



The Cost of Representation Compared to the Cost of Incarceration

How Defense Lawyers Reduce The Costs of Running the Criminal Justice System

Fifty years ago the U.S. Supreme Court recognized the “obvious truth” that a lawyer is a necessity and not a luxury when a defendant faces a criminal charge.¹ While the need for the assistance of counsel may have been obvious to the Court, legislators have not always seen things quite so clearly. The reluctance to adequately fund indigent defense is undoubtedly

based on an unwillingness to spend money on attorneys to represent defendants who are perceived as most likely guilty. Providing defendants with representation is therefore seen as a waste of money; attorneys will only delay the inevitable and will make the criminal justice system less efficient. Indigent defense providers have typically responded to this sort of prejudice by pointing out that every defendant is presumed to be innocent and is entitled to due process of law. While that is certainly true, those arguments too often fall on deaf ears.

In addition to arguing that representation provides an immeasurable benefit to a defendant and the quality of justice he receives in court, indigent defense providers are now communicating the fact that representation provides a measurable benefit to society. The lack of adequate funding for indigent defense not only erodes the public trust in the criminal justice system, but it contributes to the high incarceration rate. An increasing body of research into the role and function of defense attorneys in the criminal justice system suggests that inadequate funding for indigent defense results in higher incarceration costs. This research suggests that underfunding indigent defense does not save the state money. The criminal justice system is just that — a system.

When one component of that system is not well maintained, the entire system functions less efficiently.

Adequately resourced defense attorneys increase the effectiveness of the entire justice system. “When the system includes well-trained public defenders, cases move faster (helping the court manage growing case-loads), and the system tends to generate and implement innovative programs.”² The interconnectedness of the criminal justice system requires that every person operating within that system have access to adequate resources in order to ensure a just result.

With that in mind, there is a growing recognition of the correlation between government spending on indigent defense and incarceration costs. A Justice

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Policy Institute report entitled *System Overload: The Costs of Under-Resourcing Public Defense* identified five ways in which the poor quality of public defense can increase incarceration costs: (1) more pretrial detention for people who do not need it; (2) increased pressure to plead guilty; (3) wrongful convictions and other errors; (4) excessive and inappropriate sentences; and (5) increased barriers to re-entry.³ The choice for policymakers is a simple one — either spend the money necessary to ensure that every defendant has an adequate defense, or continue to pay the costs associated with a criminal justice system that incarcerates one out of every 100 adults in the country.⁴

The Sooner Counsel Is Provided, the Better

Several studies demonstrated the importance of providing counsel at a defendant's first appearance before a judicial officer who has the power to take away the defendant's liberty. It is at this critical stage of the proceeding where representation can influence the outcome of a case and where effective representation leads to greater efficiency and more accurate results.

Do Lawyers Really Matter? The Empirical and Legal Case for Attorneys at Bail studied the effect that lawyers have on pretrial release decisions in Baltimore, Md.⁵ The study concluded that (1) having defense attorneys at the first appearance results in defendants being released on their own recognition twice as often than if they were unrepresented, and (2) bail is reduced four times as often for the remaining defendants. This translates into a 20 percent reduction in the average amount of time spent in jail per defendant. Having representation at the initial appearance means that fewer defendants will be held in custody unnecessarily, and that will help reduce the high costs of incarceration. The end result is that whatever it might cost to have defense counsel present at a first appearance, in the end, defense attorneys pay their own way.

A study released in 2012 by the New York City Criminal Justice Agency entitled *A Decade of Bail Research in New York City* documents how defendants who are incarcerated pretrial have worse case outcomes than defendants who are allowed to remain at liberty. The study found that defendants who are detained pretrial are more like-

ly to be convicted, if convicted they are more likely to be sentenced to incarceration, and if incarcerated their sentences are likely to be longer.⁶ These findings suggest that the decision to set bail not only imposes greater pretrial incarceration costs but also results in higher postconviction incarceration costs due to the increase in the average length of sentence.

Delaying the appointment of counsel does not make financial sense, but it also does not make sense if the goal is to ensure the accuracy of the adversarial system. Defense counsel needs to be able to conduct an investigation into the facts of the case, and the best time to do that is immediately following the defendant's arrest. As time passes, witnesses become more difficult to locate and their memories fade. Physical evidence may be lost or begin to deteriorate. If we expect the adversarial system to function properly, there is simply no reason to give the prosecution a head start by delaying the appointment of counsel.

innocent defendants to prison ended up costing taxpayers \$13 million.⁹ The director of Michigan's State Appellate Defender Office estimated that over a period of five years the underfunding of indigent defense led to nearly \$70 million in unnecessary incarceration costs. This estimate leaves out the additional costs associated with appellate litigation, which includes the cost of appellate defense counsel and prosecutors as well as appellate courts.¹⁰

