards, they are very limited.” In the 10<sup>th</sup> category regarding quality, the experts also commented on the lack of performance standards. “[The lack of standards leads] to wide variations in the quality of justice.” Consistent through these assessments is the focus on the lack of standards and enforcement (Michigan Campaign for Justice, 2009).

In the sections Independence, State Funding and Structural Integrity, Availability, and Advocacy, the state earned “F” ratings. In the first section, Independence, the experts focused on contract systems where attorneys answer only to judges. “This practice leads to a compromised justice system in which attorneys may be forced to make critical decisions based not on the best interest of their clients but on pleasing the judge. “The second category, State Funding, the experts noted that Michigan is one of seven states that provides no state funding for public defense services. They stated that “Michigan’s [counties] are ill-equipped to fund and manage statewide public defense services.” The eleventh category, Advocacy, is said to be a principle that cannot be implemented unless the other ten principles are upheld. Experts have concluded that Michigan’s public defense system “lacks the structure to uphold the first ten principles.” Using these assessments, we are able to draw the conclusion that Michigan’s public defense system needs to set standards and enforce them. Additionally, “an efficient and

effective public defense system requires adequate state funding and state oversight to meet even minimum national standards (Michigan Campaign for Justice, 2009).

The Bureau of Justice Statistics published a special report titled “Defense Counsel in Criminal Cases” in 2000. This report examines the correlation between type of counsel and conviction rates, sentences, and other case information. The findings of this study support the idea that there are significant disparities between appointed and retained counsel. One conclusion the report offered is that “of [defendants] found guilty, higher percentages of defendants with publicly financed counsel were sentenced to incarceration.” The study offered that in large state courts, 54% of defendants represented by private counsel were sentenced to incarceration. Alternatively, 71% of defendants represented by public counsel were sentenced to incarceration (Harlow, 2000). This correlation is important in Michigan not only because of the number of defendants that utilize the services of Court Appointed Attorneys, but also because of the overcrowding in jails across the state.

Additionally, the report concludes that workloads are constantly increasing for public defenders. Between the fiscal years of 1994 and 1998, the caseload for public counsel increased by 26%. However, the budget for public defense did not increase accordingly. Not only are these attorneys underfunded, they are over worked. “The Defender Services Division estimates that court-appointed counsel represent 85% of criminal defendants at the same time during the conduct of their case” (Harlow, 2000).

The report also concluded that “state defendants with a criminal record are more likely than other defendants to use public counsel.” This could be attributed to a cycle of events: defendant commits a crime, can’t get a job, has no money, commits another crime, then has to

be represented by public counsel. Ultimately, this cycle creates more work for public defenders. The report states that “86% with a previous conviction and 77% without had public defenders or assigned counsel” (Harlow, 2000).

Another discrepancy between defendants who have retained versus assigned counsel is the contact they have with their attorney. “Of inmates with court-appointed counsel, 37% of state inmates... spoke with their attorneys within the first week. In contrast, of those with hired counsel, about 60% of state inmates... had contact with their attorneys within a week of arrest.” On average, defendants with appointed counsel speak to their counsel less frequently than those who retain private counsel. One of the most surprising statistics is that approximately 14% of defendants in state court first speak with public appointed counsel on the day of trial. The percentage is several times lower for those who hire private counsel. This report provides a Quantitive data in addition to the information that other studies have observed (Harlow, 2000).

In February of 2006, the state Bar of Michigan, Michigan Bar Journal published an article titled “Indigent Criminal Defense Systems in the State of Michigan-A Time for Evaluation and Action.” This article assesses the dire situation Michigan’s public defense system is currently in. The article makes the point “lawyers in criminal courts are necessities, not luxuries.” Michigan is presently in a situation where there are “no statewide standards or funding structure to assure adequate representation.” In 2002, the American Bar Association adopted ‘The Ten Principles of a Public Defense Delivery System.’ These principles are designed to make all courts, especially state trial courts more efficient, effective, ethical, and of higher quality. Since, the adoption of these principles, NLADA has concluded that Michigan has always fallen short. In

