

Committee to Review the Criminal Justice Act Program
Testimony of Judge Thomas Boyd
55th Judicial District, Michigan
May 16, 2016

Introduction

Thank you for including defense structures within state criminal justice systems in your work to review the Criminal Justice Act Program. My testimony will focus on the history of efforts toward reform of Michigan's indigent criminal defense system.

I am a District Court¹ judge in Mid-Michigan. I serve as a member of Michigan's Indigent Defense Commission. I am also the current President of the Michigan District Judges Association. A more thorough bio follows.²

History

Michigan has struggled with meeting its responsibility to provide constitutionally adequate counsel to indigent criminal defendants ever since *Gideon*. Michigan has delegated this responsibility to each of its 83 counties. The resulting patchwork approach has been criticized as inadequate for decades. A review of history is needed to understand our current challenges.

This history predates *Gideon* with the suggested unification of the Michigan court system by the State's Constitutional Convention in 1962. This unification was adopted, at least conceptually, in the Constitution ratified a year later. Despite the clear assertion of a unified State court system, the succeeding 50 years saw numerous efforts toward systemic reform concerning the provision of indigent defense and State funding for court operations. These efforts have all failed to bring any uniformity or quality control to the multiple systems which provide counsel to indigent criminal defendants.

1963 Ratification of the Constitution of Michigan of 1963, which includes:

The judicial power of the state is vested exclusively in *one court of justice* which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. (Emphasis added)

1974 National Legal Aid & Defender Association (NLADA) conducted a review of Wayne County Juvenile Defender Services at the behest of the United States Department of Justice. This review found case overload and political interference and concluded that "the only answer to the problems plaguing juvenile justice representation in Detroit was enactment of statewide trial-level representation legislation."

1975 Michigan Supreme Court Chief Justice Thomas G. Kavanagh led in the creation of the Defense Services Committee of the State Bar of Michigan which included judges, prosecutors, defenders, and court officials. This Committee issued a report with 10 recommendations. These recommendations included:

- “Appointed counsel shall receive reasonable adequate compensation to permit effective representation.”
- “[t]he right of an indigent defendant to hire necessary expert witnesses is fundamental to the right to a fair trial.”

These recommendations have not been implemented.

1978 The NLADA updated its 1974 Wayne County report. This update concluded, in part, “[t]he juvenile system needs massive assistance. Unless serious changes are made in funding to provide adequate staff and facilities, especially social service programs, and unless programs in diversion, remedial schooling, and other approaches are tried, today’s juveniles will become alienated and impoverished adults who will flood the jails and infect our entire social existence.”

1978 Public Act 620 of 1978 is signed by Governor Milliken. This Act created the State Appellate Defender and what is now the State Appellate Defender Office (SADO). This action was taken in response to previous reviews of the indigent defense system. SADO is now a well-respected, integral part of Michigan’s appellate indigent criminal defense system.

1980 Public Acts 438 and 443 reorganized the Wayne County courts including the addition of State funds. It was noted that “[t]he need for state government to streamline the operations and assume the costs of the state’s judicial system has been recognized for some time now.” Subsequent legislation shifted the financial burden back to local government.

1986 In his annual State of the Judiciary presentation to the legislature, Michigan Supreme Court Chief Justice G. Mennen Williams called for a statewide system of “equal justice”. Echoing the Michigan Constitution’s call for one court of justice, Chief Justice Williams commented, “[t]his system remains to be fully implemented,” he said, “and it only can be fully implemented through state financing.”

1992 The State Bar of Michigan dedicated the entire February edition of the *State Bar Journal* to the topic of Indigent Criminal Defense. The *Journal* focused on inadequate compensation for appointed counsel and specifically highlighted the State’s failure to provide support services (investigators, expert witnesses, etc.); training for defense attorneys; intrinsic lack of independence and freedom from judicial control; the lack of supervision and qualification standards for appointed counsel; and the lack of a general and statewide institutional presence. Michigan State Supreme Court Chief Justice Michael F. Cavanagh authored the foreword to this edition. He observed that “[i]t is unfortunate that as we mark the 200th Anniversary of the *Bill of Rights* and extol its important guarantees, we at the same time witness the failure to secure those guarantees, adequately or at all, to significant segments of society.”

