



The Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

223 Fourth Avenue, Tenth Floor
Pittsburgh, PA 15222
412.697.1311
pa-interbranchcommission.com

**MEMORANDUM IN SUPPORT OF REFORM OF THE PROVISION OF
CRIMINAL INDIGENT DEFENSE SERVICES IN PENNSYLVANIA**

To: Hon. Lisa Baker, Chair, Senate Judiciary Committee
Mike Cortez, Esq., Executive Director, Senate Judiciary Committee

From: Lisette M. McCormick, Esq., Executive Director, Pennsylvania Interbranch
Commission for Gender, Racial and Ethnic Fairness

Kaitlyn M. Burns, Esq., Staff Attorney, Pennsylvania Interbranch Commission
for Gender, Racial and Ethnic Fairness

Re: Costs/Benefits of Proposed Reform of the Provision of Criminal Indigent
Services in Pennsylvania

Date: October 28, 2020

I. INTRODUCTION

Pursuant to your request for information regarding the estimated cost and benefits to the Commonwealth of Pennsylvania of enacting certain reforms to the county-funded provision of indigent defense services, the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness submits the following report. The reforms include the creation of a statewide and state-funded Office of Indigent Defense ("OID"), which would be tasked with providing the following responsibilities: (1) defense counsel services to indigent defendants against whom the death penalty has been sought, (2) general appellate and post-conviction representation for adult indigent criminal defendants, (3) juvenile delinquency defense legal support services to counties, and (4) training, research and data collection services to county indigent defense offices representing juveniles in delinquency proceedings and adults at the trial level. These responsibilities currently reside with the county-funded public defender offices (with the exception of the First Judicial District), whose budgets are woefully inadequate to provide those services effectively.

To date, Pennsylvania remains the only state in the country that historically¹ has never provided funding for indigent defense services.² This is an abdication of the state's constitutional responsibility to provide free and "effective" counsel for indigent criminal defendants.³ Moreover, as all of the studies on the provision of indigent defense services in Pennsylvania have demonstrated⁴, the acute underfunding of these services has not only created significant fiscal problems for the counties, but has cost the state hundreds of thousands of dollars each year to incarcerate and retry defendants, due to the inability of their indigent defense counsel to represent them effectively. The vast majority of states in this country have reformed their systems to cure many of the deficiencies that are currently present in Pennsylvania's patchwork of county-funded indigent defense systems. The lesson they have learned is that providing effective representation to indigent defendants not only reduces the fiscal burden on the counties and the state, but also allows government to repurpose funds spent on incarceration toward rehabilitation and re-entry programs. In the end, an efficient and humane system makes all of us safer.

II. U.S. SUPREME COURT CASE LAW ESTABLISHING RIGHT TO COUNSEL

In the landmark case of *Gideon v. Wainwright*, the U.S. Supreme Court ruled that the Sixth and Fourteenth Amendments to the U. S. Constitution require **the states** to provide free counsel for criminal defendants who are accused of serious crimes and cannot afford to hire an attorney.⁵ Subsequent precedents have broadened the right to counsel in several ways.⁶ The right to free assistance of counsel applies during "critical stages" of the criminal justice process, such as during line-up identification,⁷ arraignment,⁸

¹ A number of years ago, South Dakota provided some limited funding for indigent criminal defense services throughout the state, but stopped the funding in recent years. Like Pennsylvania, local governments in South Dakota now shoulder the full financial burden of providing indigent criminal defense services.

² In June 2019, the Pennsylvania General Assembly approved a \$500,000 allocation to reimburse counties for costs of indigent criminal defense in capital cases. However, it is unclear how these funds have been disbursed and the extent to which they have eased the burden counties continue to shoulder for providing such defense services.

³ See U.S. Const. Amend VI (guaranteeing defendants the right to assistance of counsel in criminal prosecutions); U.S. Const. Amend XIV (requiring states to afford individuals the rights guaranteed by the Bill of Rights in state proceedings); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to effective assistance of counsel."); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963) (holding that states are required to provide indigent criminal defendants with free legal representation under the Sixth and Fourteenth Amendments).

⁴ See e.g., Eugene A. DePasquale, *Criminal Justice Reforms to Improve Lives & Save Money*, PA Auditor Gen. (June 2020); Joint State Gov't Comm'n ("JSGC-ID Report"), *A Constitutional Default: Services To Indigent Criminal Defendants in Pennsylvania* (Dec. 2011); Holly R. Stevens et al, *State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008*, ABA (Nov. 2010); The Spangenberg Group, *A Statewide Evaluation of Public Defender Services in Pennsylvania* (May 2002).

⁵ *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).

⁶ American Bar Association, Standing Committee on Legal Aid and Indigent Defendants (ABA/SCLAID), *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (December 2004).

⁷ *Id.*; *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951 (1967).

⁸ *Hamilton v. Alabama*, 368 U.S. 53, 82 S. Ct. 157 (1961).

preliminary hearing,⁹ plea negotiation, entry of a guilty plea,¹⁰ and direct appeals.¹¹ Additionally, since its decision in *Gideon*, the U.S. Supreme Court has expanded the right to free counsel to those accused in juvenile delinquency proceedings¹² and in misdemeanor prosecutions that may result in imprisonment.¹³

In Pennsylvania, the right to counsel is, in certain respects, broader than it is under the U.S. Constitution.¹⁴ It applies upon the arrest of a suspect, even if no formal proceedings have commenced.¹⁵ Convicted defendants in Pennsylvania also have a constitutional right to representation in post-conviction proceedings¹⁶ and parole revocation hearings.¹⁷ In both respects, Pennsylvania law governing the right to counsel for criminal defendants exceeds the minimum requirements mandated under federal constitutional law.

