

THE RIGHT TO COUNSEL IN WAYNE COUNTY, MICHIGAN

EVALUATION OF THE STATE DEFENDER OFFICE OF THE METROPOLITAN JUSTICE CENTER OF SOUTHEAST MICHIGAN

APRIL 2018



SIXTH
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CENTER

The Right to Counsel in Wayne County, Michigan: Evaluation of the State Defender Office of the Metropolitan Justice Center of Southeastern Michigan

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The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding at all critical stages of a case.

For this evaluation, the 6AC worked in collaboration with the Defender Initiative of the Seattle University School of Law (SUSL). The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

A representative from the National Legal Aid & Defender Association and an attorney from the Federal Defender Office in Detroit participated in the site visit team and contributed to the report.

DISCLAIMER

Wayne County commissioned this report under a generous grant of the Michigan Indigent Defense Commission. The report solely reflects the opinions of the authors and does not necessarily reflect the views of Wayne County or the Michigan Indigent Defense Commission.

On June 8, 2018, the Sixth Amendment Center was made aware of a publication error. Any downloaded copy of the Executive Summary prior to that date is erroneous. Please use the body of the report for any analysis or future reporting. The corrected Executive Summary is now available.

EXECUTIVE SUMMARY

In September 2017, the Sixth Amendment Center (6AC), in cooperation with the Defender Initiative at Seattle University School of Law (SUSL), conducted an evaluation of the State Defender Office of the Metropolitan Justice Center of Southeast Michigan. Wayne County requested the evaluation under a grant from the Michigan Indigent Defense Commission.

Chapter I (pages 3 – 12) provides general background information on right to counsel services in Michigan and on the State Defender Office specifically. The State Defender Office (SDO) has only existed in its current incarnation since 2016, after its former parent organization Legal Aid and Defender Association, Inc. (LADA) was reorganized. LADA was founded in 1909 as a non-profit organization to provide legal services to poor people in civil actions; it later began to provide criminal defense and juvenile representation. Since 1972, the Michigan Supreme Court has required that the SDO be appointed on a weekly basis to 25% of all indigent felony cases. In 1973, LADA began providing criminal defense services in federal courts.

In 2008, on behalf of the Michigan Legislature, the National Legal Aid & Defender Association (NLADA), in partnership with the State Bar of Michigan, evaluated trial level indigent defense representation throughout the state and found that all services – including those in Wayne County – were constitutionally inadequate. With regard to the SDO specifically, the statewide evaluation found that attorneys were working at nearly twice the workload allowed under national standards.

The statewide NLADA evaluation coincided with the launch of an American Civil Liberties Union (ACLU) systemic class action lawsuit. The evaluation and lawsuit led Governor Snyder to issue an executive order in 2011 creating the Indigent Defense Advisory Commission. The commission recommended comprehensive legislation that was subsequently passed by the legislature in 2013. The legislation created the Michigan Indigent Defense Commission (MIDC) as a state-level body charged with drafting and implementing standards for the provision of effective assistance of counsel throughout the state. MIDC administers grants of state funding to the counties to ensure compliance with those standards.

Before and during the implementation of the MIDC statute, LADA began experiencing a diminution of funding across its various service areas, leading to significant corporate restructuring. The juvenile law group was affected first when LADA's juvenile services contract was terminated in 2009. The civil law group was the next to see a reduction in

funding when the federally funded Legal Services Corporation (LSC) notified LADA in late 2015 that it decided against continuing to award funding to LADA.

In light of its reduced funding, in December 2015 LADA restructured its organization into four non-profit organizations, with the changes taking effect on July 1, 2016. The Southeastern Michigan Administration Services Group (SEMASG) is organized as a parent organization that directs and provides administrative services to the other three subsidiary entities, including the Metropolitan Justice Center of Southeast Michigan (MJCSM). MJCSM operates two legal divisions: the Federal Defender Office, and the State Defender Office.

FINDING #1: The State Defender Office attorneys are unable to put each and every prosecution to the “crucible of meaningful adversarial testing,” as is their ethical duty and constitutional obligation.

Chapter II (pages 13 – 28) details the parameters of effective representation under U.S. Supreme Court case law and determines that the SDO fails to meet those thresholds, due primarily to underfunding. From October 2000 through August 2016, Wayne County paid the same flat rate of \$1,980,000 annually for the State Defender Office to handle one quarter of felony cases in the Third Judicial Circuit. Wayne County did not increase funding for indigent defense representation by the SDO even after the 2008 NLADA report concluded that indigent defense services in Wayne County, and specifically the representation provided by SDO attorneys, were constitutionally deficient.

To say that the SDO experienced flat funding, however, is a bit of a misnomer. Although Wayne County paid the same dollar amount each year, two factors caused the amount available to SDO for defending each case to decrease.

Overhead expenses increased

In January 2007, LADA purchased for \$12,640,000 the office building at 613 Abbott Street that currently houses the reorganized non-profit organizations. LADA did not have the financial resources to purchase the building outright and took out a mortgage. After the elimination of LADA’s juvenile division in 2009, each of the remaining three service divisions (civil, federal, and state) were allocated a separate floor of the building, so LADA divided up the monthly cost of the mortgage more or less evenly among them. Despite LADA’s allocation to the SDO of a whole floor of 613 Abbott, the SDO did not need as large a space as the federal and civil divisions because they had significantly fewer staff than each of those other divisions at that time. After the loss of LSC funding in 2015, even more of the mortgage cost was shifted to the SDO.

Over the same period of time, the administrative costs attributed to the SDO by its parent organization also increased. Historically, LADA allocated its administrative costs to each of its service divisions based on the percentage of administrative time dedicated to each division. Around the time of the reorganization, the accounting procedures were changed to charge administrative costs proportionally based on numbers of staff in each of the resulting four non-profit organizations. After the loss of the civil division's LSC funding in 2015, the parent organization had little beyond the resources earned by the federal and state divisions with which to pay the administrative costs assessed by the parent organization. Of the \$1,980,000 that Wayne County paid SDO annually from October 2000 through July 2016, by 2016 the SDO's parent organization would allocate roughly \$756,244 to the overhead costs of office space and administrative services.

Then, in 2017, the Office of the General Counsel for the U.S. Courts disallowed any increased fees and informed the parent organization that the federal Defender Services Office would obtain its administrative services from elsewhere. Thus, as of September 2017, the SDO was shouldering the vast majority of administrative costs too.

Workload increased

As a lessening portion of the amount paid by Wayne County was available to the SDO for representing indigent felony defendants, the actual number of felony cases handled by the SDO attorneys each year was increasing. From the beginning of 2011 through the end of 2017, the Third Judicial Circuit's felony appointments to the SDO increased from 2,528 appointments per year to 3,469.

In August 2016, Wayne County and the parent organization entered into a new contract. In short, Wayne County began paying \$300,000 more per year for the SDO to also provide representation to indigents on the "welfare fraud" and "felony child non-support" dockets. However, SDO's parent organization did not use the new funding to hire additional SDO lawyers, as it expressly stated to Wayne County officials that it would do. Now, the same 16 SDO attorneys are doing even more work, with no additional support.

Although the SDO attorneys are increasingly asked to do more with less, they are poorly paid for their work. In the 17 year period from October 2000 through September 2017, only one salary increase occurred, circa 2003, raising starting level attorney salaries from \$28,000 to \$35,000 per year. Extremely low salaries have contributed to high turnover among the SDO attorneys, and some attorney positions have been left vacant.

FINDING #2: The State Defender Office attorneys are prevented from providing effective representation because they lack sufficient time, resources, and support staff to properly prepare cases.

Chapter III (pages 29 – 48) shows how the SDO attorneys lack sufficient time to provide effective representation. National standards, as summarized by the American Bar Association, agree that a defense lawyer’s workload must be controlled to permit the rendering of quality representation. For example, national standards state that a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, and nothing else. In 2017, the SDO attorneys collectively handled 3,469 newly appointed cases, plus any cases appointed in previous years that had not concluded. The 16 SDO attorneys each had on average 217 new felony cases (or 145% of the national standard). And, the SDO does not have any social workers, investigators, paralegals, or interns on staff to aid the attorneys in conducting their work.

Moreover, the 16 SDO attorneys are contractually obliged to be in 29 different courtrooms on Monday through Thursday, and in 30 different courtrooms on Friday, for virtually the entire time those courts are in session. Five of these courtrooms are located between 20 and 30 minutes away from the SDO offices. The limited number of SDO attorneys, combined with the large number of courtrooms to be covered, means that the same attorney rarely ever represents an indigent defendant from appointment through disposition of the case – another violation of national standards.

The final Chapter IV (pages 49 – 63) sets out recommendations.

Recommendation #1: The State of Michigan must share the financial burden for providing felony representation in the Third Judicial Circuit.

Providing the Sixth Amendment right to effective assistance of counsel is a state obligation under the due process clause of the Fourteenth Amendment. Although the U.S. Supreme Court has never directly considered whether it is unconstitutional for a state to delegate this responsibility to its counties and cities, if a state chooses to place this responsibility on its local governments, then the state must guarantee that the local governments are not only capable of providing adequate representation, but that they are in fact doing so. The State of Michigan has failed to ensure that Wayne County adequately funds felony representation. Although the state is to be commended for the comprehensive MIDC reforms, those reforms have yet to take root. The ultimate liability remains with the state.

This by no means lets Wayne County off the financial hook. Although the SDO’s parent organizations share blame for rarely submitting requests for additional funding from 2001 through 2015, the NLADA report in 2008 stated that felony services were constitutionally inadequate. By the time the MIDC legislation was enacted, Wayne County officials had already flat funded the defender office for more than a decade, while its costs rose every single year. The MIDC legislation was designed to ensure

that the state share the financial burden for indigent defense that the state is required to provide. Wayne County must continue to pay its local share amount, but the state must also recognize its responsibilities mandated by the legislation.

Recommendation #2: The Michigan Indigent Defense Commission and Wayne County should work together to determine the most effective service delivery model, in consultation with the Third Judicial Circuit Court.

There is no single “cookie-cutter” delivery model that guarantees effective indigent defense services in every jurisdiction. Jurisdictions must tailor the systems they use to meet unique local demands. The Michigan Indigent Defense Commission and Wayne County have an opportunity to reimagine how services can most efficiently and effectively be delivered.

The private attorney roster system used in the Third Judicial Circuit and the district courts within Wayne County was not the subject of this evaluation. That system, though, was part of the 2008 NLADA report that found indigent representation in Wayne County to be constitutionally deficient and subject to undue judicial influence. MIDC and Wayne County presently have the opportunity to redesign the private attorney roster system, in addition to the public defender office component, to ensure independence of the entire defense function.

Recommendation #3: Sixth Amendment indigent defense services in Wayne County must be adequately funded to provide effective representation.

Given the many decisions that state and county authorities must make about how Sixth Amendment representation will be provided to indigent people, it is not possible at this point to develop a definitive and comprehensive budget. To begin that conversation, however, a budget is recommended that assumes a reorganized State Defender Office, under contract with the state or county, will be appointed to 25% of felony cases.

Attorneys

National workload standards prescribe that attorneys should handle no more than 150 felonies in a single year. The SDO needs approximately 33 attorneys carrying a full caseload (5,000 cases/150 per attorney = 33.33 attorneys) to meet this standard. National standards require one supervising attorney for every 10 attorneys carrying a full caseload. Therefore, SDO needs three supervising attorneys, in addition to the chief defender. All national standards require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program. Therefore, MIDC and Wayne County should require the SDO to have a full-time attorney designated to developing its own formalized training program for new hires.

In accord with MIDC's proposed Standard 8, supervisor and line attorney salaries are budgeted to compensate attorneys of varying experience levels within the range of salaries paid to Michigan assistant attorneys general. In total, attorney salary costs for all 38 attorneys are projected to be \$2,633,993.

Non-Attorneys

National standards require one investigator and one social worker for every three staff attorneys. This means the public defense system needs 11 investigators and 11 social workers. Investigators and social worker salaries are projected to be \$456,750 each. National standards require one paralegal for every four staff attorneys. This means SDO needs eight paralegals. The same national standards require one legal secretary for every six attorneys, so SDO will require 5.5 such positions. Each are projected to earn \$28,000 per year. Total annual support staff salaries are projected at \$442,000.

The chief financial officer will oversee all financial planning, accounting, and budgeting operations and is projected to be paid \$70,000. An office manager is to be paid at \$58,000 per year to oversee clerical and data entry staff and to provide human resource support.

Total Personnel Costs

In total, projected annual salaries for all personnel is \$4,117,493. The recommended budget uses a fringe benefit rate of 33%, which is an approximate standard for a public law office. Fringe benefits are projected at \$1,358,772.69. The final personnel costs are therefore estimated at \$5,476,265.69.

Expenses

Office space projections use a rate of \$25 per square foot charged against 200 square feet per staff (for a total of \$5,000 per staff member). This results in an annual rent of \$375,000 ($\$25/\text{ft}^2 \times 200\text{ft}^2 \times 75 \text{ staff}$). In total, annual overhead is projected to be \$835,383.

Of course, expanding the size of the SDO staff will require a one-time capital outlay. Capital costs to expand the office and upgrade existing equipment, including computers and cell phones for all staff, are estimated to be approximately \$228,300.

Total Projected Budget

The final annual budget (personnel, fringe, and overhead) is \$6,311,649 – approximately three times the SDO's current budget – plus one-time capital costs of \$228,300.

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CHAPTER I

INTRODUCTION

“I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations This danger ought to be wisely guarded against.”

– James Madison, Virginia Convention Speech, 1788

The adversarial system of justice is rooted in the very fabric of our nation. Once Americans threw off the shackles of tyranny in the Revolution, they created a Bill of Rights specifically to protect personal liberty from the tyranny of big government. All people, they promised, are free to express unpopular opinions, or choose their own religion, or to take up arms to protect their home and family, without fear of retaliation from the government.

Preeminent in the Bill of Rights is the idea that no one’s life, liberty, and property can ever be taken away in our criminal justice systems without the process being fair. That is, to protect against the tyrannical impulses of government – what the U.S. Supreme Court calls the “machinery” of law enforcement¹ – the country’s founders devised an adversarial justice system that consciously made it difficult for government to put someone in jail or prison. A jury made up of everyday citizens, protections against self-incrimination, and the right to have a lawyer advocating on one’s behalf are all American ideas of justice enshrined in the first ten amendments to the United States Constitution and ratified by the states in 1791.

Over the ensuing 225-plus years, the U.S. Supreme Court has clarified that the Sixth Amendment requires that all indigent people receive effective assistance of counsel at all critical stages of a criminal case in which they may potentially lose their liberty.²

¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² *Id.* (felonies); *Argersinger v. Hamlin*, 307 U.S. 25 (1972) (misdemeanors); *Alabama v. Shelton*, 505 U.S. 654 (2002) (misdemeanors with suspended sentences); *Douglas v. California*, 372 U.S. 353 (1963) (direct appeals); *Halbert v. Michigan*, 545 U.S. 605 (2005) (appeals challenging sentence imposed following guilty plea where sentence not agreed to in advance); *see also In re Gault*, 387 U.S. 1 (1967) (children in delinquency proceedings facing loss of liberty).

ASSESSMENT OF THE STATE DEFENDER OFFICE, WAYNE COUNTY

In August 2017, the Michigan Indigent Defense Commission awarded a grant to Wayne County to evaluate the State Defender Office of the Metropolitan Justice Center of Southeast Michigan. Indigent defense changes at both the state and county levels prompted the request for an objective evaluation.

The Michigan Indigent Defense Commission (MIDC) is a 15-member body in the executive branch of state government, charged with drafting and implementing standards for the provision of effective assistance of counsel throughout the state.³ MIDC administers grants of state funding to the counties to ensure compliance with those standards.

On February 7, 2017, the MIDC proposed four standards: attorney training and qualifications; initial client interviews; use of investigators and experts; and the presence of appointed counsel at first appearance.⁴ Of significance to the impetus for this evaluation, MIDC Standard 1 proposed that indigent defense attorneys have training and skills relevant to the cases to which they are appointed. Standard 1 also includes a requirement that indigent defense systems provide continuing legal education for their attorneys.⁵

The Third Judicial Circuit is the general jurisdiction court in Wayne County with authority over felony cases that originate from the district and municipal courts

In 2008, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun,” 554 U.S. 191, 211 (2008), and “[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings . . .” *Id.* at 212; *see also* Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 388-89 (1977).

Under Sixth Amendment case law, “[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.” Strickland v. Washington, 466 U.S. 668, 685 (1984). The attorney must also be effective. McMann v. Richardson, 397 U.S. 759, 771 n.14 (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

³ MIDC “shall develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are delivered to all indigent adults in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and with the Michigan Indigent Defense Commission Act,” and it encourages best practices through the administration of grants. *About the Michigan Indigent Defense Commission*, MICH. INDIGENT DEFENSE COMM’N, <http://michiganidc.gov/michigan-indigent-defense-commission/> (last visited Feb. 20, 2017).

⁴ *See* Letter from James H. Fisher, Chair, Mich. Indigent Defense Comm’n, to Shelly Edgerton, Director, Mich. Dep’t of Licensing and Regulatory Affairs (Feb. 7, 2017), *available at* <http://michiganidc.gov/wp-content/uploads/2015/04/Letter-to-Director0217-with-first-set-of-standards.pdf>.

⁵ MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES § 1 (MICH. INDIGENT DEFENSE COMM’N 2017).

within the circuit.⁶ For representation to indigent people, the State Defender Office is appointed to approximately 25% of all felony cases arising in the circuit,⁷ and the court appoints private attorneys to represent the other approximately 75%.⁸

In anticipation that the MIDC standards would be approved,⁹ the Third Judicial Circuit judges began preparations for how the court would comply with the new standards. Initially, in April 2017, the Third Judicial Circuit issued an order creating qualifications and training requirements for attorneys appointed to four tiers of felony cases of varying type and severity.¹⁰ Before the system could be implemented, concerns were raised about qualifying attorneys under the new MIDC training standards and the creation of a new computer program to ensure a random rotation within each of the four designated tiers. Responding to these concerns, in May 2017, the Third Judicial Circuit rescinded that order and reinstated the prior order requiring that the attorneys appointed to felonies be members in good standing with the Wayne County Criminal Defense Bar Association and be certified by the Detroit-Wayne County Criminal Advocacy Program (CAP).¹¹

While the Third Judicial Circuit was developing and implementing the new qualifications and training requirements, the State Defender Office offered a proposal

⁶ There are 20 district courts within the Third Judicial Circuit. *See Michigan Trial Courts*, MICHIGAN COURTS (May 2017), <http://courts.mi.gov/Administration/SCAO/Resources/Documents/maps/CourtsByCountyAndDistrictCourtDetail.pdf> (last visited Feb. 20, 2018).

⁷ The requirement that SDO receive 25% of Third Judicial Circuit indigent felony cases is imposed by order of the Michigan Supreme Court. *See Admin. Order No. 1997-5 – Defenders – Third Judicial Circuit Court* (Mich. July 25, 1997). A formal written contract between Wayne County, the Third Judicial Circuit, and the SDO's parent organization governs the appointments to the SDO and the compensation paid, but the reality of which cases and how many are assigned to the SDO is more complex. *See Resolution No. 2016-320*, Wayne County Commission (July 7, 2016) (approving Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. (eff. Aug. 1, 2016)).

⁸ The Third Judicial Circuit judges administer the roster of private attorneys, determining which attorneys can take which cases. A panel of the circuit judges collaborates on decisions to admit private attorneys to the roster.

⁹ By statute, the MIDC must submit all proposed standards to the Department of Licensing and Regulatory Affairs (LARA) for approval. Mich. Comp. Laws § 780.985 (2017). LARA approved the MIDC standards on May 22, 2017. MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES (MICH. INDIGENT DEFENSE COMM'N), <http://michiganide.gov/standards/> (last visited Feb. 20, 2018).