Current Efforts

The NLADA returned to Michigan at the request of the Michigan Legislature³ in 2006. NLADA conducted an extensive year-long study in ten representative counties in partnership with the State Bar of Michigan. The resulting report, *A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis* (2008)⁴, found multiple systemic failures. The report includes the following findings:

- The failure of the representative counties to ensure that their public defenders are shielded from undue judicial interference, as required by Principle 1. In Grand Traverse County, for example, the judiciary forces public defense attorneys to provide certain legal services for which they are not compensated if they wish to be awarded public defender contracts.
- The failure of the representative counties to manage and supervise its public defense attorneys' workload as required by ABA Principles 5 and 10⁵. In Oakland County, one judge indicated that because attorneys are not barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance and sometimes struggle with. Beyond that nothing is done to ensure the rendering of quality representation.
- The failure of the representative counties to provide public defense attorneys with sufficient time and confidential space to attorney/client meetings as required by Principle 4. The district court in Chippewa County, for example, provides no confidential space within which an attorney may meet with clients. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others will talk softly in the corridor.
- The failure of Michigan counties to adhere to ABA Principles 6 and 9 requiring that public defense attorneys have experience and training to match the complexity of the case. It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers. Even the training provided in the large urban centers is inadequate.
- The failure of the representative counties to provide indigent defense clients with vertical representation, i.e., continuous representation by the same attorney from the time counsel is appointed until the client's case is resolved as recommended in ABA Principle 7. Judges in Wayne County, for example, spontaneously appoint attorneys in courtrooms as "stand-ins" when attorneys fail to appear or remove the appointed attorney from the case and appoint an attorney who happens to be in the courtroom.

The initial legislative response to the *Race to the Bottom* report was a statewide organization to provide trial level counsel to indigent criminal defendants.⁶ This effort failed to garner serious support and died in committee.

In 2011, the State Bar of Michigan issued a comprehensive report on the future of Michigan's justice system.⁷ This report concluded that representation of indigent criminal defendants was one of the critical challenges facing our justice system. The report included the following scathing evaluation of the current system; “[b]y almost every measure, indigent criminal defense as a whole in Michigan falls far short of accepted standards, undermining the quality of justice, jeopardizing public safety, and creating large and avoidable costs.”

Governor Rick Snyder was elected in 2010. He read and was briefed on the *Report of the Judicial Crossroads Task Force* early during his tenure. Governor Snyder issued an Executive Order creating the Indigent Defense Advisory Commission (IDAC) in October, 2011.⁸ The Advisory Commission consulted with experts and conducted public hearings.

I presented on the IDAC's progress to a meeting of the Wayne County District Court Judges Association (Wayne is Michigan's largest county and home to the City of Detroit). The IDAC's work was not yet done. My presentation was a discussion of the ABA 10 Principles of a Public Defense Delivery System. The first principle calls for independence, including independence from the judiciary. My presentation followed that of a Circuit Court (trial court of general jurisdiction) Judge on an unrelated topic. When I finished, it was the Circuit Judge who had the first question; “If appointed counsel are independent from the judiciary, how will we fund our campaigns?” He was not joking and none of the meeting attendees laughed. They all waited for a response to what they believe to be a very legitimate question.

The IDAC called for the creation of a permanent commission to set minimum standards to apply to each and every indigent criminal defense system in its final report in June 2012.⁹ In other words, the IDAC called for preservation of the historic local control – including the much maligned county based system. The goal would be adopt minimum standards based on the ABA 10 principles and national and international norms. Local systems would then change each local system to conform to these minimum standards. In my view, this approach was embraced for two reasons:

- (1) Every part of Michigan's criminal justice system is controlled locally. Under Michigan law, law enforcement, prosecution, courts and jails are all overseen by local officials. The change to a State level bureaucracy, assuming this is ever a good idea, would not be well-received or easily implemented with these local systems.
- (2) This type of statewide minimum standards for local operations is already accepted and functioning within Michigan's criminal justice system. The Michigan Commission on Law Enforcement Standards (MCOLES) is a State regulatory agency with authority over law enforcement officers. MCOLES authorizes police academies which each teach the same MCOLES developed curriculum. Local sheriffs and police chiefs must comply with MCOLES rules, regulations, and standards in hiring individual deputies and officers.

Significantly, the IDAC recommended State funding for all additional spending required for each local system to meet the new statewide standards. Local indigent criminal defense systems would be required to maintain their current level of funding.

