

INDIGENT DEFENSE PRINCIPLES REVISITED

The Indigent Defense Committee proposes that the State Bar of Georgia, Board of Governors adopt the following principles related to Indigent Defense.

PRINCIPLE 1: *Meeting Georgia’s Constitutional Obligation.* *Adequate and effective indigent defense is a state responsibility required by the United States and Georgia Constitutions. Providing counsel to indigent defendants, not only gives effect to the right to counsel, but also ensures that poverty has no weight on the scales of justice.*

COMMENTS:

It is a fundamental principle of our constitutional republic that impoverished individuals have a right to counsel in criminal proceedings. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Wilson v. Southerland*, 371 S.E.2d 382, 383 (Ga. 1988); Ga. Const. of 1983, Art. VI, Sec. IX, Para. I; U.S. CONST. amend. VI, XIV. This fundamental principle also extends to juveniles. *In re Gault*, 387 U.S. 1 (1967). Moreover, the provision of indigent defense is primarily a *state* responsibility. Under Georgia law, the State is “responsible for assuring that adequate and effective legal representation is provided . . . to indigent persons.” O.C.G.A. § 17-12-1. Thus, while counties play an integral role, ultimately it is the State’s burden to ensure the provision of adequate and effective legal representation.

Adequate and effective legal representation cannot be achieved without adequate funding. *Wilson*, 258 Ga. at 480 (“the constitutional policy of this state cast upon the courts the duty to ensure [not only] that crimes are effectively prosecuted [but also] that defendants are effectively represented [which means that] adequate funding is constitutionally mandated.”) Thus, the adequate funding of indigent defense is mandatory, not optional. In *Sacandy v. Walther*, 413 S.E.2d 727, 730 (Ga. 1992), the Georgia Supreme Court held that any indigent defense system operated in this State must be adequately funded; otherwise, it may be rendered unenforceable. A system that is “adequately funded” is one in which the state is able to provide constitutionally adequate representation to those who are entitled by law to receive such representation. Adequate representation occurs when the attorneys providing such representation discharge their duties to the client in accordance with the standard of care that would apply to Georgia lawyers generally in the factual and legal context of a particular case, which would include having the expert and investigatory resources necessary to provide an effective defense.

PRINCIPLE 2: *Ensuring an Effective Criminal Justice System.* *Indigent defense is an integral component of a properly functioning criminal justice system. When adequately provided, indigent defense protects the rights of the accused and helps to avoid wrongful convictions. The presence of counsel also advances the integrity, fairness, and accuracy of criminal proceedings. Counsel also helps to avoid needless delays and the unnecessary expense of retrying criminal cases that have been reversed due to constitutionally ineffective assistance.*

COMMENTS:

The provision of indigent defense counsel serves multiple purposes in the criminal justice system. The practical considerations supporting an adequately funded indigent system should not be overlooked. Besides protecting the constitutional rights of the accused, defense counsel advances the efficiency and accuracy of criminal proceedings. Inadequate, under-trained, or deficient representation can lead to delay, additional costs, or worse, wrongful convictions. Wrongful convictions and delays are expensive and lead to higher judicial expenses and incarceration costs.

An inadequate defense dramatically increases the chances of a wrongful conviction or excessive sentencing. Regardless of their political beliefs, the American people share a strong and common bond that our criminal justice system must be fair and unbiased. Put another way, we want criminals to be punished, but we want to make sure we convict only the accused that are actually guilty. Although the exact number of innocent persons convicted of crimes in this country is not known, recent studies have proven that the phenomenon is more common than once believed. One study estimates that the annual number of wrongful convictions in serious felony cases nationwide may be as high as 10,000. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 Rutgers L. Rev. 1317, 1343 (1997). According to the Innocence Project at the Benjamin Cardozo School of Law at Yeshiva University, as of August 2008, there have been 220 DNA exonerations of individuals who were convicted of both capital and non-capital felonies. These individuals collectively served more than 2,700 years in prison for crimes they did not commit. Seven were exonerated in Georgia. Innocence Project, "Facts on Post-Conviction DNA Exonerations," available at <http://www.innocenceproject.org/Content/351.php>.

Criminal defense practice is a complex and ever-changing field, and defense lawyers must be well-trained to investigate and defend each case. Like in any legal field, it is important that public defenders be provided excellent training opportunities.

The current Circuit Public Defender system is an efficient and effective means of delivering indigent defense services. With proper funding, management and oversight, this system can best fulfill the State's constitutional obligations and ensure the fairness and accuracy of criminal proceedings. Towards this end, the use of the contract attorneys should be disfavored. If retained in any county, it should be based primarily on quality of service and experience, rather than the lowest bid, and should be limited to a specific number of cases.