¹⁰ Local Admin. Order 2017-04, Plan for Assignment of Counsel in the Third Judicial Circuit Court – Criminal Division (Mich. 3rd Jud. Cir. Apr. 19, 2017) (Tier 1: murder and manslaughter; Tier 2: criminal sexual conduct in the 1st, 2nd and 3rd degree; child abuse in the 1st and 2nd degree; Tier 3: all other capital offenses; and Tier 4: non-capital offenses).

¹¹ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit Court – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017). CAP is an organization dedicated to “improv[ing] the professional knowledge and skills of all persons who are involved in the administration of the criminal justice system,” through training and education. *See Detroit / Wayne County Criminal Advocacy Program, By-laws*, art. 1, <http://capwayne.org/wp-content/uploads/2017/07/CAP-By-Laws.pdf> (last visited Feb. 21, 2018).

to increase their percentage of the overall felony caseload to 50%.¹² Wayne County and the Third Judicial Circuit judges had concerns that such a plan would overtax the defender organization.¹³ With MIDC requiring counties to submit local plans for meeting all four standards by November 20, 2017, an objective assessment of the State Defender Office's strengths and weaknesses was a prudent first step in considering what type of model(s) would most effectively deliver representation to indigent defendants charged with felonies in Wayne County. Accordingly, Wayne County received MIDC grant funds to conduct such an assessment.

The Sixth Amendment Center (6AC),¹⁴ in cooperation with the Defender Initiative at Seattle University School of Law (SUSL),¹⁵ conducted the principal assessment during a four-day site visit in September 2017.¹⁶ The visit consisted of interviews with criminal justice stakeholders and policymakers,¹⁷ courtroom observations,¹⁸ and data review.¹⁹

¹² See Letter from Deierdre L. Weir, President/CEO, Southeastern Michigan Administrative Services Group – Metropolitan Justice Center of Southeast Michigan, to Hon. Timothy M. Kenny, Presiding Judge, Third Judicial Circuit Court (Jan 31, 2017) (on file with Sixth Amendment Center).

¹³ Wayne County and the Third Judicial Circuit had been presented with and considered proposals for the SDO to increase its workload up to 50% of all felony cases beginning in 2015. Some of the county and court concerns are reflected in documents from 2015. See, e.g., Letter from Hon. Robert J. Colombo, Jr., Chief Judge, Third Judicial Circuit Court, to Gary Woronchak, Chairperson, Wayne County Commission (Sept. 18, 2015) (on file with Sixth Amendment Center).

¹⁴ The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders regarding the constitutional requirement to provide effective assistance of counsel to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding at all critical stages of a case.

¹⁵ The Defender Initiative of the Seattle University School of Law is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

¹⁶ The 6AC/SUSL site team also included Marea Beeman, Director of Research Initiatives, Defender Legal Services, National Legal Aid & Defender Association, and Michael Carter, Staff Attorney, Federal Defender Office of Detroit.

¹⁷ No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, interviews were conducted with a broad cross-section of stakeholder groups during the site visit. In addition to speaking with indigent defense attorneys and support staff, interviews were conducted with trial court judges and magistrates, county officials, and prosecutors. State-level agency staff members were also interviewed. The site team interviewed 59 stakeholders involved in providing criminal justice services in Wayne County.

¹⁸ Evaluating how right to counsel services work in any jurisdiction requires an understanding of the interaction among at least three critical phenomena: (a) the procedures an individual defendant experiences as a case advances from arrest through disposition; (b) the process the defense attorney experiences while representing an individual defendant at the various stages of a case; and (c) the substantive laws and procedural rules that govern the justice systems in which indigent representation is provided. In Wayne County, the site team conducted 20 courtroom observations to clarify these processes.

¹⁹ Basic information about how a jurisdiction provides right to counsel services is often available in a variety of documents, from statistical information to policies and procedures. Relevant hard copy and electronic information, including copies of indigent defense contracts, policies, and procedures, was obtained at the local level and analyzed.

HISTORICAL BACKGROUND

The State Defender Office (SDO) has only existed in its current incarnation since 2016, after its former parent organization Legal Aid and Defender Association, Inc. (LADA) was reorganized.

Legal Aid and Defender Association, Inc.

LADA was founded in 1909 as a non-profit organization to provide legal services to poor people in civil actions in Detroit. In 1968 it began to provide criminal defense and juvenile representation. In May 1972, the Michigan Supreme Court ordered that LADA's defender division be appointed on a weekly basis to 25% of all indigent felony cases to encourage the "efficient administration of criminal justice" through partial reliance on full-time public defenders rather than solely on appointed private attorneys.²⁰ In 1997, as part of court reorganization, the Supreme Court extended the order appointing LADA from Recorder's Court to the Third Judicial Circuit "until further order."²¹ In 1973, the Administrative Office of the U.S. Courts, Defender Services Office, contracted with LADA to provide indigent criminal defense representation in federal cases.

According to its own annual report, by 2007 LADA had grown to be "the largest public law firm in Michigan, and one of the largest in the U.S."²² It was a single non-profit organization with its own administration and four legal divisions – civil, federal, state criminal, and juvenile – that together employed 160 staff members.²³ That year, LADA purchased its six-story, 78,000 square foot building at 613 Abbott to bring all of its employees and services under one roof.²⁴

Statewide indigent defense reform

In 2008, on behalf of the Michigan Legislature, the National Legal Aid & Defender Association (NLADA), in partnership with the State Bar of Michigan, evaluated trial level indigent defense representation throughout the state.²⁵ The report concluded that, "the state of Michigan fails to provide competent representation to those who cannot

²⁰ Admin. Order No. 1972-2 – Assignment of Counsel in Recorder's Court (Mich. May 11, 1972).

²¹ Admin. Order No. 1997-5 – Defenders – Third Judicial Circuit Court (Mich. July 25, 1997). The original Order (Administrative Order 1972-2) required that 25% of all indigent felony cases arising in Recorder's Court of the City of Detroit be assigned to the defender office of LADA. In 1997, the Recorder's Court was merged into the Third Judicial Circuit (Wayne County) thus prompting the need for a new administrative order. The Supreme Court extended its original order "until further notice" through Administrative Order 1997-5 clarifying that the Chief Judge of the Third Judicial Circuit must appoint LADA "on a weekly basis" to 25% of all indigent felony cases.

²² LEGAL AID & DEFENDER ASS'N, TAKING JUSTICE FORWARD: 2007 ANNUAL REPORT 2 (2007).

²³ *Id.*

²⁴ *Id.*

²⁵ See Mich. S. Con. Res. 0039 (2006).

afford counsel in its criminal courts.”²⁶ Although the level of services varied from county to county, the evaluation found that none of the public defense services in any of the ten sample jurisdictions – including Wayne County – were “constitutionally adequate.”²⁷

With regard to LADA, NLADA found that its state defender attorneys were carrying too many cases,²⁸ working at nearly twice the workload allowed under national standards that the American Bar Association declares “should in no event be exceeded.”²⁹ These excessive workloads caused attorneys to regularly substitute for one another in court at various stages of cases “anywhere from preliminary examinations to sentencing,”³⁰ in a manner nationally referred to as “horizontal representation,” which is prohibited by national standards.³¹ At the time of the NLADA evaluation in 2008, LADA’s state criminal defense division had been flat-funded by Wayne County in each of the prior seven years (2000 to 2007), preventing LADA from increasing compensation beyond the \$35,000 annual salary of the majority of its attorneys.³²

While NLADA was conducting its evaluation, the American Civil Liberties Union (ACLU) filed a class action lawsuit on behalf of all current and future indigent defendants charged with felonies in three Michigan counties: Berrien, Genessee, and Muskegon.³³ Though the three named counties were the focus of the complaint, the ACLU explained that the types of harms suffered by indigent defendants were “by no means limited or unique” to just the three counties.³⁴ The ACLU alleged that the State of Michigan had done “nothing to ensure that any county ha[d] the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation.”³⁵ With

²⁶ NATIONAL LEGAL AID & DEFENDER ASS’N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS i (2008).

²⁷ *Id.* at 2.

²⁸ *Id.* at 66.

²⁹ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 5 (AM. BAR ASS’N 2002).

³⁰ NATIONAL LEGAL AID & DEFENDER ASS’N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 66 (2008).

³¹ *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-6.2 cmt (AM. BAR ASS’N 1992).

³² NATIONAL LEGAL AID & DEFENDER ASS’N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 66 (2008). A Third Judicial Circuit review of the initial draft of this report notes: “It is unclear from the record if LADA ever evaluated their circumstances and approached the County regarding this issue.” Email from Richard Lynch, Counsel for the Third Judicial Circuit Court, to David Carroll, Executive Director of the Sixth Amendment Center (Feb. 19, 2018) (on file with Sixth Amendment Center).

³³ *Duncan v. Michigan*, 747 N.W.2d 89 (Mich. Ct. App. 2009).

³⁴ Complaint at 5, *Duncan v. Michigan*, No. 07-242-CZ (Mich. Cir. Ct. Ingham County filed Feb. 22, 2007).

³⁵ Complaint at 3, *Duncan v. Michigan*, No. 07-242-CZ (Mich. Cir. Ct. Ingham County filed Feb. 22, 2007).

no state funding or oversight of trial level services, most Michigan county indigent defense services were “seriously under-funded, poorly administered, and [did] not ensure that indigent defense providers have the tools necessary to do their jobs.”³⁶

The NLADA evaluation and ACLU lawsuit led Governor Rick Snyder to issue an executive order in October 2011 creating the Indigent Defense Advisory Commission.³⁷ After more than a year’s work, the commission recommended comprehensive legislation that was subsequently passed by the legislature and signed into law by Governor Snyder in July 2013.³⁸ The legislation created the Michigan Indigent Defense Commission as a state-level body to develop and oversee the “implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults” in Michigan.³⁹

MIDC’s principal power to carry out its mission rests with its authority to promulgate and enforce binding standards and to make grants of state funding to local governments to aid them in complying with the standards. As new standards are adopted, each local government submits a plan to MIDC for how it will meet the standards and the projected cost of doing so.⁴⁰ Local governments are required by statute to maintain their local share of funding for indigent criminal defense services,⁴¹ defined as their average annual expenditure in the three fiscal years immediately preceding the creation of the MIDC.⁴² “If the MIDC determines that funding in excess of the local unit of government’s share is necessary in order to bring its system into compliance with the minimum requirements established by the MIDC, that excess funding shall be paid” by the State of Michigan.⁴³ If a local government fails to meet MIDC standards, the MIDC is authorized to take over the administration of indigent criminal defense services in that jurisdiction.⁴⁴

Diminished funding and LADA restructuring

Between 2008 and 2015, LADA experienced a diminution of funding across its various service areas, leading to significant corporate restructuring.

The juvenile law group was affected first. In 2009, at a time when Wayne County (along with the nation) struggled financially, the Third Judicial Circuit’s family

³⁶ *Id.*

³⁷ Governor Rick Snyder, Executive Order No. 2011-12, Indigent Defense Advisory Commission (Oct. 13, 2011).

³⁸ Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Act 93 (codified at MICH. COMP. LAWS §§ 780.981-780.1003).

³⁹ MICH. COMP. LAWS § 780.989(1)(a) (2017).

⁴⁰ MICH. COMP. LAWS § 780.993 (2017).

⁴¹ MICH. COMP. LAWS § 780.993(6) (2017).

⁴² MICH. COMP. LAWS § 780.983(h) (2017).

⁴³ MICH. COMP. LAWS § 780.993(6) (2017).

⁴⁴ MICH. COMP. LAWS § 780.995 (2017).

division advised all of its existing service providers of the need to reduce costs in response to budget cuts enacted by its funding unit, Wayne County. As the court reviewed proposals, it determined that LADA provided fewer attorneys at a higher cost⁴⁵ than the other three organizations providing delinquency representation.⁴⁶ The court terminated its use of LADA's juvenile services on July 10, 2009.⁴⁷

The civil law group was the next to see a reduction in funding. Funding for LADA's civil legal services historically came primarily from the Legal Services Corporation (LSC) and from local philanthropic entities.⁴⁸ LSC is a federally funded, non-profit organization created in 1974 to promote equal justice by making grants to organizations that provide civil legal representation to low-income people.⁴⁹ LSC makes awards based on an annual competitive grants process. In late 2015, LSC notified LADA that it decided against continuing to award funding to LADA.⁵⁰

⁴⁵ Email from Richard Lynch, Counsel for the Third Judicial Circuit Court, to David Carroll, Executive Director of the Sixth Amendment Center (Feb. 19, 2018) (on file with Sixth Amendment Center) (“LADA provided a bid that provided a lower level of services at a higher cost than other providers by reducing the number of attorneys and dockets for the same price point. In addition, it appeared that LADA attorneys were not performing home visits and other essential services for clients as required by court rule or statute.”).

⁴⁶ Those organizations were: the Michigan Children's Law Center; the Juvenile Law Group, PLLC; and the Child Advocacy Group, PLLC.

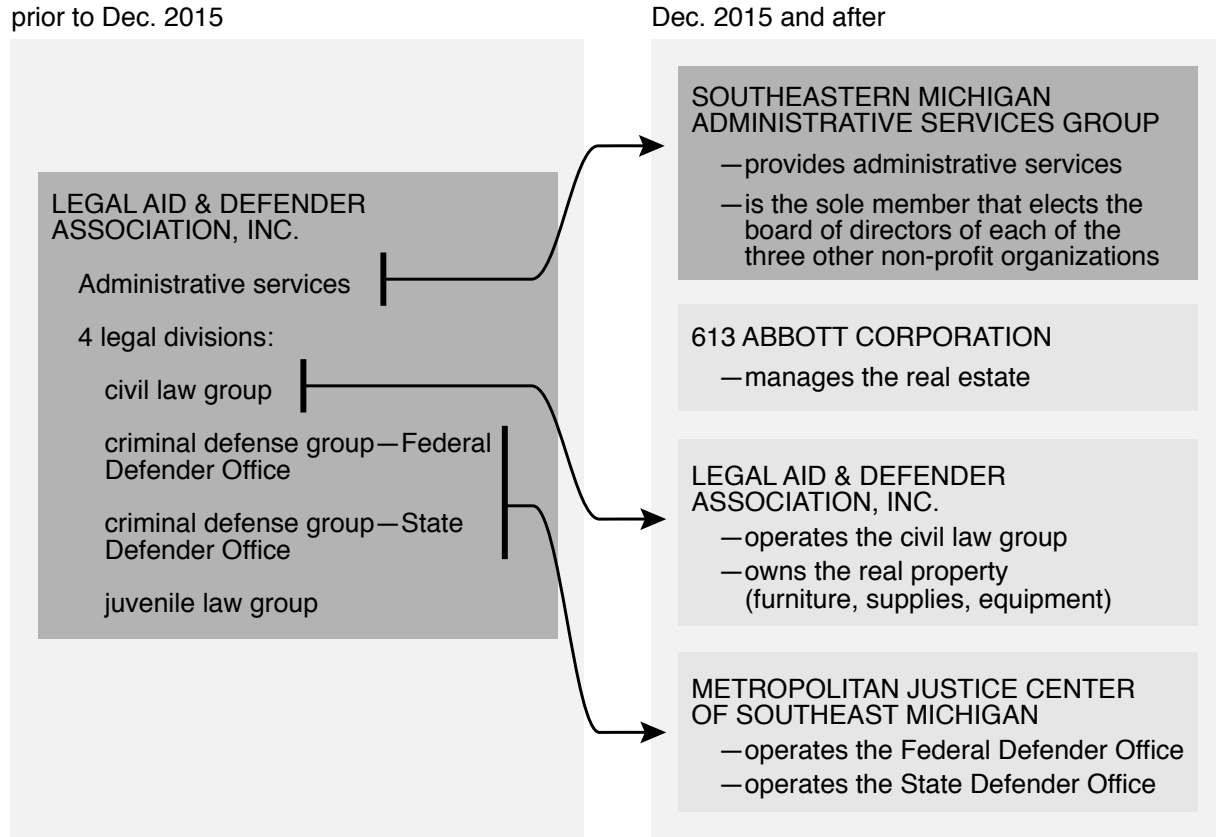
⁴⁷ Email from Richard Lynch, Counsel for the Third Judicial Circuit Court, to David Carroll, Executive Director of the Sixth Amendment Center (Dec. 15, 2017) (on file with Sixth Amendment Center) (discussing review of litigation LADA filed for a writ of superintending control and injunctive relief following the termination of the contract). During this evaluation, representatives of the Southeastern Michigan Administrative Services Group and the Metropolitan Justice Center of Southeast Michigan expressed the opinion that the court made decisions based solely on cost, not quality. Because this evaluation does not include juvenile representation, no opinion is drawn as to how the decision was made.

⁴⁸ Compare LEGAL AID & DEFENDER ASS'N, TAKING JUSTICE FORWARD: 2007 ANNUAL REPORT 7 (2007), available at http://www.ladadetroit.org/LAD_AR07.pdf (showing funding was provided by Legal Services Corporation, United Way of Southeast Michigan, Michigan State Bar Foundation, City of Detroit, Wayne County, U.S. Department of Housing and Urban Development, Administrative Office of U.S. Courts, and charitable donations) with *About Us*, LEGAL AID & DEFENDER ASS'N, INC., <http://www.ladadetroit.org/aboutus.php> (last visited Feb. 20, 2018) (showing funding provided by United Way of Southeastern Michigan, Michigan State Bar Foundation, Detroit Area Agency on Aging, The Senior Alliance, City of Detroit, Wayne County, U.S. Department of Housing and Urban Development, Administrative Office of U.S. Courts, and charitable donations).

⁴⁹ *About LSC*, LEGAL SERVICES CORPORATION, <https://www.lsc.gov/about-lsc> (last visited Feb. 20, 2018).

⁵⁰ The loss of LSC funding was the subject of much innuendo and rumor while the site team evaluated the SDO. There were allegations that a troubling federal audit found fiscal mismanagement that led to the defunding. The 6AC/SUSL formally asked LSC for the last audit of LADA prior to its defunding, but the audit is not publicly available. Email from Lora M. Rath, Director, Office of Compliance and Enforcement, LSC, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 27, 2017) (on file with Sixth Amendment Center). The official LSC position is that, “[a]s a result of LSC's annual competitive grants process, LSC awarded its funding to another entity rather than to the Legal Aid & Defender Association.” *Id.*

WITH REDUCED FUNDING,
LEGAL AID & DEFENDER ASSOCIATION RESTRUCTURED IN 2015



In light of its reduced funding, in December 2015 LADA restructured its organization into four non-profit organizations, with the changes taking effect on July 1, 2016.

- Southeastern Michigan Administration Services Group (SEMASG): SEMASG is organized as an umbrella organization that directs and provides administrative services (human resources, technology, accounting, etc.) to the other three subsidiary entities. It is the sole member of each of the other organizations and appoints the boards of directors for each of the other organizations.⁵¹
- 613 Abbott Corporation: 613 Abbott Corporation manages the real estate and oversees the physical plant operations of the building that houses the former LADA entities. It is a membership organization whose sole member is SEMASG.⁵²

⁵¹ Southeastern Michigan Administrative Services Group, Articles of Incorporation (Dec. 29, 2015), available at <https://cofs.lara.state.mi.us/corpweb/CorpSearch/CorpSearch.aspx> (input entity name into “search by entity name” box; click search; on next page, select entity name; on next page, under “View filings for this business entity,” select “Articles of Incorporation,” click “view”; on next page, select hyperlink to document).