I have made several presentations on the topic of constitutionally effective assistance of counsel to judges and judicial associations. As a result, my colleagues and I will often discuss the courts' role in complying with the 6th Amendment as articulated by specific state and federal cases. The United State Supreme Court decided *Missouri v Frye*, 132 S.Ct. 1399 (2012)¹⁰, on March 21, 2012. *Frye* sparked numerous such discussions.

As you know, *Frye* serves to emphasize (or hold conclusively – depending on your perspective) the requirement of counsel during pretrial bargaining. Justice Kennedy writing for the court included the following:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” *Lafler*, post, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. **It is not some adjunct to the criminal justice system; it is the criminal justice system.**” (Citations omitted, Emphasis added)

This unequivocal statement on pretrial bargaining as a critical phase of the criminal proceeding leaves no doubt that counsel must be provided to indigent defendants for this purpose. Many Michigan jurisdictions do not provide counsel to defendants at pretrial. Defendants are expected to bargain with the prosecution first. If -- and only “if” -- they still demand a trial, is counsel then appointed. I have long considered this process unconstitutional. Armed with *Frye*, I contacted several colleagues who utilize this system. One such conversation is particularly memorable.

I spoke with a colleague who is a former prosecuting attorney for his county. I have known him for nearly 20 years, both in his roles as prosecutor and judge. He is a good person who works hard to protect the rights of those coming before him. I believe he strives for just results in his cases. I forwarded him a copy of *Frye* and followed-up a couple of weeks later by phone. It was a short conversation. I asked if he intended to begin appointing counsel to indigent defendants for the purpose of pretrial. He said he was not. I inquired if he disagreed with my reading of that requirement in *Frye*. He said that is clear that the US Supreme Court requires counsel at pretrial. Confused, I asked one more time – then why will you not comply. He responded, “I just don’t have the money.”

This is a cautionary tale in support of independence from the Judiciary. Most Michigan counties include the funding for indigent counsel within the court’s budget. In other words, every local dime spent on indigent defense is a dime that cannot be spent on court operations and/or other court programs. It stands to reason, therefore, that the ABA chose independence as the first of its ten principles. A competition for resources between defense and the court cannot coexist with effective and vigorous assistance of counsel.

The IDAC final report was forwarded to the Governor Snyder and legislative leaders. Representative Tom McMillin, a member of the IDAC, introduced legislation consistent with the IDAC recommendations and embracing the State-local compromise.¹¹ This legislation was introduced on April 10, 2013 and signed into law by Governor Snyder on July 1, 2013.¹² While very clearly only the beginning of substantive change for the local indigent criminal defense systems, and criminal defendants, swift passage for Representative McMillin's legislation marks a turning point in Michigan.

The new Michigan Indigent Defense Commission Act (the "Act") establishes a roadmap for development and adoption of statewide minimum standards. The Act also provides a mechanism for approval of newly developed minimum standards by the State Supreme Court; development of local compliance plans within each indigent criminal defense system and the request for and appropriation of required funding.

Unfortunately, the Act also inadvertently established some hurdles in the creation of the new permanent Commission. The Act assures that a variety of interests are represented on the permanent commission. Political difficulties within some of those constituencies delayed the appointment of the new Michigan Indigent Defense Commission (MIDC) until spring of 2014. The MIDC, however, hit the ground running. Within the first nine months, the MIDC began meeting, organized itself, and searched for and hired an Executive Director. Additional information on the MIDC can be found at <http://michiganidc.gov/>.

The MIDC has developed four initial minimum standards.¹³ These standards are now pending review by the Michigan State Supreme Court pursuant to the Act. The Court has scheduled a public hearing for May 18, 2016, as part of this review. The initial standards address some of the major problems Michigan faces in the delivery of adequate indigent defense systems: training and education of counsel, the initial client interview, use of investigation and experts, and counsel at first appearance and other critical stages.

Once the Michigan Supreme Court approves these initial standards, local indigent criminal defense systems will have 180 days to develop compliance plans for their organization. The local system is defined as each trial court and its funding unit. This will force each local community to review their criminal justice system for compliance with the new minimum standards. It will be up to each community to craft a path forward which is consistent with the standards. Significantly, the Act reserves to the MIDC the right to determine if a local plan is, in fact, meeting each standard.

Again, this is only the beginning point for substantive change. Michigan has neglected faithfulness to this path for the better part of 50 years. It will take time to put us back on the correct path and even more time before we make progress in this new, better direction.

