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# Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia

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Issue Brief

## **Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia**

**By Stephen B. Bright and Lauren Sudeall Lucas**

**September 2010**

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## **Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia**

**Stephen B. Bright<sup>\*</sup> and Lauren Sudeall Lucas<sup>\*\*</sup>**

All three branches of Georgia's government have failed in their constitutional responsibility to ensure that poor people accused of crimes are effectively represented by competent lawyers with the time and resources necessary to provide individualized representation, contest the prosecution's case, and present an adequate defense. They are not the only entities responsible, however, for protecting the rights of indigent criminal defendants in Georgia. The federal government, which has made immense contributions to the prosecution of criminal cases in Georgia through grants to law enforcement, prosecutors, and courts, shares responsibility for the integrity of Georgia's criminal justice system and the enforcement of the constitutional right to counsel.

Unlike Florida, which created public defender offices in each of its judicial circuits within two months of the Supreme Court's decision in *Gideon v. Wainwright*<sup>1</sup> – the landmark case establishing the right to counsel for indigent defendants – Georgia resisted *Gideon*'s mandate for 40 years, leaving the representation of poor people accused of crimes up to each of its 159 counties. Finally, shamed by reports by the media and others of grossly deficient representation, and prodded by the admonitions of three chief justices, the report of a blue ribbon commission, and numerous lawsuits, the legislature reluctantly created a statewide public defender system in 2003. However, the legislature has never funded the system adequately,<sup>2</sup> leaving the major responsibility for the system to the counties. In addition, the statewide program is poorly managed, lacks independence from political interference, and eliminated an outstanding training program after its first two years.

While unquestionably an improvement over the fragmented approaches that existed before it, the new system has in some cases failed completely to provide representation to some indigent defendants and has provided inadequate representation to many others. Many public defenders carry crushing caseloads, often lack the investigative and expert assistance needed to represent their clients effectively, and are pressured to represent defendants with conflicting interests. Some capital cases have gone without funding for counsel, investigation, and experts for years, making a timely investigation and a fair trial impossible. Hundreds of defendants in

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<sup>1</sup> 372 U.S. 335 (1963); ANTHONY LEWIS, *GIDEON'S TRUMPET* 212 (1964).

<sup>2</sup> In fiscal year 2008, for example, Georgia spent only \$4.30 per capita on indigent defense. CLARK D. GRADNEY, *STATE FUNDING OF INDIGENT DEFENSE SURVEY: EXECUTIVE SUMMARY 4* (2008), available at <http://www.utahstatebar.org/cle/annualconvention/materials/breakout%20CC/State%20Funding.pdf>. By contrast, the national average for per capita spending on indigent defense in 2008 was \$11.86. NAT'L LEGAL AID & DEFENDER ASS'N (NLADA), *A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS* ii (June 2008), available at [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf).

felony cases have not had *any representation* – some pre-trial and others on motions for new trial and appeal. And fixed-fee contracts have increasingly been used to provide only nominal representation to many other defendants.

The failures of Georgia’s struggling indigent defense system provide a clear demonstration of the need for federal assistance and oversight. This Issue Brief will provide a brief history of Georgia’s current public defender system and its deficiencies. It will then describe the impact of those deficiencies on individual defendants. Finally, it will explore ways in which the federal government can play a role in remedying Georgia’s failure to enforce the right to counsel by providing grants to improve representation, conditioning grant funding on states having an adequate indigent defense system, bringing lawsuits against deficient programs, and filing amicus briefs in support of systemic improvements.

I. An Indigent Defense System in Need of Repair: Georgia’s Refusal to Provide Adequately for the Right to Counsel

A. The Beginnings of Georgia’s Statewide Indigent Defense System

After the *Gideon* decision, Georgia delegated the responsibility and cost for indigent defense to each of its 159 counties. As a result, the method of providing representation varied greatly from county to county. Several counties simply conscripted lawyers to handle criminal cases: every member of the bar, regardless of their area of specialization or years of experience, was required to accept indigent criminal case appointments – with or without compensation, depending on the jurisdiction.<sup>3</sup> Some counties contracted with attorneys willing to work for minimal compensation; in other counties, judges appointed willing lawyers and counties paid them by the case or by the hour at rates far below what lawyers were paid for other work.<sup>4</sup> Only 21 counties employed public defender offices composed of full-time, salaried attorneys specializing in the representation of poor people accused of crimes.<sup>5</sup> A common feature of these haphazard and underfunded approaches was that they resulted in grossly deficient representation. The vice president of the Georgia Trial Lawyers Association described in 1985 the “the mirror test” used to determine whether a defendant received adequate counsel: “You put a mirror under the court-appointed lawyer’s nose, and if the mirror clouds up, that’s adequate counsel.”<sup>6</sup>

Nearly 40 years later, in December 2000, Georgia Supreme Court Chief Justice Robert Benham established a commission to “study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation.”<sup>7</sup> After two years of hearings and study, the Commission reported that there was “insufficient funding” for indigent defense, a lack

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<sup>3</sup> THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE [hereinafter SPANGENBERG GROUP REPORT] 31–32 (Dec. 12, 2002), *available at* [http://www.georgiacourts.org/index.php?option=com\\_content&view=article&id=144&Itemid=28](http://www.georgiacourts.org/index.php?option=com_content&view=article&id=144&Itemid=28). As a result, lawyers without experience or interest in criminal law simply entered pleas in their clients’ cases. *Id.*

<sup>4</sup> *Id.* at 35–37; *see also* MICHAEL B. SHAPIRO, INDIGENT DEFENSE IN GEORGIA: A REPORT TO THE BLUE RIBBON COMMISSION ON INDIGENT DEFENSE 35 (Sept. 19, 2001).

<sup>5</sup> SHAPIRO, INDIGENT DEFENSE IN GEORGIA, *supra* n.4, at 35.

<sup>6</sup> Hal Strauss, *Indigent Legal Defense Called “Terrible,”* ATLANTA J.-CONST., July 7, 1985, at 12A.

<sup>7</sup> REPORT OF CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE 1 (Dec. 2002), *available at* <http://www.georgiacourts.org/aoc/press/idc/idc.html> (citing Georgia Supreme Court Order of December 27, 2000).

of accountability and oversight, and “a complete absence of uniformity in the administration of and quality of indigent defense services” in the state.<sup>8</sup> The Commission ultimately recommended creation of a statewide public defender system organized by judicial circuit, and that the state – not the counties – provide adequate funding for indigent defense services.<sup>9</sup>

The Georgia legislature created such a system through passage of the Indigent Defense Act of 2003.<sup>10</sup> In 2004, it adopted a number of fines and fees to fund the system,<sup>11</sup> and the system began operation on January 1, 2005.<sup>12</sup> The Indigent Defense Act provided for the representation of indigent defendants to be carried out by circuit public defender offices.<sup>13</sup> The only exceptions were that a few single-county circuits were allowed to opt-out of the system<sup>14</sup> and that circuit public defender offices were not to represent clients where there was a conflict of interest.<sup>15</sup> The Act also created a statewide oversight agency, the Georgia Public Defender Standards Council (GPDSC), which was charged with the ultimate responsibility to ensure adequate and effective legal representation to all indigent persons entitled to such representation.<sup>16</sup>

Contrary to the recommendation of the Commission, however, the state has not taken full responsibility for funding the system. The counties are still paying 60% of the cost of representation.<sup>17</sup> Moreover, the legislature did not restrict the fund generated by the court filing fees and fines adopted in 2004 to indigent defense and has diverted a significant portion of that fund to be spent for other purposes.<sup>18</sup> In the first four years after the system began operations, the fund generated \$23 million that the legislature did not appropriate to the defense of poor people accused of crimes.<sup>19</sup> In fiscal year 2010, the fund took in \$7 million more than the

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<sup>8</sup> SPANGENBERG GROUP REPORT, *supra* n.3, at ii; *see also* REPORT OF CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, *supra* n.7, at 3–4.

<sup>9</sup> REPORT OF CHIEF JUSTICE’S COMMISSION ON INDIGENT DEFENSE, *supra* n.7, at 5–6.

<sup>10</sup> GA. CODE ANN. § 17-12-1 (West 2010).