⁵² 613 Abbott Corporation, Amended Articles of Incorporation (Mar. 24, 2016), available at <https://>

- Legal Aid and Defender Association, Inc. (LADA): LADA operates the civil law group and owns the furniture, supplies, and equipment used at the building that houses the former LADA entities. It is a membership organization whose sole member is SEMASG.⁵³
- Metropolitan Justice Center of Southeast Michigan (MJCSM): MJCSM operates the Federal Defender Office and the State Defender Office. It is a membership organization whose sole member is SEMASG.⁵⁴

There is little if any independence among the four organizations, because SEMASG has the controlling interest in all of them and the former President/CEO of LADA became the President/CEO of each of the four.⁵⁵ This can give rise to conflicts of interest when, for example, SEMASG sets the rental rates for office space that MJCSM pays to 613 Abbott Corporation.

Funding related to the criminal defense group's federal attorneys was then reduced in 2017. The Administrative Office of the U.S. Courts has since 1973 contracted with LADA to provide representation to indigent federal defendants, including paying a fee to LADA for administrative services. On June 1, 2017, the Office of the General Counsel for the U. S. Courts advised that it would obtain from a different provider the administrative services that LADA had historically provided.⁵⁶

The balance of this report is 6AC/SUSL's assessment of the State Defender Office to determine the constitutional effectiveness of services rendered, along with a set of recommendations to overcome deficiencies identified in the evaluation.

cofs.lara.state.mi.us/corpweb/CorpSearch/CorpSearch.aspx (input entity name into "search by entity name" box; click search; on next page, select entity name; on next page, under "View filings for this business entity," select "Amended Articles of Incorporation," click "view"; on next page, select hyperlink to document).

⁵³ Legal Aid & Defender Association, Amended Articles of Incorporation (Jan. 5, 2016), *available at* <https://cofs.lara.state.mi.us/corpweb/CorpSearch/CorpSearch.aspx> (input entity name into "search by entity name" box; click search; on next page, select entity name; on next page, under "View filings for this business entity," select "Amended Articles of Incorporation," click "view"; on next page, select hyperlink to document).

⁵⁴ Metropolitan Justice Center of Southeast Michigan, Articles of Incorporation (Dec. 28, 2015), *available at* <https://cofs.lara.state.mi.us/corpweb/CorpSearch/CorpSearch.aspx> (input entity name into "search by entity name" box; click search; on next page, select entity name; on next page, under "View filings for this business entity," select "Articles of Incorporation," click "view"; on next page, select hyperlink to document).

⁵⁵ While the person who originally served as President/CEO is no longer in that position, the position still maintains complete control over SEMASG and all subsidiary organizations.

⁵⁶ *See* Letter from Sheryl Walter, General Counsel at Administrative Office of the Courts, to Deierdre Weir, President & CEO at Southeastern Michigan Administrative Services Group (May 19, 2017) (on file with Sixth Amendment Center). Similar to the rumors and innuendo related to the loss of LSC grant funding, many people interviewed during the site visit were quick to suggest that a federal defender audit resulted in findings of financial mismanagement. The 6AC/SUSL requested copies of the audits from the Southeastern Michigan Administrative Services Group, but SEMASG refused to provide the audits. Ultimately, the audits are less important than the fact that the U.S. Courts transferred administrative services elsewhere.

CHAPTER II

FUNDING

“We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not by the courts, then by whom? . . . [C]oncerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to trump constitutional compliance, despite any visceral reaction to the contrary.”

– Duncan v. Michigan, 774 N.W.2d 89, 98 (Mich. Ct. App. 2009)

Two U.S. Supreme Court cases, decided on the same day, describe the tests used to determine the constitutional effectiveness of right to counsel services. *United States v. Cronic*⁵⁷ and *Strickland v. Washington*⁵⁸ describe two different tests to assess effective assistance depending on when in the process of representation the question is asked. *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel, setting out a two-pronged test of whether the appointed lawyer’s actions were unreasonable and prejudiced the outcome of the case. *Cronic* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of a case, then a court should presume that ineffective assistance of counsel will occur.

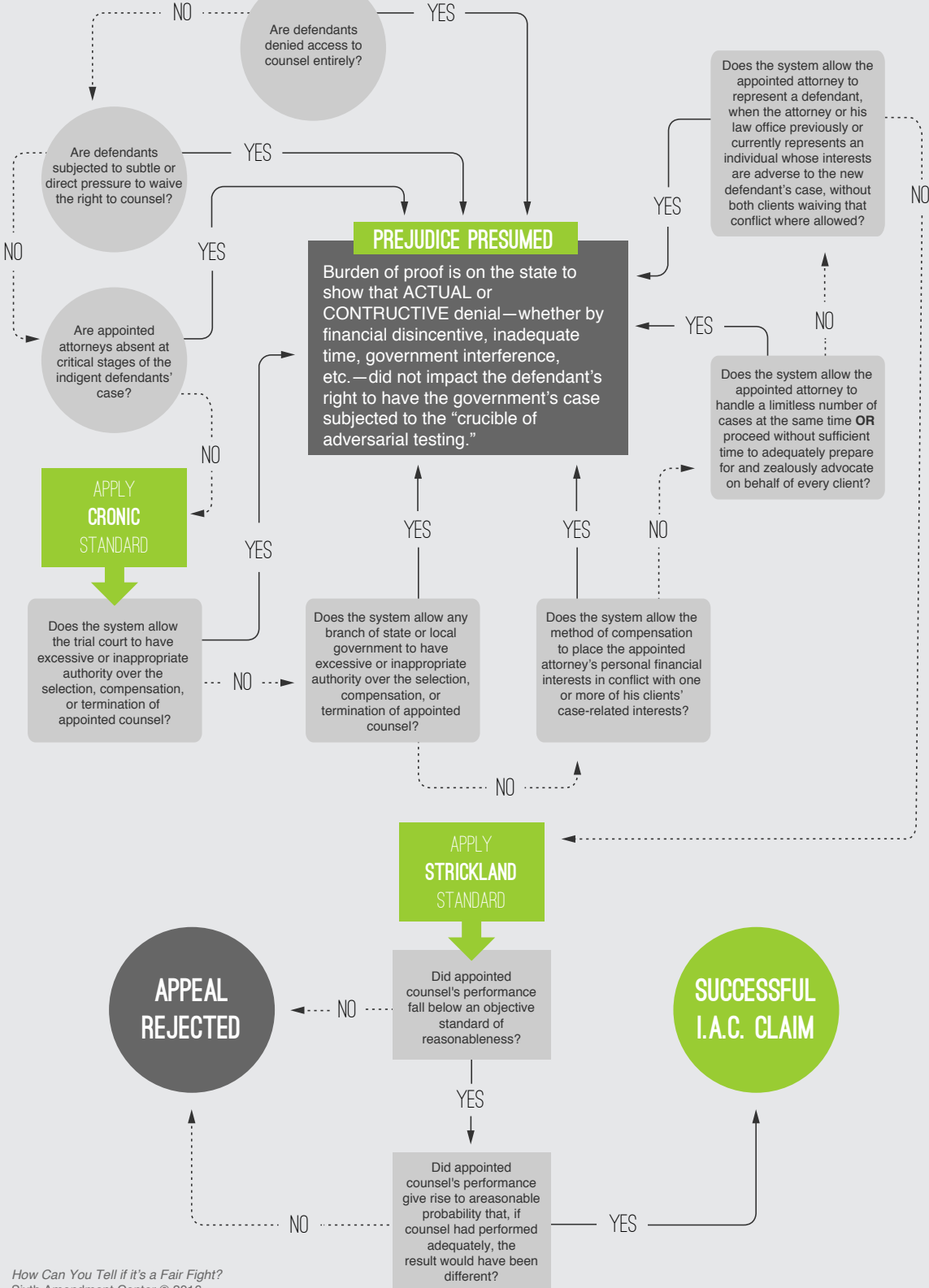
Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys, with sufficient time and resources to provide effective representation, under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

⁵⁷ 466 U.S. 648 (1984).

⁵⁸ 466 U.S. 668 (1984).

HOW CAN YOU TELL IF IT'S A FAIR FIGHT?

The U.S. Supreme Court says: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Unfortunately, where systems fail, it leaves the fundamental fairness of criminal and delinquency court proceedings in doubt.



Providing the Sixth Amendment right to effective assistance of counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.⁵⁹ Because the “responsibility to provide defense services rests with the state,” national standards unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁶⁰

Historically, the State of Michigan has delegated to its local governments the responsibility for funding trial level right to counsel services.⁶¹ Although the statutory changes that created the MIDC are intended to eventually result in a shared responsibility between the state and its local governments to fund indigent defense services,⁶² those funding changes have yet to take effect. At the time of this evaluation, Wayne County funded all felony indigent defense representation in the Third Judicial Circuit courts.

State funding is called for by national standards in part because the local jurisdictions most in need of indigent defense services are often the ones least able to afford them. In many instances, the circumstances that limit a county’s revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates. In high poverty areas, more people accused of crime are indigent and entitled to public defense services. Further, these counties typically spend more on social services such as housing assistance and health services, leaving less money available for protecting people’s rights under the Sixth Amendment.⁶³

⁵⁹ *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

⁶⁰ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 2 cmt. (AM. BAR ASS’N 2002).

⁶¹ Michigan’s statutes direct that every magistrate “shall appoint counsel” to any person found eligible under the Michigan Indigent Defense Commission Act. MICH. COMP. LAWS § 775.15 (2017). Under that Act, indigency is determined by the “indigent criminal defense system,” MICH. COMP. LAWS § 780.991(3) (a) (2017), and “indigent criminal defense system” is defined as “the local unit of government that funds a trial court,” MICH. COMP. LAWS § 780.983(g) (2017).

“Each trial court must adopt a local administrative order that describes the court’s procedures for selecting, appointing, and compensating counsel who represent indigent parties in that court.” MICH. CT. R. 8.123(B). County boards of commissioners are responsible for the funding of the circuit courts, MICH. COMP. LAWS § 600.591(1) (2017), and “[t]he governing body of each district funding unit” is responsible for funding the district courts, MICH. COMP. LAWS § 600.8271(1) (2017). As the Michigan Supreme Court observed: “Despite the fact that the courts have always been regarded as part of state government, they have operated historically on local funds and resources. An unbroken line of cases stretching back 130 years recognizes the practice of imposing the costs of operating the courts on local funding units.” *Grand Traverse Cnty. v. Michigan*, 450 Mich. 457, 473-74 (Mich. 1995).

⁶² MICH. COMP. LAWS § 780.993 (2017) (“The MIDC shall submit a report . . . requesting the appropriation of funds necessary to implement the plan for each system approved by the MIDC. . . . The legislature shall appropriate to the MIDC the additional funds necessary for a system to meet and maintain those minimum standards, which shall be provided to indigent criminal defense systems through grants An indigent criminal defense system shall not be required to provide funds in excess of its local share. . . .”); *see also* MICH. COMP. LAWS § 780.997(2) (2017). (“A system’s duty of compliance with the terms of the plan . . . is contingent upon receipt of a grant in the amount contained in the plan and cost analysis approved by the MIDC.”).

⁶³ Email from Marianne Talon, Wayne County Corporation Counsel, to David Carroll, Executive

Wayne County fits this profile squarely, and the recession of 2008 greatly affected the county and its people. As of 2016, nearly one in four people in Wayne County live in poverty, compared to 14% of people in the entire United States.⁶⁴ It is worse for children, with nearly 34% of all Wayne County children living in poverty; 14% higher than the national childhood poverty rate.⁶⁵ Although Wayne County's civilian unemployment rate has been improving in recent years,⁶⁶ as of 2016 it was still nearly four percentage points higher than the national average.⁶⁷ The median household income in Wayne County is just \$43,464 per year, comparing poorly to the national median of \$57,617.⁶⁸ A smaller percentage of people in Wayne County own their homes than across the country,⁶⁹ and for those who do the median value of homeowner occupied units in Wayne County is nearly \$100,000 less than nationally.⁷⁰ In 2008, Wayne County collected \$378 million in property taxes, but that number fell by approximately \$100 million between 2008 and 2015.⁷¹ Property tax revenue is not expected to reach pre-2008 levels until 2028.⁷² The loss of revenue prompted the county to enter into a consent agreement with the state to avoid bankruptcy.⁷³

These economic indicators all exist in an environment with higher crime rates. Wayne County's 2016 population was estimated at 1,749,366, with Detroit making up a little

Director of the Sixth Amendment Center (Jan. 29, 2018) (on file with Sixth Amendment Center) (“[F]or Wayne County, our main expense other than the court and law enforcement, is for physical and mental health services for our low income and detained adults and juveniles. For instance, we have administered over 1000 hepatitis A vaccinations in our clinics and 400 in our jails in the last 3 months.”)

⁶⁴ Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED POPULATION PROFILE IN THE UNITED STATES – 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (ID S0201) (Dec. 1, 2017), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “Dataset,” then select “2016 ACS 1-year estimates;” in “Geographies,” add to your selections both “United States” and “Wayne County, Michigan;” from the available files, select “Selected Population Profile in the United States” (ID S0201)) (national 14.0%; Wayne County 22.7%).

⁶⁵ *Id.* (national 19.5%; Wayne County 33.9%).

⁶⁶ *Local Area Unemployment Statistics – Detroit-Dearborn-Livonia, MI Metropolitan Division*, U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, https://data.bls.gov/timeseries/LAUDV261980400000003?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true (last visited Feb. 20, 2018).

⁶⁷ Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED POPULATION PROFILE IN THE UNITED STATES – 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (Dec. 1, 2017), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “Dataset,” then select “2016 ACS 1-year estimates;” in “Geographies,” add to your selections both “United States” and “Wayne County, Michigan;” from the available files, select “Selected Population Profile in the United States” (ID S0201)) (national 5.8%; Wayne County 9.7%).

⁶⁸ *Id.*

⁶⁹ *Id.* (national 63.1%; Wayne County 60.4%).

⁷⁰ *Id.* (national \$205,000; Wayne County \$105,300).

⁷¹ Email from Marianne Talon, Wayne County Corporation Counsel, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 2, 2018) (on file with Sixth Amendment Center).

⁷² *Id.*

⁷³ *Id.*

less than 40% at 672,829.⁷⁴ For Detroit alone without taking into consideration the rest of the county,⁷⁵ the number of violent crimes reported to the Detroit Police Department in 2016 constitutes a violent crime rate of 1908.66 per 100,000, or almost five times the national rate.⁷⁶ For property crimes, Detroit's 2016 rate of 4733.74 per 100,000 is close to double the national rate of 2450.7.⁷⁷ Wayne County produces about one-fifth of all felony criminal filings and more than a third of all capital cases in the state of Michigan.⁷⁸ Judges, defense attorneys, prosecutors, and jail administrators all discussed the severe strains imposed on the system by the high volume of cases.

Expecting Wayne County to take on the heavy financial burden of providing adequate indigent defense services is unwise at best given these conditions. Like many places, Wayne County's budget is already heavily depleted by the need to provide welfare and assistance to its residents. When it comes to indigent defense, counties often tend to seek out services that cost the least and not necessarily those that would provide constitutionally effective representation to each and every indigent defendant.

FINDING #1: The State Defender Office attorneys are unable to put each and every prosecution to the “crucible of meaningful adversarial testing,” as is their ethical duty and constitutional obligation.

The State Defender Office attorneys provide representation to indigent defendants charged with felonies in the Third Judicial Circuit, and they do so within the structure

⁷⁴ Search of U.S. CENSUS BUREAU, AMERICAN FACTFINDER, SELECTED POPULATION PROFILE IN THE UNITED STATES – 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (ID S0201) (Jan. 15, 2018), <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t> (in “Topics,” select “Dataset,” then select “2016 ACS 1-year estimates;” in “Geographies,” add to your selections “United States” and “Wayne County, Michigan” and “Detroit city, MI;” from the available files, select “Selected Population Profile in the United States” (ID S0201)).

⁷⁵ Comparable 2016 information is not readily available for the entirety of Wayne County.

⁷⁶ The F.B.I. defines the crime rate as the number of crimes per 100,000 inhabitants. *Compare Reported Crimes Through December 31, 2016*, DETROIT POLICE (Jan. 5, 2017), <http://www.detroitmi.gov/Portals/0/docs/Police/Crime%20Statistics/2016/2016%20Annual%20Stats.pdf> (12,842 reported violent crimes ÷ population of 672,829 = 0.01908657 × 100,000 = 1908.66) *with 2016 Crime in the United States*, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (last visited Jan. 15, 2018) (national violent crime rate 386.3).

⁷⁷ *Compare Reported Crimes Through December 31, 2016*, DETROIT POLICE (Jan. 5, 2017), <http://www.detroitmi.gov/Portals/0/docs/Police/Crime%20Statistics/2016/2016%20Annual%20Stats.pdf> (31,850 reported property crimes ÷ population of 672,829 = 0.04733744 × 100,000 = 4733.74) *with 2016 Crime in the United States*, U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (last visited Jan. 15, 2018) (national property crime rate 2450.7).

⁷⁸ *Compare MICHIGAN COURTS, STATEWIDE CIRCUIT COURT SUMMARY, 2016 COURT CASELOAD REPORT (2016)*, available at <http://courts.mi.gov/education/stats/Caseload/reports/statewide.pdf> (showing 48,399 new non-capital filings and 3,118 new capital filings) *with MICHIGAN COURTS, 3RD CIRCUIT COURT OF WAYNE COUNTY SUMMARY, 2016 COURT CASELOAD REPORT (2016)*, available at <http://courts.mi.gov/education/stats/Caseload/reports/Wayne-3rdCircuitCourt.pdf> (showing 10,056 new non-capital filings and 1,110 new capital filings).

of the indigent defense system established by the Third Judicial Circuit and funded by Wayne County. The Sixth Amendment guarantee of effective assistance of counsel requires that the defense put the prosecution’s case to the “crucible of meaningful adversarial testing.”⁷⁹ The U.S. Supreme Court explains in *Cronic*⁸⁰ that deficiencies in an indigent defense system can make any lawyer – even the best attorney – perform in a non-adversarial way. The result, as the court declares in *Strickland*, is a “constructive” denial of the right to counsel.⁸¹

When a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively ineffective. The government bears the burden of overcoming that presumption.⁸² The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government’s burden to prove this. As the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*,⁸³ “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”⁸⁴

FLAT FUNDING THE STATE DEFENDER OFFICE

Beginning in 1972, the Michigan Supreme Court ordered that the State Defender Office be appointed to 25% of all indigent felony cases arising in Detroit’s Recorder’s Court and extended to the Third Judicial Circuit Court in 1997.⁸⁵ The Third Judicial Circuit is required to have a “local administrative order that describes the court’s

⁷⁹ United States v. Cronic, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

⁸⁰ 466 U.S. 648 (1984).

⁸¹ *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.” (citing *Cronic*, 466 U.S. 648)).

⁸² Only after the system within which public attorneys work is found to be structurally sound, as defined and prospectively determined by a *Cronic* and *Powell* analysis, can *Strickland*’s two-prong test be used to retrospectively measure the effectiveness of specific attorneys who work within those structurally sound indigent defense systems.

⁸³ 766 F.2d 1071 (7th Cir. 1985).

⁸⁴ *Id.* at 1076.

⁸⁵ See Admin. Order No. 1972-2 – Assignment of Counsel in Recorder’s Court (Mich. May 11, 1972), extended by Admin. Order No. 1997-5 – Defenders – Third Judicial Circuit Court (Mich. July 25, 1997).

procedures for selecting, appointing, and compensating counsel who represent indigent parties” in its courts.⁸⁶ As required by the Supreme Court’s order, the Third Judicial Circuit plan allocates 25% of indigent felony cases to the State Defender Office.⁸⁷

For the fiscal year that began October 1, 2000, the Third Judicial Circuit and the SDO’s parent organization LADA entered into a written agreement⁸⁸ that the SDO would be paid \$1,980,000⁸⁹ over a one-year period.⁹⁰ In exchange, the SDO would represent 25% of indigent adults charged with felonies in the Third Judicial Circuit and represent all of the juveniles waived into adult court whom LADA’s juvenile division had represented in delinquency matters.⁹¹ The details of how the SDO attorneys would be assigned to specific cases and the duties of the SDO attorneys in specific courtrooms and on certain days were made part of the agreement through an attached Letter of Understanding.⁹² Although this agreement terminated by its own terms on September 30, 2001,⁹³ the SDO continued to provide the same services and the Third Judicial Circuit continued to pay the same amount until August 1, 2016.