response to this finding, NLADA has proposed a solution. The proposed solution points out that “a system that metes out justice in proportion to the availability of limited local resources cannot assure victims, the accused and the general public that resulting verdicts are fair, correct, swift and final” (Cranmer, 2006). NLADA stresses the need for not only uniform data, but also for quantitative, statistical data about quality and cost effectiveness. “Michigan is the only state in the entire country that cannot accurately account for the total amount of state and local funding dedicated to ensuring people’s constitutional right to counsel.” Additionally, “because local funding is primarily derived from property taxes, the amount available for defender services tends to constrict in inverse proportion to the demand for such services (i.e. , a weakened local economy causes increases in unemployment, worker flight, demands for other county services, and crime)” (Cranmer, 2006). NLADA suggests that there are costly repercussions to the lack of knowledge Michigan currently has, both literally and figuratively. “The failure to account for spending decisions may be resulting in an enormous waste of money that is borne by taxpayers and community businesses.” The article focuses on the importance of a change in the current system. “Action is needed... Our system of justice will only work if we provide every defendant with competent, fully trained, and adequately paid defense counsel” (Cranmer, 2006).

One of the most significant studies done on the trial-level indigent defense systems in Michigan is an evaluation conducted by the National Legal Aide & Defender Association titled “A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis.” In chapter one, Overview, the evaluation discusses several of Michigan’s deficiencies and emphasizes

problems like lack of funding, lack of structure, and lack of enforcement. The study was conducted in ten Michigan counties which, in entirety, accurately reflected geographic, population, and defense delivery method of the whole state (National Legal Aid & Defender Association, 2008).

Chapter two is labeled “Michigan’s History of Muting Gideon’s Trumpet.” In the decision in *Gideon v. Wainwright*, the Supreme Court stated

“the right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”

The issue in Michigan isn’t always the lack of having an attorney, but more often is the lack of having adequate representation.

The ruling in *Gideon* also made clear “the Sixth Amendment’s guarantee of counsel was ‘made obligatory upon the states by the Fourteenth Amendment’ – not upon county or local governments.” However, in Michigan, this is often overlooked. Many of the counties rely solely on local and county funding to support defense programs. “Michigan is one of only seven states that still place the entire burden for funding trial-level right to counsel services on its counties as an unfunded mandate”. This presents an issue because most local and county governments rely on property taxes as their main source of revenue. “When property values are depressed because of factors such as high unemployment or high crime rates, poorer counties find themselves having to dedicate a far greater percentage of their budget toward criminal justice matters than more affluent counties. This, in turn, limits the amount of money

these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions..." (National Legal Aid & Defender Association, 2008). This ultimately leads to depressed property values because no one wants to move to or live in a community with limited social services and high crime rates.

It is all too often the case that the counties that can least afford to pay for indigent defense are the counties who are in most need of it. Michigan has not always been in the position it is currently in. "As recently as the early 1990s when 34 counties paid by the hour, Michigan was known as a state that followed the assigned counsel model of indigent defense delivery." Unfortunately, this is no longer the case. Currently, there are a couple ways of contracting indigent defense in Michigan. One style is the flat fee contract model. "Flat-fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation. Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions" (National Legal Aid & Defender Association, 2008)

There have been several proposed alternatives and solutions in the last two decades. In a previous study conducted by NLADA, it was "recommended that the only answer to the problems plaguing juvenile justice representation in Detroit was enactment of statewide trial-level representation legislation." Much of the legislation proposed, in hopes of reform, has been quickly forgotten. For example, Public Acts 438 and 443 proposed in the 1970's were enacted, but funding quickly ran out and were forgotten. (National Legal Aid & Defender Association, 2008) Additionally, Chief Justice G. Mennen Williams 1986 was the first of many

Supreme Court Justices that have called for broad reform, but concerns have gone unaddressed.

The evaluation also acknowledges there are problems throughout Michigan, but many of the problems are more prevalent and profound on the east side of the state in counties like Wayne. Broad reform proposed for Wayne in the past has ultimately been abandoned. The study suggests that there are many financial disincentives to due process. The study features a part of the *Report of the Special Master* from April 3, 1991.

“The current system of court assignment and payment has gone far to do what it was designed to do, namely speed the court docket. [However, it does] encourage defense attorneys to persuade their clients to plead guilty. The incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed. Under the current system, a lawyer can earn \$100 an hour for a guilty plea, whereas if he or she goes to trial the earnings may be \$15 an hour or less. Essential motions are neglected. In short, the system of reimbursement of assigned counsel now exists creates a conflict between the attorney’s need to be paid fully for his services and obtaining the full panoply of rights for the client... The system of payment according to the seriousness of the crime rather than on hours spent or work performed is not reasonable or just and is a disincentive to due process...” (National Legal Aid & Defender Association, 2008).