<sup>11</sup> *See* H.B. 1EX, 2004 Gen. Assem. Extra. Sess. (describing a \$15 increase on all civil filing fees, a 10% surcharge to criminal and traffic fines and fees, a 10% surcharge to bonds and bail fines (with a \$50 cap), and a \$50 fee to apply for representation by a public defender).

<sup>12</sup> *See* GA. CODE ANN. §§ 17-12-20–37 (West 2010).

<sup>13</sup> GA. CODE ANN. § 17-12-23 (West 2010).

<sup>14</sup> Under the statute, judicial circuits composed of a single county may continue alternative indigent defense service delivery systems as long as that system meets certain requirements set forth by the statute. GA. CODE ANN. § 17-12-36 (West 2010).

<sup>15</sup> Where the Circuit Public Defender office has a conflict with providing representation to an individual defendant either at trial or on appeal, the Georgia Public Defender Standards Council – also created by the same legislation – is responsible for establishing a procedure by which alternative legal representation can be provided. GA. CODE ANN. § 17-12-22 (West 2010).

<sup>16</sup> GA. CODE ANN. § 17-12-1 (West 2010).

<sup>17</sup> Walter C. Jones, *Crime costs are hitting taxpayers from multiple angles*, ROME (GA.) NEWS TRIBUNE, Mar. 1, 2010 (noting that state was paying 37% of the cost of indigent defense).

<sup>18</sup> *See* Order at 35, n.38, *Flournoy v. State*, No. 2009CV178947, Fulton County (Ga.) Super. Ct. (Feb. 23, 2010) [hereinafter *Flournoy Order*].

<sup>19</sup> *Id.*; *see also* Ben Smith, *Debating indigent defense*, FULTON COUNTY DAILY REPORT, May 24, 2010, at 1 (quoting Emmet Bondurant, first chairman of the Public Defender Standards Council, saying that the legislature had diverted \$22 million from the fund); STATE BAR OF GEORGIA, INDIGENT DEFENSE PRINCIPLES REVISITED 3, *available at* <http://gabar.org/public/pdf/LEG/Revised%20Principles%20Indigent%20Defense.pdf> (“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. . . . In each year, the unallocated funds have flowed into the General Revenue fund to be used for purposes other than indigent defense.”); C. Wilson Dubose & E. Wycliff Orr, *Indigent Defense: System is unfairly under*

legislature allocated to the public defender system.<sup>20</sup> As a result, there is still great inconsistency in the quality of representation across the state – some counties are unwilling to contribute almost anything to their local public defender programs, while others are more generous – and many lawyers have been forced to represent clients without adequate compensation or resources.

The fledgling program has also been badly mismanaged and lacks independence. The Act was amended in 2008 so that the director of the GPDSC serves at the pleasure of the governor, leaving the Council almost completely powerless. For the past three years, the director has been a former state legislator who is also a timber lawyer, mule trader, and auctioneer. Before becoming director, he had no prior background in the representation of poor people accused of crimes aside from handling a small number of court-appointed cases. During his tenure, he has neglected completely the two most critical areas needed to build a strong public defender program: recruitment and training. Faced with a grossly underfunded system, the director has pressured public defenders to represent defendants with conflicting interests despite the legal and ethical prohibitions of doing so.<sup>21</sup> Many lawyers are no longer willing to represent indigent defendants because, under its current management, the GPDSC has arbitrarily cut payments to lawyers, delayed payments for long periods of time, and, on occasion, not compensated lawyers at all.<sup>22</sup>

The GPDSC's director has also made uninformed and misdirected decisions, such as the firing of the entire Metro Conflict Defender Office, which provides conflict representation to indigent defendants in the metropolitan Atlanta area.<sup>23</sup> The decision was made with very little notice, without consulting the judges, district attorneys, and public defenders in the affected judicial circuits, and without making any arrangements for how the clients would be represented. Complete chaos was avoided only because the director backed off most of the attorney firings once a lawsuit was filed seeking to enjoin his actions.<sup>24</sup> Filing lawsuits on a case-by-case basis is not a sustainable means for ensuring that the rights of all indigent defendants are adequately protected, however; such egregious mismanagement cries out for more comprehensive oversight.

## B. The Effects of Georgia's Failures on Its Indigent Defendants

The inadequate funding, mismanagement, and lack of training and recruitment evidenced since the advent of Georgia's statewide system have not only kept Georgia from making up

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*attack*, ATLANTA J.-CONST., June 16, 2008, at A9 (noting also that “no state tax dollars are used to fund the public defender system”).

<sup>20</sup> Greg Land, *\$7 million from Indigent Defense Fund routed to state treasury*, FULTON COUNTY DAILY REPORT AT LAW BLOG, July 8, 2010, available at <http://www.atlawblog.com/2010/07/7-million-from-indigent-defense-fund-routed-to-state-treasury/> (“The funding stream intended to pay for Georgia’s indigent defense system took in \$7 million more than the state allocated to defend the poor in fiscal year 2010[.]”).

<sup>21</sup> See *infra* n.81.

<sup>22</sup> See *infra* Part I.B.4.

<sup>23</sup> See Bill Rankin, *Council discards defender contracts: Hiring of low-cost lawyers in Fulton County criticized*, ATLANTA J.-CONST., Jan. 17, 2009, at C1.

<sup>24</sup> See Motion to Dismiss at 1-4, *People Accused of Crimes and Their Lawyers, et al. v. Crawford, et al.*, No. 2008CV151884, Fulton County (Ga.) Sup. Ct., Jan. 16, 2009.

for years of neglect of the right to counsel, but have also resulted in further injustices, ranging from the wholesale denial of counsel to a willingness to sacrifice the quality of counsel for cost considerations.

### 1. No Counsel at All: The Denial of Counsel to Defendants Awaiting Trial and Appeal

The most obvious manifestation of the various factors mentioned above has been the complete denial of counsel to indigent defendants awaiting trial and appeal. The primary cause of this phenomenon is the drastic slashing of budgets for conflict cases – *i.e.*, cases in which the public defender is precluded by a conflict of interest from representing an indigent client (for example, because the public defender already represents another co-defendant in the same case) and therefore the GPDSC must provide alternative representation.

For example, in the Northern Judicial Circuit, a five-county circuit in northeast Georgia, the Council reduced the budget for conflict cases in July 2008 from nearly \$130,000 to approximately \$37,000.<sup>25</sup> As a result, the contracts with attorneys representing defendants conflicted from representation by the public defender in that circuit were not renewed.<sup>26</sup> Two of the attorneys were allowed to withdraw from their cases;<sup>27</sup> the third was not paid and, as a result, simply stopped working on his cases.<sup>28</sup> As a result, hundreds of people – most with felony charges – were left pre-trial without representation.<sup>29</sup> For some, the time in jail without counsel resulted in loss of a job or their home, inability to receive necessary medical treatment, or the inability to attend the funeral of a loved one.<sup>30</sup>

Eventually, when faced with a class-action lawsuit on behalf of the hundreds of unrepresented defendants without representation,<sup>31</sup> the GPDSC signed additional contracts with lawyers in the circuit to handle a number of cases for a low fixed fee.<sup>32</sup> On July 8, 2010, two years after the lawsuit was filed, it was resolved with a consent order. The GPDSC agreed to contract with lawyers under specific caseload limits (*i.e.*, 125 felony defendants or 300 misdemeanor defendants).<sup>33</sup> In findings of fact made to supplement the consent order, the trial judge stated: “The Georgia indigent defense system is broken.”<sup>34</sup>

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<sup>25</sup> Bill Rankin, *Lawyerless defendants file lawsuit: Funds or freedom*, THE ATLANTA J.-CONST., Apr. 7, 2009, at B1.

<sup>26</sup> *Id.*

<sup>27</sup> Complaint at 15–16, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Super. Ct., filed Apr. 7, 2009 [hereinafter *Cantwell* Complaint].

<sup>28</sup> *Id.* at 16.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 16–17.

<sup>31</sup> See Rankin, *Lawyerless defendants file lawsuit*, *supra* n.25, at B1.

