From Rep. McMillin

Rick Snyder
Governor

The Honorable Rick Snyder
Governor

The Honorable Randy Richardville
Michigan Senate

The Honorable James Bolger
Michigan House of Representatives

Dear Sirs:

The Indigent Defense Advisory Commission has completed its work, ahead of schedule, and has issued the attached report. We all appreciated the opportunity to serve our state in this important endeavor.

The Commission was a very diverse group representing all major stakeholders on this issue, and our members hold a wide range of political views. However, the Commission was unanimous in acknowledging the importance of the 6th Amendment Right to Counsel as a bedrock value of our criminal justice system, and we all believe that our current system of indigent defense could be improved.

Ensuring competent and fairly compensated defense attorneys for all persons accused of a crime is a very difficult issue, and problems in this area have been recognized by a number of groups that have previously studied indigent defense systems in Michigan. We believe that our core recommendation that an independent and permanent Indigent Defense Commission, with authority to establish and enforce minimum standards for indigent defense across the state, represents a practical way to begin to address the problems that have been identified in this area. It is also consistent with the dual goals of maintaining local control and responsibility, while making sure that all areas of our state provide adequate indigent defense services.

I would like to acknowledge the time, effort, and cooperation by the members of the commission. It has been gratifying to work with them, and we could not have completed our task on time without their dedication. It is our hope that the legislature will see the importance of adopting these recommendations, and we know that our great state can provide better and more effective

representation for those charged with crimes in the future.

Very Truly Yours,

James Fisher
Chairman, Michigan Advisory Commission on Indigent Defense

Report of the Michigan Advisory Commission on Indigent Defense

June 22, 2012

OVERVIEW

Governor Rick Snyder signed Executive Order 2011-12 on October 13, 2011 establishing the Michigan Advisory Commission on Indigent Defense. The Commission was charged with the following responsibilities:

A. "The Commission shall analyze existing data that is needed to assist policymakers in making decisions on the appropriate funding and staffing levels to ensure effective public criminal defense services.
B. The Commission shall make recommendations to the Governor and the Legislature for improvements to the system of providing legal representative for indigent criminal defendants, as follows:
    1. The improvements must be fiscally responsible, cost-effective, and take into account the current economic conditions of the state and local units of government.
    2. The improvements must be responsive to jurisdictional variances and local community needs.
    3. The improvements must ensure that indigent defense is free from undue political interference and conflicts of interest.
    4. The improvements must seek to ensure that the right to counsel is delivered by effective counsel at each critical stage of the proceedings in a manner that is consistent throughout the state.
    5. The improvement must aspire to ensure that government-funded criminal defense attorneys are sufficiently trained and supervised, appropriately qualified, and adequately compensated."

Members of the commission were appointed by the Governor with terms expiring December 2012 and they served at the pleasure of the Governor: James Fisher (Chairman), The Honorable Thomas Boyd, The Honorable Colleen O'Brien, The Honorable Bruce Caswell, The Honorable Bert Johnson, The Honorable Tom McMillin, the Honorable Ellen Cogen Lipton, John Shea, Ronald Schaefer, Andrew Richner, Maggie Jones, Judith Gracey, Michael Brown, and Suzanne Sareini.

ANALYSIS

The Commission extensively reviewed a variety of existing data, resources and viewpoints from within and outside of Michigan. Additionally, Chairman James Fisher convened two subcommittees to consider policy and finance.

In June 2008, the National Legal Aid & Defender Association issued a report at the behest of the Michigan Legislature in which the Association concluded that Michigan ranked, when compared with all states, both with and without capital punishment, to be 44th in per capita spending on indigent defense representation. David J. Carroll, the Director of Research and Evaluation for the NADLA at the time of the report, was invited to and did speak before the Commission and participated in subcommittee meetings in an advisory capacity.

The commission undertook a survey of all of the State Court Administrative Office, the administrators, and the Chief Judges of each Michigan Circuit and District Court to obtain data regarding their individual local, indigent defense systems.

In January of 2012, the Commission invited Peter Ozanne of the Crime and Justice Institute and Nancy Cozine of Oregon's Office of Public Defense Services to present to the commission the evolution of Oregon's indigent defense system. The Commission next invited Frank X. Neuner of the Louisiana Public Defender Board and Laborde & Neuner to report on the State of Louisiana's reformation of the criminal indigent defense system in the past decade. The information presented was informative on budget, administrative, and legislative policy issues.