While the issue of indigent defense has long been unaddressed, it has not been unnoticed. Courts in Michigan from the Trial level to the Supreme Court level have acknowledged that the structure of Michigan’s indigent defense system is an issue that needs remedy. The Supreme Court of Michigan declared in a special report: “among other things, that ‘[t]he state should assume the core costs of the court system, including judicial salaries and benefits, the salaries and benefits of court staff, due process costs including the cost of indigent representation, and the cost of statewide information technology” (National Legal Aid & Defender Association, 2008). There are both systemic and local problems that need to be addressed. One of the biggest issues at the local level is the indifference of some elected officials. “During a public

hearing regarding the right to counsel, a witness from Michigan related, “I once addressed the Michigan Association of Counties meeting, and a county commissioner raised his hand in the back and said: ‘Is there any way we could get defendants from the jail to the prison without going to court? Because you would save a lot of money’. And that kind of sums up the attitude, especially in the rural counties.” (National Legal Aid & Defender Association, 2008).

One of the major systemic issues with the system of indigent defense in Michigan is the prioritization of speed over due process. “People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney, in direct violation of both *Argersinger* and *Shelton*.” This is true especially in misdemeanor cases, where counsel is often not offered or is viewed as an unnecessary amenity. “District courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution.” These misdemeanors overburden the court systems, and as a result due process becomes less important than speed. Defendant’s have the option to waive the right to counsel in any criminal case. However, to be valid, this waiver must be voluntary, knowing, and intelligent. In many misdemeanor cases, defendants waive this right for a variety of reasons, including pressure from the system. “Although misdemeanor convictions or sentences may not generally result in lengthy incarceration, the life consequences of convictions can be severe, including job loss, family breakup, substance abuse, and deportation – all factors that tend to foster recidivism.” Many defendants sign away their rights without full knowledge of the consequences. (National Legal Aid & Defender Association, 2008).



Because there is no uniform system of defense in Michigan, several aspects of the indigent defense services provided vary from county to county. One of these aspects is the financial eligibility requirements. While some jurisdictions have strict financial eligibility requirements, others “have no eligibility guidelines and conduct no inquiry, or simply appoint a lawyer for all defendants who claim they cannot afford retained counsel.” The latter is truer for counties with poverty rates so high that conducting inquiry would not be cost efficient. “The wide ranging practices described above paint a clear picture showing that the ability of a poor person to have their constitutionally-mandated right to counsel met is entirely dependent on which side of a county line the crime is alleged to have been committed.” (National Legal Aid & Defender Association, 2008). In Michigan’s system, individuals and jurisdictions are free to “define financial eligibility as they see fit, ranging from ‘absolutely destitute’ to ‘inability to obtain adequate representation without substantial hardship,’ with factors such as employment or ability to post bond considered disqualifying in some jurisdictions but not in others.” This practice has been found to constitute a violation of due process and equal protection by the National Study Commission on Defense Services. (National Legal Aid & Defender Association, 2008).

### ***Research Design***

This research was conducted in order to gain qualitative data regarding the state of Michigan’s public defense from attorneys who currently or in the past have practiced within the system. Research through conducting interviews gathers verbal information regarding the

opinions and observations within the system. By conducting these interviews, I hope to answer the questions: does Southwest Michigan's public defense system operate in accordance with the decisions made by the Supreme Court in cases like *Gideon v. Wainwright*, *Powell v. Alabama*, and *Argersinger v. Hamlin*? If not, what can we do to reform the system? What, if any, are the problems that are specific to Southwest Michigan's public defense system?

The participants in this research are a group of seven attorneys that have in the past or currently practice public defense in Kalamazoo, Barry, Calhoun or Allegan Counties. These attorneys are able to provide holistic, insightful opinion. Also, they are able to provide a perspective from within the system. Each interviewee was asked a total of thirteen questions regarding discrepancies between representation of retained and indigent defendants, the quality of public defense attorneys and the general problems facing the current public defense system. The respondents were advised that they may elect not to answer a question or questions, as they would not be forced to participate. Respondents were explained the importance and scope of the study being conducted, as well as the aim and scope of the study.