The Kentucky Department of Public Advocacy's Post-Trial Division identified 14 wrongful convictions in which defendants collectively spent approximately 112 years in jail before having their convictions overturned.¹¹ For the defendants who have been wrongfully convicted, it is impossible to put a price on those lost years, but there is a very real price to be paid by taxpayers. A Vera Institute of Justice Report entitled *The Price of Prisons: What Incarceration Costs Taxpayers* estimates that it currently costs Kentucky \$14,603 a year to house an inmate.¹²

The adversarial system breaks down

The early appointment of counsel benefits not only the defendant but the entire criminal justice system.

Better to Get It Right The First Time

Underfunding indigent defense inevitably leads to excessive caseloads for defense attorneys.⁷ Like everyone else, when defense attorneys do not have the time or resources necessary to do the job properly, mistakes will be made. Everyone pays a price for these mistakes. A 2011 report by the Better Government Association and the Center on Wrongful Convictions at Northwestern University, entitled *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, concluded that wrongful convictions in 85 Illinois cases since 1989 had cost taxpayers \$214 million.⁸

Faces of Failing Public Defense Systems: Portraits of Michigan's Constitutional Crisis, a report prepared by the ACLU in 2011, documents the exoneration of 13 defendants who were convicted because of attorney errors directly attributed to the inadequate funding of Michigan's county-based indigent defense system. Sending the 13

when the defense is underfunded; it becomes both inaccurate and inefficient. U.S. Attorney General Eric Holder noted the consequences of underfunding public defense: "When defendants fail to receive competent legal representation, their cases are vulnerable to costly mistakes that can take a long time to correct. Lawyers on both sides can spend years dealing with appeals arising from technical infractions and procedural errors. When that happens, no one wins."¹³

Finding Cheaper and Safer Options

The active participation of defense counsel from the inception of a case ensures that defendants will have access to diversion programs, which are typically much cheaper and more effective at reducing recidivism than incarceration. Defense attorneys are in the unique position to effectively identify defendants who have substance abuse issues or mental health issues. A national study of people in jails across the

country found that 68 percent of people in jails suffered with dependence or abuse of alcohol or drugs.¹⁴ According to a report from the Vera Institute of Justice Substance Abuse and Mental Health Program, 33 percent of adult D.C. residents arrested had some indication of a mental health need, but criminal justice agencies failed to identify this need 46 percent of the time.¹⁵ Early involvement in a defendant's case increases the likelihood that defense attorneys will be able to identify defendants with substance abuse issues or mental health problems and can begin to seek appropriate treatment options for them.

In addition, many jurisdictions are seeking to implement evidence-based practices when making determinations regarding pretrial release. In the report *Philadelphia's Crowded, Costly Jails: The Search for Safe Solutions*, researchers estimated that the city of Philadelphia spent seven cents out of every tax dollar on holding people in its jails.¹⁶ In an effort to reduce the overall jail population, the report made recommendations that included expanding options for diverting cases away from the courts and creating a broader range of pretrial services.

A 2010 study, *Baltimore Behind Bars: How to Reduce the Jail Population, Save Money and Improve Public Safety*, concluded that it costs \$100 a day to hold a person in custody in the Baltimore Detention Center, but providing pretrial release services to defendants would cost only \$2.50 per person per day.¹⁷ Defense counsel is once again in a position to provide the court with the type of information that will lead to more rational conditions of release or detention.

The Real Costs of Incarceration

The studies referenced identify the short-term savings associated with a reduction in incarceration rates; however, there is also evidence to suggest that there are long-term financial benefits associated with a reduction in the incarceration rate. A 2010 study by the Pew Center on the States entitled *Collateral Costs: Incarceration's Effect on Economic Mobility* found that incarceration carries significant and enduring economic repercussions. Former inmates work fewer weeks per year, earn less money, and have limited upward mobility. Past incarceration

was found to reduce subsequent wages by 11 percent, cut annual employment by nine weeks, and reduce yearly earnings by 40 percent.¹⁸

The Texas Criminal Justice Coalition's 2010 report, *Costly Confinement and Sensible Solutions: Jail Overcrowding in Texas*, concluded that long waits in jail lead to a loss of employment and housing for defendants, which contributes to recidivism. The report emphasized the important role counsel plays in helping a defendant navigate the criminal justice system and called for representation prior to a defendant's first appearance or plea negotiations. It determined that public defender programs not only increase the quality of indigent defense services but also have cost benefits. Defense attorneys have the ability to significantly reduce the number of days between an individual's arrest and trial. This reduces the unnecessary and harmful collateral consequences of job and housing loss, promotes family stability, and lowers substantial jail costs and overcrowding.¹⁹

