

Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness Indigent Defense Reform Memorandum Highlights 10/2820

I. State Constitutional Responsibilities for Providing Indigent Criminal Defense Services

In 1963, a unanimous U.S. Supreme Court ruled in its landmark decision, *Gideon v. Wainwright*, that the Sixth and Fourteenth Amendments to the United States Constitution requires all states to provide criminal defendants, who are accused of serious crimes and cannot afford an attorney, with court-appointed counsel at government expense. Since *Gideon*, this Court has expanded the right to assistance of counsel at state expense to those accused in juvenile delinquency proceedings as well as to those who are charged with misdemeanor offenses and face potential incarceration.

II. Current Status of Criminal Indigent Defense Services in Pennsylvania

Despite the Supreme Court's rulings requiring states to provide indigent criminal defendants with counsel at government expense, Pennsylvania remains the only state in the country that historically has never provided funding for indigent criminal defense services. Rather, with the exception of First Judicial District, the responsibility of providing free counsel to indigent criminal defendants and juveniles in the Commonwealth currently rests squarely upon county governments, whose budgets are woefully inadequate to provide those services effectively. A study commissioned by the Pennsylvania General Assembly and conducted by its Joint State Government Commission ("JSGC") found that Pennsylvania's current, county-based indigent defense system suffers from the following deficiencies:

- Insufficient office and investigatory resources to provide effective representation;
- Low pay and high workloads for indigent counsel;
- Lack of a standardized system or oversight mechanisms governing the assignment and remunerating of court-appointed or conflict counsel;
- Lack of oversight of indigent defense office caseloads and practices;
- Lack of adequate training and supervision of indigent defense counsel; and
- Risk of political interference from county government officials.

The findings from this study were remarkably consistent with all of the studies previously conducted on the provision of indigent defense services in Pennsylvania. The Supreme Court of Pennsylvania has also recognized the constitutional inadequacies of Pennsylvania's county-based indigent defense system in numerous opinions.

III. Current Cost of Providing Indigent Criminal Defense Services in Pennsylvania

The current direct costs of providing indigent criminal defense services in Pennsylvania, which are set forth in further detail in Part IV and Appendix A of this Memorandum, at a minimum, total approximately \$104,779,108 per year, excluding the costs of the First Judicial District's unique indigent defense system. Other indirect costs, such as those associated with housing indigent capital case defendants in state correctional facilities, require the state to expend an extra \$262,525 per inmate over the course of each of their lives, 97% of whom are unlikely to be executed because their appeals are granted, they are exonerated, or they die awaiting execution.

IV. Proposed County/State Hybrid Indigent Defense System

This Memorandum proposes that the Pennsylvania General Assembly adopt certain indigent defense reforms, which will help the Commonwealth fulfill its constitutional obligations to provide free and effective assistance of counsel to indigent criminal defendants and juveniles, while simultaneously reducing the cost to the state and counties of providing these critical services.

A. Statewide, State-Funded Office of Indigent Defense (“OID”): This Memorandum proposes that a centralized, state-funded OID be established to provide the following:

- Trial and appellate criminal defense counsel services to all state indigent criminal defendants charged with capital murder, excepting indigent capital defendants in the First Judicial District;
- Appellate and post-conviction defense counsel services to all state indigent criminal defendants in non-capital cases, excepting indigent defendants in the First Judicial District;
- Juvenile delinquency defense legal support services to county-funded public defender and conflict counsel offices; and
- Training, research and data collection services for all county-funded criminal indigent defense offices representing juveniles in delinquency proceedings and adults in pre-trial proceedings and at trial.

B. Staff: The OID will be comprised of the following staff:

- An Executive Director
- A Director of the Capital Case Unit
- A Director of the Non-Capital Appellate and Post-Conviction Review Unit
- A Director of Juvenile Defense Unit
- A Director of Training, Research and Data Collection
- 27 Full-Time Assistant Attorneys
- Six Investigators
- Six Mitigation/Psychiatric Experts
- Nine Support Staff (Administrative Assistants/Paralegals)

C. Capital Defense System in the First Judicial District (Philadelphia County)

The public defense system of the First Judicial District differs markedly from the systems in all other Pennsylvania counties. Attorneys from the Defender Association of Philadelphia (“DAP”) provide representation to indigent defendants in Philadelphia, with the exception of cases in which representational conflicts exist. In those cases, the court appoints a private attorney to represent the client. With regard to indigent capital representation, however, DAP represents only 20% of the indigent defendants charged with a capital offense in Philadelphia; the other 80% of indigent capital defendants are represented by private attorneys appointed by the courts

Most importantly, unlike any other public defense office in Pennsylvania, DAP is a 501(c)(3) corporation. As such, DAP receives funding from a variety of sources that are unavailable to other public defense offices in the Commonwealth. As a result, studies have found that the quality of the representation provided by DAP is superior to that provided by county-funded public defenders in Pennsylvania. In particular, a recent study of Pennsylvania’s capital justice system conducted by the Joint State Government Commission (“JSGC-CP Study”) found that capital

defendants represented by DAP receive more effective assistance from DAP's Capital Defense Unit than capital defendants represented by the county-funded public defenders and the private attorneys appointed by the Philadelphia courts.