After the completion of the interviews, the responses were evaluated and assessed. All relevant information was compared to the other interviews and selected literature. Information that appeared to have significance was included in the study.

In researching this topic, I conducted several interviews with individuals involved in the court appointed systems in different counties in Michigan. Many of the court appointed Attorneys in Kalamazoo County began practicing here after "the switch". The switch occurred

approximately three years ago when Kalamazoo County made the switch from a bid system to a contract system.

## ***Interviews***

### Financial Incentive to Plead

Sarissa K. Montague is a criminal defense attorney in Kalamazoo, Michigan practicing both privately and as a court appointed attorney. Montague is on the felony “defense contract” for Kalamazoo County. In this system, cases are assigned by the defense coordinator every quarter. Each attorney on the contract is given two days of cases a month, with one to five cases per day. Montague makes initial contact with her court appointed clients most often on the morning of their Preliminary Examination. Unlike many court appointed attorneys, Montague attempts to make contact with court appointed clients by sending a letter with a copy of their police report, and calling the number provided to her by the court. However, in her experience, she has found that the information provided by the court is often incorrect. Alternatively, with retained clients, she often meets with them prior to any court date, with the exception of the arraignment. Another important facet to look at is plea bargaining. While plea bargaining is a big part of any criminal case, it is encouraged in court appointed cases almost to a fault. “It is incumbent upon any court appointed Attorney to plead the case in the first days. The system is set up to encourage plea bargaining in the early stages. By handling more cases in less time, you do better economically.” Attorneys in Kalamazoo County are paid \$460 for some cases, and \$800 for others, regardless of how much time or effort they put into a case.

They are only paid more if the case goes to trial, and even then they are not allotted funding for typical trial expenses. The lack of pay “encourages quick representation and getting things settled. There is little money for experts and other typical expenses.” Montague also commented on the attire of court appointed Attorneys in Kalamazoo County. “[The appearance of court appointed attorneys] in Kalamazoo, Michigan is disgraceful. This absolutely sets the pace of what your clients [and the court] think of you.” Alternatively, all retained attorneys are dressed professionally.” The appearance of attorneys is a detail that can easily be overlooked. There is an unspoken assumption that attorneys should present themselves in a professional way, and not doing so can result in a lack of respect from Judges and Prosecuting Attorneys.

#### Resource Constraints – Limit Options

Anastase Markou is another attorney currently practicing criminal defense in Kalamazoo County. While he is currently practicing solely private defense today, he practiced as a court appointed attorney in Kalamazoo County from 1994 to 2003. In his experience with the court appointed system, he worked on both federal and state levels, with cases in both felony and misdemeanor systems. However, he has always refused to take on court appointed life sentence felony cases, because he feels that “there are not enough resources for a court appointed attorney to properly handle a life sentence case.” When Attorney Markou was involved with the court appointed system, Kalamazoo County ran a bid system; however, they have since switched to a contract system for felony cases. In his opinion, the bid system is more beneficial to all parties, because the attorneys have more contact with one another. One of the major problems with the contract system is that attorneys answer only to judges. There

are less checks and balances in this system, because there is no administrator to answer to. Attorney Markou noted some discrepancies in the Plea Bargaining between retained clients and court appointed clients. He explained that because retained clients have the resources to attend recommended treatments and programs, “they have a step up on rehabilitation.” They have the ability to travel more and can afford things like independent drug tests and anger management. Attorney Markou also noted discrepancies in bonds set for retained and court appointed clients. There is “an unspoken assumption that if you can afford to hire an attorney, you’re less likely to flee.” One of the most important things Attorney Markou noted is that “because of a heavy workload and a lack of resources, court appointed Attorneys often cannot challenge pretrial issues like constitutional violations.” Court appointed Attorneys don’t have the time to interview witnesses or funds to hire expert witnesses or perform adequate research. “Because of the lack of time and money, they are not as prepared.”

Attorney Susan Eifler has been practicing in Kalamazoo County since “the switch” occurred, for approximately three years and in Calhoun County for ten years. Attorney Eifler shared that one difference between retained and appointed attorneys is the use of Prelim Exams. Often retained attorneys hold them, while appointed attorneys no not. “They are a good way to get discovery in and hear the prosecution’s witnesses. It is important to weigh whether or not there will be damage to the client.” In addition to this, she feels that retained Attorneys also file more motions. Attorney Eifler noted that in Calhoun County, there was one year a group of out of town attorneys sent in a bid that severely undercut the local attorneys. The County accepted the bid, and local attorneys were out of luck.

