

Vision Statement: The Defender Initiative of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law (SUSL) and the Sixth Amendment Center (6AC) seek an award from the U.S. Department of Justice, Bureau of Justice Assistance in the amount of \$718,091.39 for a three-year project to improve the quality of state-level indigent defense services in the United States consistent with the American Bar Association (ABA) *Ten Principles of a Public Defense Delivery System* (“*Ten Principles*”).

The *Ten Principles* detail the broad structures and policies that are critical to any healthy, minimally functioning indigent defense system. No matter how talented, dedicated, and smart an indigent defense attorney may be, she will fail to provide her clients the quality of representation guaranteed by the constitution if she is, for example, systemically barred from meeting her client for several months after arrest (*Principle 3*), has too many other clients trying to be served simultaneously (*Principle 5*), fails to continually keep abreast of the latest criminal law best practices (*Principle 9*), and/or is financially beholden to the judge presiding over her cases (*Principle 1*). Many defenders have as many as 2000 cases per year, making effective representation for all of them impossible.¹ The proposed “Systemic Defender Standards Project (SDSP)” seeks to increase the number of jurisdictions meeting one or more of the *Ten Principles* through a combination of technical assistance, training, public education, and policy development.

The distinct strengths of SUSL and the 6AC make this partnership uniquely qualified to provide these services. The Korematsu Center advances justice and equality through a unified vision that combines research, advocacy, and education. In 2008, the

¹ See, *Minor Crimes, Massive Waste, The Terrible Toll of America’s Broken Misdemeanor Courts* (NACDL, 2009), available at http://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf.

Defender Initiative joined the Korematsu Center to bring that unified vision to bear on the nation's inconsistent provision of an adequate right to counsel. The method has proven effective, as the Initiative recently completed a three-year misdemeanor right to counsel project in which it educated judges and local governments in four states on the need to provide counsel to eligible accused persons at arraignments, consistent with ABA *Principle 3*. As a result of the project, thousands of accused persons now have lawyers who before the project would have proceeded without counsel. The Initiative also has provided amicus briefs in trial and appellate courts on effective assistance issues and has held a number of conferences on public defense, attracting nationally respected speakers and key local officials and state supreme court justices. Additionally, the Korematsu Center has access to both professional social scientists and law students to augment the research capabilities of this project. The Initiative Director is a key member of the Washington State Bar Council on Public Defense, on which he leads a subcommittee on defender standards. The WSBA worked closely with the Washington Supreme Court on developing and implementing defender standards. The Director has worked on defender standards in Washington and nationally for 30 years. As the partner with the most seniority in overseeing grants, SUSL will provide all fiscal oversight for the grant.

In 2011, the 6AC was established to provide evaluation services and technical assistance to state and county policymakers who have the authority, but lack the knowledge necessary to fix the long-standing, deep-rooted indigent defense deficiencies that U.S. Attorney General Eric Holder, Jr., has called a national "crisis." The 6AC's theory of change acknowledges that for reform to be sustainable it is necessary for policymakers to understand the crisis and determine for themselves, within the

parameters of the *Ten Principles*, the best solution for their individual jurisdiction. The 6AC is uniquely situated to provide these services because it is not a membership organization. The 6AC board consists not of sitting policymakers or indigent defense providers whose jurisdictions may become the subject of an evaluation, but it consists of former state Supreme Court justices, law enforcement personnel, and state legislators, in addition to academicians, constitutional scholars, and mental health experts. The 6AC will be a sub-grantee and serve as the substantive lead.

Statement of the Problem: The provision of the right to counsel in America exists on a broad continuum. Public defender offices that meet or exceed the *Ten Principles* make up a small portion of the spectrum. The most prevalent manner for delivering indigent defense services in the United States is for a private attorney to handle an unlimited number of cases for a single flat fee under contract with the judge presiding over the lawyer's cases or with local government. These services lack accountability and proper supervision. They are entirely uncoordinated and the level of quality delivered differs drastically from one courtroom to the next. They are not truly "systems." Without any clear structure consistent with the *Ten Principles* they are better described as "non-systems."