It is apparent that the SDO was already beginning to struggle when its parent organization entered into the 2000 agreement with the Third Judicial Circuit and that it continued to do so in subsequent years. The organization wrote to the court in 2016:

A review of our internal records and board minutes revealed that, from the years 1986-1989, the State Defender Office was at its peak in terms of staffing, with 24 full-time deputy defenders, five investigators, five clerical support staff, and a psychologist. In 2000, the number of deputy defenders dropped to twenty. In 2003, the Office eliminated the psychologist position, and began losing more deputy defenders, investigators and clerical support staff.⁹⁴

From October 2000 through July 2016, Wayne County paid the same flat rate of \$1,980,000 annually for the State Defender Office to handle one quarter of felony

⁸⁶ MICH. CT. R. 8.123(B).

⁸⁷ Local Admin. Order 2017-07, Plan for Assignment of Counsel in the Third Judicial Circuit Court – Criminal Division (Mich. 3rd Jud. Cir. June 16, 2017).

⁸⁸ Agreement, between the Legal Aid and Defender Association, Inc. and the Third Judicial Circuit of Michigan (June 1, 2000) (on file with Sixth Amendment Center).

⁸⁹ *Id.* at ¶ VI.A. The authors have not studied the sufficiency of the SDO’s funding in 2000 and express no opinion as to whether it was adequate to provide effective representation at that time.

⁹⁰ *Id.* at ¶ I.A.

⁹¹ *Id.* at ¶ II.A.

⁹² *Id.* at ¶ II.A.3 (incorporating Letter of Understanding, between the Legal Aid and Defender Association, Inc. and the Third Judicial Circuit of Michigan ¶ II (Oct. 1, 2000)).

⁹³ *Id.* at ¶ I.A.

⁹⁴ Letter from Deierdre L. Weir, President/CEO of Southeastern Michigan Administrative Services Group, to Hon. Robert J. Colombo, Jr., Chief Judge, Third Judicial Circuit of Michigan (Dec. 8, 2016) (on file with Sixth Amendment Center).

cases in the Third Judicial Circuit. Wayne County did not increase funding for indigent defense representation by the SDO even after the 2008 NLADA report concluded that indigent defense services in Wayne County, and specifically the representation provided by LADA's SDO attorneys, were constitutionally deficient.⁹⁵

To say that the SDO experienced flat funding, however, is a bit of a misnomer. Although Wayne County was paying the same dollar amount each year, two factors caused the amount available to SDO for defending each case to decrease. First, SDO's overhead expenses – the upfront costs to maintain and operate its law practice – increased. Second, the number of cases SDO handles also increased.

Overhead expenses increase

The State Defender Office is and has always been a division of a larger non-profit law firm, and so the SDO does not determine or control its own budget.⁹⁶ Instead, that budget is determined by SDO's parent organization (LADA until June 30, 2016; MJCSM for July 1, 2016 to present). The cost of running any law firm increases over time,⁹⁷ as the price of utilities, insurance, and other necessary expenses rise. Further, inflation regularly causes costs to increase; inflation rose 38% from October 2000 to August 2016.⁹⁸ But in addition to the broader increases in the cost of doing business, the portion of the parent organization's overhead expenses charged to the SDO also increased significantly.

In January 2007, just prior to the worldwide financial downturn but at a time when the SDO was already struggling, LADA purchased for \$12,640,000 the office building at 613 Abbott Street that currently houses the reorganized non-profit organizations.⁹⁹ LADA did not have the financial resources to purchase the building outright and took out a mortgage to finance the purchase.

After the elimination of LADA's juvenile division in 2009,¹⁰⁰ each of the remaining three service divisions (civil, federal, and state) were allocated a separate floor of the building, so LADA divided up the monthly cost of the mortgage more or less evenly

⁹⁵ NATIONAL LEGAL AID & DEFENDER ASS'N, *A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS* 2, 66 (2008).

⁹⁶ The SDO chief defender reported that he “has never seen an SDO budget.”

⁹⁷ See, e.g., NATIONAL ASS'N OF CRIMINAL DEFENSE LAWYERS, *RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS* 8 (2013) (noting that “[t]he 2012 *Survey of Law Firm Economics* by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” and overhead tends to be a higher percentage of gross receipts as a law office gets smaller”); ALM LEGAL INTELLIGENCE, *2012 SURVEY OF LAW FIRM ECONOMICS* 4 (2012) (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

⁹⁸ *CPI Inflation Calculator*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1&year1=200110&year2=201610> (last visited Feb. 20, 2018).

⁹⁹ See Email from Angela Smith, Vice President of Finance for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 21, 2017) (on file with Sixth Amendment Center).

¹⁰⁰ See discussion *supra* pp. 9-10.

among them.¹⁰¹ That is, LADA charged to each of the three divisions \$16.30 per square foot for 12,883 square feet of office space and 16,454 square feet of common area (including the lobby area, training space, and the administration's separate floor).¹⁰²

Despite LADA's allocation to the SDO of a whole floor of 613 Abbott, the SDO did not need as large a space as the federal and civil divisions because they had significantly fewer staff than each of those other divisions at that time.¹⁰³ After the loss of LSC funding in 2015,¹⁰⁴ even more of the mortgage cost was shifted to the SDO.



Much space in the defender office is unused.

As part of LADA's 2015-2016 organizational restructuring, SEMASG took out a new mortgage on the 613 Abbott building.¹⁰⁵ As of September 2017, approximately \$464,013 annually of the funding Wayne County provides for indigent defense goes simply to pay for the SDO's office space,¹⁰⁶ and there is a large amount of unused space in the center of SDO's office.

¹⁰¹ Although 613 Abbott rents space to a number of businesses, the bulk of the mortgage for the building was divided among LADA's three divisions.

¹⁰² The federal defender division was charged for an additional 357 square feet for additional office space on a different floor. Similarly, the civil division was charged an additional 456 square feet for office space in an annexed building. The federal and civil divisions each were charged a proportional amount on the common areas. Legal Aid & Defender Association, Inc., Square Footage Allocation (undated) (on file with Sixth Amendment Center).

¹⁰³ As previously noted, by 2003 the SDO already had less than 20 staff attorneys and it lost more after 2003. Letter from Deirdre L. Weir, President/CEO of Southeastern Michigan Administrative Services Group, to Hon. Robert J. Colombo, Jr., Chief Judge, Third Judicial Circuit of Michigan (Dec. 8, 2016) (on file with Sixth Amendment Center).

¹⁰⁴ See discussion *supra* p. 10.

¹⁰⁵ At the time of the site visit, \$4,515,512.00 was still owed on this mortgage. Email from Angela Smith, Vice President of Finance for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 21, 2017) (on file with Sixth Amendment Center).

¹⁰⁶ See SEMASG, 2017 Budget Projection (draft on file with Sixth Amendment Center). While the budget projection is only a draft, it reflects the most reliable figures the authors could obtain concerning SDO's budget, given the rapid changes taking place in the organization at the time of this report's publication.

Both the building purchase and the parent organization's method of allocating the mortgage cost meant that a higher proportion of the funding paid by Wayne County was consumed in overhead, leaving less money to apply toward SDO's representation of indigent felony defendants.

Over the same period of time, the administrative costs attributed to the SDO by its parent organization also increased. Historically, LADA allocated its administrative costs to each of its service divisions based on the percentage of administrative time dedicated to each division. Around the time of the reorganization, the accounting procedures were changed to charge administrative costs proportionally based on numbers of staff in each of the resulting four non-profit organizations.

As part of the reorganization, all of the former LADA administrative positions transferred to SEMASG. This left LADA with four employees, and as of September 2017 SEMASG had ten employees.¹⁰⁷ The building management organization 613 Abbott has just eight employees.¹⁰⁸ So the bulk of all administrative costs fell to MJCSM's service divisions (federal and state defenders).

MJCSM had only the resources earned by the federal and state divisions with which to pay the administrative costs assessed by SEMASG. In 2017, SEMASG demanded that the Administrative Office of the U.S. Courts, Defender Services Office pay increased administrative fees. On June 1, 2017, the Office of the General Counsel for the U.S. Courts disallowed the increased fees and informed SEMASG that the federal Defender Services Office would obtain its administrative services from elsewhere.¹⁰⁹ Thus, as of September 2017, the SDO is shouldering the majority share of SEMASG's administrative costs, paying \$292,231 annually for administrative services.¹¹⁰

Of the \$1,980,000 that Wayne County paid annually from October 2000 through July 2016 for the SDO to handle 25% of indigent felony cases, by 2016 the SDO's parent organization would allocate roughly \$756,244 to the overhead costs of office space and administrative services.¹¹¹ If nothing changed, this would leave only approximately \$1,223,756 per year (62%) available to the SDO for payment of all salaries and benefits, as well as all other overhead expenses (equipment, supplies, communications,

¹⁰⁷ As of September 2017, SEMASG positions include: President & CEO; Vice-President of Finance; Vice-President of Development; Vice-President of Facilities; Director of Human Resources; Grants Manager; Donor Development; Executive Assistant; Accounting Clerk; and one facilities person. See Email from Lynn McLeod, Human Resources Director for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 20, 2017) (on file with Sixth Amendment Center).

¹⁰⁸ Email from Keshia Sawyer, SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 23, 2018) (on file with Sixth Amendment Center).

¹⁰⁹ See Letter from Sheryl Walter, General Counsel at Administrative Office of the Courts, to Deirdre Weir, President & CEO at Southeastern Michigan Administrative Services Group (May 19, 2017) (on file with Sixth Amendment Center).

¹¹⁰ See SEMASG, 2017 Budget Projection (draft on file with Sixth Amendment Center).

¹¹¹ See *id.*

insurance, etc.), and for the representation of indigent felony defendants in the Third Judicial Circuit courts.

Workload increases

As a lessening portion of the amount paid by Wayne County was available to the SDO for representing indigent felony defendants, the actual number of cases handled by the SDO attorneys each year was increasing, because SDO is responsible for 25% of indigent felony cases in the Third Judicial Circuit and the overall indigent felony caseload has risen considerably. From the beginning of 2011 through the end of 2017, the Third Judicial Circuit's felony appointments to the SDO increased from 2,528 appointments per year to 3,469.¹¹²

YEAR	ALL INDIGENT APPOINTMENTS			STATE DEFENDER OFFICE APPOINTMENTS			
	Capital*	Non-Capital	Total	Capital	Non-Capital	Total	% of Appts.
2011**	1,150	10,628	11,778	288	2,240	2,528	21.46%
2012	1,140	10,827	11,967	280	2,515	2,795	23.36%
2013	1,225	10,948	12,173	250	2,627	2,877	23.63%
2014	1,315	11,272	12,587	274	2,913	3,187	25.32%
2015	1,197	10,689	11,886	301	2,678	2,979	25.06%
2016	1,236	10,806	12,042	253	2,883	3,136	26.04%
2017	1,066	11,274	12,340	249	3,220	3,469	28.11%

* The administrative reporting requirements for the Michigan trial courts divide felony cases into: capital felonies, defined as "cases in which life sentence is possible and a larger number of peremptory jury challenges is provided;" and noncapital felonies. See MICH. SUPREME COURT, STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURT CASE FILE MANAGEMENT STANDARDS 78 (Sept. 2017), available at http://courts.mi.gov/administration/scao/resources/documents/standards/cf_stds.pdf.

** Estimates based on six months of data from the calendar year.

¹¹² The Third Judicial Circuit provided reliable data on the number of new felony "filings" for each year going back to 1999 and for the number of indigent felony appointments for the years 2013 to 2016. Email from Richard Lynch, Counsel for the Third Judicial Circuit, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 2, 2018) (on file with Sixth Amendment Center). The State Defender Office provided information about indigent felony appointments it received that confirmed the court's data. SDO also provided limited information on closed cases, which showed that as a general trend the number of new appointments the SDO receives each year is approximately equal to the number of cases it disposes. Email from Tiffani Palmer, State Defender Office Data Clerk to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 5, 2018) (on file with Sixth Amendment Center). This analysis reflects the appointment data as provided by the Third Judicial Circuit and by the State Defender Office.

In 2011, each of the SDO's 16 attorneys was appointed on average to 158 new felony cases. By 2017, each of the attorneys was appointed on average to 217 new felony cases.

As the SDO looked toward 2017, if all of the Wayne County funding remaining after payment for SDO's office space and administrative services went to direct representation (and it would not, because the SDO is assessed for additional overhead expenses), and if nothing changed, the SDO would have roughly \$1,223,756 per year to pay for the representation of indigent felony defendants in the Third Judicial Circuit. Acknowledging that the SDO had *more* of the Wayne County funding available after payment of overhead in earlier years than it would have in subsequent years, even the lesser amount would have allowed for about \$484 per case in 2011 when the SDO was appointed to 2,528 felony cases. In 2016, for the 3,136 felony cases that would be appointed, the SDO would have \$390 available to pay for the attorney and case-related expenses for each felony case.¹¹³ The following chart shows that, even without including the greater amount available after overhead in earlier years, the SDO and its attorneys experienced dramatic changes from the beginning of 2011 in dollars per case and average new cases per attorney.

Year	Funding after overhead & administration	# of new appointments	# of attorneys	\$ per case	# of average new cases per attorney
2011	\$1,223,756	2,528	16	\$484	158
2012	\$1,223,756	2,795	16	\$438	175
2013	\$1,223,756	2,877	16	\$425	180
2014	\$1,223,756	3,187	16	\$384	199
2015	\$1,223,756	2,979	16	\$411	186
2016	\$1,223,756	3,136	16	\$390	196

On December 2, 2015, the SDO's parent organization said the SDO was "now in a state of financial crisis. The Office will be unable to continue to operate at its current level, without an immediate increase in funding."¹¹⁴

Effective August 1, 2016, Wayne County, the Third Judicial Circuit, and LADA entered into a new contract.¹¹⁵ For the 14 months beginning August 1, 2016 through

¹¹³ If an SDO lawyer handled 150 cases in a year at \$353 each, that would yield \$52,950, which is approximately the starting salary at the prosecutor's office, with no money for benefits or overhead or support staff.

¹¹⁴ Letter from Legal Aid and Defender Association Inc. Board of Directors, to Hon. Timothy M. Kenny, Presiding Judge, Criminal Division, Third Judicial Circuit Court (Dec. 2, 2015) (on file with Sixth Amendment Center).

¹¹⁵ See Resolution No. 2016-320, Wayne County Commission (July 7, 2016) (approving Professional

September 30, 2017,¹¹⁶ the SDO was paid an annualized amount of \$2,280,000 (payable at \$190,000/month).¹¹⁷ In exchange, the SDO represents: 25% of indigent felony defendants whose cases arise out of certain courts and on certain days;¹¹⁸ 100% of the indigent defendants in the Third Judicial Circuit’s Friday “welfare fraud docket;” and 100% of the indigent defendants in the Third Judicial Circuit’s Monday through Friday “felony child non-support docket.”¹¹⁹ The contract additionally allocates \$760,000 to the Third Judicial Circuit court budget, available for the court to approve reimbursement to the SDO for “extraordinary expenses or fees incurred” (such as for experts or an investigator) in representing indigent defendants under the contract.¹²⁰ This contract was extended for an additional year, through September 30, 2018, with no other substantive changes and with no additional allocation for extraordinary expense reimbursement.¹²¹

In short, Wayne County began paying \$300,000 more per year for the SDO’s existing services *plus* new services it would provide. SDO’s parent organization did not use the new funding to hire additional SDO lawyers, as it expressly stated to Wayne County officials that it would do.¹²² This means the same 16 SDO attorneys are doing even more work, with no additional capacity to do so.

Stagnating compensation

The SDO’s parent organization also did not use the increase in funding to give raises to the SDO attorneys. Although the SDO attorneys are increasingly asked to do more with less, they are poorly paid for their work. In the 17-year period from October 2000

Services Contract, between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. (eff. Aug. 1, 2016)). Technically, by July 1, 2016, the SDO attorneys were no longer employed by LADA and were instead employed by the Metropolitan Justice Center of Southeast Michigan; nonetheless, LADA was the named party in the contract.

¹¹⁶ Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. ¶ 4 (eff. Aug. 1, 2016) (on file with Sixth Amendment Center).

¹¹⁷ *Id.* ¶ 8.01, Appendix B.

¹¹⁸ The number of specific courts and days for which the SDO is required to appear increased from the prior October 2000 through July 2016 agreement. Compare Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. Appendix A ¶ 1.5 (eff. Aug. 1, 2016) (on file with Sixth Amendment Center) with Letter of Understanding between the Legal Aid and Defender Association, Inc. and the Third Judicial Circuit of Michigan ¶ II.A (Oct. 1, 2000) (on file with Sixth Amendment Center).

¹¹⁹ Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. ¶ 3.01, Appendix A (eff. Aug. 1, 2016) (on file with Sixth Amendment Center). SDO represents 100% of indigent defendants in the new dockets, absent a conflict of interest.

¹²⁰ *Id.* Appendix B ¶ 2.

¹²¹ *See* Modification #1 to Extend the Contract Between the County of Wayne and Metropolitan Justice Center of Southeast Michigan, State Defender Office (formerly known as the Legal Aid and Defender Association) (executed August 2017) (on file with Sixth Amendment Center).

¹²² Letter from Deirdre Weir, President & CEO of SEMASG, to Presiding Judge Timothy Kenny, Third Judicial Circuit Criminal Division (Jan. 30, 2017) (on file with Sixth Amendment Center).

through September 2017, only one salary increase occurred circa 2003, raising starting level attorney salaries from \$28,000 to \$35,000 per year.¹²³ This is true despite the President of LADA (and its successor organizations) earning \$173,168 per year.¹²⁴

Position	Legal Experience	Years with SDO	2017 Salary*
Ch Def	39 yrs	34 yrs	\$96,127
Supv 1	28 yrs	28 yrs	\$69,425
Supv 2	38 yrs	18 yrs	\$69,425
Dep 1	27 yrs	17 yrs	\$56,855
Dep 2	37 yrs	16 yrs	\$56,608
Dep 3 (trg)	19 yrs	18 yrs	\$51,530
Dep 4	22 yrs	20 yrs	\$49,438
Dep 5	19 yrs	16 yrs	\$37,383
Dep 6	38 yrs	6 yrs	\$35,000
Dep 7	15 yrs	14 yrs	\$35,000
Dep 8	12 yrs	11 yrs	\$35,000
Dep 9	18 yrs	4 yrs	\$35,000
Dep 10	5 yrs	1 yr	\$35,000
Dep 11	1 yr	< 1 yr	\$35,000
Dep 12	29 yrs	10 yrs	\$35,000
Dep 13	vacant	vacant	\$35,000

* Email from Lynn McLeod, Human Resources Director for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 20, 2017) (on file with Sixth Amendment Center).

Extremely low salaries have contributed to turnover among the SDO attorneys, and some attorney positions have been left vacant. Indeed, during this evaluation, one SDO attorney who had been hired only a few months earlier resigned to take a position in the prosecutor's office at an annual salary over \$15,000 higher than what he could earn at SDO.

¹²³ Email from Donald Johnson, Director of SDO, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 22, 2018) (on file with Sixth Amendment Center).