In conjunction with its holdings regarding the right to free assistance of counsel for indigent criminal defendants, the U.S. Supreme Court has also held that the right to counsel includes the **right to the effective assistance of counsel**, which is denied when counsel fails to represent the client competently.¹⁸ As will be established below, with few exceptions, the current provision of indigent defense services in Pennsylvania is woefully inadequate to meet the standards that the Supreme Court has laid out for “competent” assistance of counsel.

⁹ *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970).

¹⁰ *White v. Maryland*, 373 U.S. 59, 83 S. Ct. 1050 (1963).

¹¹ *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963); *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582 (2005).

¹² *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967).

¹³ *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985).

¹⁴ See *The Spangenberg Group*, *supra* note 4, at 5-7 (Appendix vol. 1 to the *Racial and Gender Bias Report*, 164).

¹⁵ *Commonwealth v. Richman*, 320 A.2d 351, 352-54 (Pa. 1974) (right to counsel commences upon arrest); *Kirby v. Illinois*, 406 U.S. 682 (1972) (right to counsel commences at the indictment), *but see U.S. v. Ash*, 413 U.S. 300 (1973) (right to counsel does not apply to post-indictment photograph identification). The governing rule under the Sixth Amendment is that the right attaches upon the initiation of adversarial judicial proceedings. *Kirby*, 406 U.S. at 688, 92 S. Ct. at 1881.

¹⁶ Compare *Commonwealth v. Mitchell*, 235 A.2d 148 (Pa. 1967) (defendant entitled to free counsel for a collateral attack under PCRA), with *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (U.S. Constitution requires free counsel only for a direct appeal).

¹⁷ *Commonwealth v. Tinson*, 249 A.2d 549 (1969) (relying on Public Defender Act, § 6(a)(10); 16 P.S. § 9960(a)(10)); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973) (applicability of right to counsel to parole revocation hearings is decided on a case-by-case basis).

¹⁸ *Strickland v. Washington*, 466 U.S. 468, 104 S. Ct. 2052 (1984). The Court had already held that effective assistance could be denied by the government if it “interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense” such as when the government barred counsel from consulting with the defendant during an overnight recess. *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2063 (citing cases). See also *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“[T]he right to counsel is the right to effective assistance of counsel.”).

III. CURRENT DEFICIENCIES IN THE PROVISION OF CRIMINAL INDIGENT DEFENSE SERVICES IN PENNSYLVANIA

As stated above, Pennsylvania remains the only state in the country that historically has provided no state-level funding toward the provision of indigent defense services. Instead, each county operates its own indigent defense system, creating an inconsistent patchwork of effectiveness and compliance with the constitutional protections afforded to indigent defendants, as well as with the ABA's Ten Principles of a Public Defense Delivery System.

One of the most extensive studies conducted on the provision of indigent defense services in Pennsylvania was commissioned by the Pennsylvania General Assembly and conducted by its Joint State Government Commission ("JSGC"). The report, entitled *A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania* ("JSGC-ID Report")¹⁹, found that Pennsylvania's county-based indigent defense system ("IDS") suffers from the following deficiencies:

- Insufficient resources essential for effective representation, such as investigators, access to legal research and technology, and private space to meet with clients.
- Low pay and high workloads for public defenders, leading to a high attrition rate and low morale.
- Lack of a standardized system or oversight for appointing or remunerating assigned and conflict counsel, on which many counties heavily rely to supplement their public defender's office.
- Lack of statewide oversight that has created a dangerous deficiency in the data available on current IDS caseloads and practices.
- Lack of training, supervision, and accountability required for public defenders to meet professional standards for legal representation.
- Risk for political interference from county officials, which leaves county indigent defense offices more vulnerable to corruption.

The findings from this study were remarkably consistent with previous studies conducted on the provision of public defense services in Pennsylvania.²⁰ One of the studies, conducted by The Spangenberg Group (referenced in footnote four) on behalf of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, summarized the effects of Pennsylvania's lack of state financial support for, and oversight of, the provision of indigent defense services in the Commonwealth, as follows:

Pennsylvania has no mechanism in place to hold accountable either the lawyers who represent the poor or the county and judicial officials who administer indigent

¹⁹ JSGC-ID Report, *supra* note 4, at 5-8.

²⁰ Holly R. Stevens et al, *supra* note 4; The Spangenberg Group, *supra* note 4.

defense systems. The absence of guidelines for the appointment of counsel has resulted in minimal quality control. In addition, the flat fee paid to appointed counsel can be a disincentive to effective preparation and advocacy; the low compensation rates create little incentive to develop expertise in criminal defense. Moreover, the sparse resources available for support services, coupled with exploding and unmanageable caseloads, allow indigent defense counsel little time, training, or assistance for conferring with clients in a meaningful manner, researching relevant case law, reviewing client files, conducting necessary pre-trial investigations, securing expert assistance or testimony, or otherwise preparing adequately for hearings and trials. Compounding these deficiencies is the lack of political independence afforded [public defenders] whose budgets are controlled by local county politicians.²¹

Indeed, the Supreme Court of Pennsylvania itself has recognized the constitutional issues stemming from the underfunding of indigent defense services in Pennsylvania. In a class action case filed by indigent clients who alleged that their constitutional right to counsel would be violated by the unavoidable ineffective representation to be provided by a severely underfunded public defender office, the Court ruled that “a cause of action exists entitling a class of indigent criminal defendants to allege prospective, systemic violations 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.”²²