Data on file with the State Court Administrator's Office provided statistical data on spending per Circuit Court and District Court.

The public was invited and encouraged to testify. Data and opinion was presented by the Michigan State Bar, the Michigan Judges Association, the Michigan District Judges Association, the State Appellate Defender Office, Criminal Defense Association of Michigan, the Michigan Prosecuting Attorneys Association of Michigan, the Campaign for Justice, the Kent County Public Defender's Office, Michigan Council on Crime and Delinquency, Oakland County Court Administrator, Michigan Association of Counties, the Bay County Public Defender's Office, the National Association of Black Lawyers, the University of Michigan Innocence Clinic, the Legal Aid and Defender Association, Inc., the Chippewa County Public Defense Office, the American Civil Liberties Union, the Michigan Council of Professional Investigators, Wayne County Prosecutor's Office, the Wayne County Criminal Defense Association, the Washtenaw County Public Defender, and the Michigan Catholic Conference, among others.

The following are the Commission's Findings and Recommendations that were the result of this analysis.

FINDINGS

1. Article I, Section 24 of the Michigan Constitution provides that victims of crime have the right to the "timely disposition of the case following the arrest of the accused."

2. Article I, Section 20 of the Michigan Constitution provides that people accused in criminal prosecutions have the right "to have the assistance of counsel for his or her defense." In accordance with the state's obligation under the Sixth and Fourteenth Amendments of the United States Constitution, a competent attorney shall be appointed to all people facing a potential loss of liberty in a criminal prosecution who cannot without substantial hardship afford private counsel.

3. Accordingly, it is the obligation of the state to ensure that criminal trials are fair and accurate, and that the results are swift and final. This *must* be the case not only for the victim and the accused in a particular crime, but for all of us for whom the courts are the bulwark of a safe, secure and fair society.

4. To achieve that aim it is the obligation of the state to ensure for the general framework and the resources necessary to provide for the delivery of public defender services in this state. The state of Michigan has historically delegated its responsibilities under the United States and Michigan constitutions to local funding units. 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. It is the state's obligation to ensure that local funding units meet the constitutional obligations.

5. Nothing in the Commission's work should be construed to overrule, expand, or extend, either directly or by analogy, the decision reached by the United States Supreme Court in Strickland v. Washington, 466 US 688 (1984), nor its progeny adopted by the Michigan Supreme Court.

6. The obligation to provide counsel to indigent defendants belongs to the State, not the counties. However, Michigan's history has been to leave it to the counties to meet this State obligation. The result has been an uncoordinated, 83-county patchwork quilt of service delivery systems, with each county's "system" dependent on its own interpretation of what is adequate and on its own funding availability.

7. At present, there are no promulgated state-wide standards for defining and ensuring constitutionally adequate defense counsel for indigent defendants. Therefore, the counties have had no regulatory guidance as to what their service delivery systems should provide.

8. As a direct result of Finding 6 and Finding 7, the availability, quality, and funding resources of county-provided indigent defense services at the trial level varies greatly across the State.

9. The American Bar Association has developed a set of standards for providing trial-level indigent defense services, entitled "Ten Principles of a Public Defense Delivery System," a copy of which are attached. While indigent defense systems have been studied by many and for many years, the ABA Ten Principles is a concise statement of minimum standards required for operation of such a system consistent with the United States Constitution.

10. In June 2008, a study by the National Legal Aid and Defender Association (NLADA) of trial-level indigent defense services, commissioned by the Legislature of 10 counties chosen by a legislator-convened advisory group, found that none of those counties met these minimum standards. While some persons providing testimony before the Commission defended their own local systems, on balance the testimony presented to the Commission from Michigan indigent defense practitioners, judges, and prosecutors (including those defending their own systems) confirmed that the ABA Ten Principles are not met in Michigan.

11. Common examples of the ways in which these minimum standards are not met include local systems that are not independent of the judiciary, that do not control for attorney workload, and that do not match an attorney's training and experience to the nature and complexity of the case. Additionally, few local systems of which the Commission was made aware required continued legal education of its defense attorneys or systems to evaluate performance. Finally, a uniform complaint was that the local systems were significantly underfunded.