¹²⁴ Email from Nicole Goodson, Interim President & CEO of SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 22, 2018) (on file with Sixth Amendment Center). It is not unusual for a President and CEO of a large organization like LADA, which at one point employed 160 staff, to be paid such a salary. However, the president's salary remained the same even after the organization experienced significant financial difficulties and staff had to be cut substantially, while defense attorneys handling murder cases were and continued to be paid only \$35,000 per year.

The experience of another lawyer, who worked at the SDO under a Northwestern University School of Law post-graduate fellowship, highlights the inadequacies of the SDO attorney salaries. The fellowship paid this attorney a \$50,000 annual salary to work at the SDO, while more experienced SDO attorneys were paid only \$35,000. When the fellowship ended, the SDO offered this attorney a permanent position at the \$35,000 starting attorney salary. The attorney opted instead to go to the prosecutor's office as a project consultant at a salary of \$50,000, although with no benefits, while waiting for an assistant prosecuting attorney position in the prosecutor's office to open up.

By way of comparison, of the 139 permanent attorney positions at the Wayne County Prosecutor's office:¹²⁵

- 37 APA-1 attorneys earn up to \$51,563 per year (more than 11 of the SDO's 13 deputy defenders);
- 24 APA-2 positions earn up to \$68,232 per year;
- 30 APA-3 positions earn up to \$100,555 per year (more than all of the SDO attorneys, including the chief defender and the two supervisors);
- 22 APA-4 positions earn up to \$116,017 per year; and
- 26 lead attorney positions earn up to \$123,017 per year.

All prosecuting attorneys receive an automatic annual increase in pay until they reach the maximum salary for their tier. Prosecuting attorneys can earn additional compensation by serving on-call over nights or weekends, or for performing supervisory functions, or simply at the chief prosecutor's discretion for exceptional performance.

Currently, resources within SDO are so paltry that the SDO attorneys cannot perform some of the most basic functions necessary to adequately represent a client. SDO attorneys have resorted to photocopying one old business card and handwriting their personal phone numbers on the photocopy to give to clients. There is no color printer in the SDO office, so attorneys must request color copies from the administration and wait for the copies to be delivered downstairs from the administrative office. There are no laptops available for attorneys to take into court. SDO attorneys sometimes cannot view discovery produced by the prosecution because the software on their computers is outdated.

The overarching principle in *United States v. Cronin*¹²⁶ is that the process of a criminal case must be a fair fight. Although the fair fight standard does not necessitate one-for-one parity between the prosecution and the defense, still governments must ensure that both functions have the resources they need at a level their respective roles demand.

¹²⁵ Wayne County Department of Personnel/Human Resources, General Schedule of Approved Pay Rates (Sept. 08, 2017) (on file with Sixth Amendment Center). This is not intended as an expression of opinion as to whether the salaries of the prosecutors are adequate, as 6AC/SUSL has not evaluated the Wayne County Prosecutor's Office.

¹²⁶ 466 U.S. 648 (1984).

As the Supreme Court has observed: “[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”¹²⁷

¹²⁷ *Id.* at 657 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

CHAPTER III

TIME SUFFICIENCY

“The prompt disposition of criminal cases is to be commended and encouraged. But, in reaching that result, a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”

– Powell v. Alabama, 287 U.S. 45, 59 (1932)

In *United States v. Cronin*,¹²⁸ the U.S. Supreme Court pointed to the case of *Powell v. Alabama*¹²⁹ as representative of the constructive denial of the right to counsel.¹³⁰ In *Powell*, the Court notes that the lack of sufficient time to consult with counsel and to prepare an adequate defense “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”¹³¹ Insufficient time is, therefore, a marker of constructive denial of counsel, and the inadequate time may itself be caused by any number of things, including but not limited to insufficient resources, inadequate support staff, and excessive workload.

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every case. Even in the simplest felony case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but,

¹²⁸ 466 U.S. 648 (1984).

¹²⁹ 287 U.S. 45 (1932).

¹³⁰ *Cronin*, 466 U.S. at 659-60 (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

¹³¹ *Powell*, 287 U.S. at 56-59.

before doing so, learn from the client what conditions of release are most favorable to the client);

- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant's background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client's rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).¹³²

One state supreme court observed a quarter century ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent's defense has increased considerably.”¹³³

Where attorneys lack support staff to assist them, for example in meeting with clients, preparing routine documents, reviewing discovery, and conducting investigations, adequately preparing to defend a case takes more time and is more costly. For this reason, national standards explain the necessity of having secretaries, paralegals, social workers, and investigators available to assist indigent defense attorneys.¹³⁴

¹³² See generally PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (NAT'L LEGAL AID & DEFENDER ASS'N 1995).

¹³³ Louisiana v. Wigley, 624 So.2d 425, 428 (La. 1993).

¹³⁴ See GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (NAT'L STUDY COMM'N ON DEFENSE SERVS. 1976) (“Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.”); see also STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES § 5-14 cmt. (AM. BAR ASS'N 3d ed. 1992) (among the support staff necessary to render quality legal representation “are secretarial, investigative, and expert services”).

National standards, as summarized by the ABA, further agree that “[d]efense counsel’s workload [must be] controlled to permit the rendering of quality representation.”¹³⁵ The lawyer’s workload must take into consideration “not only a defender’s numerical caseload, but also factors like the complexity of defenders’ cases, their skills and experience, and the resources available to them.”¹³⁶

The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.¹³⁷ NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or
- 25 appeals per attorney per year.¹³⁸

This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer’s cases (public, private, and *pro bono*). The caseload limits also assume that the lawyer does not have any other duties, such as management or supervisory responsibilities.

FINDING #2: The State Defender Office attorneys are prevented from providing effective representation because they lack sufficient time, resources, and support staff to properly prepare cases.

¹³⁵ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 5 (AM. BAR ASS’N 2002).

¹³⁶ Statement of Interest of the United States at 7, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash. filed Aug. 14, 2013), *available at* <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>; *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

¹³⁷ Building on the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration (DOJ/LEAA) appointed the National Commission on Criminal Justice Standards and Goals (NAC) in 1971, with DOJ/LEAA grant funding, to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function.

¹³⁸ NATIONAL ADVISORY COMM’N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense) § 13.12 (1973).

COURTS WITH JURISDICTION IN WAYNE COUNTY

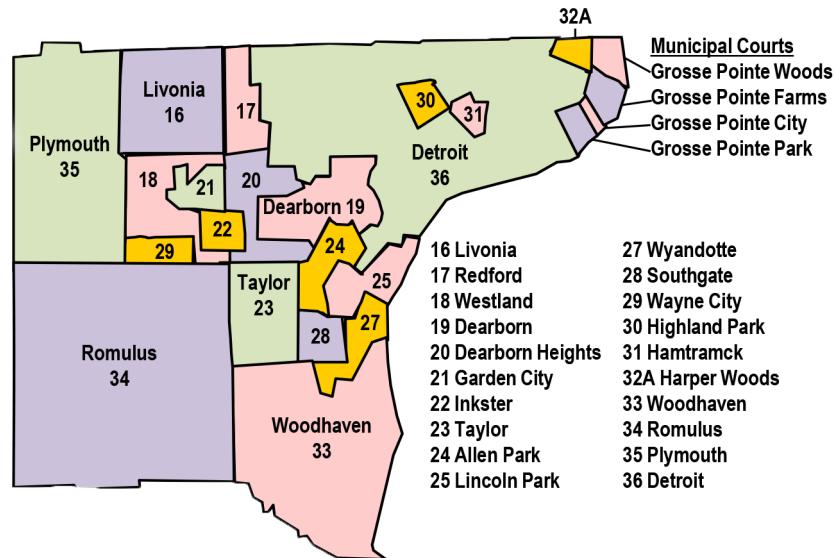


Photo Credit: Michigan Courts, courts.mi.gov/Administration/SCAO/Resources/Documents/maps/CourtsByCountyAndDistrictCourtDetail.pdf

As of September 2017, the State Defender Office has a total of 16 attorney staff positions, though one of the attorney positions is unfilled.¹³⁹ Since August 1, 2016, the SDO attorneys are under contract with Wayne County and the Third Judicial Circuit to provide representation to indigent defendants as follows:¹⁴⁰

- 25% of the felony cases that arise out of:¹⁴¹
 - the Third Circuit; Monday through Friday
 - the 36th District (Detroit); Monday through Friday
 - the 23rd District (Taylor); Monday
 - the 33rd District (Woodhaven); Tuesday
 - the 34th District (Romulus); Wednesday
 - the 18th District (Westland); Thursday
 - the 35th District (Plymouth); Friday

¹³⁹ See Email from Lynn McLeod, Human Resources Director for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 20, 2017) (on file with Sixth Amendment Center).

¹⁴⁰ Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. ¶ 3.01, Appendix A (eff. Aug. 1, 2016) (on file with Sixth Amendment Center).

¹⁴¹ The SDO must accept substitution of one district court for another if asked to do so, but “in no instance” is the SDO required to handle two district courts outside of the 36th District on the same day.

- 100% of the welfare fraud docket; Friday
- 100% of the felony child non-support docket; Monday through Friday.

To fulfill the terms of this contract, the 16 SDO attorneys are obliged to physically be in particular courtrooms on certain days each week for the entire time those courts are in session. To fulfill their Sixth Amendment obligations, those same 16 SDO attorneys must carry out all of the steps that are necessary in each individual case, including appearing in the series of courts to which that case is allotted for every critical stage of the case. Understanding what this means for the SDO attorneys' actual responsibilities requires some explanation.

The Third Judicial Circuit's jurisdiction encompasses the entirety of Wayne County's geography.¹⁴² The court has three divisions,¹⁴³ one of which is the criminal division housed at the Frank Murphy Hall of Justice (FMHJ) in Detroit.¹⁴⁴ The criminal division has 23 judges.¹⁴⁵ These judges handle all of the felony cases that are bound over from the district and municipal courts.¹⁴⁶

Each of the 20 district courts within the Third Judicial Circuit has limited jurisdiction over felony cases arising within its own limited geography, in addition to handling other types of cases. All felony cases begin in these district courts and in a few municipal courts with more limited jurisdiction.¹⁴⁷

The 36th District covers Detroit. Four of its judges, in addition to one Third Judicial Circuit judge who sits as a 36th District judge,¹⁴⁸ have felony responsibilities. Their courtrooms are located in the same courthouse as the Third Judicial Circuit.

The other district courts within the Third Judicial Circuit are referred to in the local vernacular as "out-county districts," because they are located in various towns outside of Detroit but within Wayne County. The SDO is responsible for 25% of felony cases in five of these out-county districts.¹⁴⁹ In order of approximate driving time from the SDO offices in Detroit, they are: 23rd District courthouse in Taylor (20-minute drive);

¹⁴² See *About Third Judicial Circuit of Michigan*, THIRD JUDICIAL CIRCUIT OF MICHIGAN, <https://www.3rdcc.org/general-information/About-Us> (last visited Feb. 20, 2018).

¹⁴³ *Id.*

¹⁴⁴ See *Criminal*, THIRD JUDICIAL CIRCUIT OF MICHIGAN, <https://www.3rdcc.org/divisions/criminal#/list> (last visited Feb. 20, 2018).

¹⁴⁵ *Id.*

¹⁴⁶ MICH. CT. R. 6.008(B).

¹⁴⁷ MICH. CT. R. 6.008(A).

¹⁴⁸ This cross-designated judge handles the "pre-exam docket" for cases arising out of the 36th District that the prosecutor's office has determined to be eligible for the expedited plea program. Local Admin. Order 2015-01, Criminal Division Case Assignment ¶ 6.a (Mich. 3rd Jud. Cir. Feb. 19, 2015).

¹⁴⁹ Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. ¶ 3.01, Appendix A (eff. Aug. 1, 2016) (on file with Sixth Amendment Center).

34th District courthouse in Romulus (22-minute drive); 33rd District courthouse in Woodhaven (24-minute drive); 35th District courthouse in Plymouth (25-minute drive); and 18th District courthouse in Westland (28-minute drive).

FELONY CASES IN THE DISTRICT COURTS

When a person is arrested on a felony charge, the arresting officer must take the person “without unnecessary delay” to the appropriate district court,¹⁵⁰ where the judge conducts an arraignment on the complaint (or warrant). In all of the district courts pertinent to this evaluation, the arraignment on the complaint is conducted by videoconference, with the defendant physically standing in a room at the jail and the judge physically located at the courthouse. Neither prosecutors nor defense attorneys are present at or participating in the arraignment on the complaint.

Defendants are advised of the charge upon which they have been arrested and the possible sentence if convicted,¹⁵¹ the court sets conditions of pretrial release if any,¹⁵² and defendants are advised of their constitutional rights, including the right to an appointed lawyer for an indigent defendant.¹⁵³ In courts within Wayne County, if a defendant says he cannot afford to hire his own attorney, the defendant fills out an application for appointed counsel but the courts do not conduct any inquiry into a defendant’s financial status outside of this application.¹⁵⁴ The court will appoint counsel to defendants who fill out the application, and that counsel remains on the case until a defendant either waives his right to counsel or retains a private attorney.¹⁵⁵

In the five out-county district courts and in five courtrooms of Detroit’s 36th District, the courts appoint the SDO to represent one out of every four defendants who request counsel at their arraignment on the complaint.¹⁵⁶ The felony charges for which the SDO

¹⁵⁰ MICH. COMP. LAWS § 764.13 (2017); MICH. CT. R. 6.104(A).

¹⁵¹ MICH. CT. R. 6.104(E).

¹⁵² MICH. CT. R. 6.106. Because no defense attorney is present during this arraignment on the complaint, there is no attorney to advocate or present evidence on behalf of an indigent defendant about pretrial release or detention.

¹⁵³ MICH. CT. R. 6.005, 6.104(E).

¹⁵⁴ The Court conducts indigency evaluations post-judgment, as only individuals who are convicted may be asked to contribute to the cost of their defense. MICH. CT. R. 6.005(C).

¹⁵⁵ MICH. COMP. LAWS § 775.16 (2017) (“If the person states that he or she is unable to procure counsel, the magistrate shall appoint counsel, if the person is eligible for appointed counsel under the Michigan indigent defense commission act.”); MICH. COMP. LAWS § 780.991(1)(c) (2017) (“[C]ounsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal services.”); MICH. COMP. LAWS § 780.991(3)(a) (2017) (“A preliminary inquiry regarding, and the determination of, the indigency of any defendant . . . shall be made as determined by the indigent criminal defense system not later than at the defendant’s first appearance in court.”); MICH. CT. R. 6.005.

¹⁵⁶ Four 36th District judges have felony responsibilities and one Third Judicial Circuit judge is cross-designated as a 36th District judge to handle the “pre-exam docket” for cases arising out of the 36th District that the prosecutor’s office has determined to be eligible for the expedited plea program, Local Admin. Order 2015-01, Criminal Division Case Assignment ¶ 6.a (Mich. 3rd Jud. Cir. Feb. 19, 2015).

is appointed to represent indigent defendants in these 10 separate district courtrooms run the full gamut from the least serious, carrying the possibility of probation, to the most serious, carrying the possibility of life in prison (a “capital case” in Wayne County).

At the arraignment on the complaint proceeding, the district court sets a date for a probable cause conference to be held within seven to 14 days and a date for a preliminary examination to be held five to seven days after that if the exam is not waived at the probable cause conference.¹⁵⁷ An SDO attorney must be present in the appropriate district court at each of these proceedings on behalf of every indigent defendant appointed to the SDO. At least six separate district courtrooms conduct these proceedings every day of the week.

The purpose of the probable cause conference is to allow the prosecutor, defense attorney, and defendant to meet and determine whether they can reach a plea agreement, whether they will waive or conduct a preliminary examination, and whether bail should be modified for the defendant.¹⁵⁸

Unless the defendant pleads guilty or the parties agree to waive the preliminary examination,¹⁵⁹ the preliminary examination will usually be held as scheduled some five to seven days later in the same district court.¹⁶⁰ In all district courts, the defendant is usually physically present in the courtroom with his lawyer during this evidentiary hearing where witnesses (most often law enforcement) testify.¹⁶¹ The purpose of the preliminary examination is for the court to determine whether probable cause exists to believe that a felony offense occurred and that the defendant committed it.¹⁶² If the court finds no probable cause, then the felony charge against the defendant is dismissed.¹⁶³ If the court finds that there is probable cause, then the defendant’s case is bound over to the circuit court.¹⁶⁴

Some felony cases are resolved at the district court, either through a guilty plea or a finding of no probable cause. All of the SDO felony cases that are not disposed in the district courts are bound over to the Third Judicial Circuit for an arraignment on the information within 14 days.¹⁶⁵

¹⁵⁷ MICH. COMP. LAWS § 766.4(1) (2017); MICH. CT. R. 6.104(E)(4).

¹⁵⁸ MICH. COMP. LAWS § 766.4 (2017); MICH. CT. R. 6.108.

¹⁵⁹ If the preliminary examination is waived, the defendant is bound over to the circuit court. MICH. CT. R. 6.110(A).

¹⁶⁰ MICH. COMP. LAWS § 766.4(4) (2017).

¹⁶¹ MICH. COMP. LAWS § 766.4(6) (2017); MICH. CT. R. 6.110(C).

¹⁶² MICH. CT. R. 6.110(E).

¹⁶³ MICH. COMP. LAWS § 766.13 (2017); MICH. CT. R. 6.110(F).

¹⁶⁴ MICH. COMP. LAWS § 766.13 (2017); MICH. CT. R. 6.110(F).

¹⁶⁵ MICH. COMP. LAWS § 766.13 (2017); MICH. CT. R. 6.113. By local administrative orders, the district court judges in the 18th, 23rd, 33rd, 34th, and 36th districts may, with consent of the parties, conduct the circuit court arraignment on the information immediately after bind-over. Joint Local Administrative

FELONY CASES IN THE THIRD JUDICIAL CIRCUIT

When a felony case is bound over to the Third Judicial Circuit, it is allotted to one of 23 specific court dockets,¹⁶⁶ depending on the type of case. SDO attorneys are appointed to represent indigent felony defendants whose cases are allotted to all 23 of these court dockets, each of which hold court every day of the week.

- All felonies that carry a possible life sentence and all other cases that include a felony firearm charge are allotted directly to one of 15 trial dockets, or “second tier” courts.¹⁶⁷ These cases will remain in their allotted court through the conclusion of the case.¹⁶⁸
- All other cases are allotted to one of seven “first tier” court dockets:¹⁶⁹
 - Failure to pay child support cases¹⁷⁰ arising out of the 36th District are allotted to the “felony non-support docket.”¹⁷¹ These cases can be resolved in this court by a guilty plea within 63 days of bind-over.¹⁷² If a case is not resolved within that time, it is allotted to a particular trial docket court.¹⁷³
 - Auto theft offenses, as designated by a court docket directive, are allotted to the “felony auto theft docket.”¹⁷⁴ These cases can be resolved in this court by a guilty plea within 28 days of bind-over.¹⁷⁵ If a case is not resolved within that time, it is allotted to a particular trial docket court.¹⁷⁶
 - Certain domestic violence cases, identified by the prosecutor’s office as fitting the appropriate definition, are allotted to the “non-capital domestic violence” docket.¹⁷⁷ These cases can be resolved in this court by a guilty plea within 28 days of bind-over.¹⁷⁸ If a case is not resolved within that time, it is randomly allotted to a trial docket court.¹⁷⁹
 - Four courts are randomly allotted all of the other cases arising out of all of the district courts.¹⁸⁰ These cases can be resolved in these courts by plea

Orders 2013-10J, 2013-15J, 2013-23J, 2013-24J, 2013-25J (Mich. 3rd Jud. Cir. Dec. 10, 2013); *see also* MICH. CT. R. 6.111.