In several opinions, both concurring and dissenting, Hon. Thomas Saylor, Chief Justice of the Supreme Court of Pennsylvania, noted the harmful effects of “the pervasive underfunding of indigent defense.”²³ Referring to the poor quality of representation in the capital justice system, Chief Justice Saylor stated, “[s]ignificantly, Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the *ad hoc* fashion by which indigent defense services are funded from the local government level.”²⁴ Further, Chief Justice Saylor called for “a collaborative conversation among the judicial, legislative and executive branches to institutionalize statewide remedies”, noting “the importance of legislative involvement.”²⁵

Admittedly, there have been occasional infusions of funds to public defender offices by counties as a result of litigation or for other reasons, but those contributions amount to no more than a proverbial “drop in the bucket”. What is clearly needed to meet the

²¹ *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System* (March 2003).

²² JSGC-ID Report, *supra* note 4, at 184 (citing *Kuren v. Luzerne County*, 146 A.3d 715, 718 (Pa. 2016)).

²³ *Id.* (citing *Commonwealth v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring)).

²⁴ *Id.* (citing *Commonwealth v. McGarrell*, 87 A.3d 809, 810-811 (Pa. 2014) (Saylor, J., dissenting)).

²⁵ *Id.* at 185.

constitutional mandate set by *Gideon v. Wainwright* and its progeny²⁶, as substantiated by the previous studies and the experience of most states, is a significant and economically efficient reorganization of the provision of indigent defense services in Pennsylvania, leaving some responsibilities with the counties and others assumed by the state. This Memorandum sets forth a proposal for accomplishing this task, including the expected costs and potential savings the state and counties will reap from the recommended reorganization.

A. Indigent Juvenile Representation

1. **Deficiencies in Indigent Juvenile Representation**: In May 2010, the Pennsylvania Interbranch Commission on Juvenile Justice issued a report (“PICJJ”)²⁷ which identified serious deficiencies in the Luzerne County Juvenile Justice System, including the failure of the county public defender office to provide competent and effective representation. However, the deficiencies noted in the report were not confined to Luzerne County. Many of these deficiencies existed and continue to exist among public defender offices across the state, excepting Philadelphia, Dauphin and Allegheny Counties. The most notable of these deficiencies include the following:

- There is a lack of consistent training for juvenile defenders and contract or conflict counsel (collectively referred to herein as defenders) who are assigned to represent juveniles in delinquency proceedings. The lack of consistency results from many factors, some of which include: no centralized source for in-house office training or resources; high turnover of staff due to burnout resulting from high caseloads and low salaries; and the inability of many juvenile defenders, due to lack of training, to recognize juvenile defense as a complicated, specialized area of law. Currently, there are no mandated continuing education requirements for juvenile defenders, as compared to lawyers representing defendants in capital murder cases. (See, Pa. R. Crim. P. 801).
- There is no centralized entity which connects all public defender and conflict counsel offices in the state that can collect data and share information, *i.e.* staffing, salaries, caseload performance standards, and placement facilities, such as the Prosecutor’s Network.
- As noted above, there is no in-house training for defenders. The Juvenile Defenders Association of Pennsylvania (“JDAP”) conducts low-cost training

²⁶ See *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963); *Gilbert v. California*, 388 U.S. 263, 87 S. Ct. 1951 (1967); *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967); *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985).

²⁷ See generally PICJJ, *Interbranch Commission on Juvenile Justice Report* (May 2010), <http://www.pacourts.us/assets/files/setting-2032/file-730.pdf?cb=4beb87>.

four times per year across the state, but not at county public defender offices. Defenders elect to attend training sessions on various topics on their own. With this approach, defenders can work for months representing juveniles without necessary training. Presenters at seminars are usually volunteer attorneys from across the state who speak on issues that JDAP identifies. A state office would have attorney staff that could provide the necessary in-house training on a timely basis, which even JDAP cannot provide.

- Most county public defender offices do not have master level or licensed social workers on staff to perform bio-psycho-social assessments on juvenile clients, which would assist the defenders and court in determining a proper disposition. In many cases, defenders do not obtain school and medical or mental health treatment records that are essential to representing a child's interest. Defenders have little or no knowledge about placement facilities and the programs offered at those facilities, and they do not communicate with their clients in placement. Because of these factors, juvenile defenders are not in a position to offer alternative suggestions to the recommendations by probation staff to the court in addressing a child's ultimate disposition.
 - Resources to assist defenders are outdated. In 2010, the Pennsylvania Juvenile Defense Notebook was published by JDAP and the Defender Association of Philadelphia with support from the MacArthur Foundation. These entities also published a Collateral Consequences Checklist Guidebook in 2010 (updated once). These valuable resources can be timely updated and provided to juvenile defenders by a centralized state office.
 - Contract lawyers or conflict counsel who are appointed by the court to represent juveniles when a conflict exists with a public defender office are ill-equipped to competently and effectively represent juveniles, due to inadequate training and resources as discussed herein.
- 2. Model Juvenile Representation Unit - Luzerne County:** Since the issuance of the PICJJ report, Luzerne County, with the assistance of numerous stakeholders, created a dedicated juvenile defender unit whose staff was well-trained, met performance guidelines and adhered to caseload standards recognized by the American Bar Association. The unit has become a model for juvenile defense representation, which could be replicated by the proposed Juvenile Defense Unit.