While there are certainly costs associated with incarceration for both the defendant and the state, there are also costs imposed by a conviction—even a conviction that does not result in incarceration. A survey of statutory collateral consequences of conviction in Kentucky identified adverse consequences in the following areas: civil rights, civil liberties, parental rights, public offices and officials, professional or occupational licenses, employment and employment benefits, applications and disclosures, licenses and permits, penalty enhancements, sex offender registration, contractual relations and, lastly, disqualification as an heir or beneficiary.²⁰

The Choice Between Representation and Incarceration

Ultimately, the early appointment of counsel benefits not only the defendant but the entire criminal justice system. The involvement of the attorney leads to a more reasoned bail determination that will reduce the costs of pretrial detention. It allows the attorney to identify the defendant who would benefit from alternatives to incarceration such as drug or alcohol treatment programs, which are less costly and more effective at reducing recidivism than incarceration. Early appointment of counsel also permits

the defense to conduct a prompt investigation of the case, which helps the defendant make an informed decision regarding whether or not to enter into a plea bargain. This in turn leads to greater efficiency that reduces court costs. It allows for the preservation of evidence, which enables the defendant to prepare and present an adequate defense, thereby increasing the accuracy of the trial outcome and reducing the possibility that an innocent defendant will be incarcerated.

The reality is that defense attorneys reduce incarceration costs, increase efficiency, and increase the accuracy of the criminal justice system. Defendants benefit, society benefits, and even the victims of crime benefit by having their complaints resolved quickly and accurately. The Court of Appeals of Kentucky stated: "It is in the public interest that the administration of criminal justice proceed fairly, impartially, expeditiously, and efficiently."²¹

There can be no doubt that declining revenues have forced states to make cuts in essential services. When faced with these harsh economic realities, the question that is usually posed by legislators to advocates for the right to counsel is, "How can we afford to give poor people lawyers?" Based on the empirical evidence, the simple response is, "How can we afford not to?"

Notes

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).
2. TONY FABELO, KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, WHAT POLICYMAKERS NEED TO KNOW TO IMPROVE PUBLIC DEFENSE SYSTEMS 2 (2001), available at <https://www.ncjrs.gov/pdffiles1/bja/190725.pdf>.
3. Available at http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.
4. THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.
5. Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).
6. MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 127 (2012); available at <http://www.cjareports.org/reports/DecadeBailResearch.pdf>.
7. See Norman Lefstein, AMERICAN BAR

ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/lis_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

8. Available at http://www.bettergov.org/investigations/wrongful_convictions_1.aspx.

9. Available at http://www.aclu.org/files/assets/MI_failedjustice_bookletsm.pdf.

10. Written Testimony of Dawn Van Hoek, Chief Deputy Director, State Appellate Defender Office, Before the U.S. House of Representative Committee on the Judiciary (2009); available at http://beta.sado.org/sado_news/DVH_testimony_3-26-09.pdf.

11. Department of Public Advocacy 2012 Annual Report at 20, available at <http://dpa.ky.gov/NR/rdonlyres/A4E59688-A807-4914-BAC3-3FB616475BD6/0/2012AnnualReportDraftFINAL090612REDUCED.pdf>.

12. Available at http://www.vera.org/download?file=3542/Price%2520of%2520Prisons_updated%2520version_072512.pdf.

13. Remarks by Attorney General Eric Holder at the American Council of Chief Defenders Conference, Washington D.C., June 24, 2009.

14. JENNIFER C. KARBERG & DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL

INMATES 2002 (2005).

15. See CLOSING THE GAP: USING CRIMINAL JUSTICE AND PUBLIC HEALTH DATA TO IMPROVE THE IDENTIFICATION OF MENTAL ILLNESS (2012); available at <http://www.vera.org/download?file=3544/closing-the-gap-report.pdf>.

16. Available at http://www.pewtrusts.org/uploadedFiles/www.pewtrusts.org/Reports/Philadelphia_Research_Initiative/Philadelphias_Crowded_Costly_Jails_rev.pdf.

17. Available at http://www.justicepolicy.org/images/upload/10-06_REP_BaltBehindBars_MD-PS-AC-RD.pdf.

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20. See Daniels, Danley-Nichols, Morgan & Rhoades, *Kentucky's Statutory Collateral Consequences Arising From Felony Convictions: A Practitioner's Guide*, 35 N. Ky. L. REV. 413 (2008).

21. *Bradshaw v. Ball*, 487 S.W.2d 294, 298 (Ky. 1972). ■

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