¹⁶⁶ Local Admin. Order 2015-01, Criminal Division Case Assignment (Mich. 3rd Jud. Cir. Feb. 19, 2015).

¹⁶⁷ *Id.* at ¶¶ 5, 9.

¹⁶⁸ *Id.* at ¶ 9.

¹⁶⁹ *Id.* at ¶¶ 5, 6.

¹⁷⁰ MICH. COMP. LAWS §§ 750.161, 750.165 (2017).

¹⁷¹ Local Admin. Order 2015-01, Criminal Division Case Assignment ¶ 6.b (Mich. 3rd Jud. Cir. Feb. 19, 2015).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at ¶ 6.c.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at ¶ 6.d.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at ¶ 6.e.

agreement within 28 days of bind-over.¹⁸¹ If a case is not resolved within that time, it is allotted to a trial docket.¹⁸²

The SDO is also contractually required to represent 100% of the indigent felony defendants: every Friday in the trial court to which all welfare fraud cases are allotted,¹⁸³ and every Monday through Friday in the trial court to which all non-support cases are allotted.¹⁸⁴

SDO CONTRACTUAL DUTIES TO THE COURTS

Putting this all together, the 16 SDO attorneys are contractually obliged to be in 29 different courtrooms on Monday through Thursday, and in 30 different courtrooms on Friday, for virtually the entire time those courts are in session. The table on page 38 shows how the SDO attempts to allocate its attorneys to these courts.

The district courts appoint the SDO at a defendant’s arraignment on the complaint, a proceeding where the SDO is not present. As appointments are received in the SDO office, they are assigned to specific SDO attorneys.

The SDO initially assigns all felony appointments in the five out-county district courts to a single SDO attorney (shown as “Dep 1” in the table, *infra* p. 38). On each day of the week, he appears in one of the five out-county district courts and represents all indigent defendants appointed to the SDO during their probable cause conference and then some days later at the preliminary examination. Some cases are disposed of in these out-county districts by a guilty plea or by a finding of no probable cause. For the great majority of cases that are bound over, a new SDO attorney will be assigned to take over each case (taking into account case severity, as explained below) for the arraignment on the information.

.....
During 2016, the SDO attorney assigned to the five out-county districts disposed of 262 felony appointments in those district courts. This is 112 *more* cases than a single attorney is allowed to handle under the NAC caseload standards (or 175% of the NAC allowable caseload) before taking into account all of the other cases he handled in the out-county districts that were bound over to the circuit court.
.....

The SDO rotates 14 of its attorneys, based on their availability, to take all felony appointments arising in the 36th District pre-exam docket on a given day. On each day of the week, one of these 14 SDO attorney appears in the pre-exam docket courtroom

¹⁸¹ *Id.*

¹⁸² *Id.* There is one exception: the AOI courts retain cases where the defendant has waived his right to a jury trial and is charged with carrying a concealed weapon with a maximum 5-year penalty or drug offenses with a maximum 4-year penalty. *Id.* at ¶ 7.

¹⁸³ *Id.* at ¶ 11.

¹⁸⁴ *Id.* at ¶ 6.b.

WEEKLY COURTROOM & CASE DUTIES OF SDO ATTORNEYS

SDO Position	Monday	Tuesday	Wednesday	Thursday	Friday		
Dep 1	23rd Dist (Taylor)	33rd Dist (Woodhaven)	34th Dist (Romulus)	18th Dist (Westland)	35th Dist (Plymouth)		
Ch Def Supv 1 Supv 2 Dep 2 Dep 3 Dep 4 Dep 5 Dep 6 Dep 7 Dep 8 Dep 9 Dep 10 Dep 11 Dep 13	Each lawyer is assigned to courts as available	36th Dist - #1 pre-exam docket 36th Dist - #2 36th Dist - #3 36th Dist - #4 36th Dist - #5 3rd Cir – AOI #1 non-support 3rd Cir – AOI #2 auto theft 3rd Cir – AOI #3 dom. viol. 3rd Cir – AOI #4 felony 3rd Cir – AOI #5 felony 3rd Cir – AOI #6 felony 3rd Cir – AOI #7 felony 3rd Cir – Trial #1 3rd Cir – Trial #2 3rd Cir – Trial #3 3rd Cir – Trial #4 3rd Cir – Trial #5 3rd Cir – Trial #6 3rd Cir – Trial #7 3rd Cir – Trial #8 3rd Cir – Trial #9 3rd Cir – Trial #10 3rd Cir – Trial #11 3rd Cir – Trial #12 3rd Cir – Trial #13 3rd Cir – Trial #14 3rd Cir – Trial #15		Each of these courts meets M-F			
Dep 12		3rd Cir – Trial #__ non-support	3rd Cir – Trial #__ non-support		3rd Cir – Trial #__ non-support	3rd Cir – Trial #__ non-support	3rd Cir – Trial #__ non-support 3rd Cir – Trial #__ welfare fraud

and represents all indigent defendants to which the court has appointed the SDO during their probable cause conference and then some days later at the preliminary examination. The entire goal behind the creation of this specialized docket is to achieve a quick guilty plea, as indicated by its alternate name of “expedited plea program.”¹⁸⁵ Unique among the district courts, a felony case can remain in this court for up to 21 days after it is bound over, to allow additional time to reach a plea agreement.¹⁸⁶ If a case is not resolved within that time, it is randomly allotted to one of the Third Judicial Circuit’s 15 criminal trial court dockets.¹⁸⁷

For all felony appointments arising in the other four 36th District courts, the SDO initially assigns cases to one of 14 SDO attorneys based on the charge. For felonies that carry the possibility of life in prison (“capital” felonies, in the nomenclature of the courts)¹⁸⁸ and for certain other serious felonies, an SDO supervisor¹⁸⁹ assigns each case to a specific SDO attorney based on the attorney’s experience,¹⁹⁰ specialization, and current caseload. The assigned SDO attorney represents the defendant in that case in the appointing 36th District courtroom during the probable cause conference and then some days later at the preliminary examination.¹⁹¹ If the case is bound over, the same SDO attorney is intended to keep the case through its disposition, and because most of these cases are capital felonies, they usually go directly from one of the four 36th District courts to one of the 15 Third Judicial Circuit “second tier” trial courts.¹⁹² Nonetheless, this leaves the SDO attorneys who are handling the most serious felony cases with

.....
In addition to his caseload, the SDO chief defender is also responsible for the day-to-day management of the SDO’s criminal defense services. He handles all hiring and firing of SDO attorneys and staff, determines how the SDO fulfills its court staffing obligations, and determines whether an SDO attorney is allowed to request an expert in a given case.
.....

¹⁸⁵ *Id.* at ¶ 6.a.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ The administrative reporting requirements for the Michigan trial courts divide felony cases into: capital felonies, defined as “cases in which life sentence is possible and a larger number of peremptory jury challenges is provided;” and noncapital felonies. *See* MICH. SUPREME COURT, STATE COURT ADMINISTRATIVE OFFICE, MICHIGAN TRIAL COURT CASE FILE MANAGEMENT STANDARDS 78 (Sept. 2017).

¹⁸⁹ This is a very time-intensive task that takes the supervisor away from other responsibilities. Significantly, this supervisor carries a full caseload. The time he must devote to reviewing new case files in order to appropriately assign them to individual SDO attorneys detracts from his work as an attorney and mentor.

¹⁹⁰ Among the SDO’s 16 attorney positions, as of September 2017, all of the attorneys except three had more than 10 years of legal experience, and eight of those attorneys had more than 20 years’ experience. *See* table *supra* p. 26.

¹⁹¹ Although, due to caseload demands, defenders often substitute for each other at certain court appearances.

¹⁹² *See* Local Admin. Order 2015-01, Criminal Division Case Assignment ¶¶ 5, 9 (Mich. 3rd Jud. Cir. Feb. 19, 2015).

responsibility for appearing in up to 19 courtrooms that are all conducting business every day of the week.

The SDO initially assigns all of its other non-capital felony appointments in the four 36th District felony courtrooms to one of the same 14 SDO attorneys who handle the more serious felonies, based on their availability to appear in the appointing courtroom on the appropriate day. This ensures that the SDO attorneys, and in particular the attorneys newer to the office or with less legal experience, do not practice in front of a single district court judge all of the time. It also creates some level of efficiency for the individual attorneys and the individual courts, because the attorney is not required to appear in quite so many courtrooms each day and the judge does not have to wait for a series of SDO attorneys to become available for each scheduled proceeding on a given day. Unfortunately, it means that the indigent defendants charged with non-capital felonies will likely be represented by at least two and more likely three different SDO attorneys over the course of the case. The SDO attorney designated for each of the four 36th District courtrooms on a given day will represent all indigent defendants appointed to the SDO who have a probable cause conference scheduled for that day, and ideally the same SDO attorney will also handle the preliminary examination in those cases a few days later, however, a new SDO attorney will be assigned to take over each non-capital felony case that is bound over.

The SDO assigns non-capital felony cases that are bound over from all of the district courts (both out-county and 36th District) other than the 36th District pre-exam court

based on which SDO attorney is available to appear in the AOI circuit courtroom to which the case is allotted on the day the case is scheduled for proceedings. The SDO Chief Defender handles one of these dockets each day. Otherwise, the SDO attorney who begins representation of a non-capital felony case at the arraignment on the information is intended to keep that case through disposition in whichever of the 15 trial courts it is allotted to for that purpose, with two exceptions.

As of September 2017, the SDO attorney assigned to handle all indigent welfare fraud and non-payment of child support cases at the trial court stage had about 400 open felony cases. During 2016, he represented 678 indigent felony defendants. This is 528 more cases than a single attorney is allowed to handle under the NAC caseload standards, or 452% of the allowed number. After he leaves court each day, he returns to the office and spends hours in telephone calls with clients and processing necessary paperwork.

By Third Judicial Circuit administrative order, all welfare fraud and non-payment of child support cases that are not disposed of in an AOI circuit court

are allotted to a particular trial court.¹⁹³ The SDO is contractually responsible for representing all indigent felony defendants on each of these trial court dockets, on

¹⁹³ *Id.* at ¶¶ 6.b, 11.

Monday through Friday for the non-support cases, and on Friday for the welfare fraud cases.¹⁹⁴ The SDO assigns one of its attorneys (shown as “Dep 12” in the table, *supra* p. 38) to handle all cases on both of these trial dockets. This means each of these defendants will be represented by at least three different SDO attorneys between arrest and disposition of their case. Of note, while this single SDO attorney handles every case on the non-support docket, the Wayne County prosecutor’s office devotes three full-time prosecutors and the Attorney General has a part-time attorney there as well.

Further complicating matters are the felony cases appointed to the SDO that are bound over from the out-county districts. After bind-over, these cases are layered on top of the 36th District caseload already assigned to one of 14 SDO attorneys, and the individual cases are assigned to a specific attorney in the same fashion, first based on seriousness of charge and then on availability of the attorney. An indigent defendant whose felony case originates out of an out-county district will definitely be represented by at least two and more likely three different SDO attorneys over the course of the case.

SDO attorneys also routinely serve as “house counsel” in Third Judicial Circuit criminal courts; each attorney typically serves in this role once each week. “House counsel serves the critical function of providing representation in the AOI courts when a defendant appears on a bench warrant arraignment or for a violation of probation. . . . The role of house counsel may last for the day of the event or for the remainder of the case.”¹⁹⁵ While most of the house counsel appointments are to cases involving a violation of probation, SDO attorneys routinely receive assignments to felony cases at a pre-trial stage and can even receive appointments to capital cases.¹⁹⁶

Finally, SDO also represents all probationers in the Third Judicial Circuit’s mental health court. The court meets about once each week. An SDO attorney serves on the treatment team and represents defendants who face removal from the program for alleged noncompliance.

SDO SIXTH AMENDMENT DUTIES

The SDO’s 16 attorneys are bound under the Sixth Amendment to carry out all of the steps that are necessary in each case to which they are appointed, including appearing in the series of courts to which each case is allotted for every critical stage of the case.

¹⁹⁴ Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. ¶ 3.01, Appendix A (eff. Aug. 1, 2016) (on file with Sixth Amendment Center).

¹⁹⁵ Email from Richard Lynch, Court Administrator for Third Judicial Circuit of Michigan, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 22, 2018) (on file with Sixth Amendment Center).

¹⁹⁶ Email from Donald Johnson, Director of SDO, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 22, 2018) (on file with Sixth Amendment Center).

National standards, as summarized in ABA Principle #7, require that the same attorney initially appointed to a case continuously represent the client until the completion of the case.¹⁹⁷ Commonly referred to as “vertical representation,” this stands in contrast to “horizontal representation,” where one attorney represents the client during one court proceeding before handing off the client’s case to another attorney to cover the next stage. Horizontal representation is used to the detriment of clients, as a cost-saving measure and in response to excessive workloads. In explaining why horizontal representation is so harmful to clients, the ABA states:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been ‘processed by the system.’ This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased.¹⁹⁸

The limited number of SDO attorneys, combined with the large number of courtrooms to be covered and the Third Judicial Circuit’s case docketing scheme, means that the same SDO attorney rarely ever represents an indigent defendant from appointment through disposition of the case. Crucial information in cases and about clients is lost, according to the SDO attorneys, as cases move from lawyer to lawyer within the SDO. “All of the attorneys in the office have their own filing system,” and the attorney who picks up a case is not always able to understand what the previous attorney did. One judge explained that it is “not uncommon for me to say ‘What’s the offer? Is your client interested?’” and the SDO attorney replies, “I just met the client 10 minutes ago.” Another judge confirmed the “biggest problem with [the SDO] is that clients never get the same lawyer twice.” When the lawyers change so frequently, “clients aren’t getting continuity they need, or the relationship that they need.”

In 2017, the SDO’s 16 attorneys collectively handled 3,469 newly appointed cases,¹⁹⁹ plus any cases appointed in previous years that had not concluded. Each SDO attorney had on average 217 new felony cases. This is 67 *more* cases per attorney than the maximum NAC allowed caseload (or 145%).²⁰⁰

¹⁹⁷ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 7 (AM. BAR ASS’N 2002).

¹⁹⁸ STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES § 5-6.2 cmt. (AM. BAR ASS’N 3d ed. 1992).

¹⁹⁹ THIRD JUDICIAL CIRCUIT COURT – CRIMINAL DIVISION ASSIGNED COUNSEL APPOINTMENTS (JUDICIAL TWO-WEEK ROTATION) 01/01/2017 THRU [sic] 12/31/2017 (Jan. 9, 2018) (on file with Sixth Amendment Center).

²⁰⁰ NATIONAL ADVISORY COMM’N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense) § 13.12 (1973).

A WORD ABOUT THE NAC WORKLOAD STANDARDS

The fifth of the ABA *Ten Principles* states that the NAC caseload standards should in “no event be exceeded,” while explaining that workload standards that take into account such factors as case complexity, an attorney’s nonrepresentational duties, and local drive times to jail and court, among others, are a more accurate measurement.

For example, in May 2017, the Director of the New York State Office of Indigent Legal Services (ILS) released a report^a setting binding workload standards required in five upstate counties as part of the settlement agreement in a class action lawsuit that alleged systemic deficiencies in the delivery of indigent defense services in those counties.^b The new ILS caseload standards are set out in two ways: the maximum number of new cases, by case type, that can be assigned to each full-time equivalent attorney in public defender offices; and the minimum number of hours that must be devoted to each case type by private attorneys assigned to cases. For example, public defenders handling violent felonies should not exceed fifty new assignments per year, while private attorneys should spend a minimum of 37.5 hours on similar cases. The standard for non-violent felonies is 100 cases per public defender or a minimum of 18.8 hours per case for private counsel. This is far below the NAC standard of 150 felonies per attorney per year.

In creating its state specific standards, the ILS report summarizes national critiques of the NAC caseload standards, including that:

- The NAC standards were not produced through empirical research or any rigorous data collection; and
- The practice of criminal defense has changed dramatically since 1973 such that the work an attorney needs to do to provide effective representation has increased significantly as a result of, among other things:
 - major advances in forensic analysis and technology;
 - the complicated and ever-changing body of immigration law; and
 - the need to research and explain the collateral consequences of a conviction that go beyond immigration and can potentially arise in all areas of a client’s life.

^a NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES, A DETERMINATION OF CASELOAD STANDARDS PURSUANT TO § IV OF THE *HURRELL-HARRING V. THE STATE OF NEW YORK* SETTLEMENT (Dec. 8, 2016), *available at* <http://sixthamendment.org/wp-content/uploads/2017/05/Caseload-Standards-Report-Final-full-version3.pdf>.

^b *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010).

The SDO attorneys are handling this excessive number of cases, in addition to their court staffing responsibilities, with the support of only one office manager and two secretaries.²⁰¹ The SDO does not have any paralegals or interns on staff.²⁰² This means that SDO attorneys must themselves devote time to preparing routine paperwork and documents – such as the “gun letters” in firearms cases²⁰³ – that paralegals or interns should be able to prepare at far less cost. Lacking adequate support staff, SDO attorneys personally photocopy discovery for their clients.

The SDO attorneys spend most hours of each work day in court, leaving them with insufficient time to carry out tasks that are critical to effective representation, such as communicating with clients, reviewing the state’s discovery, conducting independent defense investigation, and conducting necessary legal research. This lack of preparation time hampers court processes and denies indigent defendants the effective representation required by the Sixth Amendment.

Although the SDO is appointed by the district courts to represent felony defendants at the time those defendants are arraigned on the complaint, the SDO attorney does not necessarily learn of the appointment in advance of the defendant’s probable cause conference. It is only in very few cases that an SDO attorney will meet with a newly appointed client during the one to two weeks between the defendant’s arrest and the probable cause conference.²⁰⁴ In most instances the SDO attorney and the defendant will meet each other for the first time just minutes before the probable cause conference. In the 36th District, the defendant appears in person in the courtroom, and the SDO attorney can meet briefly with the defendant in person. In the out-county districts, the probable cause conference is typically conducted by videoconference for incarcerated defendants – the defendant is physically located in a room at the jail; the judge, prosecutor, defense attorney, and all court personnel are physically located in the courtroom – and the SDO attorney has an opportunity to speak only briefly and by confidential videoconference to his client before the probable cause conference begins.

Occasionally, SDO attorneys do not learn they have been assigned to a case until the same day they are required to conduct the preliminary examination. Most of the felony defendants who are in jail because they cannot make bond will not meet their SDO attorney in person until the preliminary examination, because, SDO attorneys say,

²⁰¹ See Email from Lynn McLeod, Human Resources Director for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 20, 2017) (on file with Sixth Amendment Center).

²⁰² See *id.*

²⁰³ Defendants can only get sentence reductions on gun charges if they can prove the gun in question was legally owned. To do so, the attorneys must write to the gun board to get a certification that their client legally owned the weapon. Additionally, clients must provide proof of employment, proof of education, and character references. Some SDO attorneys report that prosecutors withdraw plea offers when the attorneys pursue this sentencing option on behalf of their clients.

²⁰⁴ SDO has an internal policy requiring that its attorneys meet with clients in serious cases prior to the probable cause conference.

SYMPTOMS OF A TRIAGE SYSTEM

Many interviewees pointed to SDO's trial rate as proof that the SDO provides effective representation. Based on data contained in the case management system, the trial rate for the office was over 8% in 2017. Of those who could provide us with firm data, every defender had won as many or more trials than he or she lost in the past two years; the cumulative win percentage among these attorneys was 64.62%.