Contractual arrangements in "non-systems" are rife with financial incentives for lawyers to do as little work on cases as possible. Generally, all trial expenses (experts, investigators, etc.) must be paid out of the same flat fee, meaning that a lawyer's take home pay is negatively affected the more outside assistance he seeks.² Often, lawyers in these "non-systems" take into account what they must do to please a judge in order to get

² Flat fee contracts are strictly prohibited under ABA *Principle 8*.

the next contract, rather than solely advocating on a defendant's behalf.

It is not uncommon for attorneys working for flat annual fees to end up juggling several hundred cases at the same time. Such lawyers inevitably triage the duty they owe each and every client, meaning some defendants receive meaningful representation while others do not. Excessive caseloads lead to inordinate court delays, with defendants waiting months in jail at taxpayers' expense, or to our courts becoming assembly-lines to process poor people into jail without bothering to sort out the guilty from the innocent. When an innocent person sits in jail because her attorney did not have the necessary time, ability or resources, the real perpetrator remains on the streets, often threatening public safety. This is not acceptable and contributes to the problems of over-incarceration in this country.

The scope of the problem is massive. There are 3,033 organized county or county-equivalent governments in the United States. The Department of Justice, Bureau of Justice Statistics reports that there are only 957 public defender offices in the country.³ Even accounting for the few contract systems that do meet national standards, a full 64% of the country (more than 1,900 counties) operates "non-systems" of public defense.

A number of other advocacy groups focus on improving services of existing public defense systems, through lawyer training, enhanced focus on client-centered holistic advocacy, or leadership development. However, such efforts will not help in "non-system" states. For example, the federal government could provide resources to train a fleet of lawyers and send them into "non-system" jurisdictions. But if judges control the appointment process, the judges may simply not appoint any of these trained

³ See U.S. Department of Justice, Bureau of Justice Statistics. *Census of Public Defender Offices, 2007* at: <http://bjs.gov/content/pub/pdf/pdo07st.pdf>.

lawyers if the lawyers do anything to slow down the docket with, for example, a healthy motions practice. Instead, the judges may simply appoint the same lawyers as before. In short, the national indigent defense crisis will not be overcome without a sustained focus on creating true defense “systems” that are consistent with the ABA *Ten Principles* in places where they currently do not exist. As the SDSP helps state and local policymakers create defender systems, we will simultaneously create new opportunities for these other advocacy groups to achieve their laudable goals.

Project Design and Implementation: The “Systemic Defender Standards Project (SDSP)” has four focus areas:

1. Technical Assistance: Over the three-year project, SDSP will provide technical assistance in five or more jurisdictions—at least two of which shall be at the state level—evaluating the health of the jurisdictions' indigent defense systems. SDSP will create a matrix to determine where each state currently stands in regards to each of the *Ten Principles* as the criteria for prioritizing incoming technical assistance requests. The SDSP partners will rate each request in terms of need, potential for success in improving their rating against the grid, and available resources. We would welcome BJA input into those decisions. Particular emphasis will be placed on “non-system” jurisdictions⁴ with the potential for state policymakers to create systems through the implementation of the *Ten Principles*.

One state needing immediate assistance is Mississippi. Mississippi is one of only eight states that do not contribute any money for non-capital, trial-level right to counsel

⁴ For this purpose, a jurisdiction will be defined as having a “non-system” if public defense services lack independence (*Principle 1*), early appointment of counsel (*Principle 3*), workload controls (*Principle 5*), supervision and training (*Principles 9 & 10*), or employs flat fee contracts (*Principle 8*).

services.⁵ Local government must shoulder the entire burden of providing public attorneys to the poor. And, unlike many states where municipal courts only hear local ordinance violations, Mississippi's 246 municipal courts adjudicate misdemeanors and hold preliminary hearings on felonies making cities and towns the primary funder of right to counsel services.