#### High Crime Impacts the System in Many Ways

Attorney Julie Nakfoor Pratt is currently practicing both private and public defense in Kalamazoo and Barry County. Barry County's court appointed felony system is different from Kalamazoo's in the way that Attorneys are paid on a "point system", on a quarterly basis. In her experience as a court appointed Attorney in both counties, court appointed clients have noticeably higher recidivism rates. It becomes somewhat of a vicious cycle. "Often, it is the case that because of prior criminal history, they can't get a job, and can't pay for an attorney." Attorney Nakfoor Pratt noted several differences between Kalamazoo and Barry County. Because Barry County is so small, Kalamazoo has a 3x larger caseload. The Kalamazoo jail is crowded, so it is typical that defendants receive longer sentences for comparable crimes in Barry County. Attorney Nakfoor Pratt also pointed out that the court appointed systems in both Kalamazoo and Barry County run fairly smoothly, however, this is not the case in many counties in Michigan.

Attorney Nathan Tagg has been practicing in the Kalamazoo County court appointed system for approximately four years and in the Barry County court appointed system for approximately five years. He expressed that his personal ratio of appointed to retained clients over the years has pretty consistently been 20:1. Much like Attorney Sarissa Montague, Attorney Nathan Tagg attempts to contact his court appointed through a letter, but has found that he gets a response about 5% of the time. When asked about the differences between the counties, he noted that attorneys in Barry County are not as well qualified. Attorneys in Barry county "do not have as much experience, there is a different demographic" between the counties. Because of the significant disparities in crime levels between the two counties, Barry

County Attorneys often practice Criminal Law less frequently than Attorneys in Kalamazoo County.

#### Less Involved Attorneys are Less Concerned

Attorney Susan Prentice-Sao practices law in both Allegan and Kalamazoo counties. She has practiced as a court appointed Attorney in Kalamazoo for approximately three years. However, most of the work she does in Allegan County is bankruptcy and contract law. Attorney Prentice-Sao relies on the sheets the attorneys are given by the court to contact clients. She finds that she often makes initial contact with her clients at their Preliminary Examination. She feels that court appointed attorneys in Kalamazoo County are paid “just fine.” It may seem like these programs are underfunded, but to her “it balances out in the big picture. [She] may spend two hours on one case, but 10 hours on another.” In comparison with other appointed attorneys in Kalamazoo County, Prentice-Sao takes an oppositional perspective.

#### Court Appointed Counsel as “Repeat Players”

Attorney Kathryn Russell has practiced in Kalamazoo County as a court appointed Attorney for three years, and has more than ten years of experience working in Barry County’s court appointed system. Through working for both counties, she has gained perspective about each individual system, and the State’s system as a whole. “The state of Michigan’s economy has greatly affected private work in both counties. Five years ago, it was 25% appointed work 75% retained. However, now it is 60% court appointed and 40% retained.” In today’s system, many attorneys who do court appointed work are making their living off of those cases, not retained work. Attorney Russell acknowledged that both counties have some positive aspects “Barry

County tries to make sure attorneys are compensated well – they have gotten consistent raises except in 2010. Kalamazoo, [while more underfunded], is a well organized system.” Russell also wanted to make it known that there can be benefits to having court appointed representation. “Court Appointed Attorneys deal with Prosecutors on a daily basis... they know the judges well, [in some cases] hired attorneys from other counties don’t.”

### Administration and Attorneys are Equally Responsible

Prior to being elected judge in the 9<sup>th</sup> Circuit Court in Kalamazoo, Michigan Judge Gary Giguere served as a criminal defense attorney for ten years practicing on both state and federal levels. Before practicing criminal defense, Judge Giguere worked as a county prosecutor for four years. Through his years of experience, Judge Giguere has gained incredible perspective into the court appointed system in Kalamazoo County. Giguere noted that the court appointed system in Kalamazoo County now runs much smoother than the systems in many other counties in Michigan. Kalamazoo County now screens attorneys before putting them on the list for felony clients to ensure that they are qualified enough to handle felony cases. However, this was not the case four years ago when “the switch” occurred and approximately 20 attorneys formerly on the court appointed list left. The switch occurred after “a breakdown in negotiations. There was a wholesale changeover in the Indigent Defense roster.” The switch allowed an entire group of new, inexperienced, out of town attorneys to take on felony cases in Kalamazoo County. Judge Giguere was appointed right before the switch occurred, and so “had a front row seat and a dim view of [the new attorneys’] abilities.” For a short period of time, “there was a real question whether or not clients were receiving the adequate representation