IV. CURRENT COST OF INDIGENT DEFENSE IN PENNSYLVANIA

With the exception of the First Judicial District (Philadelphia County)²⁸, the entire cost of the provision of criminal defense representation in Pennsylvania is borne by the counties. These costs vary widely depending on each county's allocation and available funds, but in sum, the approximate total cost to the counties of indigent defense in FY 2019-20, excepting the First Judicial District, is \$104,779,108. This figure is comprised of county funding for all costs associated with county public defender offices (projected to be approximately \$82,779,108 in FY 2019-20)²⁹ and county fees for contract counsel, conflict counsel and experts (projected to be approximately \$22,000,000 in FY 2019-20).

V. PROPOSED COUNTY/STATE HYBRID INDIGENT DEFENSE SYSTEM FOR PENNSYLVANIA

The JSGC-ID Report included proposed legislation to restructure the provision of indigent defense services in Pennsylvania. While we concur with the broad restructuring proposal set forth in the JSGC-ID Report, we have determined that the best course of action during this time of financial uncertainty, is to propose a less ambitious restructuring of indigent defense services that will result in more effective representation of indigent criminal defendants and considerable reduction in costs for the counties and the state.

In this proposal, a central, statewide Office of Indigent Defense ("OID") would be established, but its responsibilities would be fewer than those set forth in the proposed Office of Defense Services recommended in the JSGC-ID Report. The county public defenders ("PDs") would retain many of their current local responsibilities. However, with the exception of the First Judicial District, the cost of representation during general criminal appeals, PCRA proceedings, and capital cases would be shifted from the counties to the Commonwealth. Additionally, the OID would provide juvenile defense legal support to county-funded public defender offices, as well as statewide training, research and data collection services, through which public defenders could obtain support for their cases.

The proposed responsibilities of the OID would be spread among four divisions, each headed by a director who would be accountable to the Office's Executive Director. Because capital case, appellate, and post-conviction representation require skills somewhat different from regular trial practice, these forms of criminal representation can be better administered, and less expensively provided, by a central office staffed with attorneys who specialize in those areas of criminal law.

²⁸ The Defender Association of Philadelphia represents indigent criminal defendants in Philadelphia County and receives funding from the City and the County of Philadelphia, as well as additional private and public sources due to its status as a 501 (c)(3) corporation.

²⁹ The detailed data supporting these figures is set forth in Appendix A.

Additionally, the representation of children as a specialized area of law is “different from, but equally as important as, the representation of adults in criminal proceedings.”³⁰ To better serve the particular needs of juveniles, and consistent with the recommendations of the PICJJ referenced above, creating a centralized office staffed with attorneys that specialize in juvenile defense to support county public defender offices is critical.

Each area of representation will have its own unit, comprised of several attorneys, support staff, investigators/experts (if applicable), and a director. Accordingly, the central OID would operate under an Executive Director’s management authority with the following staffing:

- 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, divided among the units as detailed in Part VII
- Six Investigators
- Six Mitigation Specialists/Psychiatric Experts for the Capital Case Unit
- Nine Support Staff (Administrative Assistants/Paralegals)

In addition to creating the OID, it would be advisable for the proposed OID to include a Board of Directors which would be charged with providing additional oversight and guidance for the OID. Board members would serve in a volunteer capacity and would meet remotely, creating no additional cost to the state or county governments.

VI. PROPOSED EXCEPTION FOR 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 that instance, the court appoints a private attorney to represent the client. With regard to indigent capital representation, in particular, 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, it receives funding from a variety of sources that are unavailable to other public defense offices in the Commonwealth. As a result, studies

³⁰ NJDC and NLADA, “Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems” (2nd ed.) (Washington, D.C.: NJDC and NLADA, July 2008).

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, with regard to indigent capital representation, the General Assembly's Joint State Government Commission conducted an extensive study of Pennsylvania's capital justice system and produced a report of its findings in 2018 ("JSGC-CP Report")³¹. Relying upon the findings of the 2017 study of Pennsylvania's capital justice system by the Pennsylvania State University ("PSU Study"), the report indicated that capital defendants represented by DAP received 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. Specifically, the PSU Study, *Capital Punishment: Decisions in Pennsylvania: 2000-2010: Implications for Racial, Ethnic and Other Disparate Impacts*,³² found the following concerning links between type of counsel and capital case outcomes:

...defendants represented by public defenders in Philadelphia were much less likely to receive the death penalty than defendants represented by public defenders in the other 17 counties in the field study. Our findings regarding the effectiveness of Philadelphia public defender's office (Defender Association of Philadelphia) as well as Anderson and Heaton's (2012) findings regarding that office suggest homicide defendants represented by that office seem to obtain relatively good outcomes.³³

To be clear, the analysis regarding the quality of capital case representation by public defenders in Philadelphia applied exclusively to the capital attorneys in DAP, which, as stated earlier, represents only 20% of the indigent capital defendants in Philadelphia. The remaining 80% of these defendants are represented by court-appointed attorneys who do not share the same reputation for effectiveness³⁴. Regarding the remainder of capital representation by public defenders in Pennsylvania, the PSU Study found that "defendants represented by public defenders were 5-7% more likely to receive the death penalty."³⁵

Consequently, it is proposed that, in lieu of the legal representation services OID will provide to all county-funded public defender offices in Pennsylvania, the Pennsylvania

³¹ Pa. J. State Gov't Comm'n, *Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee* ("JSGC-CP Report") (June 2018). In 2011, the Pennsylvania General Assembly tasked its Joint State Government Commission with conducting a wide-ranging study of 17 different aspects of the administration of capital punishment in the Commonwealth of Pennsylvania, including litigation, incarceration, post-conviction appeals, and re-litigation due to reversal on appeal.