<sup>32</sup> See Merritt Melancon, *Northern Judicial Circuit legal battle not over*, ATHENS BANNER-HERALD, Sept. 4, 2009, available at [http://www.onlineathens.com/stories/090409/new\\_489483886.shtml](http://www.onlineathens.com/stories/090409/new_489483886.shtml); see also Transcript of Class Certification Hearing at 99-100, 148-50, 163-64, 179-80, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Super. Ct. (Mar. 3-4, 2010). One contract attorney testified that he “was being offered the contract to make the Southern Center lawsuit go away.” *Id.* at 100.

<sup>33</sup> Consent Order, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Super. Ct. (July 8, 2010) [hereinafter *Cantwell* Consent Order]

<sup>34</sup> Court’s Analysis of Indigent Defense System at 8, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Super. Ct. (July 8, 2010).

Similar violations of the right to counsel have occurred with regard to defendants' motions for new trial and direct appeals – stages at which defendants are just as entitled to effective representation as they are at trial.<sup>35</sup> In *Flournoy v. State*, filed in December 2009, the Southern Center for Human Rights and co-counsel brought a lawsuit on behalf of nearly 200 individuals across the state who had been denied the assistance of conflict-free counsel on their motions for new trial and on appeal.<sup>36</sup>

The GPDSC's Appellate Division is responsible for providing legal representation for all of the conflict criminal appeals across the entire state.<sup>37</sup> However, due to gross underfunding, its staff is not nearly large enough for the task: since 2008, its staff has consisted of only two full-time attorneys and one part-time attorney. It reported in November 2009 a staggering caseload of 476 cases and an inability to assign counsel to 187 persons; by January of the next year, the Division's caseload had reached 515, with 191 individuals unrepresented in their motions for new trial and on appeal.<sup>38</sup> Of the 187 individuals without counsel as of December 2009, some had been waiting *more than three years* for counsel to be appointed and many others had been waiting at least a year.<sup>39</sup> The Division contracts with private attorneys to handle some of the additional caseload, but it has not been allocated funding sufficient to provide adequate representation to all who are entitled to it.

On February 23, 2010, the trial court issued an order in *Flournoy* granting class certification and requiring that the GPDSC provide lawyers to members of the class without conflict-free appellate counsel "at the earliest possible opportunity" and no later than 30 days after the entry of the order.<sup>40</sup> The *Flournoy* litigation is ongoing, however, and the quality of the representation to be provided remains to be seen.

The constitutional right to a lawyer is meaningless unless the lawyer is provided when it matters – promptly after arrest or, in the case of an appeal, after conviction. In Georgia, however, cost containment has prevailed over fundamental constitutional rights. With litigation as the sole means to compel compliance from such a mismanaged system, the long-term outlook for those in need of a lawyer is grim. Federal oversight and incentives are necessary to increase the likelihood of compliance with the right to counsel.

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<sup>35</sup> See *Douglas v. California*, 372 U.S. 353 (1963); *Adams v. State*, 405 S.E.2d 537 (Ga. Ct. App. 1991).

<sup>36</sup> Complaint, *Flournoy v. State*, No. 2009CV178947, Fulton County (Ga.) Super. Ct., filed Dec. 15, 2009 [hereinafter *Flournoy* Complaint].

<sup>37</sup> Under Georgia law, the courts can no longer make appointments of counsel directly; instead, the GPDSC – and through the GPDSC, individual circuit public defender offices – are responsible for the provision of counsel to those who are entitled to and yet cannot afford legal representation. *Bynum v. State*, 658 S.E.2d 196, 197–98 (Ga. Ct. App. 2008); see also GA. CODE ANN. § 17-12-1 et seq. (West 2010).

<sup>38</sup> *Flournoy* Order, *supra* n.18, at 7–8.

<sup>39</sup> *Flournoy* Complaint, *supra* n.36, at 33; Bill Rankin, *Funding short, felons wait years for justice: Suit challenges lack of money for appeals*, ATLANTA J.-CONST., Dec. 16, 2009, at B4.

<sup>40</sup> *Flournoy* Order, *supra* n.18, at 37. As to future members of the class – those who will inevitably become part of the ever-growing backlog awaiting counsel upon conviction – the court held that effective conflict-free counsel must be provided no later than 30 days after the GPDSC receives the request for new counsel. *Id.*



## 2. Indifference Even When Life is At Stake: Inadequate Funding of Capital Cases in Georgia

Georgia has also failed to provide adequate counsel to people facing the death penalty. For much of the state's history, those accused of capital crimes were assigned incompetent lawyers who offered little or no resistance as their clients were swiftly dispatched to death row.<sup>41</sup>

The Georgia Capital Defender Office, which was created by the Indigent Defense Act of 2003 in part to remedy such poor representation, started in January 2005 with a budget of nearly \$7.5 million.<sup>42</sup> However, the division's budget was eventually cut in half<sup>43</sup> – despite the \$2.3 million cost of the defense in *State v. Brian Nichols*, a capital case involving an escape from custody and the murder of a judge, court reporter, and sheriff's deputy, followed by the murder of a federal agent<sup>44</sup> – rendering the adequate defense of capital cases in Georgia nearly impossible.<sup>45</sup>

Today, attorneys in the Capital Defender Office have had to significantly increase their caseloads in order to handle all the cases assigned to the office, and the budget allowed for capital cases staffed by private lawyers falls far short of what is necessary to provide effective representation. There is currently only one attorney employed to handle all of the capital appeals across the state. Several capital defendants in Georgia have been deprived of funds for counsel, investigative assistance, and expert assistance for years while waiting for their capital murder trials. For example, in 2005, Stacey Sims was charged with multiple counts of murder in Tift County, Georgia; the state chose to seek the death penalty in Sims's case.<sup>46</sup> Two lawyers were appointed to represent Sims, but they withdrew a year and a half later because they had not been paid.<sup>47</sup> Two new lawyers were appointed to represent Sims, but another year and a half later, they also withdrew because they also had not been paid.<sup>48</sup> Sims was eventually appointed

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<sup>41</sup> See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, 103 YALE L. J. 1835, 1839, 1841 n.45, 1843 (1994); Marcia Coyle et al., *Trial and Error in the Nation's Death Belt: Fatal Defense*, NAT'L L.J., v.12, n.40 (June 11, 1990), at 30, 34; Jeanne Cummings, *Bad Lawyers Tip the Scales of Justice Toward Death Row*, ATLANTA J.-CONST., Apr. 1, 1990, at A1. See also SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES 10–12 (2000).

<sup>42</sup> Reply Brief for Appellant at 7 n.9, *Weis v. State*, No. S09A1951 (Ga. Oct. 20, 2009) [hereinafter *Weis* Reply Brief].

<sup>43</sup> See *id.* (budget reduced to \$4.3 million for the capital defender office's second year); see also Bill Rankin & Cameron McWhirter, *Nichols trial leaves deep footprint on state courts*, ATLANTA J.-CONST., Dec. 12, 2008, at A8.

<sup>44</sup> Nichols is now serving a life sentence in prison without the possibility of parole. Bill Rankin, *Reversal on new legal aid system? Responsibility for some indigent defense could return to counties*, ATLANTA J.-CONST., Apr. 6, 2010, at A1; see also Adam Liptak, *Defendants Squeezed by Georgia's Tight Budget*, N.Y. TIMES, Jul. 6, 2010, at A13 (noting that the Nichols prosecution “drained most of the new [capital defender] office's budget”).

<sup>45</sup> See Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, Mar. 22, 2007, available at <http://www.nytimes.com/2007/03/22/us/22atlanta.html?scp=1&sq=georgia+murder+case%27s+cost+saps+public+defense+system&st=nyt> (reporting that “[a] high-profile multiple-murder case has drained the budget of Georgia's public defender system and brought all but a handful of its 72 capital cases to a standstill”).

<sup>46</sup> Bill Rankin, *Can Georgia afford the death penalty? State public defender system's lack of funds held up trial for 2 years*, ATLANTA J.-CONST., Nov. 11, 2009, at A1.

<sup>47</sup> *Weis* Reply Brief, *supra* n.42, at 45 n.54 (citing Hearing in *Sims v. State*, No. 2006-CR-91, Tift County (Ga.) Superior Court (Dec. 22, 2008)).

<sup>48</sup> *Id.*

another set of lawyers from the state Capital Defender Office and the case was resolved in August 2010 with an agreement that Sims would serve six concurrent life sentences with the possibility of parole.