they are constitutionally entitled to.” However, through education and training, there has been improvement in the past couple years. The four judges of the 9<sup>th</sup> Circuit Court work together to monitor the quality of the felony court appointed attorneys. There are instances when judges need to step in and meet with attorneys to discuss issues affecting their quality of representation. Any complaint letters sent from clients are addressed by the judges and administration. Given the choice, Judge Giguere would implement a public defender’s office in Kalamazoo County. A public defender system financed equally with the Prosecutors Office would be a better match than the current system. As the current system stands, there are inherent inequalities between Court Appointed Attorneys and Prosecuting Attorneys. Because Prosecuting Attorneys are county employees, they receive healthcare benefits, have their Bar dues paid, and receive other additional perks that Court Appointed Attorneys do not receive. However “because the public defender system is politically unpopular, it is not likely to be implemented.”

## **CONCLUSION**

While there is some debate as to the reason or reasons why Michigan’s public defense system is failing, there is no denying that it is a failing system. There are many factors that contribute to the failing system. One of the most significant factors is the considerable underfunding most of the counties in Michigan experience. Another factor to consider is the disparity in the problems that face the east and west sides of the state. Arguably, one of the biggest problems with Michigan’s public defense system is the prioritization of speed over all

other factors. One issue that should be addressed in any solution is the lack of oversight on the State level.

It is evident that Michigan is currently in a state of financial crisis. Nearly every system in the state is being underfunded and overworked. Nowhere is this truer than in the public defense system. As a whole, Michigan is falling nearly 38% below the national average in per capita spending, and heavily populated counties are fall far below that. The funding that is allocated for public defense is coming from a nearly dry well. Counties are expected to use property tax revenue to fund our systems. This notion may work in counties where crime rates are lower and incomes are higher. However, that simply is not the case for most counties in Michigan. In most counties, crime is higher and more people fall below the poverty line than don't. This is a vicious cycle that leads to injustices in our system. While it is impossible to fix this overnight, we need to stop looking for band-aid solutions and begin reform.

There is simply no uniform solution for all counties, because the problems the counties in Michigan face are not uniform. There are major socioeconomic, cultural, educational, social, income, and size discrepancies between the counties in Michigan. These differences are most evident between the East and West sides of the state. While counties may face some of the same issues on a general level, the depth and intensity of these issues could differ entirely. For these reasons, a uniform indigent defense program run on the state level is not likely to work. However, there should be some level of consistency between county programs to prevent inequality. "The counties various funding mechanisms coupled with the lack of oversight often leads to similarly situated defendants in different counties receiving disparate levels of justice."

(Legislative Analysis, 2009). For this reason, some of the best proposed solutions involve an advisory board run at the state level.

District Courts across Michigan are littered with defendants being denied their constitutional right to adequate representation. The prioritization of speed over Due Process can be attributed to a variety of factors. The combination of underfunded programs, overworked attorneys, and an underlying expectation to plea out cases results in the prioritization of speed. The incentive for attorneys being paid a flat fee is to resolve cases in the first days. This focus on speed results in trouble for both the government and individuals being prosecuted. Wrongful convictions are problems that not only waste taxpayer's dollars to convict and incarcerate the innocent; they also allow the guilty to walk the streets, endangering public safety. Another problem with reaching "quick pleas" to get a case over with is the toll a conviction can have on a person. Even misdemeanor convictions make it nearly impossible for someone to keep a job or get an apartment. It is not a stretch to believe that being homeless and poor would lead to higher recidivism rates. When you combine this factor with the notion that counties are relying primarily on property taxes to fund public defense systems, it becomes evident why the systems are failing.