³² Kramer, John H. and Ulmer, Jeffery Todd and Zajac, Gary, *Capital Punishment Decisions in Pennsylvania: 2000-2010: Implications for Racial, Ethnic and Other Disparate Impacts* (September 2017). Available at SSRN: <https://ssrn.com/abstract=3148037> or <http://dx.doi.org/10.2139/ssrn.3148037>

³³ *Id.* at 120.

³⁴ JSGC-CP Report, *supra* note 31, at 183-184.

³⁵ Kramer et al, *supra* note 32, at 120.

General Assembly instead would allocate funding in the amount of \$1,500,000 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 proposed 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 those services, it is in a better position to provide capital representation to indigent criminal defendants in the First Judicial District than the proposed OID.

VII. ESTIMATED COST TO THE STATE OF THE PROPOSED HYBRID INDIGENT DEFENSE SYSTEM

A. Capital Case Unit

1. Difficulties in Quantifying Costs: The estimated cost to the state of capital case representation in the proposed hybrid indigent defense system is difficult to quantify. This difficulty is attributable to a number of dependent variables, among them the following: the number of defendants charged with murder in a given year; the decisions of state and county prosecutors to pursue the death penalty in a given case and/or to retract their initial decision to pursue the death penalty; the defendant's decision to plead guilty rather than proceeding with trial; the complexity of a particular case; the types of mitigation defense strategies available to defendants; and the length of jury selection, trial, sentencing, and appellate review. Consequently, indigent defense costs could fluctuate from one year to the next based upon the extent to which each of these dependent variables are present.

2. Calculable Fixed Costs: Some costs associated with a capital defense system are fixed and calculable. Salary costs, for example, can be approximated by averaging the median salaries of attorneys and support staff of county public defender offices that likely have specialized defense units. Three such counties are Lehigh County, Erie County, and Dauphin County. Based on salary data listed on the three counties' 2020 approved budgets,³⁶ the following represents the median salaries of chief public defender (office director), full-time assistant public defenders, and support staff:³⁷

- Chief Public Defender (Office Director): \$122,000³⁸

³⁶ The relevant 2020 salary data from the three counties' budgets is set forth in Appendix B.

³⁷ For purposes of this Memorandum, the median salary figures for each position have been rounded to the nearest thousand in order to provide a more succinct approximate figure of the total cost of the proposed hybrid indigent defense system.

³⁸ The proposed salary for the Unit Directors of the OID is slightly higher than that of the average Chief Public Defender for the aforementioned counties. The intention is to create more parity between the Unit Directors, who ensure indigent defense services are adequately and appropriately administered throughout the Commonwealth, and the Commonwealth's First Assistant District Attorneys.

- Full-Time Assistant Public Defender: \$70,000
- Support Staff: \$46,000

These figures may be used as a starting point to estimate the base salary costs to the state for capital defense representation. However, because capital representation requires an advanced and specific set of skills that most Pennsylvania lawyers do not possess, the salaries of attorneys employed within this unit of the proposed OID should be higher than that of the general assistant public defender. Consequently, the estimated base salary costs for the proposed Capital Defense Unit are set forth as follows:³⁹

1 Unit Director x \$ 125,000 =	\$125,000
8 Full-time capital trial attorneys x \$90,000 =	\$720,000
4 Full-time capital appellate attorneys x \$90,000 =	\$360,000
6 Full-time capital post-conviction attorneys x \$90,000 =	\$540,000
6 Investigators x \$60,000 =	\$360,000
6 Mitigation Specialists/Psychiatric Experts x \$70,000 =	\$420,000
4 Support staff x \$46,000 =	<u>\$184,000</u>
TOTAL	\$2,709,000

3. Other Cost Considerations for Capital Representation:

a. Costs for Philadelphia County Indigent Defense: As stated in Part VI of this Memorandum, the OID will provide legal representation services to indigent defendants in every Pennsylvania judicial district except the First Judicial District (Philadelphia County). However, with regard to capital cases, the great majority of them historically have been initiated in that District. For this reason, we are proposing that, in addition to creating and funding the OID, the Pennsylvania General Assembly allocate funds to be used by DAP for representing a greater percentage of capital case indigent defendants in the First Judicial District in trials and post-conviction reviews. Allocating additional funds for this purpose will enable DAP to represent more capital clients than they currently can represent, ensuring that considerably more capital indigent defendants in Philadelphia County receive effective assistance of counsel. As a result, significant costs savings would be realized since the overall expenditures needed to fund appeals and post-conviction reviews for ineffective assistance of counsel will decrease. Additionally, provision of funds to DAP for trial and post-conviction review representation will decrease the judicial district's need to appoint capital counsel at the county government's expense.

b. Capital Trial Costs from Other States: The researchers who conducted the JSGC-CP study referenced above were hampered by the lack of Pennsylvania data on

³⁹ Although salaries may be adjusted for inflation and merit-based raises in future fiscal years, this total figure represents a fairly accurate total of salary costs to be borne by the state. Fringe benefits and payroll tax costs are calculable as well, but are not included in this calculation.

capital trial costs, but were able to review similar data from other states. A sampling of the findings from those states includes the following:

New Jersey: The New Jersey Death Penalty Study Commission found that if the death penalty were eliminated (in 2006), the Office of Public Defender expected to save \$1,460,000 per year.⁴⁰