12. The NLADA study found that Michigan ranked 44th out of the 50 states in terms of per capita funding for trial-level indigent defense services, with its per capita spending on such services 38% less than the national average, at approximately $74,000,000. Testimony presented to the Commission indicated that Michigan's indigent defense service delivery system is significantly underfunded. Further, the underfunding is pervasive, meaning it impacts all aspects of the defense function. It would require additional support of nearly $50,000,000 to bring our state up to the national average. Currently, only 3 of our 57 circuit courts supports indigent defense at or above the national average, and many provide only a fraction of the national average.

13. The Commission finds that Michigan should create a system that requires and ensures full, consistent, and state-wide implementation of those minimum standards, and adequate funding authorized by the Legislature for that system.

14. In furtherance of Finding 13, the Commission finds that a new and independent State agency, governed by a permanent Commission, is necessary, which agency's and Commission's mission would be to promulgate and enforce standards applicable statewide for providing trial-level indigent defense services consistent with the ABA Ten Principles.

15. The Commission's study was limited to trial-level indigent defense services for crimes charged in the adult system. However, at various times issues arose regarding defense services for indigent persons charged in the Michigan's juvenile system. The Commission finds that an assessment of the juvenile defense system, which has a distinctly different structure and purpose than adult courts, is needed to ensure that the constitutional rights of Michigan's youngest citizens are upheld, and recommends that the Governor appoint a separate study commission focused on that system.

16. The Commission did not consider and does not recommend changes to the Appellate Defender Act or the infrastructure of the appellate defense delivery system.

17. The State Bar of Michigan has adopted and endorses the ABA Ten Principles as its own. In addition, the SBM has adopted an 11th Principle which calls for "defender offices," to "explore and advocate for programs that improve the system and reduce recidivism." The Commission finds that Michigan's indigent defense system should, in some meaningful way, incorporate this principle within the mission of the State agency that the Commission recommends be created.

18. The Commission finds that criminal defense interests are often unrepresented in statewide criminal justice policy and planning bodies created by the courts, legislature and executive. Criminal justice system policy-making bodies should include criminal defense representatives, to ensure more representative results.

19. The Commission finds that there is a lack of quality, consistent data collection for indigent defense across the state. Data is an essential component to a transparent system; it ensures that the state is accountable to citizens for the use of their tax dollars and helps identify where the problems may exist. The new commission will serve as the centralized data collector and will ensure that standardized data from each county is collected. Current data varies so much that it has not been useful to report caseloads or other information.

20. The Commission addressed the issue of judicial independence in Recommendation #4 (1). The Commission finds that the permanent commission created in statute should add protections t ensure and protect the independence of attorneys. The Commission heard testimony that individual attorneys have suffered repercussions for raising concerns about compliance with national standards, including those related to caseload. Lawyers should not face discipline or be subject to repercussions for complying with professional and ethical responsibilities. Additionally, public defenders should be free to give

truthful statements about their work conditions and the aspects of their practices that are not subject to attorney-client privilege.

21. The commission was provided data from the Appellate Division of the Attorney General's Office, the Wayne County Prosecutor's Office, and the State Appellate Defender Office regarding ineffective assistance of trial counsel claims (IATC). The Appellate Division of the Attorney General's Office represents the 56 smallest Michigan counties in criminal appeals through the Prosecuting Attorney Appellate Service (PAAS) and provided six years of data. Wayne County is the State's most populous county and is responsible for more criminal cases, by a wide margin, than any other county and provided four years of data. SADO represents indigent appellate defendants each year, in cases from all counties, and provided 15 years of data. There could be many ~~other~~ issues raised on appeal that, although they are not labeled as Ineffective Assistance of Trial Counsel, they are essentially caused by an attorney's inadequate performance, or a lack of sufficient resources. The commission finds ineffective assistance of trial counsel claims that result in reversal of a criminal conviction are not common in Michigan but are not necessarily the only indicator of a well-functioning system.

22. A result of the many different public defense delivery systems, varying interpretations of what is adequate and inconsistent funding availability, the current delivery of indigent defense results in a public defense system that is too often subject to errors at the trial level, and at its worst, results in a wrongful conviction. Michigan taxpayers are exposed to millions of dollars in unnecessary expense in these most egregious cases. Additionally, the commission was provided data from SADO that indicated avoidable sentencing errors cost Michigan taxpayers millions of dollars annually. An indigent defense system that provides for minimum standards and adequate and reliable funding should ensure attorneys are trained and competent to handle a criminal case from beginning to end thus ensuring quality representation to the indigent and potentially substantial savings to Michigan taxpayers by eliminating trial level and sentencing errors.