Jamie Weis, another capital defendant in Georgia, has been without legal representation for years due to the state's failure to provide adequate funding for his defense. Weis was arrested February 2, 2006, in Pike County, Georgia.<sup>49</sup> The prosecution filed its notice of intent to seek death in August 2006, yet death-qualified counsel did not enter their appearance until October 12, 2006.<sup>50</sup> Funding ran out the following March and Weis was without funds for his representation until July 2009.<sup>51</sup> When his lawyers were unable to prepare his defense without the assistance of investigators and experts, the district attorney moved to replace them – even though they had represented Weis for over a year – with two local public defenders. The state's motion was subsequently granted.<sup>52</sup> The public defenders sought unsuccessfully to withdraw, representing to the trial court in one of three motions that they “lack[ed] the time and expertise to conduct the extensive investigation that is necessary,” “remain[ed] overburdened with their current caseloads,” and could not “under the current state of affairs, perform adequately in representing the Defendant, no matter how good our intentions or diligent our efforts.”<sup>53</sup> The public defenders also explained that they had been unable to obtain necessary funds for experts, investigation, and travel.<sup>54</sup> Weis eventually secured representation by his original counsel after filing a mandamus action against the judge,<sup>55</sup> but the GPDSC still provided no funds for his defense until July 2009, when it agreed to provide “a significantly reduced amount from the amount that counsel believed was necessary in order to provide an adequate defense.”<sup>56</sup>

Weis's lawyers filed a pre-trial appeal in the Georgia Supreme Court in September 2009, arguing that his rights to counsel and to a speedy trial had been violated.<sup>57</sup> In a 4-3 decision, the Court rejected Weis's arguments, holding that that he and his lawyers were responsible for most of the delays, given their refusal to accept the assistance of the public defenders.<sup>58</sup> The majority also found that because the public defenders were appointed – even though they made it clear they were not capable of representing Weis in a capital case – there was no “breakdown in the public defender system,” which has been recognized by the U.S. Supreme Court as a basis for a speedy trial violation.<sup>59</sup> Three justices dissented, stating: “The failure to move this case forward

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<sup>49</sup> Weis v. State, 694 S.E.2d 350, 353 (Ga. 2010); Rankin, *Can Georgia afford the death penalty?*, *supra* n.46, at A1.

<sup>50</sup> Weis, 694 S.E.2d at 353, 359 (Thompson, J., dissenting); *see id.* at 360 (Thompson, J., dissenting) (noting that “[t]he prosecution took an inordinate amount of time to decide whether to seek the death penalty”).

<sup>51</sup> *Id.* at 353-54; *see also* Rankin, *Can Georgia afford the death penalty?*, *supra* n.46, at A1.

<sup>52</sup> Record on Appeal, Transcript of Nov. 26, 2007, Hearing at 40-50, Weis v. State, 694 S.E.2d 350 (Ga. 2010) (No. S09A1951).

<sup>53</sup> Record on Appeal at 964, Weis v. State, 694 S.E.2d 350 (Ga. 2010) (No. S09A1951).

<sup>54</sup> Weis, 694 S.E.2d at 353.

<sup>55</sup> *Id.* at 353-54.

<sup>56</sup> *Id.* at 354; *see also id.* at 360 (Thompson, J., dissenting) (noting that the GPDSC provided funds “on the eve of trial and at a steep discount, leaving Weis with little time and no real ability to mount a defense”).

<sup>57</sup> *Id.* at 352.

<sup>58</sup> *Id.* at 352, 354-57.

<sup>59</sup> Vermont v. Brillion, 129 S. Ct. 1283, 1292 (2009).

is the direct result of the government's unwillingness to meet its constitutional obligation to provide Weis with legal counsel and the funds necessary for a full investigation."<sup>60</sup>

In *Phan v. State*,<sup>61</sup> the Georgia Supreme Court applied its decision in *Weis* to do even greater violence to the constitutional right to counsel. The capital case against Khanh Dinh Phan had been pending for over *five years* without proceeding to trial because the GPDSC has been unable to provide funds for attorneys, investigators, and expert witnesses.<sup>62</sup> The GPDSC originally agreed to pay Phan's lawyers \$125 per hour, but reduced the amount to \$95 per hour, and then did not pay them at all after August 30, 2008.<sup>63</sup> It also refused to fund an investigation that the GPDSC itself recognized as constitutionally required.<sup>64</sup>

On a pretrial appeal of a speedy trial issue, the Georgia Supreme Court, in another 4-3 decision, remanded the case to the trial court to consider alternatives to ensure Phan effective representation, including the possibility of appointing alternative counsel.<sup>65</sup> On remand, the trial court in *Phan* – although it has already found that there is no funding available for defense representation in capital cases<sup>66</sup> – is to seek out lawyers who will work for nothing or next to nothing and who can somehow represent their client in accordance with recognized performance standards, even without resources for necessary expert and investigative assistance.<sup>67</sup> Obviously, this will be an impossible task.

In an effort to speed things along, and in light of the lack of available funding, the majority in *Phan* also instructed the trial court to consider superficial alternatives – “such as phone or internet interviews of witnesses” – to the investigation needs proposed by Phan's counsel for the guilt-innocence and penalty phases of the trial.<sup>68</sup> However, a thorough investigation requires following leads, surveying the physical environment in which the client developed,<sup>69</sup> talking to people who may not be available by telephone or internet,<sup>70</sup> repeated in-

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<sup>60</sup> *Weis*, 694 S.E.2d at 362 (Thompson, J., dissenting).

<sup>61</sup> *Phan v. State*, 2010 WL 2553467 (Ga. June 28, 2010).

<sup>62</sup> Bill Rankin, *5-year delay kills case, suspect's lawyers argue: No money, no trial; high court asked to toss murder charge*, ATLANTA J.-CONST, Mar. 9, 2010, at B8.

<sup>63</sup> *Phan*, 2010 WL 2553467, at \*4 n.1 (Thompson, J., dissenting).

<sup>64</sup> *Id.* at \*4 (Thompson, J., dissenting).

<sup>65</sup> *Id.* at \*2.

<sup>66</sup> *Id.* at \*4 (Thompson, J., dissenting).

<sup>67</sup> See, e.g., WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH; DEFENSE ATTORNEYS IN CAPITAL CASES (2006) (describing the demands upon defense lawyers in capital cases); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) (setting out detailed guidelines which constitute the standard of care required for the proper defense of capital cases).

<sup>68</sup> *Phan*, 2010 WL 2553467, at \*2.

<sup>69</sup> See Gregory J. Kuykendall, Alicia Amezcua-Rodriguez & Mark Warren, *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 HOFSTRA L. REV. 989, 1009-11 (2008) (describing the need to survey the physical environment where the client has lived, particularly in the case of those who have lived in foreign countries).

<sup>70</sup> In *Phan*, the witnesses with regard to both guilt-innocence and mitigation are in Vietnam. The survivor of the murders with which Phan is charged fled to Vietnam and all of Phan's family lives there. *Phan*, 2010 WL 2553467 at \*1.

person interviews,<sup>71</sup> assessing the impact that witnesses will have on the jury, and preparation of the witnesses for direct and cross examination.

For poor people facing the ultimate punishment in Georgia, lawyers have become fungible and subject to replacement at any time based on cost considerations. A defense lawyer who suggests that a true investigation is needed can be swapped for a lawyer who will not investigate or will conduct only a superficial investigation. The substitution of less qualified counsel without sufficient resources not only undermines the relationship between attorney and client, but also deprives the defendant of a thorough investigation<sup>72</sup> while counsel is not appointed or funds are not available. This may result in the loss of valuable evidence or witnesses and cause irreparable harm to a defendant's case. Faced repeatedly with such flagrant violations of the right to counsel, the Georgia Supreme Court has not only refused to provide a remedy, but decreed that capital trials will move forward despite the refusal of the legislature to provide the funding for a competent defense for those facing the ultimate penalty.

### 3. Outsourcing Injustice: The Use of Flat-Fee Contracts

Before 2005, many jurisdictions in Georgia contracted with lawyers to handle all of their indigent criminal cases for a fixed fee. The creation of the public defender system was supposed to drastically minimize or end the use of such contracts. However, because it has never adequately funded its system, Georgia has continued to use contracts and, when the funding for conflict cases was drastically reduced in 2008, greatly increased their use. It has primarily used such contracts to provide lawyers in cases where the public defender offices cannot provide representation due to a conflict of interest.