Consequently, in lieu of the legal representation services OID will provide to all county-funded public defender offices in Pennsylvania, it is proposed that the Pennsylvania General Assembly instead would allocate funding to the DAP to be used exclusively for the representation of a significantly higher percentage of the indigent capital defendants in Philadelphia than it currently represents. This action would improve the quality of representation available to an increased percentage of indigent capital defendants who are currently represented by court-appointed attorneys in Philadelphia. Because DAP meets professional thresholds not realized by other indigent defense offices in the Commonwealth, and has a solid, existing infrastructure from which to provide the services, it is in a better position to provide capital representation in the First Judicial District, and at a lower cost, to indigent criminal defendants than the proposed OID.

V. Costs of Proposed County/State Hybrid Indigent Defense System

A. Capital Case Unit: Costs associated with capital defense services are difficult to quantify due to the variability in county prosecutorial decisions to seek the death penalty, plea bargaining, case complexity, and the length of jury selection, trial, sentencing and appellate review. However, staff salary costs for the new unit can be estimated by examining the current median salaries of county public defender office staff and the need for experienced attorneys with special litigation skills in the proposed OID. Based on the estimate of 35 staff members for the proposed Capital Case Unit, the total cost of salaries would be approximately \$2,709,000 per year.

As noted above, the OID's Capital Defense Unit will not provide legal representation services to Philadelphia's indigent capital defendants. Instead, we propose that, in addition to creating the OID, the Pennsylvania General Assembly allocate funds to be used by DAP in the amount of \$1,500,000, so that it may provide defense services to an increased percentage of indigent capital defendants than it currently represents.

B. Non-Capital Adult Appellate and Post-Conviction Review Unit: Because appellate and post-conviction representation does not involve use of many of the expenditures associated with trial work (*i.e.*, expert witness fees and discovery costs), the majority of the costs associated with establishing a non-capital appellate and post-conviction review unit is salary costs. The estimated annual salary costs of OID's Non-Capital Adult Appellate and Post-Conviction Review Unit is \$757,000.

C. Juvenile Defense Unit: Because Pennsylvania's judicial districts utilize diversionary programs to resolve the majority of their juvenile cases, the largest cost associated with providing legal support to county juvenile defense offices will likely be salary costs. The estimated annual salary costs to the state for establishing the OID's Juvenile Defense Unit is \$381,000.

D. Other Salary Costs and Office Space: The remaining costs associated with the proposed OID consist of the salaries of the Executive Director (\$186,000) and the Director of Training, Research and Data Collection (\$125,000), and one Support Staff for each of these Directors (\$92,000

collectively), for a total of \$403,000 per year. The cost of rental of office space for the OID (between 6,360 and 11,660 square feet) will likely be between \$1,229,515 and \$2,254,111.

E. Total Cost: The three largest expenses associated with the proposed reforms include the salary costs for the 53 staff members of the OID (\$4,250,000), OID office rental (\$1,750,000), and the allocation to the DAP for the representation of an increased percentage of indigent capital defendants in Philadelphia (\$1,500,000). Thus, the proposed reforms are projected to cost the state approximately \$7,500,000.

VI. Anticipated Cost Savings from Proposed Hybrid Indigent Defense System

Although the costs of the proposed reforms would require an initial, upfront financial investment from the Commonwealth, the estimated costs of the reforms pale in comparison to the costs savings to be realized by the state and county governments.

A. Cost Savings Due to Improved Effectiveness of Capital Case Representation: A 2017 Pennsylvania State University study of the provision of indigent criminal capital defense services in Pennsylvania found that, as of May 2018, 150 death row inmates have had their convictions or sentences overturned on the basis of ineffective assistance of counsel since the death penalty was re-instated in 1978. Additional study findings revealed that approximately 80% of capital defendants are indigent, and therefore, represented by court-appointed counsel or public defenders. These findings, coupled with the finding that capital defendants represented by public defenders are more likely to be sentenced to death, strongly suggest that there is an obvious deficiency in the level of representation provided by county-based indigent counsel. Creating a centralized unit charged with providing trial, appellate, and post-conviction capital defense services will improve the effectiveness of indigent defendants' representation, resulting in fewer appeals, fewer re-trials due to ineffective assistance of counsel claims, and fewer inmates housed on death row.

B. Savings from Appellate and Post-Conviction Representation: Affording indigent defendants adequately trained appellate and post-conviction counsel in a special unit of a centralized system would significantly reduce the need to file additional post-conviction petitions and collateral appeals. This would minimize the overall amount of prosecutorial, defense, and judicial resources needed to be allocated to a specific case.

C. County Cost Savings: The state's assumption of responsibility for capital and criminal appellate representation costs will result in substantial cost savings to counties. This reform would permit the county public defender offices to spend the realized savings on hiring additional trial attorneys, social workers, and support staff, thereby reducing caseloads and improving representation.

D. Avoidance of Costly Potential Lawsuits: Implementing changes that protect indigent defendants' Sixth Amendment rights will also help insulate the state and county governments from potential lawsuits, which typically cost government entities hundreds of thousands of dollars to defend against and settle.