23. The commission finds that Michigan's current system of providing legal representation for indigent criminal defendants lacks procedural safeguards to ensure effective public criminal defense services.

RECOMMENDATIONS

Recommendation #1

The Michigan Indigent Defense Advisory Commission recommends that the Michigan Legislature create a permanent commission on Indigent Defense.

Recommendation #2

The permanent commission should be given the authority to establish and enforce minimum standards statewide for the delivery of constitutionally effective assistance of counsel to indigent criminal defendants. The commission shall also identify and encourage best practices for creation and operation of such a delivery system.

Recommendation #3

Michigan should continue its tradition of providing indigent defense through local delivery systems. Legislation creating and enabling a permanent indigent defense commission should mandate that local systems must comply with statewide standards established by the commission. As long as local systems comply with state standards, they may utilize various methods of their choosing.

Recommendation #4

The Michigan Legislature should adopt and incorporate the following as the guiding standards for the permanent commission and all local systems providing counsel to indigent criminal defendants.

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent of the judiciary while assuring that local judges be allowed meaningful input.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. The permanent commission shall give deference where a local system is otherwise compliant with the remaining 9 principles articulated here.

3. Clients are screened for eligibility and defense counsel is assigned as soon as feasible after formal charges are filed. The commission shall determine what indigency means on a statewide basis.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5. Defense counsel's workload is controlled to permit the rendering of quality representation. Each local system must take affirmative steps to avoid the creation of economic disincentives or incentives that threaten to impair the provision of effective assistance of counsel. Local systems should be given latitude to develop workload controls that assure effective assistance of counsel.

6. Defense counsel's ability, training, and experience match the nature and complexity of the case.

7. The same individual attorney continuously represents and personally appears at every court appearance from beginning to end. Local systems should be allowed to exempt ministerial, non-substantive tasks and hearings from this rule.

8. Defense attorneys are equal partners in the criminal justice system. The defense function, as with all criminal justice functions, should be adequately funded so it can fulfill its particular role.

9. Defense counsel is provided with and required to attend relevant continuing legal education.

10. Defense counsel is systematically reviewed for quality and competence according to standards adopted by the permanent commission.

Recommendation #5

The permanent commission should be an autonomous entity within the judicial branch of state government.

Recommendation #6

To assure independence of the permanent commission the appointing authority should be balanced between the three branches of government. This balance should be realized through appointments by the Governor from recommendations of others. This approach is consistent with Michigan's history, traditions and current practices.

1. Specifically, the permanent commission should have 13 members and should be established as follows:

a. 2 members from a list of 6 names submitted by the Speaker of the Michigan House of Representatives;

b. 2 members from a list of 6 names submitted by the Majority Leader of the Michigan Senate;

c. 1 member from a list of 3 names submitted by the Chief Justice of the Michigan Supreme Court;

d. 2 members from a list of 6 names submitted by the Criminal Defense Attorney Association of Michigan;

e. 1 member from a list of 3 names submitted by the Michigan Judges Association;

f. 1 member from a list of 3 names submitted by the Michigan District Judges Association;

g. 1 member from a list of 3 names submitted by the State Bar of Michigan;

h. 1 member from names submitted by bar associations whose primary mission or purpose is to advocate for minority interests;

i. 1 member selected by the Governor from the general public;

j. 1 member selected by the Governor from local government; and

k. The Chief Justice of the Michigan Supreme Court, or his or her designee, should serve as an ex-officio member of the permanent commission.

2. Individuals nominated for service on the permanent commission shall have significant experience in the defense of criminal proceedings or shall have demonstrated a strong commitment to quality representation in indigent defense matters. At least two members must be non-attorneys.

3. Each commissioner should be appointed to serve a four-year term.

4. Legislation creating the permanent commission should stagger these terms so approximately ¼ of the terms expire each year.

5. Vacancies on the permanent commission should be filled in the same manner as the original appointments with the nominating source submitting 3 names for each vacant position.

6. Persons receiving compensation through, the state or any local system for providing representation to or prosecution of indigent defendants in state courts shall not serve on the permanent commission.

7. The Governor shall appoint one of the permanent commission's original 13 members to serve as chair for one year. Thereafter, the permanent commission members shall annually elect a chairperson from their membership to serve a one-year term. No person should be allowed to serve as commission chair for more than three consecutive one-year terms.