North Carolina: Based upon the expenditures associated with capital cases in the trial phase, the payments to jurors, capital post-conviction costs, resentencing hearings and prison system spending, “abolition of the death penalty would have reduced state expenditures on murder cases by about \$10.8 million per year” for fiscal years 2005 and 2006.⁴¹

The Death Penalty Information Center (“DPIC”), a national non-profit organization that provides analysis of issues concerning capital punishment, has compiled information on the costs of capital litigation in other states. It reports that the cost of capital trials in Kansas averaged approximately \$400,000 per case, compared to the costs of non-capital murder trials, which averaged approximately \$100,000 per case.⁴² In Oklahoma, the cost of litigating a capital case is approximately 3.2 times higher, on average, than the cost of litigating a non-capital case.⁴³

c. Costs Paid by the Commonwealth of Pennsylvania in Connection with the

Capital Punishment System: The costs connected with capital case litigation that are borne by the Commonwealth of Pennsylvania are mainly related to the special housing of death row inmates. The JSGC-CP Report found the following: “Because of segregation and close supervision, in fiscal year 2016-17, it cost \$15,010 more [compared to non-capital inmates] per year to house an inmate in the capital case unit.”⁴⁴ Using that figure (adjusted historically), the number of inmates on death row, and the average length of incarceration, the report estimates the total increased incarceration cost for capital inmates throughout their lives to be \$39,378,735.^{45,46}

B. Non-Capital Adult Appellate and Post-Conviction Review Unit

Unlike the costs of capital defense representation, the estimated cost of non-capital appellate and post-conviction representation are more predictable. Given the nature of appellate and post-conviction proceedings, many fees associated with trial work, such as

⁴⁰ JSGC-CP Report, *supra* note 31, at 48.

⁴¹ *Id.* at 49.

⁴² DPIC, *Facts About the Death Penalty*, <https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1601652961.pdf> (last updated Oct. 2, 2020).

⁴³ *Id.*

⁴⁴ JSGC-CP Report, *supra* note 31, at 56.

⁴⁵ *Id.*

⁴⁶ The recent settlement of a lawsuit filed by death-row prisoners challenging the PA DOC’s mandatory solitary confinement policy may influence these figures to some extent.

witness fees and expert fees, and discovery costs, rarely, if ever, apply. Further, because courts typically waive transcription and filing fees for indigent clients, the bulk of costs associated with indigent appellate and post-conviction representation consist of salary and fringe benefit costs.

If the same salary figures used to calculate the base salary of the capital defense unit are used to calculate the base salaries associated with the non-capital appellate and post-conviction unit, the estimated total is as follows:⁴⁷

1 Unit Director x \$125,000 =	\$125,000
3 Full-time appellate attorneys x \$90,000 ⁴⁸ =	\$270,000
3 Full-time post-conviction attorneys x \$90,000 =	\$270,000
2 Support staff x \$46,000 =	<u>\$92,000</u>
TOTAL	\$757,000

C. Juvenile Defense Unit

As with non-capital appellate and post-conviction representation, the costs of indigent juvenile representation are far more predictable than the costs of capital representation. Because Pennsylvania’s judicial districts utilize diversionary programs to resolve the bulk of their juvenile cases, the largest cost associated with juvenile representation training and legal support will likely be salary costs.⁴⁹ Accordingly, based upon the average salary figures used above, the estimated base salary costs to the state for indigent juvenile representation can be broken down as follows:⁵⁰

1 Unit Director x \$125,000 =	\$125,000
3 Full-time attorneys x \$70,000=	\$210,000
1 Support staff x \$46,000 =	<u>\$46,000</u>
TOTAL	\$381,000

D. Other Costs for Establishing the Statewide Office of Indigent Defense

As noted *supra*, the majority of the costs associated with establishing the OID are overhead expenses, specifically fees associated with staffing the office. Consequently,

⁴⁷ Fringe benefits and payroll tax costs are also calculable but are not included in this estimate.

⁴⁸ As with capital representation, performing adult appellate and post-conviction review work requires skill sets that many criminal trial lawyers do not need or possess. Consequently, we propose that the attorneys in this Unit be paid slightly higher salaries than the average median salary of assistant public defenders in Lehigh, Dauphin, and Erie Counties.

⁴⁹ It is important to note that, in certain juvenile cases, such as when a juvenile is charged with murder, the costs of litigation may be much higher the overhead costs. Like with capital representation, the costs associated with defending a juvenile accused of murder is difficult to calculate because costs depends on the complexity and specific facts of the case.

⁵⁰ Fringe benefits and payroll tax costs are also calculable but are not included in this estimate.

the estimated total costs of the proposed hybrid IDS can be calculated, in part, by combining the estimated salary costs for each individual unit enumerated above. However, in addition to the salary costs associated with these units, it is also necessary to include the costs associated with the appointment of an Executive Director, who will oversee the entire OID, and of a Director of Training, Research and Data Collection, who will be tasked with devising standardized guidelines for all indigent defense offices across the state, collecting data from local PD Offices and the OID, providing research assistance to local PD Offices, and developing and providing training to county-funded indigent defense attorneys throughout the Commonwealth. Each of these positions will have one support staff member. Accordingly, the salary costs of two additional support staff will also be included in the estimated total costs of operating this office. The total estimated salary costs of the entire office are set forth as follows:

1 Executive Director	\$186,000
1 Support Staff for Executive Director	\$46,000
1 Director of Training, Research and Data Collection (unit)	\$125,000
1 Support Staff for Director of Training, Research and Data Collection	\$46,000
Capital Defense Unit Staff	\$2,709,000
Non-Capital Adult Appellate and Post-Conviction Defense Unit Staff	\$757,000
Juvenile Defense Unit Staff	<u>\$381,000</u>
TOTAL SALARY COSTS:	\$4,250,000

In addition to salary costs, the second largest expense will likely be the cost of leasing office space to house the OID. Because this office will provide services to indigent criminal defendants and training to indigent defense attorneys throughout the Commonwealth, housing it in the state capital of Harrisburg, PA is ideal. According to one commercial real estate company, the average rental rate for office space in Harrisburg is currently \$16.11 per square foot.⁵¹ If this figure is used to estimate the lease price of an office space large enough to accommodate an office of 53 staff (between approximately 6,360 and 11,660 square feet)⁵², the estimated annual office space rental cost is between \$1,229,515 and \$2,254,111.

⁵¹ See Property Shark, https://www.propertyshark.com/cre/office/us/pa/harrisburg/?Zoom=13&View_port=-76.966792057337,40.19767863899135,76.78071112471981,40.3205564738514&GeopickerType=viewport (last visited Oct. 12, 2020).

⁵² The estimate of the amount of office space needed is based on a calculation using a tool designed by a commercial real estate firm. The lower estimate was calculated by selecting a "dense" office space with minimal common areas within the tool. The higher estimate was calculated by selecting an "average" office space with minimal common areas within the tool. See Kristi Svec Simmons, *How Much Office Space Do I Need? (Calculator & Per Person Standards)*, <https://aquilacommercial.com/learning-center/how-much-office-space-need-calculator-per-person/#calculator> (last visited Oct. 12, 2020).

E. Total Estimated Costs for Proposed Hybrid Indigent Defense System

If the cost of salaries (\$4,250,000), office space leasing (\$1,750,000) and the allocation from the General Assembly for DAP (\$1,500,000) are added together, the estimated total cost of the proposed hybrid Office of Indigent Defense for the Commonwealth of Pennsylvania would be approximately \$7,500,000.

VIII. POSSIBLE SOURCES OF ADDITIONAL FUNDING

As previously stated in footnote two, in June 2019, the Pennsylvania General Assembly allocated \$500,000 to reimburse counties for indigent defense services in capital cases. To the extent that these funds are available, it is suggested that they be used to fund the proposals set forth in this Memorandum.

IX. ANTICIPATED COST SAVINGS FROM PROPOSED HYBRID INDIGENT DEFENSE SYSTEM

Although creation of the proposed hybrid IDS will require initial, upfront investment from the state, implementation will likely create significant cost savings for both state and county governments. Providing standardized, consistent, and adequately-funded defense counsel to indigent defendants in capital cases, juvenile cases, and at the non-capital appellate and post-conviction stages will better protect defendants' Sixth Amendment right to effective assistance of counsel at considerably less cost to the counties and state.

A. Improved Effectiveness of Representation of Indigent Defendants Can Produce Significant Savings to the State

Centralized capital defense representation will cost the state the most to implement, but will likely create substantial state Department of Corrections cost savings, due to much improved representation of capital defendants. Approximately 80% of capital defendants are indigent, and thus represented by either public defenders or court-appointed counsel.⁵³ As stated in Section VI of this Memorandum, the PSU study of the Pennsylvania capital justice system found links between type of counsel and capital case outcomes that indicated that defendants represented by public defenders were more likely to receive the death penalty.

Appellate review of these cases has highlighted the deficiencies of Pennsylvania's underfunded approach to indigent defense, particularly in the capital context. As of May 2018, 150 Pennsylvania death row inmates sentenced under PA's 1978 death-penalty statute have had their convictions or sentences overturned on the basis of ineffective

⁵³ Kramer et al, *supra* note 32, at 75.

assistance of counsel.⁵⁴ “Death sentences in 93 of these cases were overturned because of counsel’s failure to investigate and present mitigating evidence in the penalty phase.”⁵⁵ The PSU Study found that, “in nearly a quarter of the cases, no mitigating circumstances were filed by the defense, raising questions about the effectiveness with which defense counsel pursued those cases.”⁵⁶ Moreover, the PSU Study concluded that “some indigent defense practitioners failed to meet professional standards, partially because the system delivering that services is not standardized to train or supervise statewide.”⁵⁷

The ineffectiveness of indigent defense counsel at the local level, as described above, results in significant costs to the counties, but also to the state. The county and state taxpayer funds spent on the pre-trial, trial, sentencing and appellate process are wasted, or even worse, doubled, when cases must be retried due to avoidable errors committed by underfunded, insufficiently trained public defenders, conflict counsel, and court-appointed private counsel. Moreover, when a capital inmate is found to be innocent, the state has wasted hundreds of thousands of dollars housing the inmate in the special capital case unit in state prison.

Even when capital defendants are not found innocent but receive competent representation, the state and counties save money. For example, according to the Death Penalty Information Center (referenced in footnote 42, if properly represented, most prisoners on Pennsylvania’s death row would not have been sentenced to death at all; thus, the state would not have borne the increased costs of capital incarceration. In the years since DAP began taking homicide cases, 90 people have been sentenced to death in Philadelphia. If quality of counsel had made no difference, 20% of those deaths verdicts would have been DAP cases.⁵⁸ But none of DAP’s capital defendants received death sentences. This strongly suggests that far fewer of the 90 defendants would have received death sentences if the quality of their representation was improved or equal to that provided by DAP. Moreover, with quality counsel, a significant number of prisoners would have been convicted of lesser charges, such as third-degree murder or manslaughter that do not carry life sentences, thus further reducing the costs to the state.

