Public Defense in Michigan

From the Top to the Bottom

By Frank D. Eaman

In 1963 the United States Supreme Court held in *Gideon v Wainwright* that the Sixth Amendment of the United States Constitution required the states to provide an attorney to anyone prosecuted for a felony who could not afford counsel.[1] Within 10 years, the Court also held that the Sixth Amendment required the states to provide counsel to juveniles facing dispositional hearings,[2] and to anyone prosecuted in a misdemeanor case in which a jail sentence was a possibility.[3]

Michigan's Pre-*Gideon* Right to Appointed Counsel

Well before *Gideon,* in the middle of the nineteenth century, Michigan courts could provide counsel to indigent defendants. Circuit judges, in their discretion, could appoint counsel in felony cases, and if counsel was appointed, a state statute provided that the judge could order the county where the case was being prosecuted to pay the lawyer a certain sum, depending on the charges; the statute was later revised to allow the chief circuit judge to order a "reasonable fee" in every felony case in which counsel was appointed.[4]

The Michigan Constitution of 1908, Sec. 19, "Rights of accused" provided: "In every criminal prosecution, the accused shall have the right…to have the assistance of counsel for his defense… and in courts of record, when the trial court shall so order, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal."

Michigan's statute and the Constitution of 1908 were a basis for court appointment of counsel at public expense on a case-by-case basis before *Gideon* required the state to provide counsel in every case.

Michigan's Post-*Gideon* Public Defense—County-by-County Systems

After *Gideon,* Michigan continued with the system in place—appointing counsel on a case-by-case basis. Michigan remained a state where, for the most part, individual attorneys were appointed by the courts for the accused and paid by the counties, not the state. Two early exceptions to the appointed-counsel pattern were the State Appellate Defender Office and Wayne County. The State Appellate Defender Office was created by the legislature in 1979 to represent defendants in 25 percent of the felony appeals throughout the state.[5] In Wayne County, the Detroit Bar Association established a staffed defender office, which was approved by

Fast Facts:

Michigan has historically provided counsel to indigent defendants in county-based systems.

The 2008 National Legal Aid & Defender Association study commissioned by the legislature revealed constitutionally inadequate public defense in 10 Michigan counties.

the Supreme Court in 1972 to represent defendants in 25 percent of the criminal cases in the Recorder's Court for the City of Detroit and in the Wayne County Circuit Court.[6]

Although the appointment of counsel in all felony, misdemeanor, and juvenile delinquency cases had become mandatory under the Sixth Amendment, the fees set by judges throughout the 1970s for appointed counsel in Michigan seldom were fair and just compensation for the hard work done (see Justice Black's 1972 dissent in *In re Meizlish,* quoting from "Slave Labor in the Courts"[7]). Lawyers often had to apply to the Court of Appeals to seek an order for payment in cases in which judges refused to order payment for extraordinary work done.[8] The courts retained the power to order "reasonable fees" as provided by statute, but usually failed to exercise that power. The amount paid for public defense by the counties was more a function of what the counties' budgets would allow rather than what was truly reasonable.

As the '70s became the '80s, Michigan saw a rising inflation that tripled the cost of living. Most judges, under pressure from counties that were hit hard by inflation and also by falling revenues, did not increase the already low rates of pay for appointed counsel. Fees for appointed counsel work, which were originally set below the going rate that private counsel charged, became intolerable. Bar associations and other groups began a series of cases in the Michigan Supreme Court trying to convince the Court to order the circuit judges to pay the "reasonable fee" guaranteed by statute. One opinion the litigation generated was *Recorder's Court Bar Ass'n v Wayne Circuit Court* in 1993 in which the Court threw out as unreasonable a Wayne County "flat fee" schedule that paid as much to a lawyer when the defendant pled guilty as when the lawyer tried the case before a jury.[9]

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Today, Michigan still lacks any state public defense system for providing assigned counsel or public defense services. Each county, in conjunction with the circuit court for that county, crafts a plan and a pay scale for public defense services. A few counties have a defender office, some a contract office, and many a plan that appoints attorneys from a list of assigned counsel. The requirement for a "reasonable fee" is largely ignored: almost all lawyers engaged in public defense are woefully underpaid.

NLADA's 2008 Survey—The Failures of Michigan's System

In June of this year, the National Legal Aid & Defender Association (NLADA), after studying public defense services in 10 Michigan counties,[10] issued a scathing indictment of Michigan's provision of public defense services. The NLADA report was in response to a 2006 joint resolution of the Michigan Senate and House, sponsored by Sen. Alan Cropsey (R–DeWitt), requesting a review of public defense services in Michigan. In the NLADA report, entitled *A Race to the Bottom—Speed and Savings Over Due Process: A Constitutional Crisis,*[11] the authors observed that Michigan ranks 44th in the country in per capita spending for public defense. In its review of services in 10 Michigan counties, the NLADA team found that the Sixth Amendment rights of defendants appearing in Michigan courts were systematically violated, often for the expedience of moving the docket.[12] The authors observed that Michigan is one of only seven states in the country that still have 100 percent county-funded public defense.