Most contracts executed by the GPDSC provide that the flat sum provided to the attorney is to compensate her not only for her time, but also for necessary investigators, expert witnesses, overhead, and other incidental expenses – such as copying volumes of criminal or medical records – thus creating disincentives for the lawyer to spend resources on investigation and expert assistance. The contracts also typically allow the lawyers to maintain private practices, creating motivation to dispose of their indigent clients' cases as quickly as possible, since they will be paid the same amount regardless of the time spent and the quality of representation provided.

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<sup>71</sup> See *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (finding counsel ineffective for “not even” taking the first step of “interviewing witnesses” or requesting records); William M. Bowen, Jr., *A Former Alabama Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 38 HOFSTRA L. REV. 805, 814 (2008) (describing the importance of “in-person, face-to-face, one-on-one interviews with . . . the client's family, and other witnesses who are familiar with the client's life, history, or family history” and the need for “multiple interviews” with some witnesses “to establish trust, elicit sensitive information” (citation omitted)); American Bar Association, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES, Guideline 10.7 – Investigation & Commentary to Guideline 10.7, *reprinted in* 31 HOFSTRA L. REV. 913, 1015-26 (2003) (discussing need for interviews of client and various witnesses by defense counsel, the investigator, the mitigation specialist, and other members of the defense team).

<sup>72</sup> *Porter*, 130 S. Ct. at 452-53; *Wiggins v. Smith*, 539 U.S. 510, 524, 525 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also* *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (describing a “thorough-going investigation” as “vitaly important”).

In *Cantwell* – the case litigated by the Southern Center for Human Rights in the Northern Judicial Circuit – attorneys signed contracts for \$50,000 a year in exchange for handling 175 cases – a rate of compensation that breaks down to approximately \$285 per case.<sup>73</sup> One of the attorneys who had signed such a contract not only maintained a private practice, but also served as an appointed public defender in seven municipal courts and as a juvenile court judge in the circuit.<sup>74</sup> He testified at a hearing in March 2010 that when he signed the contract to take on 175 cases, the GPDSC did not inquire as to his existing workload.<sup>75</sup>

In response to the lawsuit filed in *Flournoy v. State*, discussed above, the GPDSC executed contracts with ten different attorneys. Each contract provided for the attorneys to take on a certain number of cases for a fixed fee – \$1,200 to \$1,500 per case.<sup>76</sup> Prior to executing the contracts, the GPDSC did not tell the lawyers anything about the cases they would be assigned, so they had no basis on which to evaluate whether the rate of compensation provided by the contracts would allow them to provide effective representation in those cases.<sup>77</sup>

GPDSC’s Appellate Division Director estimated at a hearing in February 2010 that the average motion for new trial and direct appeal – under the contracts, attorneys would assume responsibility for both – require approximately 140 hours of attorney time, excluding time for travel.<sup>78</sup> At the rate of compensation for which they had contracted, the attorneys would effectively be working for \$8.57 to \$10.71 per hour, depending on whether they were being paid \$1,200 or \$1,500 per case.<sup>79</sup> In addition, the attorneys agreed to seek no more than \$150 in travel reimbursement (when their assigned cases could require them to travel anywhere in the state) and no more than \$150 in reimbursement for expert assistance and other incidental expenses. They agreed to these limits without having any idea as to the nature of the cases or whether expert assistance would be needed. Based on this information and other evidence presented over the course of the hearing, the trial court found that:

Given the low rate of total compensation and the significant limitations placed on reimbursement of expert and other expenses, it is highly unlikely, if not practically impossible, for an attorney to provide effective representation to the named Plaintiffs and other class members under such a contractual arrangement. To the contrary, an attorney has a strong economic disincentive to

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<sup>73</sup> *Cantwell* Complaint, *supra* n.27, at 15.

<sup>74</sup> Transcript of Class Certification Hearing at 117-18, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Super. Ct. (Mar. 3–4, 2010).

<sup>75</sup> *Id.* at 118–19. Under the July 8, 2010, Consent Order, contract attorneys’ contract caseloads will be restricted to the limits set forth in the Order and the GPDSC is required to assess whether a contract attorney’s private caseload will affect the quality of representation he can provide to his contract clients. *Cantwell* Consent Order, *supra* n.33, at 7.

<sup>76</sup> *Flournoy* Order, *supra* n.18, at 33.

<sup>77</sup> *Id.* at 32–33.

<sup>78</sup> A defendant who has a new lawyer for a motion for a new trial or appeal in Georgia must research, investigate, and litigate motions for new trial because Georgia law requires that a defendant raise or waive ineffective assistance claims at the earliest possible opportunity. *See Adams v. State*, 405 S.E.2d 537 (Ga. Ct. App. 1991).

<sup>79</sup> *Flournoy* Order, *supra* n.18, at 33. The contracts also did not provide any funding to cover overhead or other related expenses. *Id.*

perform a thorough investigation and develop and present the substantial evidence often required to prevail in a motion for new trial. The inadequacy of compensation and the disincentives created by these arrangements raises a serious doubt that an attorney can provide effective assistance without suffering severe financial detriment or sacrifice.<sup>80</sup>

Low rates of compensation and a lack of other resources provided to contract attorneys result in an intractable conflict of interest between the client's interest in adequate representation and the attorney's personal and financial interests. Flat fee contracts to represent a large number of defendants should therefore be avoided. If a jurisdiction must resort to contracts for conflict cases or other unique reasons (as in rural areas where there are few cases and few lawyers), there must be adequate compensation for the representation and clear restrictions on simultaneously-maintained private caseloads and on the number of cases handled under the contract, as well as adequate provisions made for investigative and expert assistance, to ensure that representation provided under such contracts meets basic constitutional and ethical requirements.

#### 4. Selling Out: Compromising Ethical and Professional Standards to Meet Budgetary Limitations

As necessary resources have been withheld from Georgia's indigent defense system, ethical, professional, and constitutional standards regarding a lawyer's representation of multiple co-defendants and duty to decline representation when his or her workload makes it impossible to provide competent representation<sup>81</sup> have given way to cost control measures. The same pressure to control costs has manifested in overwhelming caseloads for public defenders and a failure to compensate private contract counsel for work they have already performed.

In cases involving multiple defendants, cases may be resolved with one defendant agreeing to testify against another or a lawyer may argue for more lenient treatment based on the relative culpability of the defendants. Constitutional and ethical rules protect the interests of the accused in cases involving multiple defendants.<sup>82</sup> Although the overwhelming majority of criminal cases end in guilty pleas, such rules make no distinction between cases that are resolved pre-trial and those that proceed to trial. Nevertheless, many circuit public defenders offices in Georgia have – under pressure from the GPDSC – simultaneously represented defendants with conflicting interests as a cost-saving measure.<sup>83</sup> Public defender offices have been urged to

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<sup>80</sup> *Id.* at 33–34.

<sup>81</sup> *Holloway v. Arkansas*, 435 U.S. 475 (1978) (representation of defendants with conflicting interests by the same lawyers violated the Sixth Amendment right to counsel); *Glasser v. United States*, 315 U.S. 60 (1942) (same). Georgia's Rules of Professional Conduct also prohibit lawyers from representing clients with conflicting interests: “The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.” GA. RULES OF PROF'L CONDUCT 1.7(a), cmt. 7 (emphasis added); *see also* GA. RULES OF PROF'L CONDUCT 1.1 (prohibiting lawyers from handling a matter unless they can do so competently).

<sup>82</sup> *Id.*

<sup>83</sup> *See* Greg Land, *Bar opinion could cost PD agency: Formal Advisory Opinion states that conflicts exist when public defenders from the same circuit represent co-defendants*, FULTON COUNTY DAILY REPORT, Apr. 28, 2010, at 1, 8 (noting that “at least four circuits have kept some conflict cases in house”).

“hold” conflict cases for as long as possible before declaring a conflict in the hope that cases will be resolved with plea bargains. But the resolution of a case by plea bargain does not mean that there is no conflict. Moreover, if a conflict is finally declared, the entire public defender office may be disqualified due to knowledge it has of all of the affected defendants’ cases. It may also take time to find conflict-free representation for the defendants, who may already have been prejudiced by the conflicted representation.