8. No more than 3 sitting or retired judges shall serve on the Commission at one time.

9. The Governor shall have authority to reject any list of nominations that are submitted and has the authority to ask for additional names.

Recommendation #7

Transparency and accountability being pillars of an effective system, the permanent commission and its staff should be subject to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

Recommendation #8

The permanent commission's authority and/or responsibility should include, but not necessarily be limited to, the following:

1. Develop and oversee the implementation and enforcement of standards, rules and procedures to ensure that effective assistance of counsel is consistently delivered statewide to individuals in trial level adult criminal proceedings in accordance with the U.S. Constitution, the Michigan Constitution, and the provisions of this act. This includes the authority to modify such standards, rules and procedures as the commission deems advisable.

2. Investigate, audit and review the operation of local indigent defense delivery systems to assure compliance with standards, rules and procedures of the commission. Participation in and cooperation with such review shall be mandatory for each local system.

3. Hire an Executive Director and determine the appropriate number of staff needed to accomplish the commission's mandate consistent with annual appropriations.

4. Charge the Executive Director with establishment of an organizational chart; preparation of an annual budget; hiring, discipline and firing of staff;

5. Charge the Executive Director and staff with assisting it in developing, implementing, regularly reviewing and enforcing the commission's standards, rules and procedures.

6. Establish procedures for the receipt and resolution of complaints, and the implementation of recommendations from the courts, other participants in the criminal justice system, clients and members of the public.

7. Establish procedures for the mandatory collection of data concerning operation of the commission, each individual attorney representing indigent defendants and each local indigent defense system.

8. Establish procedures for annually reporting to the Governor, Legislature and Supreme Court. The annual report shall include any recommendations for further legislation.

9. The first annual report shall include an implementation timeline. This timeline should include both projections for establishing minimum statewide standards and estimates for bringing each local system into compliance. The timeline should be updated annually until such time as all local systems are expected to be in compliance.

Recommendation #9

Legislation creating the permanent commission should include procedural safeguards for local systems. A local system must be afforded an opportunity to be heard by the permanent commission before it is found in non-compliance. A local system must be afforded reasonable time to come into compliance with the minimum standards after defect(s) are formally identified by the permanent commission and communicated to the local system. The permanent commission should be empowered to provide indigent defense services directly with state resources should any local system fail to meet the minimum standards for the delivery of constitutionally effective assistance of counsel to

indigent criminal defendants. The legislature should authorize the State Treasurer to withhold an amount equal to the cost of providing local indigent defense services from any and all state payments to such local unit of government.

Recommendation #10

Since indigent defense is a state obligation, justice system funding is a shared responsibility for the state and local government, and the current trial level indigent defense is 100% locally funded, any new funding requirements should be fulfilled by the state. Each local government should be required to maintain at least the same level of funding for indigent defense services, adjusted for inflation, as the average expended annually in the three fiscal years preceding creation of the permanent commission (with a minimum of $7.25 per capita). State funding should be made available through the annual appropriations process at times and in amounts necessary to meet the demonstrated and quantified needs of local systems to meet the minimum standards established.

Recommendation #11

The permanent commission should be authorized to seek and receive grants from the federal government, from private and public foundations, or from any other source.

Recommendation #12

The legislature should appropriate the permanent commission sufficient funds at its creation to hire staff, establish minimum standards and begin the collection of data from all local systems and individual attorneys providing indigent defense. The permanent commission should establish metrics, to the extent feasible, for determining the resources necessary for each local system to comply with the minimum standards and for determining the resources necessary for the permanent commission to fulfill its role. The permanent commission should establish a timeline for local systems to comply with statewide minimum standards consistent with these metrics and state appropriations.

ACKNOWLEDGMENTS

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The State Bar of Michigan
Michigan Attorney General Bill Schuette
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National Legal Aid & Defender Association
Peter Ozanne, Crime and Justice Institute
Nancy Cozine, Oregon's Office of Public Defense Services
Frank X. Neuner, Louisiana Public Defender Board and Laborde & Neuner
Campaign for Justice
Michigan Appellate Defender Office
The Honorable Theresa M. Brennan
Thomas M. Cooley Law School
Elizabeth Lyon, State Bar of Michigan
Carrie Sharlow, State Bar of Michigan