The conclusion of the NLADA report was that "the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts." The authors compared Michigan's system to that of Alabama in 1932, which was

Serendipity by Kinnari Sutariya

strongly criticized in *Powell v Alabama,*[13] the infamous "Scottsboro Boys" case.

Before the NLADA report was released, the national and Michigan American Civil Liberties Union, with the assistance of other groups, filed a class-action lawsuit in Ingham County Circuit Court, *Duncan v Michigan,* on behalf of indigent defendants in three counties that were not included in the NLADA report—Muskegon, Genesee, and Berrien Counties. The allegations in the complaint of the lawsuit were similar to the findings of the NLADA report: lawyers meeting their clients for the first time in court in nonpublic areas, no investigation of cases, and no experts or investigators being provided for defense counsel.[14] The suit requested that the Ingham County Circuit Court, pursuant to *Gideon,* order the state and governor to fund public defense in the three counties named. At the time of this writing, the state had appealed the order of the Ingham County Circuit Court denying the state's motion for summary disposition, and the state's appeal is set for argument on December 9 in the Court of Appeals at Detroit.

Proposals for Change

The winds of change are blowing. The Michigan Counsel on Crime and Delinquency created a Public Defense Task Force that has been working for several years to change Michigan's system for providing public defense. A group called the Michigan Campaign for Justice has begun to work toward change in Michigan's public defense. The State Bar has a long history of being at the forefront for change in Michigan's century-old county public defense systems. At the 2006 State Bar Annual Meeting, the Criminal Law Section brought in lawyers from Georgia and Montana (two states where Michigan-type systems were replaced with statewide public defense) who discussed the changes that have happened in their states ("Fixing Michigan's Broken Public Defense System," State Bar Annual Meeting, 2006). The State Bar has created the Criminal Issues Initiative of the Committee on Justice Initiatives to consider problems in indigent representation, including the general ignorance among assigned counsel of the collateral consequences of a criminal conviction. And the State Bar Representative Assembly has approved the Eleven Principles of a Public Defense Delivery System, which require public defense to meet certain basic standards.[15]

The NLADA report should be a strong impetus for change. Since the NLADA report was in response to a joint resolution of the Michigan Senate and House, it is hoped that it will be the first step toward legislative action to bring Michigan into the twenty-first century.

In 150 years Michigan has gone from the top—a state that provided assigned counsel before the Sixth Amendment was held to require counsel and a state that compensated assigned counsel reasonably—to the bottom—a state that is 44th in the country in spending on public defense and a state that, according to the NLADA, systematically denies Sixth Amendment rights to defendants appearing in its courts. Michigan must now move in the right direction—state funding and a public defense system—to restore justice in our criminal courts and bring Michigan back to the top. ■

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FOOTNOTES

1. *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).
2. *Application of Gault,* 387 US 1; 87 S Ct 1428; 18 L Ed 2d 527 (1967).
3. *Argersinger v Hamlin,* 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972).
4. 1857 PA 109, now MCL 775.16.
5. The State Appellate Defender Act, 1978 PA 620, eff. January 6, 1979, MCL 780.711, et seq. The other 75 percent of appeals for indigent defendants continue to be assigned to private counsel, and their fees continue to be paid by the counties. A state-funded administrative office, the Michigan Appellate Assigned Counsel System, was authorized by the State Appellate Defender Act and eventually funded by the legislature to oversee the appointment of counsel and the performance of counsel in the other 75 percent of cases. See Administrative Order No. 1981-7 and 1989-3.
6. See Administrative Order No. 1972-2.
7. *In re Meizlish,* 387 Mich 228, 242; 196 NW2d 129 (1972), dissent by Black, J.
8. See e.g., *Matter of Ritter,* 63 Mich App 24; 233 NW2d 876 (1975); *Matter of Burgess,* 69 Mich App 689; 245 NW2d 348 (1976).
9. *Recorder's Court Bar Ass'n v Wayne Circuit Court,* 443 Mich 110; 503 NW2d 885 (1993).
10. The counties studied by the NLADA were Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee, and Wayne.
11. At the time of this writing, the NLADA report was available on the State Bar's website at <http://www.michbar.org/publicpolicy/indigentdefense.cfm> (accessed October 19, 2008).
12. The NLADA report was issued shortly before the Supreme Court's decision in *Rothgery v Gillespie County,* ___ US ___ ; 128 S Ct 2578; 171 L Ed 2d 366 (2008), where the Court held that counsel must be provided at arraignment, if bond is set, even before charges are issued. Michigan routinely fails to provide counsel to defendants at arraignment, unless counsel is retained.
13. *Powell v Alabama,* 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932). Ironically, according to the NLADA report, Alabama is now far above Michigan in the funds it appropriates for public defense.
14. The complaint can be found on the website of the Michigan Coalition for Justice, <www.micoalitionforjustice.org> (accessed October 19, 2008).
15. Based on the observations in the NLADA report, few, if any, county systems for public defense meet the standards of the eleven principles, available at <http://mipublicdefense.org/about/eleven.html> (accessed October 19, 2008).