Originally, the GPDSC had several conflict defender offices, which employed full-time lawyers, investigators, and support staff to provide representation to co-defendants with conflicting interests on a cost-effective basis.<sup>84</sup> In addition, during the first few years of its existence, the GPDSC assigned lawyers to conflict cases and paid them by the hour (\$60 for in-court work and \$45 for out-of-court work).<sup>85</sup> Even when lawyers were being paid by the hour, however, they were not fully paid for the work they did. The former conflicts director for the GPDSC told a legislative committee that he “arbitrarily” cut the amount paid to conflict attorneys by \$429,000,<sup>86</sup> simply because there were not sufficient funds to pay the lawyers what they had earned.<sup>87</sup> In some cases, cuts led to lawyers who had agreed to work for \$45 or more per hour being compensated at the rate of only \$14 per hour.<sup>88</sup> As a result, some underpaid lawyers withdrew from their cases, leaving indigent defendants without representation.<sup>89</sup> After the legislature significantly cut the already inadequate funding for representation in conflict cases, the GPDSC closed some of its conflict defender offices and made cutbacks to others.<sup>90</sup>

The legislature’s refusal to provide adequate funding has also exacerbated the situation of public defender offices across the state. One Georgia public defender resigned in 2009 because she felt that she was “not providing effective representation to [her] clients. . . . due to overwhelming caseloads, being required to represent clients with conflicting interests, a woefully insufficient budget for experts, lack of adequate training and supervision and an insufficient investigative staff with little to no training.”<sup>91</sup> In just 13 months, she closed approximately 900 cases and carried approximately 270 cases at any given time.<sup>92</sup> The crushing caseloads maintained by attorneys in the office forced them to ration out the office’s “meager resources” to

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<sup>84</sup> *A Message from Director Michael Mears*, GPDSC SPRING NEWSLETTER (Ga. Pub. Defender Standards Council, Atlanta, Ga.), Apr. 2006, at 1 (referencing eight conflict defender offices), *available at* [http://www.gpdsc.com/docs/aboutus-newsletter\\_april\\_06.pdf](http://www.gpdsc.com/docs/aboutus-newsletter_april_06.pdf).

<sup>85</sup> Memorandum from Michael Mears, Director, Georgia Public Defender Standards Council, to All Circuit Public Defenders and Conflict Public Defenders (Dec. 21, 2004), *available at* <http://www.gpdsc.com/cpdsystem-conflict-protocol.htm>.

<sup>86</sup> Bill Rankin, *State council to pay defenders: Funding problems had caused it to slash fees for private lawyers representing poor people*, ATLANTA J.-CONST., Jan. 24, 2009, at A1 (noting that Schneider admitted that his cuts were “arbitrary”).

<sup>87</sup> Testimony of Larry Schneider, former Conflicts Director for GPDSC, before Ga. Pub. Defender Standards Council Legislative Oversight Comm., Atlanta, Ga., Dec. 17, 2008.

<sup>88</sup> *See* Rankin, *State council to pay defenders*, *supra* n.86, at A1.

<sup>89</sup> *Id.*

<sup>90</sup> *See* Mike King, *An indefensible move: Tight funds no excuse for reckless manipulation of office that represents poor in ‘conflict cases.’* ATLANTA J.-CONST., June 13, 2008, at A12.

<sup>91</sup> Marie-Pierre Py, Letter: *Without finds, PD system will deteriorate further*, FULTON COUNTY DAILY REPORT, Mar. 19, 2009.

<sup>92</sup> *Id.*

just a few cases following a “cursory review.”<sup>93</sup> The budgetary constraints placed on the office resulted in an ethically-dubious approach to conflicts (except in serious felony cases, attorneys were instructed not to withdraw from cases “even where an obvious conflict existed”); expert funding being limited to exceptional cases; and overwhelming caseloads.<sup>94</sup>

In short, the unavailability of funding for indigent defense has resulted not only in the failure to provide counsel in some instances, but also in the compromising of standards that exist to protect clients. Rather than fund the system adequately or explore alternative cost savings, widely accepted standards for professional ethics and caseloads limitations have been ignored because the state is unwilling to commit the resources for the system to run as it should and because there is no oversight or incentive structure to encourage the state to comply with its constitutional responsibilities.

## II. The Need for Federal Oversight of Indigent Defense

It has become apparent far beyond Georgia’s borders that indigent defense services in the United States remain in a perpetual “state of crisis.”<sup>95</sup> In addition to making fewer lawyers available to provide such representation, many states, including Georgia, have forced attorneys to carry excessive caseloads, failed to provide attorneys with resources to provide for an adequate defense, allowed significant delays in the appointment of counsel, and neglected to adequately train and supervise attorneys handling indigent criminal cases.

The cuts made to already inadequate indigent defense budgets across the country have had a severe impact on the rights of persons charged with crimes and who cannot afford a lawyer. In some cases, it has affected the quality of representation, while in others it has prevented them from receiving representation at all. Although many state budgets may have been cut across the board, prosecution agencies have continued to benefit from significant federal financial assistance. For fiscal year 2011, the Department of Justice (DOJ) proposed a budget of \$3.4 billion in federal funding for state, local, and tribal law enforcement programs.<sup>96</sup> Two and a half million dollars would be set aside to fund Access to Justice and Rule of Law activities in the DOJ that, in part, include a commitment to “ensur[e] indigent defense,”<sup>97</sup> but

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<sup>93</sup> *Id.*; see also King, *An indefensible move*, *supra* n.90, at A12 (suggesting that “[a]s money for the conflict cases runs out, public defenders may be forced to negotiate pleas for their clients even when it may not be in their interests”).

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE (2006), available at [www.indigentdefense.org](http://www.indigentdefense.org); THE CONSTITUTION PROJECT, NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTION RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>. See, e.g., THE CONSTITUTION PROJECT, JUSTICE DENIED, *supra* at 59-60 (describing how budget shortfalls in states such as Florida, Kentucky, Maryland and Minnesota have resulted in staff reductions and increased caseloads for public defender offices, the transfer of costs to defendants, and a refusal by public defender offices to provide counsel in certain cases or to pay for private court-appointed conflict counsel).

<sup>96</sup> U.S. DEP’T OF JUSTICE, FY 2011 BUDGET REQUEST: ASSIST STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT 1 (2010), available at <http://www.justice.gov/jmd/2011factsheets/pdf/law-enforcement.pdf>.

<sup>97</sup> U.S. DEP’T OF JUSTICE, FY 2011 BUDGET REQUEST: RESTORE CONFIDENCE IN OUR MARKETS, PROTECT THE FEDERAL FISC, AND DEFEND THE INTERESTS OF THE UNITED STATES 5 (2010), available at <http://www.justice.gov/jmd/2011factsheets/pdf/defend-interests-unitedstates.pdf>.



only \$1.3 million – or less than 0.04% of the total federal funding set aside for state law enforcement – would be specifically directed to indigent defense programs.<sup>98</sup> In 2008, President George W. Bush signed legislation that would provide \$4.75 million a year to the Ernest F. Hollings National Advocacy Center, a specialized school in South Carolina that trains prosecutors.<sup>99</sup> Congress has yet to provide parallel funding to train public defenders.

The generosity of federal grants programs over the years and the unwillingness of states to fund adequately programs for providing representation to poor people accused of crimes has resulted in many parts of the country in systems that are completely imbalanced. There is simply no adversary system. The public defenders and court-appointed lawyers with their crushing caseloads and limited resources simply have no chance against the overwhelming resources of the prosecution and law enforcement. The federal government should not exacerbate existing imbalances and it should not be funding law enforcement agencies and prosecutors who operate in jurisdictions that do not have a properly working adversary system.

The federal government could take an active role in improving state-run indigent defense programs by: (1) making grants directly to state or public interest programs demonstrating best practices or attached to certain minimum requirements regarding training, caseloads, and supervision; (2) conditioning funds awarded to law enforcement and prosecution agencies on a showing that the indigent defense system has reached a satisfactory level of functioning; and (3) establishing a National Center for Defense Services, similar to the Legal Services Corporation (LSC). The federal government has funded training, but its limited value in a system that suffers from such great deficiencies must be recognized. The federal government could also seek the authority to bring lawsuits to compel states to comply with the Sixth Amendment and support private litigation efforts by filing of amicus briefs. All of these tools will likely be necessary to vindicate the Constitution in states like Georgia where improvements were slow in coming and are still woefully inadequate almost 50 years after *Gideon* was decided.