PRINCIPLE 3: Providing Sources of Adequate Funding. *The special court fees established in 2003 for the sole purpose of funding indigent defense should be used to fund indigent defense.*

COMMENTS:

In 2004, as a part of an effort to reform the indigent defense system statewide, Georgia established a special funding mechanism for its new system of indigent defense. See H.B. 1EX

(2004). Certain criminal fines and civil filing fees were added for the express purpose of funding the indigent defense system. Under this system, indigent defense is funded not through taxpayer general revenue, but through fines and fees created with the express intent of paying for indigent defense.

In 2007, the State collected \$43.3 million through the fines and fees enacted pursuant to H.B. 240 but allocated only \$36.3 million to indigent defense. Similarly, in 2008, Georgia anticipates collecting \$45 million, but has allocated only \$35.4 million of that amount to indigent defense, plus a later supplement of \$2.7 million. In each year, the unallocated funds have flowed into the General Revenue fund to be used for purposes other than indigent defense. Consequently, while new funds and fees were imposed for the express purpose of funding indigent defense, some of these funds are being used for other purposes. Georgia policymakers should not consider cutting funding intended for the indigent defense system if those funds are necessary for the proper fulfillment of the state's obligation to provide constitutionally effective indigent defense representation. Those persons and agencies charged with implementing the state's obligations in this regard should properly be accountable for the wise and efficient expenditure of public funds.

Insufficient funding will result in burdening public defender attorneys with unmanageable caseloads and, at a certain point, may force them to either refuse clients or breach their ethical and professional obligation of competence – namely, to not take on more work than an attorney can handle competently, promptly and to completion. Ga. R. Prof. Resp. 1.1

PRINCIPLE 4: Ensuring the Right to Conflict-Free Representation. *The right to effective representation includes the right to an attorney unencumbered by a conflict of interest.*

COMMENTS:

The Georgia Rules of Professional Responsibility prohibit an attorney from participating in any case in which he or she has a conflict of interest. Ga. R. Prof. Resp. 1.7. Georgia law also obligates the GPDSC to “consider the most *efficient and effective* system to provide legal representation where the circuit public defender office has a conflict of interest.” See H.B. 1245, 2008 Ga. Laws 729 (effective July 1, 2008), § 29 (emphasis added). To meet these obligations, the GPDSC should maintain full-time conflict counsel in conflict defender offices. Otherwise, it should rely on appointed independent counsel for conflict and overflow work. Under either of these options, it is imperative that conflict attorneys work in separate locations from the public defenders assigned to represent other defendants in the case.

Conflict counsel must also be adequately funded. Although the GPDSC may generally promulgate standards applicable to conflict representation, it should not impose arbitrary budgeting restraints, such as limitations on the number of conflict appointments per judicial circuit. For example, it may prove unreasonable to expect that conflict counsel will be appointed in only 4.5% of criminal cases in all judicial circuits. In addition, in some cases a capped fee of \$400 will be financially insufficient. Consistently, any further reduction of funding could undermine the ethical representation of indigent defendants by conflict counsel.

PRINCIPLE 5: Achieving Parity and Maintaining Independence of Counsel. *Indigent defense counsel and prosecutors should be comparably compensated, and indigent defense attorneys should have the same degree of professional independence as privately retained defense attorneys.*

COMMENTS:

The right to independent counsel requires that public defenders not be forced to take on an unreasonable caseload. Public defenders must also have access to investigators, paralegals, and expert witnesses necessary to make an independent assessment of each case and to assure fairness and due process throughout each stage of the proceeding.

Large discrepancies exist between the salaries of prosecutors and pay for public defenders despite the fact that these two types of lawyers are representing opposing parties in the same cases. The amount of time and effort invested in those cases by a public defender is no less than that of the prosecutor and should be comparably compensated.

PRINCIPLE 6: Eliminating Political Influence and Private Interests from Indigent Defense. *The Georgia Public Defender Standards Council and its director should continue to act independently of political considerations or private interests to assure adequate and effective legal representation to indigent persons.*

COMMENTS:

Georgia law requires that the agency that oversees the indigent defense system remain independent and free from private influence. *See* O.C.G.A. § 17-12-1(c) (“The council shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter.”). A reasonable level of oversight is appropriate, and indeed helpful and expected, given the public source of funding. It is important, however, that the right balance be struck such that oversight does not become time-consuming and distracting overregulation inhibiting the system from functioning in an independent and efficient fashion.