However, such statistics are often symptomatic of a "triage" system that allows public defenders to justify their own practices in the face of excessive caseloads. Dubbed "ethical blindness" nationally, excessive workloads make it difficult for public defenders to realize that they are providing sub-par performance in the vast majority of cases in favor of dedicating more effort to a few "winnable" cases. New England School of Law professor Tigran Eldred has written extensively on the subject:^a

[B]y starting with the premise that most cases will need to be disposed of quickly, lawyers will likely engage in confirmatory and motivated reasoning, unconsciously seeking reasons to justify this pre-determined conclusion. This can happen in a number of ways. For example, the lawyer might overestimate the strength of the evidence against the client or underestimate the value of additional investigation. . . . When the lawyer fails to seek exculpatory material, to interview witnesses or to visit a crime scene – or fails to engage in many other forms of advocacy for a client – the lawyer is essentially confirming the pre-existing belief that no additional work for the client will be helpful. . . . There is a significant chance that the decision to forgo additional work for the client is the product of the type of fast thinking I have described. And then, after the fact the process become self-fulfilling. The lawyer has decided that a quick plea is appropriate without further investigation. So the client is advised to take the plea quickly and the lawyer, laboring under the illusion that the decision was solely the product of rational deliberation, remains convinced of the propriety of the decision – unaware of the subtle psychological forces that conspire to influence the lawyer's behavior.

^a Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333 (2012). For ease of readership, Professor Eldred's quotation is taken from a summarized version of the report done in an interview with 6AC Executive Director, David Carroll. *How Public Defenders Struggle With Ethical Blindness*, SIXTH AMENDMENT CENTER (Feb. 2, 2015), <http://sixthamendment.org/how-public-defenders-struggle-with-ethical-blindness/>.

they simply do not have time to visit clients in jail.²⁰⁵ Judges confirm that incarcerated defendants represented by SDO attorneys frequently say their attorneys did not visit them.

The SDO attorneys receive discovery from the prosecutor's office in stages. One SDO attorney picks up initial discovery packets for new cases from the prosecutor's office every day and brings them back to the office. The SDO attorneys usually receive initial discovery prior to the probable cause conference, though on rare occasions the initial discovery is not available until the preliminary examination.

Following the arraignment on the information, SDO attorneys have to request additional discovery, and they are told to direct their inquiries to various divisions within the prosecutor's office that might have a hand in the case. For example, both the prosecutor's domestic violence unit and criminal sexual contact unit each maintain some of the discovery in domestic violence cases. The SDO attorneys have to navigate the bureaucracy of the prosecutor's office to locate all the discovery in a given case; "hunting down discovery can be really difficult."

Once the SDO attorneys receive discovery from the prosecutor, they must review it. SDO attorneys commonly report that they simply do not have enough time to examine all the documents, photos, audio, and video the prosecution produces; many report receiving dozens – or even hundreds – of gigabytes worth of data in a single case.²⁰⁶ A circuit judge affirms that "it takes time to review new types of evidence that are being developed, such as body camera footage and cell phone location evidence." Lacking adequate technology, the SDO attorneys' computers sometimes cannot display certain media in the digital formats the prosecutors use. Perhaps worse than too much discovery is when important discovery is lost, such as in many serious cases where the prosecution takes weeks or months to bring charges, because footage from police body cameras and 911 calls are deleted every 90 days. This happens frequently in non-fatal shootings, which are common.

The SDO does not have any social workers or investigators on staff to aid the attorneys in conducting independent defense investigation,²⁰⁷ though the existing contract

²⁰⁵ There are three jails in Wayne County: "the Old Jail" and "the Baird Facility" are both right next to the courthouse in downtown Detroit, and "the Dickerson Facility" is in Hamtramck, about a ten- to fifteen-minute drive from the SDO office. There are no restrictions on the hours attorneys can visit clients in person in the jails, and both the Baird Facility and the Dickerson Facility have confidential spaces for attorney-client meetings, but the Old Jail does not. The SDO office has a conference room with four computers that can link to video rooms in the jails; in the Baird and Dickerson Facilities the defendant's side of the conversation is located in a confidential area.

²⁰⁶ SDO attorneys report that the prosecutors regularly turn over the required information, but are far less consistent in turning over any discovery requested beyond the mandatory disclosures. Mandatory disclosures include police reports and witness statements. *See* MICH. CT. R. 6.201.

²⁰⁷ *See* Email from Lynn McLeod, Human Resources Director for SEMASG, to David Carroll, Executive Director of the Sixth Amendment Center (Sept. 20, 2017) (on file with Sixth Amendment

with Wayne County earmarks funds into the Third Judicial Circuit court budget to reimburse the SDO's parent organization for hiring support such as this in cases where approved by the court.²⁰⁸ The SDO attorneys report, "we're not doing any investigation for the preliminary examination." SDO attorneys must request investigators from the court on a case-by-case basis,²⁰⁹ and in those cases where they request an investigator, the request is not made until after a client has been arraigned on the information, which can occur weeks or months after arrest.

Investigators are critical to attorneys' ability to negotiate better plea deals for their clients. Each defense lawyer's ability to fulfill his client's right to effective assistance of counsel during plea negotiations is premised on the attorney having a strong position. The lawyer should not only understand the controlling law, but he should also have completed his analysis of the evidence likely to be introduced at trial. Much of this analysis, even in less serious cases, is aided by the use of investigators. After all, if a valid defense is lost, one that could have been uncovered by the investigator, because the attorney failed to explore the topic in advance, it could hardly be said that the attorney was negotiating the plea arrangements from a position of strength.

By and large, the SDO attorneys only seek investigators in cases they already anticipate will go to trial based on conversations with the client and their experience and research.²¹⁰ Where the court authorizes the SDO to hire an investigator, in most cases that investigator is only appointed a few weeks before the final plea conference, and investigators are paid on a per-event basis but not more than a maximum of \$250 per case for their time and with no reimbursement for out-of-pocket expenses.²¹¹

Some SDO attorneys feel they frequently go into court without adequate background information or case files, but judges expect them to proceed anyway. SDO attorneys

Center).

²⁰⁸ Professional Services Contract between the County of Wayne, Michigan, the Third Judicial Circuit of Michigan, and the Legal Aid and Defender Association, Inc. Appendix B ¶ 2 (eff. Aug. 1, 2016) (on file with Sixth Amendment Center).

²⁰⁹ SDO says it is "very common" that its attorneys request resources for expert witnesses and investigators, while the Third Judicial Circuit reports that the SDO "occasionally makes requests to . . . the presiding judge, for investigators and experts. Experts are requested more frequently than the sporadic requests for investigators." Neither the SDO nor the Third Judicial Circuit could provide records on the number of requests made, the number of approvals, or the associated costs. *See* Email from Richard Lynch, Counsel for the Third Judicial Circuit Court, to David Carroll, Executive Director of the Sixth Amendment Center (Jan. 22, 2018) (on file with Sixth Amendment Center).

²¹⁰ SDO attorneys mostly report that the circuit court judges "readily" grant requests for investigators, but some judges report having never received a single request for investigative assistance. Many judges seem to agree that assigned counsel request investigators more frequently than do SDO attorneys. The court maintains a list of approved investigators. Defense attorneys request a specific person on the list of approved investigators from the judge on the case; the judge decides whether to grant the request. *See* MICH. COMP. LAWS §§ 775.15, 775.13(a) (2017). Prosecutors can – and sometimes do – object to defense requests for investigators.

²¹¹ A defense attorney may petition the presiding judge for extraordinary fees.

report regularly working more than eight hours a day, that their caseloads are “barely manageable,” and that they routinely triage cases with lesser charges to focus on those with greater potential sentences. “In non-capital cases, we’re doing things at the last minute.” While some younger attorneys work hard to avoid triage – staying late most nights of the week – some of the more experienced attorneys seem simply burned out.

CHAPTER IV

RECOMMENDATIONS

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

– Powell v. Alabama, 287 U.S. 45, 68-69 (1932)

The Oxford dictionary defines the word “crisis” as “a time of intense difficulty” when an “important decision must be made.”²¹² The SDO is in financial crisis due primarily to historical underfunding by Wayne County and the State of Michigan. This creates the very situation for which the Sixth Amendment was adopted: government taking away people’s liberty without the process being a “fair fight.” The crisis creates exposure for both Wayne County and the State of Michigan for failing to provide effective representation at all critical stages of a felony case to each and every indigent defendant, as is their duty under the Sixth and Fourteenth Amendments to the U.S. Constitution.

Recommendation #1: The State of Michigan must share the financial burden for providing felony representation in the Third Judicial Circuit.

²¹² *Dictionary*, OXFORD UNIVERSITY PRESS, <https://en.oxforddictionaries.com/definition/crisis>.

Providing the Sixth Amendment right to effective counsel is a state obligation under the due process clause of the Fourteenth Amendment.²¹³ Although the U.S. Supreme Court has never directly considered whether it is unconstitutional for a state to delegate this responsibility to its counties and cities, if a state chooses to place this responsibility on its local governments, then the state must guarantee that the local governments are not only capable of providing adequate representation, but that they are in fact doing so.²¹⁴ The State of Michigan has failed to ensure that Wayne County adequately funds felony representation. Although the state is to be commended for the comprehensive MIDC reforms, those reforms have yet to take root. The ultimate liability remains with the state.

Despite the fact that the Michigan Supreme Court's Administrative Order 1997-5²¹⁵ may be moot because LADA no longer exists as a non-profit law firm that can be appointed on 25% of all felony cases, there is little doubt that the Michigan Supreme Court requires Wayne County to use a public defender office for providing a portion of indigent defense representation. Under this order, a branch of Michigan state government ordered Wayne County to use a public defender system that, although clearly not through the intent of any government entity, became ineffective. For at least part of the time that the SDO has been in financial crisis, the State of Michigan was overseeing Wayne County under a consent agreement allowing the county to avoid bankruptcy. The state's involvement in the provision of indigent defense services within Wayne County is just another reason why the state must be a partner in resolving the organizational deficiencies and severe underfunding of Sixth Amendment representation in the Third Judicial Circuit.

This by no means lets Wayne County off the financial hook. Although the SDO's parent organizations share blame for rarely submitting requests for additional funding from 2001 through 2015, the NLADA report in 2008 stated that felony services were constitutionally inadequate. By the time the MIDC legislation was enacted, Wayne County officials had already flat funded the defender office for more than a decade,

²¹³ Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

²¹⁴ Cf. Robertson v. Jackson, 972 F.2d 529, 533 (4th Cir. 1992) (holding that, although administration of a food stamp program was turned over to local authorities, "ultimate responsibility" . . . remains at the state level"); Claremont School Dist. v. Governor, 794 A.2d 744 (N.H. 2002) ("While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process."); Osmunson v. State, 17 P.3d 236, 241 (Idaho 2000) (holding that, where a duty has been delegated to a local agency, the state maintains "ultimate responsibility" and must step in if the local agency cannot provide the necessary services); Letter and White Paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008), *available at* http://nvcourts.gov/AOC/Committees_and_Commissions/Indigent_Defense/Documents/Miscellaneous/Letter_White_Paper_Regarding_the_Delegation_of_Indigent_Defense_Duties_to_the_Counties/ ("While a state may delegate obligations imposed by the constitution, 'it must do so in a manner that does not abdicate the constitutional duty it owes to the people.'").

²¹⁵ Admin. Order No. 1997-5 – Defenders – Third Judicial Circuit Court (Mich. July 25, 1997).

while its costs rose every single year. The MIDC legislation was designed to ensure that the state share the financial burden for indigent defense that the state is required to provide. Wayne County must continue to pay its local share amount, but the state must also recognize its responsibilities mandated by the legislation.

Recommendation #2: The Michigan Indigent Defense Commission and Wayne County should work together to determine the most effective service delivery model, in consultation with the Third Judicial Circuit Court.

There is no single “cookie-cutter” delivery model that guarantees effective indigent defense services in every jurisdiction. Jurisdictions must tailor the systems they use to meet unique local demands. Therefore, the Michigan Indigent Defense Commission and Wayne County have an opportunity to reimagine how services can most efficiently and effectively be delivered. MIDC and Wayne County should seek the opinions and recommendations of the Third Judicial Circuit Court on how to safeguard the independence of the defense function in ways that do not violate national standards.

INDEPENDENCE CONSIDERATIONS

In the 1979 case of *Ferri v. Ackerman*,²¹⁶ the United States Supreme Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.”²¹⁷ Two years later, the Court observed in *Polk County v. Dodson*²¹⁸ that governments have a “constitutional obligation . . . to respect the professional independence of the public defenders whom it engages.”²¹⁹ Commenting that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court notes in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”²²⁰ *Strickland* goes further still, stating that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”²²¹

²¹⁶ 444 U.S. 193, 204 (1979).

²¹⁷ *Id.* at 204.

²¹⁸ 454 U.S. 312, 321-22 (1981).

²¹⁹ *Id.* at 321.

²²⁰ *Id.* at 318-19, 321.

²²¹ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Of particular concern to the U.S. Supreme Court is the role that trial judges play in the selection, appointment and supervision of defense attorneys. As the Court asked in *Powell*:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.²²²

In other words, it is rarely possible for a judge presiding over a case to properly assess the quality of a defense lawyer’s representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews.²²³ Judges therefore should not be involved in the appointment process, as noted in the ABA *Ten Principles*: “[t]he public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. . . . Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”²²⁴

The private attorney roster system used in the Third Judicial Circuit and the district courts within Wayne County was not the subject of this evaluation. That system, though, was part of the 2008 NLADA report²²⁵ that found indigent representation services in Wayne County to be constitutionally deficient and subject to undue judicial influence.²²⁶ During this evaluation, many people lamented this system that they referred to as “pay to play,” explaining that some private attorneys donate to some judges’ re-election campaigns and take them to lunch or dinner, in return receiving the

²²² *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

²²³ That is not to say a judge cannot provide sound feedback on an attorney’s in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge’s opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just that the judge’s in-court observations of a defense attorney cannot comprise the totality of supervision.

²²⁴ TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM § 1 cmt. (AM. BAR ASS’N 2002).

²²⁵ NATIONAL LEGAL AID & DEFENDER ASS’N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 2 (2008).

²²⁶ MIDC’s proposed Standard 5 seeks to “ensure that indigent criminal defense services are independent of the judiciary,” by requiring that “[t]he selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary.” MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES § 5 (MICH. INDIGENT DEFENSE COMM’N), <http://michiganidc.gov/standards/#tab-id-5> (last visited Feb. 20, 2018) (proposed).

favor of paying appointments and often the more lucrative ones. We were also told that many of the circuit court judges are moving to reject the pay-to-play system.²²⁷

MIDC and Wayne County presently have the opportunity to redesign the private attorney roster system, in addition to the public defender office component, to ensure independence of the entire defense function. Similarly, while this evaluation focused on felony representation, in their decision-making the MIDC and Wayne County should also consider their systems for providing misdemeanor and juvenile delinquency indigent representation.

Other considerations include:

- The American Bar Association states that wherever there is a sufficiently high caseload, the public defense delivery system should consist of both a public defender office and the active participation of the private bar, as Wayne County has done for many years. Further, MIDC proposed Standard 8 recommends both the “active participation of a robust private bar” and “an indigent criminal defender office where assignment levels demonstrate need.”²²⁸ MIDC and Wayne County must decide whether it is best to: create a government agency public defender office; continue to contract with the SDO’s non-profit parent organization; or contract with one or more other non-profit organizations.²²⁹
- Assuming the continuation of a public defender model, MIDC and Wayne County will need to determine how cases will be allocated between the private attorney roster and the other chosen system.
- MIDC and Wayne County must decide whether to create a single organization to oversee both the public defender system and the private attorney roster, or keep the oversight of these functions separate.

Recommendation #3: Sixth Amendment indigent defense services in Wayne County must be adequately funded to provide effective representation.

²²⁷ “Indeed, the Third Judicial Circuit is in the process of implementing a new random draw assignment system for private bar attorneys. See LAO 2017-04, rescinded pending infrastructure implementation.” Email from Richard Lynch, Counsel for the Third Judicial Circuit Court, to David Carroll, Executive Director of the Sixth Amendment Center (Feb. 19, 2018) (on file with Sixth Amendment Center) (discussing review of draft report).

²²⁸ MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES § 8 (MICH. INDIGENT DEFENSE COMM’N), <http://michiganide.gov/standards/#tab-id-8> (last visited Feb. 20, 2018) (proposed).

²²⁹ The Washington Supreme Court affirmed a lower court’s determination that employees of non-profit public defender agencies in King County (Seattle) should be considered county employees for purposes of participating in the public employee retirement fund because the level of control that the County imposed on the non-profits. *Dolan v. King County*, 258 P.3d 20, 33 (2011). The burden of the cost of the state retirement fund prompted King County not to renew contracts with four non-profit defender law firms in favor of making all of their attorneys government employees working for a new department of public works.

Michigan statutes allow MIDC to take over the administration of indigent defense services in Wayne County (and to charge back a percentage of costs to the county).²³⁰ MIDC must determine whether the county is presently capable of providing indigent defense representation in compliance with the MIDC standards or whether the MIDC must take over the provision of representation. In any event, indigent defense in Wayne County needs to be adequately funded.

Given the many decisions that state and county authorities must make about how Sixth Amendment representation will be provided to indigent people, it is not possible at this point to develop a definitive and comprehensive budget. To begin that conversation, however, a budget and budget narrative are presented below that assume a reorganized State Defender Office, under contract with the state or county, will be appointed to 25% of indigent felony cases. Once a delivery model is chosen, a more detailed budget must be developed. All assumptions are detailed below and it is fair to challenge any of those assumptions. This is offered simply as a benchmark to show the influx of resources likely needed to ensure that each and every indigent felony defendant receives effective representation. To be clear, this proposal indicates what the state and county must provide, *aside from any measures taken to comply with MIDC standards*, just to ensure the minimum level of effective representation required under the Sixth Amendment.

PERSONNEL

For 2017, the Third Judicial Circuit reports that 3,469 new appointments were made to the SDO (intended to represent roughly 25% of indigent felony cases); this does not take into consideration the number of pending cases still handled by SDO attorneys from previous years' appointments. Because national workload standards are based on the number of cases handled in a year, this budget takes as its basis the number of closed cases reported by the SDO and rounded to 5,000 for ease of budgeting.²³¹

Attorneys

The NAC Standards are nationally recognized as the absolute upper limit of cases that a defense attorney can be expected to handle and still provide effective, zealous representation to each and every client. For felony cases, the NAC Standards prescribe that attorneys should handle no more than 150 in a single year.²³² The SDO needs

²³⁰ See MICH. COMP. LAWS § 780.995(7) (2017).

²³¹ SDO reports 5,017 closed cases for 2016, the last year for which comprehensive data is available. For ease of budgeting, we rounded that number to 5,000. MJCSM/SDO, TOTAL CASELOAD ASSIGNED IN 2016 (draft on file with Sixth Amendment Center).

²³² NATIONAL ADVISORY COMM'N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense) § 13.12 (1973). The MIDC has authority to conduct a statewide workload study that could more accurately determine appropriate caseloads for indigent defense attorneys in Michigan, but it has not yet performed such an analysis. Thus, the NAC Standards are used in this analysis, but may reflect a higher caseload than is appropriate for felony defenders in Wayne

approximately 33 attorneys carrying a full caseload (5,000 cases/150 per attorney = 33.33 attorneys) to meet this standard. SDO currently has just 13 non-supervisory attorneys.

Chief Attorney & Supervising Attorneys

The SDO designates two staff members as supervising attorneys. Despite this, there is currently an absence of institutionalized supervision at the SDO. The SDO supervisors have an “open door” policy for younger attorneys seeking guidance, however, there is little to no proactive supervision aside from an aspirational, if irregular, semi-annual review of case files. Young attorneys are simply expected to come to the more experienced attorneys with questions and concerns. Supervisors occasionally sit in as second-chair for the first few trials a new SDO attorney has.²³³ Outside of second-chairing these trials, SDO supervising attorneys do not regularly conduct court observations, review case files, or seek feedback from judges regarding the performance of SDO attorneys in court.