#### A. Grants to State Indigent Defense Programs

The most direct means of assistance would be for the federal government to make grants available to state agencies or public interest programs providing indigent defense services or allocate a specific portion of existing grant funds to that purpose. Such grants could be conditioned on a state's demonstrated ability to provide those services through a system that meets certain requirements.<sup>100</sup> In addition to providing a much needed financial infusion and forcing states to provide defendants with constitutionally-compliant representation, the conditions attached to such federal funds could provide a needed incentive for states to

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<sup>98</sup> U.S. DEPT. OF JUSTICE, FY 2011 BUDGET REQUEST, *supra* n.96, at 3.

<sup>99</sup> Bob Kemper, *GIDEON: RIGHT TO COUNSEL?: LANDMARK DECISION FALLS SHORT OF PROMISE 6* (2009).

<sup>100</sup> Specific conditions could include: ensuring that attorneys are provided to all indigent defendants entitled to counsel within a reasonable timeframe and under reasonable conditions; that specific guidelines (*i.e.*, relating to the provision of investigative and expert services) be followed in all capital cases with appointed counsel; that strict ethical guidelines be followed in providing indigent criminal representation; that all contracts executed to provide indigent defense services meet minimum guidelines in terms of qualifications, caseloads, and compensation; and that funds dedicated to public defender offices also require minimum guidelines in terms of qualifications and caseloads.

reevaluate how they currently allocate their own budgets, potentially resulting in the choice to redirect funds from jails and prisons (amidst all of its funding troubles, Georgia maintains the fourth-highest incarceration rate in the nation<sup>101</sup>) to indigent defense and affordable sentencing alternatives.

To provide one example, the Bureau of Justice Assistance (BJA) has provided grants to support resource centers like the Arizona Capital Representation Project, which provides direct representation to indigent persons facing the death penalty, but also provides other lawyers in Arizona with consulting services, education, and training.<sup>102</sup> The resource center model is one that has worked well by demonstrating best practices and serving as an on-the-ground resource for lawyers providing representation to those accused of crimes.

There is no question that the federal government can condition funds on compliance with its own policy objectives – including grants conditioned on related system requirements.<sup>103</sup> The Innocence Protection Act, which was part of the Justice for All Act of 2004, authorized grants to states – \$375 million over five years – to improve the quality of representation for indigent defendants in capital cases at the trial, appellate, and post-conviction levels.<sup>104</sup> In addition to requiring recipients to maintain an “effective” system of capital representation, including training programs for lawyers appointed to represent capital defendants and adopting and implementing minimum standards for the appointment of prosecutors and defense counsel in capital cases, the Act also subjects states to a federal compliance assessment and requires the Attorney General to develop corrective action plans for states determined to be non-compliant.<sup>105</sup>

Aside from specifically conditioning funds, the federal government has the power to ensure that funds such as those distributed through the Edward Byrne Memorial Justice Assistance Grant (JAG) Program,<sup>106</sup> discussed below, are more equitably distributed among prosecution and defense agencies. In fiscal year 1999, for example, of the almost \$500 million in JAG grants (formerly known as Byrne grants) awarded to states, only 1.4% of the funds were

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<sup>101</sup> Carrie Teegardin & Bill Rankin, *Is price too high for punishment?: Long prison terms part of state's tough stance*, ATLANTA J.-CONST., May 23, 2010, at A1.

<sup>102</sup> BUREAU OF JUSTICE ASSISTANCE, FY09 NATIONAL INITIATIVES: ADJUDICATION PROGRAM FUNDING RESULTS, available at <http://www.ojp.usdoj.gov/BJA/funding/09NationalAdjudicationAwards.pdf>.

<sup>103</sup> See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). In other contexts, Congress has conditioned federal grants on a showing that certain systemic structures are in place. For example, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), conditioned 100% of Temporary Assistance for Needy Families (TANF) funding on the state creation of programs to provide assistance to families receiving public assistance and to assist low-income individuals in transitioning into the workforce. 42 U.S.C. § 602. TANF also provides for a bonus structure, which rewards high performing states. See 42 U.S.C. § 603(a)(4). The Act also conditioned grants made through the Child Support Enforcement Program (CSEP) on the state's ability to institute a system for child support enforcement through, among other means, creating an automated entry system for support orders and mechanisms for speedy enforcement of support orders. 42 U.S.C. §§ 651-669(b). CSEP also provides for special incentive payments calculated on the basis of the state's performance levels. See 42 U.S.C. § 658a.

<sup>104</sup> Pub. L. No. 104-405, §§ 421-426, 118 Stat. 2260 (2004).

<sup>105</sup> *Id.*

<sup>106</sup> 42 U.S.C. § 3751.

granted to defender programs.<sup>107</sup> In 32 states, public defense programs received no such funding at all.<sup>108</sup> Southern states have historically allocated the least amount of JAG grant funds to defender programs, in both dollars and as a percentage of total state JAG grant awards.<sup>109</sup> To avoid such a stark disparity, Congress could require of states (as a condition of receiving funds) that a certain amount of funding be allocated to indigent defense, as well as that the state system for providing indigent defense satisfy minimum requirements.

#### B. Conditions on Grants to Law Enforcement and Prosecution Agencies

Just as funds granted to public defense systems can be conditioned on certain requirements, funds granted to law enforcement and prosecution agencies can also be subject to conditions. For example, Congress has granted other funds to state entities for a specific purpose only where the state has demonstrated the ability to provide for fair process in the system in which such funds will be utilized. Under the Justice for All Act of 2004, the Attorney General is empowered to make grants “to provide training, technical assistance, education, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence” by law enforcement and corrections personnel, among others.<sup>110</sup> To be eligible to receive such incentive grants, states are required to have in place or to enact statutes affording reasonable process to those seeking post-conviction DNA testing and ensuring the proper preservation of DNA evidence.<sup>111</sup>

BJA awards grants to state and local law enforcement and prosecution agencies through the JAG program to improve the functioning of the criminal justice system.<sup>112</sup> The JAG program is intended to support a wide range of program areas, including law enforcement, prosecution, and courts; prevention and education; corrections and community corrections; drug treatment and enforcement; planning, evaluation, and technology improvement; and crime victim and witness initiatives.<sup>113</sup>

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<sup>107</sup> See NAT’L LEGAL AID & DEFENDER ASSOC., FEDERAL ASSISTANCE TO STATE AND LOCAL INDIGENT DEFENSE PROGRAMS, FY 1998 AND 1999 1-2, *available at* <http://www.nlada.org/DMS/Documents/1013119600.02/Federal%20Assistance%20Report%20FY98-99.pdf>. At the time these figures were collected, JAG (or Byrne) grants were part of a previous version of the program, known as the Edward Byrne Memorial State and Local Law Enforcement Program (or “Byrne formula grants”). *Id.* at ii. The Byrne formula grant program was merged with another program and retitled as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005. See Pub. L. 109-162, Title XI, § 1111(a)(2), 119 Stat 2960 (2006). For simplicity’s sake, in this paper we will refer to both iterations of the grants as “JAG grants.”

<sup>108</sup> NAT’L LEGAL AID & DEFENDER ASSOC., *supra* n.107, at 2.

<sup>109</sup> *Id.* at 3.

<sup>110</sup> 42 U.S.C. § 14136. The Justice for All Act also provides for Capital Prosecution Improvement Grants, which are conditioned on states establishing one or more of the following: training programs, standards and qualifications, and performance assessments for prosecutors, legal reforms to reduce error at the trial level, programs of systematic review of cases in which the death penalty was imposed to determine if DNA testing may be appropriate.

<sup>111</sup> See Pub. L. No. 108-405, Title IV, § 413, 118 Stat. 2285 (2004).