Effective appellate counsel also reduces the incarceration costs to the state by identifying and redressing constitutional errors at the direct appeal stage, rather than in PCRA or federal habeas proceedings, after years, or even decades of additional incarceration. Since more than 95% of Pennsylvania death-row prisoners who win post-conviction relief

⁵⁴ *Id.* at 183.

⁵⁵ *Id.* at 184.

⁵⁶ *Id.* at 88 (internal citations omitted).

⁵⁷ *Id.* at 183.

⁵⁸ DAP represents only 20% of indigent capital defendants in Philadelphia.

are not re-sentenced to death⁵⁹, the earlier the relief is granted, the more substantial the cost savings.

As stated in Section VII of this Memorandum, the Department of Corrections spends \$15,010 more per year to house an inmate in the capital case unit than in the general prison population.⁶⁰ Given that the average length of stay for an inmate on death row is 17.49 years, “the differential amount spent per inmate in the capital case unit would total \$262,524.90 *per inmate* [.]”⁶¹ “If the differential in costs for capital case unit inmates compared to general population inmates persists, the Department of Corrections can expect to spend an extra \$39,378,735 or more to incarcerate condemnees, who are unlikely to be executed.”⁶²

Therefore, by providing competent counsel to indigent defendants accused of capital murder, the state could significantly reduce the substantial costs associated with housing capital case inmates as detailed above. Competent counsel could help those defendants successfully defend against capital murder charges, and utilize their skills in negotiating plea deals with the prosecution that do not result in death sentences, thereby minimizing the amount of time such inmates are housed in the capital case unit.

B. Savings from Centralized Appellate and Post-Conviction Units

Creation of a centralized appellate and post-conviction indigent defense system would minimize actual, extra litigation costs associated with appeals and post-conviction petitions in juvenile, non-capital adult, and capital cases. Specifically, affording indigent defendants adequately trained appellate and post-conviction counsel would eliminate the need to file additional post-conviction petitions and collateral appeals, minimizing the overall amount of prosecutorial, defense, and judicial resources that need to be allocated to a specific case.

C. Cost Savings to Counties Used to Reduce Caseloads and Improve Representation at the Local Level

The savings to the counties produced by the state’s assumption of the costs of capital case representation, as well as appellate representation for all cases, will be substantial. This would permit the county public defender offices to spend the savings on hiring additional trial attorneys, significantly reducing caseloads, and other staff, such as social

⁵⁹ See, DPIC, *Arbitrariness: Pennsylvania’s Costly and Broken Death Penalty System*, <https://deathpenaltyinfo.org/news/arbitrariness-pennsylvanias-costly-and-broken-death-penalty-system> (2013); see also Robert Dunham, *The First 100 Re-Sentencings: Subsequent Dispositions of Pennsylvania Capital Cases Reversed in Post-Conviction*, <https://files.deathpenaltyinfo.org/legacy/documents/RDunhamPaReversals.pdf> (Jan. 28, 2013).

⁶⁰ JSGC-CP Report, *supra* note 31, at 56.

⁶¹ *Id.*

⁶² *Id.* at 58.

workers and support and training staff. These improvements should vastly improve the quality of representation of indigent defendants across the state, ultimately reducing the cost to the counties and the state.

D. Avoidance of Costly Potential Lawsuits

As evidenced by a report on its indigent defense costs after Texas passed indigent defense reform legislation in 2001, 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.⁶³

X. CONCLUSION

The proposals highlighted in this Memorandum will help the Commonwealth fulfill its obligation under *Gideon* and its progeny to provide effective assistance of counsel to indigent criminal defendants. Although the proposals would require initial, upfront investment from the state, the potential cost savings realized by state and county governments will be significant. If the Pennsylvania General Assembly adopts the IDS proposed in this Memorandum, the Commonwealth and its counties could save hundreds of thousands of dollars in state incarceration costs as well as the costs associated with re-litigating cases due to ineffective assistance of counsel.

⁶³ See Dottie Carmichael et al., *Indigent Defense Spending and Cost Containment in Texas: A Report to the Texas Indigent Defense Commission*, TX. A & M, at xi, 6-9 (Dec. 2018).

Appendix B - 2020 Median Salaries

Lehigh County			
Position	2020 Median Budgeted Salary		
Chief Public Defender (Office Director)	\$ 112,611.00		
Full-Time Assistant Public Defender	\$ 81,297.00		
Support Staff	\$ 41,142.00		
Dauphin County			
Position	2020 Median Budgeted Salary		
Chief Public Defender (Office Director)	\$ 150,842.00		
Full-Time Assistant Public Defender	\$ 62,150.00		
Support Staff	\$ 61,651.00		
Erie County			
Position	2020 Median Budgeted Salary		
Chief Public Defender (Office Director)	\$ 101,730.53		
Full-Time Assistant Public Defender	\$ 67,545.86		
Support Staff	\$ 35,610.71		
2020 Average Median Salaries			
Position	Average Salary	Rounded to Nearest Thousand	
Chief Public Defender (Office Director)	\$ 121,727.84	\$ 122,000.00	
Full-Time Assistant Public Defender	\$ 70,330.95	\$ 70,000.00	
Support Staff	\$ 46,134.57	\$ 46,000.00	