One of the proposed solutions to Michigan's public defense problem has been House Bill 5676. "In 2003, the State Bar of Michigan's Executive Committee adopted a resolution encouraging the legislature to establish a commission with the responsibility of investigating indigent defense services in Michigan and making recommendations for improvement. The Task Force even went so far, in May 2005, as to draft a Michigan Public Defense Act." (National

Legal Aid & Defender Association, 2008). This Bill proposes the creation of a statewide public defense system to provide counsel to eligible individuals, a Public Defense Commission, and the State Office of Public Defense and Appellate Defense Bureau. Additionally, this Bill would prohibit excessive case workloads by appointed attorneys and base compensation for defense services on the compensation of prosecuting attorneys. This Bill would also repeal the existing Appellate Defender Act.

The “goal of the Act is to create a consistently delivered, efficient, statewide public defense system.” The Michigan Public Defense Act would set eligibility requirements for not only defendants, but also for attorneys. Clients would be eligible to receive services if they were entitled counsel by law, and “in other matters as directed by the court or approved by the Public Defense Commission.” (Legislative Analysis, 2009). The Act would establish a body known as the Public Defense Commission. This body would be “created to head the state system, supervise the office and establish policies to implement the Act.” “The commission, with the assistance of [The State Office of Public Defense], would have to develop a plan that would provide public defense services that divided the state into defense regions sufficient to provide efficient provision of defense services throughout the state while addressing local needs.” (Legislative Analysis, 2009). Another of the major issues Michigan’s public defense system is facing is the lack of standards for the public defense attorneys. This coupled with a lack of oversight leads to a majority of public attorneys operating in a way that does not prioritize Due Process. House Bill 5676 would establish a set of standards that all public defense attorneys would have to meet. Some of these standards address “level of education and experience required to provide effective representation; practice standards; performance

criteria; and acceptable workloads". These standards would be established to "ensure services are provided by competent counsel and in a manner that is fair and consistent throughout the state." (Legislative Analysis, 2009). This Bill would do a number of other things to improve the quality of Michigan's public defense system including: changing compensation for attorneys from a contract to a case by case basis, transfer the responsibility of funding the system from local to state levels, and set forth reasonable and realistic eligibility criteria for defendants.

One of the most important things to consider when evaluating any proposed solution is the financial impact it will have. If House Bill 5676 were made into law, ultimately there would be a cost savings. "Providing adequate and efficient indigent defense services would save state and local resources by reducing wrongful convictions and accompanying law suits, ensuring proper sentencing, keeping innocent people out of prison, and identifying problems on the front end of the legal process." (Legislative Analysis, 2009). There would be some upfront cost to initiate the program and to ensure it ran smoothly. This cost would pale in comparison to the money that would ultimately be saved. Additionally, "by having a competent, trained defense counsel, issues like mental health and drug abuse can be identified at the front end of the legal process. By identifying these issues at the front end, defendants suffering from these problems can be diverted from jail and into necessary treatment programs at a lower cost. For criminal defendants with mental illness or drug addiction, treatment programs can provide a path to recovery, which can lead to savings in incarceration costs through reduced recidivism." (Legislative Analysis, 2009). House Bill 5676 would also allow for repayment of services by defendants in appropriate circumstances.

After research and review of Michigan's Indigent Defense System, I propose a revamping of Michigan's court-appointed systems. This solution resembles House Bill 5676 in many ways, but would differ in key ways. While House Bill 5676 would restructure the system in a way that would create regional offices to handle the work of many counties, I would leave much of the power in the hands of local officials. Much like House Bill 5676, I propose the creation of an advisory board at the state level. Among other things, this board would have the power to set standards for counsel, control the number of cases each attorney would take on per quarter. In addition to these powers, the board would be given the responsibility of allocating funds and approving budgets proposed by the individual counties. The implementation of this advisory board would make every county more uniform while addressing the individual needs of each county.

Local governments would have a number of responsibilities as well. In addition to proposing budgets, they would enforce standards set for attorneys by the State Advisory Board. Local governments would also work together with local counsel to ensure that they are competent and working on the cases they are able and prepared to handle.

Funding for this proposed solution would be primarily provided by the state (initially contributing 90%), and in part by the local governments (10%). Ultimately, the goal is to involve the federal government with funding. They would contribute 40% of the budget, leaving the state with 50% and local governments with the remaining 10%. The implementation of this would not be immediate. The first step would be the creation of the State Advisory Board, with the reconstruction of 1/3 of county court appointed systems. The first systems to be reformed would be the most overworked systems in counties like Washtenaw and Wayne. Over the

course of the next 18 months, the other 2/3 of the county systems would be reformed and upgraded to meet the standards set forth by the Board.

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