<sup>112</sup> 42 U.S.C. § 3751. The formulation used for awarding JAG grants has been criticized because it neither conditions federal funding on the establishment of statewide public defense systems, nor requires any percentage of the federal grant to be awarded to public defender programs. See, e.g., ABA, Report with Recommendation to the ABA House of Delegates 103 (Feb. 1991) (urging inclusion of public defense programs in federal grant funding), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/103.pdf>.

<sup>113</sup> 42 U.S.C. § 3751. Inclusion of “indigent defense” as a specific program area for funding – it is currently not part of the programs specified in 42 U.S.C. § 3751(a)(1) – would go a long way toward emphasizing the equal

There are already various reporting requirements tied to JAG grants. Congress could also require that, in order to be eligible to receive specific grants, states must meet certain standards with regard to their indigent defense programs, including the prompt assignment of counsel after arrest, manageable caseloads, adequate resources, independence, structure, training, and compliance with professional ethical standards. This would assure that systems that receive grants are functioning properly under constitutional and professional standards. Moreover, the benefit of this approach comes at no additional cost to the federal government; it can distribute the same levels of grant money while requiring much more of the recipients.

There will be tremendous resistance by state law enforcement, district attorneys, and attorneys general to any conditions being placed on the grants that they receive from DOJ. For years, they have received millions of dollars with little or no accountability. Things must change, but that change can be gradual: conditions may be phased in over time so that states have ample warning of what is expected of them, or states and local jurisdictions might first be required to report on the state of their indigent defense systems before being required to certify that they meet certain minimum standards. But the federal government should not continue to give billions of dollars to criminal justice systems with no assurance that those systems have functioning adversary systems or that they produce just and reliable results.

### C. Funding A National Center for Defense Services

The federal government should also establish an independent entity similar to the Legal Services Corporation through which federal funding would be provided to states to improve indigent defense services pursuant to standards ensuring independence, structure, training, supervision, competent management, and other essential elements of effective representation.

The LSC is a non-profit organization that was created in 1974 to promote equal access to justice and provide quality civil legal assistance to low-income Americans.<sup>114</sup> The LSC currently awards grants to legal services providers through a competitive grant process, conducts compliance reviews and program visits to oversee program quality and compliance with all relevant requirements and restrictions, and provides training and technical assistance to programs. The federal government provided nearly \$400 million in 2009 to the LSC, even though there is no right to counsel in civil cases.<sup>115</sup> Yet, in the criminal context, Congress has not enacted comparable legislation to assist states in cases where there is a constitutionally-mandated right to counsel.

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importance of prosecution and defense. As a practical matter, the majority of JAG grants are distributed to state and local law enforcement and aimed at crime prevention and control rather than the provision of indigent defense. THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 143-44 (Nov. 5, 2008), *available at* [http://2009transition.org/criminaljustice/index.php?option=com\\_content&view=article&id=22&Itemid=80](http://2009transition.org/criminaljustice/index.php?option=com_content&view=article&id=22&Itemid=80) (noting that “[h]istorically, states have allocated either none of their JAG funding or only a miniscule portion to public defense programs, directing a vastly greater share to law enforcement and prosecutorial programs”).

<sup>114</sup> Legal Services Corporation Act, 42 U.S.C. § 2996.

<sup>115</sup> Kemper, *supra* n.99, at 6; THE CONSTITUTION PROJECT, JUSTICE DENIED, *supra* n.95, at 200.

To fill that gap, some have proposed an independent, adequately-funded National Center for Defense Services (NCDS) with a mission to “strengthen the services of publicly funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data.”<sup>116</sup> The creation of the NCDS would disseminate sorely needed federal funding aimed at improving representation to meet the standards established by the American Bar Association (ABA), lead to increased transparency, provide continuous monitoring and oversight of state and local indigent defense programs, and support those programs in improving representation for their clients and the operation of their programs in all regards.

Others have suggested an Office of Public Counsel Services within DOJ that would formulate a long-term plan for federal support of state and local indigent defense systems, develop standards by which indigent defense systems could be evaluated, provide technical assistance and training to state and local jurisdictions to assist them in implementing such standards, administer federal indigent defense grants, and collect, analyze, and disseminate relevant indigent defense data. Because of the Department’s involvement in the prosecution of cases, however, the interests of those accused in effective representation would be best served by an independent agency that is concerned solely about defendants’ best interests and not about obtaining convictions.

#### D. The Limits of Training

Training is often put forward as the answer to all the problems of indigent defense. BJA has funded many excellent training programs, including a recent grant to the ABA to work on a National Indigent Defense Training and Technical Assistance Project, which will develop recommendations for providing training and technical assistance within indigent defense systems.<sup>117</sup> This is a step in the right direction, but training will not help lawyers carrying excessive caseloads – sometimes as high as 300 to 500 cases – who do not have the assistance of an investigator or funds for an expert. Given the conditions under which they are operating, some public defenders and contract lawyers are simply not capable of providing effective representation no matter how much training they receive. Training is important and it is important that state public defender programs develop outstanding training for their lawyers. But the problems faced by struggling indigent defense programs will not be solved by training alone, particularly training developed and provided only at a national or regional level.

#### E. Other Solutions

There are other ways that the federal government – and particularly DOJ – could provide assistance to failing indigent defense systems across the country. The Department’s Civil Rights Division could file amicus briefs in support of plaintiffs challenging deficient indigent defense systems, emphasizing the need to protect their constitutional rights. If given the authority by

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<sup>116</sup> THE CONSTITUTION PROJECT, JUSTICE DENIED, *supra* n.95, at 200-01; *see also* Kemper, *supra* n.99, at 7.

<sup>117</sup> *See* BUREAU OF JUSTICE ASSISTANCE, INDIGENT DEFENSE PROJECTS AND PROGRAMS 1, *available at* <http://149.101.22.150/BJA/topics/IndigentDefense.pdf>.

Congress,<sup>118</sup> DOJ could initiate pattern and practice lawsuits in states where indigent defense systems are inadequate. In addition to providing DOJ with authority to bring its own lawsuits, Congress could also allow the Department to “deputize” private litigants to file lawsuits on behalf of the United States.<sup>119</sup>

### III. Conclusion

The Indigent Defense Commission created by the Chief Justice of the Georgia Supreme Court in 2000 identified several elements that are essential to a successful indigent defense program. Today, Georgia has achieved only one – structure. It continues to lack other critical features such as sufficient resources, independence, proper management, effective recruitment, and a comprehensive training and continuing legal education program. Until Georgia fully integrates all of these elements into its indigent defense system, it will continue to fail in its constitutional obligation to provide effective legal representation for its indigent criminal defendants.

Georgia’s legislature has not only been unwilling to fund a system to provide competent counsel for those accused of crimes; it has diverted millions of dollars from the fund it created for indigent defense to other purposes. Georgia’s elected trial judges have presided over proceedings at which defendants were not represented in clear violation of *Gideon* and Georgia’s Supreme Court, whose justices are also elected, has urged trial courts to disregard ongoing attorney-client relationships and find other, cheaper lawyers when the state fails to adequately fund the defense. The director of the GPDSC, which now operates as part of the executive branch, has allowed indigent defendants to be represented by lawyers who are in no position to provide effective assistance or to go without counsel altogether. All three branches of Georgia’s government have completely abdicated their constitutional and moral responsibility to protect the right to counsel.

Federal involvement and oversight will be required to achieve the level of representation required by the Constitution because states like Georgia are not willing to solve this problem on their own. Policies favoring cost containment cannot override the right to counsel, and the federal government should not allow that to happen as long as it shares responsibility for ensuring state compliance with the Constitution. Unless the federal government enforces the right to counsel through measures requiring states like Georgia to fundamentally reconceive the way in which they provide indigent defense services, it is unlikely that those states will ever meet their constitutional responsibilities. The cost will be enormous in terms of wrongful convictions, uninformed sentencing, and a criminal justice system that lacks both credibility and legitimacy.

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<sup>118</sup> The Department currently has the authority to bring such lawsuits with regard to the juvenile justice systems, *see* 42 U.S.C. § 14141, but it would need specific authority to bring similar suits with regard to adult criminal justice systems.

<sup>119</sup> Some of these and other potential solutions – including the reclassification of certain misdemeanor offenses as civil infractions such that incarceration, and therefore appointed counsel, is not required – will be discussed in forthcoming Issue Briefs; therefore, we have merely touched on them here.