In fact, due to the demands placed on the office, the current supervising attorneys each carry high caseloads that themselves violate national standards, without even considering their time spent supervising. The Chief Defender and both supervising attorneys carry full caseloads, rendering comprehensive supervision difficult if not impossible.

National standards require one supervising attorney for every 10 attorneys carrying a full caseload.²³⁴ Therefore SDO needs three supervising attorneys, in addition to the chief defender.

Training Director

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.²³⁵ Specialties must be developed. Just as

County. The 150 per year felony caseload is used for illustrative purposes only and in accordance with proposed MIDC Standard 6. MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES § 6 (MICH. INDIGENT DEFENSE COMM’N), <http://michiganidc.gov/standards/#tab-id-6> (last visited Feb. 20, 2018) (proposed).

²³³ We were told that second-chairing trials became a standard practice only recently. In years past, SDO attorneys would only receive a second chair for their first trial.

²³⁴ GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (NAT’L STUDY COMM’N ON DEFENSE SERVS. 1976) (“Proper attorney supervision in a defender office requires one full-time supervisor for every ten staff lawyers, or one part-time supervisor for every five lawyers.”).

²³⁵ Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) (“The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be

you would not go to a dermatologist rather than a heart surgeon for heart surgery, despite both doctors being licensed practitioners, a real estate or divorce lawyer cannot competently represent a defendant facing a felony case. Criminal defense is an especially complex specialty area of law.

All national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,²³⁶ require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,²³⁷ at which attorney attendance is compulsory, in order to maintain competence from year to year. Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider does not have the “knowledge and experience to offer quality representation to a defendant in a particular matter” then the attorney is obligated to move to withdraw from the case, or better yet to refuse the appointment at the outset.²³⁸ Ongoing training, therefore, is an active part of the job of being a public defense provider.

Currently, one SDO attorney is responsible for training all new hires. Like the supervisors, the training attorney carries a full caseload. SDO has no training or

considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”)

²³⁶ Building upon the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration (DOJ/LEAA) appointed the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMM’N ON CRIM. JUST. STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense) (1973).

²³⁷ *Id.* at § 13.16 (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

²³⁸ *Id.*; see also PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.2(b) (NAT’L LEGAL AID & DEFENDER ASS’N 1995) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.”); PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.3(a) (NAT’L LEGAL AID & DEFENDER ASS’N 1995) (“Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”). The requirement of public defense lawyers to decline or withdraw from cases, rather than provide incompetent representation, is reflected in MICH. R. PROF. CONDUCT 1.16(a)(1).

procedural manual for attorneys. There are no formalized programs for developing trial skills or legal writing.²³⁹ MIDC and Wayne County should require the SDO to have a full-time attorney designated to developing a formalized training program for new hires. Training should cover, at a minimum: client communications; negotiation; mitigation; forensics; evidence; case processes; bail arguments; discovery; investigation; voir dire; trial skills; and updates on changes to the applicable laws.

Attorney compensation

Compensation projections are based on comparable positions in other Wayne County departments. If a comparable position was not identified, salary projections are based on the authors' collective national experience.

The Chief Defender's salary is projected at \$122,550.00, equivalent to that of the Assistant Chief Corporation Counsel for Wayne County.²⁴⁰ In accord with MIDC's proposed Standard 8,²⁴¹ supervisor and line attorney salaries are budgeted to compensate attorneys of varying experience levels within the range of salaries paid to Michigan assistant attorneys general.²⁴² The average salary of the line attorneys would

²³⁹ The SDO attorneys reported varying experiences in their first few days and weeks on the job. Often, attorneys with no prior criminal law experience start by observing, then conducting, preliminary examinations mostly on low-level felonies. Attorneys with some criminal law experience might start on arraignments or sentencing hearings. After handling preliminary hearings or sentencing hearings for a week or two, the new-to-the-office attorneys progress to more complex processes and case types. For more senior attorneys, ongoing training essentially consists of keeping them up to date on changes in statutory law and case law.

The Criminal Advocacy Program (CAP) provides training to all attorneys appointed to indigent defendants in the Third Judicial Circuit. CAP runs 13 programs throughout the year, on topics such as trial skills, evidence, cross-examination, and homicide cases. CAP also conducts case law and statutory law updates. Attorneys with less than 10 years of experience – both those on the assigned counsel rotation and in the SDO – must complete 12 hours of training each year to continue to receive assignments. Attorneys with 10 or more years of experience must complete six hours of CAP training annually. But many current and former SDO attorneys opined that the CAP program, standing alone, is not sufficient to train a new lawyer in everything needed to be a successful advocate.

²⁴⁰ *Appointee Salaries for Wayne, Oakland, Macomb, Detroit Governments*, Detroit Free Press (Mar. 1, 2016), available at <https://www.freep.com/story/news/2016/03/01/government-appointees/81148752/?appSession=31L42PE2FWY2R8778JPZ48C2E3W6LVO3KQ82G53Z395HXP7R95EAX69V0WJ2OC9J6155228ZH7C5F94U8EO1JY61R5I0XV5QE327N5P117KU04BYVHTPC53Z8LG8RF01> (select "Wayne County," then click "Search").

²⁴¹ MIDC proposed Standard 8 requires that counsel be adequately compensated for representing indigent defendants. MINIMUM STANDARDS FOR INDIGENT CRIMINAL DEFENSE SERVICES § 8 (MICH. INDIGENT DEFENSE COMM'N) <http://michiganidc.gov/standards/#tab-id-8> (last visited Feb. 20, 2018) (proposed). Salaried criminal defense attorneys working in an office should earn rates equivalent to special assistant attorneys general or attorneys in other state offices. *Id.* For private attorneys providing representation to the indigent, the MIDC has calculated minimum hourly rates of \$110 for non-capital felonies and \$120 for felonies where a life sentence is possible, adjusted annually, to provide for both compensation and the overhead necessary to run a law office. *Id.*

²⁴² *See Job Specifications*, MICH. CIVIL SERVICE COMM'N, <https://civilservice.state.mi.us/MCSCJobSpecifications/JobSpecMain.aspx> (last visited Feb. 20, 2018) (AAGs are classified as civil service staff attorneys in Michigan). AAGs earn between \$26.21 and \$49.33 per hour; an annual salary

be \$63,609.88, which is less than the midpoint of the Wayne County Prosecutor's Assistant II scale.²⁴³ In total, attorney salary costs for all 38 attorneys are projected to be \$2,633,993.

Investigators

National standards require one investigator for every three staff attorneys, with one designated to be a lead/supervising investigator.²⁴⁴ This means the public defense system needs 11 investigators.²⁴⁵ Investigators are expected to have at least a college degree. To account for experience differentials, the budget proposes three tiers of investigators. One lead/supervising investigator's salary is set at \$70,000; three senior investigators are projected at a salary of \$47,250 annually; and seven junior investigators are projected to earn \$35,000 per year. In total, annual investigator salaries are projected to be \$456,750.

Social workers

Currently, the lack of social work assistance adversely affects the SDO attorneys' ability both to obtain pre-trial release for their clients and to advocate more effectively at sentencing. Many defender offices throughout the country use social workers to augment the work of public defenders in a holistic approach to representing clients. Social workers can develop plans to provide personalized rehabilitative support that addresses pivotal aspects of offenders' lives such as addiction, physical health, mental health, housing, education, employment, family, and other issues. The presence of social workers can improve the client's successful function in the community and reduce recidivism.

As with investigators, national standards call for one social worker for every three attorneys.²⁴⁶ SDO requires 11 social workers, with one designated as a supervising social worker. Using the same salary schedule as for investigators, total social worker salaries are projected to be \$456,750.

range of \$54,080 - \$104,000. *Id.*

²⁴³ See Wayne County Department of Personnel/Human Resources, General Schedule of Approved Pay Rates September 08, 2017) (on file with Sixth Amendment Center).

²⁴⁴ GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (NAT'L STUDY COMM'N ON DEFENSE SERVS. 1976) ("Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.").

²⁴⁵ An effective public defender office typically requires investigation in approximately 30-35% of its felony cases. That would mean SDO, with 5000 cases per year, would refer approximately 1500-1750 cases to its staff investigators, who would each handle on average up to 159 cases per year.

²⁴⁶ NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES § VII.F, available at <http://www.nlada.org/defender-standards/model-contract/black-letter> (last visited Jan. 22, 2018).

Paraprofessionals and other support staff

National standards require one paralegal for every four staff attorneys.²⁴⁷ This means SDO needs eight paralegals, with one designated as a supervisor (paid \$55,000 annually). Two senior paralegals are projected to earn \$41,000 per year, and five junior paralegals are projected to have annual salaries of \$33,000.

National standards require one legal secretary for every six attorneys,²⁴⁸ so SDO will require 5.5 such positions. Because of the changing nature of the work of secretaries, this budget includes data entry clerks and receptionists all under the general category of legal secretaries. Each is projected to earn \$28,000 per year.²⁴⁹ Total annual support staff salaries are projected at \$442,000.

Non-Attorney Administration

Finally, the SDO must be supported by two positions managing the day-to-day office operations. The chief financial officer will oversee all financial planning, accounting, and budgeting operations and is projected to be paid \$70,000. An office manager is to be paid at \$58,000 per year to oversee clerical and data entry staff and to provide human resource support.²⁵⁰ Total non-attorney administrative salaries are projected to be \$128,000.

In total, projected annual salaries for all personnel is \$4,117,493. The SDO's current fringe benefit rate is 55.8% of salaries; this rate is high, in part because of the inadequacy of the current salaries. The recommended budget uses a fringe benefit rate of 33%, which is an approximate standard for a public law office. Any reduction in fringe benefits would result in more costs borne by the staff, but would be offset in part by salaries more commensurate with the professional nature of the work. Fringe benefits are projected at \$1,358,772.69. The final personnel costs are therefore estimated at \$5,476,265.69.

²⁴⁷ U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE PUB. NO. NCJ185632, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001).

²⁴⁸ NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES § VII.F, available at <http://www.nlada.org/defender-standards/model-contract/black-letter> (last visited Jan. 22, 2018)

²⁴⁹ The secretary salary estimate is approximately 90% of the salary an appointed Office Worker earns in the Wayne County Department of Homeland Security and Emergency Management. See *Appointee Salaries for Wayne, Oakland, Macomb, Detroit Governments*, DETROIT FREE PRESS (Mar. 1, 2016), available at <https://www.freep.com/story/news/2016/03/01/government-appointees/81148752/?appSession=31L42PE2FWY2R8778JPZ48C2E3W6LVO3KQ82G53Z395HXP7R95EAX69V0WJ2OC9J6155228ZH7C5F94U8EO1JY61R5I0XV5QE327N5P117KU04BYVHTPC53Z8LG8RF01> (select "Wayne County," then click "Search," navigate to page 6).

²⁵⁰ The office manager salary is similar to salaries for executive assistants in the county government. See *Appointee Salaries for Wayne, Oakland, Macomb, Detroit Governments*, DETROIT FREE PRESS (Mar. 1, 2016), available at <https://www.freep.com/story/news/2016/03/01/government-appointees/81148752/?appSession=31L42PE2FWY2R8778JPZ48C2E3W6LVO3KQ82G53Z395HXP7R95EAX69V0WJ2OC9J6155228ZH7C5F94U8EO1JY61R5I0XV5QE327N5P117KU04BYVHTPC53Z8LG8RF01> (select "Wayne County," then click "Search," navigate to page 5).

PERSONNEL		SALARY	NUMBER	TOTAL
Attorneys	Chief Public Defender	\$122,550.00	1	\$122,550.00
	Training Director	\$102,148.00	1	\$102,148.00
	Supervising Attorney	\$102,148.00	3	\$306,444.00
	Senior Attorney (Tier I)	\$84,728.00	3	\$254,184.00
	Senior Attorney (Tier II)	\$72,888.00	4	\$291,552.00
	Attorney (Tier I)	\$68,000.00	7	\$476,000.00
	Attorney (Tier II)	\$62,145.00	4	\$248,580.00
	Attorney (Tier III)	\$56,972.00	10	\$569,720.00
	Attorney (Tier IV)	\$52,563.00	5	\$262,815.00
<i>Sub-Total</i>				<i>\$2,633,993.00</i>
Investigators	Lead Investigator	\$70,000.00	1	\$70,000.00
	Investigator (Tier I)	\$47,250.00	3	\$141,750.00
	Investigator (Tier II)	\$35,000.00	7	\$245,000.00
<i>Sub-Total</i>				<i>\$456,750.00</i>
Social Worker	Lead Social Worker	\$70,000.00	1	\$70,000.00
	Social Worker (Tier I)	\$47,250.00	3	\$141,750.00
	Social Worker (Tier II)	\$35,000.00	7	\$245,000.00
<i>Sub-Total</i>				<i>\$456,750.00</i>
Support Staff	Lead Paralegal	\$55,000.00	1	\$55,000.00
	Paralegal (Tier I)	\$41,000.00	2	\$82,000.00
	Paralegal (Tier II)	\$33,000.00	5	\$165,000.00
	Legal Secretary	\$28,000.00	5	\$140,000.00
<i>Sub-Total</i>				<i>\$442,000.00</i>
Administration	Office Manager	\$58,000.00	1	\$58,000.00
	Chief Financial Officer	\$70,000.00	1	\$70,000.00
<i>Sub-Total</i>				<i>\$128,000.00</i>
Total Salaries				\$4,117,493.00
Benefits (calculated at 33% of Salaries)				\$1,358,772.69
TOTAL PERSONNEL				\$5,476,265.69

Expenses

As detailed earlier, the SDO's current rent cost is excessive at \$464,013 (or \$23,200.65 per staff person). This projection uses a more conservative rate of \$25 per square foot charged against 200 square feet per staff (or \$5,000 per staff member). This results in an annual rent of \$375,000 ($\$25/\text{ft}^2 \times 200\text{ft}^2 \times 75 \text{ staff}$).

The SDO's current rate for electronic legal research (Westlaw) is \$1,500 per attorney per year. This too seems excessive, as estimates from other large, urban public defender offices of the same projected size suggest that licenses could be obtained for about \$350 per lawyer. With a total of 38 lawyers (33 staff attorneys, plus five administrative and supervising attorneys), this is an annual cost of \$13,300.

Other expenses are estimated based on the current SDO levels or the authors' experiences in other jurisdictions. The county and state should explore options for many of these rates by soliciting bids from different vendors. Items that may potentially be procured for less than the budget estimate include telephones, insurance, information technology consulting, equipment maintenance, and case management software. Other budget expense assumptions are:

- Student loans repayment is allocated at the same \$15,000 amount as under the current SDO budget;
- \$12,000 is allocated for auditing purposes, representing an increase of \$2,000 over the current SDO budget;
- Payroll fees have been tripled from current SDO levels in light of the increase in staff from 19 to 75;
- Information technology support is the same \$90,000 as currently allocated;
- Deductibles for insurance claims are estimated at the same \$4,000 allocated under the current SDO budget;
- \$30,000 is budgeted for equipment maintenance and repair, reflecting twice the amount in SDO's current budget;
- The cost for telephones in the proposed budget is the same as SDO's current expense, because while the current per attorney rate of \$625 per year seems high, even at a more reasonable rate the total cost is likely to be equal or higher with more staff;
- Postage is calculated to allow for five first-class letters per case and an additional 500 letters;
- The books budget allows for each attorney to have a print copy of the Michigan Court Rules and Rules of Evidence;²⁵¹
- The mileage estimate allows for 35 attorneys driving 160 miles per month and 22 investigator and social worker staff driving 100 miles per month (compensated at the General Services Administration rate of \$0.545 per mile);
- Conference/training funds, office supplies, and miscellaneous expenses are each budgeted at \$200 per staff person;
- Computer supplies are budgeted based on the current SDO spending of \$125 per staff, but an additional software licenses (i.e., Microsoft Office, etc.) budget item is included at \$150 per staff;

²⁵¹ *Michigan Court Rules and Rules of Evidence*, INSTITUTE OF CONTINUING LEGAL EDUCATION http://www.icle.org/modules/store/books/book.aspx?PRODUCT_CODE=2016555621 (last visited Feb. 20, 2018).

- Case management software is estimated based on the rate charged by Defender Data of \$2 per case;²⁵²
- Professional liability insurance is calculated at the existing SDO budget amount, although this seems high for attorneys who provide only criminal defense representation;
- The property insurance rate is based on the rate currently paid by the SDO but applied to the larger office area needed for the increase in staff;
- Bar and other legal association membership dues are calculated at \$500 per attorney;
- Professional memberships for social workers, investigators, and paraprofessionals are calculated at \$30 per person; and
- The monthly parking rate is based on the existing per-staff rate of \$378 per month, with an allowance of 75 staff parking spaces.

In total, annual overhead is projected to be \$835,383. Notably, the overhead budget estimate contains no allocation for administrative costs; SDO is currently charged \$292,231 annually for administrative fees, but under the proposed budget salaried staff will provide these services.

Of course, expanding the size of the SDO staff will require a one-time capital outlay. One-time capital costs to expand the office and upgrade existing equipment, including computers and cell phones for all staff, are estimated to be approximately \$228,300.

NON-PERSONNEL EXPENSES		RATE	#	TOTAL
Overhead	Westlaw (38 licenses)	\$350.00	38	\$13,300.00
(Annual)	Student Loans Repayment	\$15,000.00	1	\$15,000.00
	Audit	\$12,000.00	1	\$12,000.00
	Payroll Fees	\$4,500.00	1	\$4,500.00
	IT Staff or Consulting	\$90,000.00	1	\$90,000.00
	Legal Fees	\$4,000.00	1	\$4,000.00
	Equipment Maintenance/Repair	\$30,000.00	1	\$30,000.00
	Rent	\$375,000.00	1	\$375,000.00
	Telephone	\$25,000.00	1	\$25,000.00
	Postage	\$13,230.00	1	\$13,230.00
	Books	\$2,257.00	1	\$2,257.00
	Mileage	\$51,012.00	1	\$51,012.00
	Conferences/Training	\$11,800.00	1	\$11,800.00
	Office Supplies	\$14,000.00	1	\$14,000.00
	Computer Supplies/Licenses	\$10,750.00	1	\$10,750.00

²⁵² Email from Carl Richey, Justice Works (producer of DefenderData software), to Bob Boruchowitz, Seattle University School of Law (Nov. 9, 2017) (on file with Sixth Amendment Center).

NON-PERSONNEL EXPENSES		RATE	#	TOTAL
	Printing	\$3,000.00	1	\$3,000.00
	Software Costs "Office 365"	\$10,500.00	1	\$10,500.00
	Case Management Software	\$10,000.00	1	\$10,000.00
	Professional Liability	\$32,634.00	1	\$32,634.00
	Property Insurance	\$45,000.00	1	\$45,000.00
	Dues (bar and nat'l ass'n)	\$500.00	38	\$19,000.00
	Professional Membership (support)	\$30.00	35	\$1,050.00
	Monthly Parking	\$28,350.00	1	\$28,350.00
	Miscellaneous	\$14,000.00	1	\$14,000.00
<i>Sub-Total</i>				\$835,383.00
Capital	One-time costs to expand office			
	Laptops	\$1,400.00	75	\$105,000.00
	Furniture	\$1,200.00	59	\$70,800.00
	Printer/Copier	\$5,000.00	3	\$15,000.00
	Cell Phones	\$300.00	75	\$22,500.00
	Incidentals	\$15,000.00	1	\$15,000.00
<i>Sub-Total</i>				\$228,300.00
TOTAL EXPENSES				\$1,063,683.00

The final annual budget (personnel, fringe, and overhead) is \$6,311,649 – approximately three times the SDO’s current budget – plus one-time capital costs of \$228,300.

“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”

– Gideon v. Wainwright, 372 U.S. 335 (1963)