One final point: After this initial set for standards was developed, the MIDC circulated a survey among lawyers who accept indigent criminal defense appointments. The MIDC plans to continually address the most pressing needs of the indigent criminal defense systems and this survey was part of gauging where to put its energies next. The survey produced interesting, yet

not surprising, results. While the survey has not yet been released, the following quotes were presented at the February 2016 MIDC meeting:

“Cases are assigned based on favoritism. If you contribute to the judge's re-election campaign you get assignments. If you don't you may not. Lawyers take judges to lunch a lot and get preferred treatment. Most judicial fundraiser tickets cost \$100. I donated \$400 to one judge who never gave me any assignments and within two weeks, she assigned me four cases. I did a test with another judge and the judge did the same thing. Cases also are assigned to inexperienced attorneys just out of law school. Assignments are based on who you know not what you know.”

“Wayne County is a pay to play system - its common knowledge that I found to be absolutely true.”

Suffice it to say, we have much work to do.

¹ The Constitution of the State of Michigan of 1963 empowered the legislature to create courts of limited jurisdiction. The District Court was created in 1968. The District Court determines probable cause in all felony cases; has jurisdiction over misdemeanor criminal offenses (those punishable by 365 days or less) and civil disputes valued at \$25,000 or less.

² Born and raised in Kalamazoo, Michigan. Graduated James Madison College at Michigan State University in 1985 (Major: Minority/Majority Group Relations and Related Policy Problem Solving); and Wayne State University Law School in 1990. Appointed Assistant Attorney General in 1995 by Democratic Attorney General Frank J. Kelley. Appointed Judge in the 55th District Court (Ingham County, Michigan) in July 2005 by Democratic Governor Jennifer Granholm. Elected to continued service in 2006, 2008 and 2014. Appointed Chief Judge of the 55th District Court by the Michigan Supreme Court, 2008 through 2015. Judge Boyd was also selected by the Michigan Supreme Court to participate in its Pilot Project on Jury Reform in 2008 (this project and the judges involved were recognized in 2012 by the National Center on State Courts with the G. Thomas Munsterman Award for Jury Innovation). Judge Boyd served on Republican Governor Rick Snyder's Indigent Defense Advisory Commission, 2011-12, and was again appointed by Governor Snyder to the Michigan Indigent Defense Commission in June, 2014. In 2014, the Michigan Supreme Court awarded 55th District Court a Court Performance Innovation Fund Grant to pilot the provision of defense counsel at arraignment. This pilot project was tremendously successful and has been used as a model for training other courts. Judge Boyd is the current President of the Michigan District Judges Association.

³ Senate Concurrent Resolution 39 of 2006

⁴ http://www.nlada.net/sites/default/files/mi_racetothebottomjseri06-2008_report.pdf

⁵ ABA 10 Principles of a Public Defense Delivery System, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

⁶ House Bill 5676 of 2009

⁷ *Report of the Judicial Crossroads Task Force*;
<http://www.michbar.org/file/judicialcrossroads/judicialcrossroadsreport.pdf>

⁸ https://www.michigan.gov/documents/snyder/EO_2011-12_366247_7.pdf

⁹

http://www.michigan.gov/documents/snyder/Indigent_Defense_Advisory_Comm_Rpt_390212_7.pdf

¹⁰ *Lafler v Cooper*, 132 S.Ct. 1376, 566 U.S. __ (2012), was decided with *Missouri v Frye*. *Lafler* comes from Wayne County Michigan. Not only is *Lafler* significant for the egregiously inadequate assistance of counsel, it is significant because this egregiously deficient conduct was not reversed upon review by Michigan's appellate courts.

¹¹ House Bill 4529:
[http://www.legislature.mi.gov/\(S\(nwmx1obgfjd4gakw3vvokll2\)\)/mileg.aspx?page=getObject&objectName=2013-HB-4529](http://www.legislature.mi.gov/(S(nwmx1obgfjd4gakw3vvokll2))/mileg.aspx?page=getObject&objectName=2013-HB-4529)

¹² Public Act 93 of 2013: <http://www.legislature.mi.gov/documents/2013-2014/publicact/pdf/2013-PA-0093.pdf>. Work done on similar legislation in 2012 sped the legislature's consideration of this bill.

¹³ Initial Standards adopted by the MIDC can be found at <http://michiganidc.gov/wp-content/uploads/2015/12/FINAL-first-set-of-standards-for-submission.pdf>