Despite this responsibility, local governments have significant revenue-raising restrictions placed on them by the state while being statutorily prohibited from deficit spending. There are three revenue sources available to local government (real estate taxes; fees for permits/services; and assessments on ordinance violations, traffic infractions and criminal convictions). But, because Mississippi has imposed the lowest tax burden of any of the 50 states, local governments must rely more heavily on unpredictable revenue streams, such as court fees and assessments, to pay for their criminal justice priorities than other states.

Limited resources have forced local governments to forego the full-time public defender model in favor of arbitrarily low per case payments to individual lawyers. Only four of 82 counties and none of the 289 municipalities have created full-time public defender offices. Instead, judges appoint an attorney (in violation of *Principle 1*).⁶ There are no statutory attorney qualification standards (in violation of *Principle 6*) beyond that the lawyer must reside in the county. In municipal court cases, attorney compensation payment cannot exceed \$200.00 per case — whether or not the case goes to trial. This produces a financial incentive for an attorney to try to dispose of the cases as quickly as

⁵ Arizona, California, Idaho, Michigan, Pennsylvania, South Dakota and Utah.

⁶ Complicating the issue is the fact that judges in misdemeanor courts do not have to be lawyers and are appointed by local mayors or aldermen.

possible.⁷ But even these stringent compensation caps have proven to be too expensive for many local jurisdictions, with many jurisdictions moving to flat fee contracts (in violation of *Principle 8*) in which a private attorney will take an unlimited number of cases for a single flat rate. Mississippi has consistently ranked in the bottom five of the 50 states for indigent defense cost per capita over the past twenty years.⁸

Presently, there is an opportunity to improve the situation in Mississippi. In 2011, the legislature established the Office of the Public Defender (OPD) by combining the existing state Office of Indigent Appeals and the Office of Capital Defense Counsel into one administrative unit. In addition to providing the direct client-representation services for which the two newly merged offices were previously responsible, the legislature also mandated that this new office examine the delivery of trial-level indigent defense services across the state. Specifically, the State Public Defender is to “coordinate the collection and dissemination of statistical data” and to “develop plans and proposals for further development of a statewide public defender system in coordination with the Mississippi Public Defenders Task Force.”⁹

Unfortunately, no staff or additional resources were provided to accomplish this important task. The 6AC has been advising the State Public Defender, but more survey and evaluation work is needed to help educate policymakers on the value of the *Ten Principles* in bringing substantive reform to the current indigent defense services.

We know that such a public education approach works, if given appropriate

⁷ Similar hard caps are statutorily in place for felonies (\$1,000) and capital cases (\$2,000). See: Miss. Code Ann. § 99-15-17.

⁸ See for example: American Bar Association, Standing Committee on Legal Aid & Indigent Defendants. *State, County & Local Expenditures for Indigent Defense Services, FY 2008*. November 2010.

⁹ Miss. Code Ann. § 99-18-1

resources, because of the 6AC's recent experience in Michigan. The 6AC provided technical assistance¹⁰ to the Governor's Advisory Commission on Indigent Defense¹¹ along the lines envisioned in Mississippi. In June 2012, the commission approved and released its report on the right to counsel in Michigan. Having defined the state's indigent defense system as an uncoordinated, 83-county patchwork quilt, with each county dependent on its own interpretation of what is adequate given limited local funding, the commission determined that Michigan's current system of providing representation for indigent criminal defendants lacks procedural safeguards to ensure effective public criminal defense services. Focusing on testimony that "individual attorneys have suffered repercussions for raising concerns about compliance with national standards, including those related to caseload,"¹² removing the judiciary from oversight and administration of indigent defense (consistent with ABA *Principle 1*) became the cornerstone of the commission's blueprint to reform.

On April 10, 2013, identical public defense reform bills were introduced in both chambers of the legislature proposing a 15-member Michigan Indigent Defense Commission (MIDC) to develop and oversee the "implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently

¹⁰ The State Bar of Michigan provided the limited funding for the 6AC.

¹¹ The commission was comprised of a majority and minority representative from each chamber of the legislature in addition to appointees recommended by the judiciary (2 appointees), prosecuting attorneys (1), the State Bar of Michigan (1), local government (1), criminal defense attorneys (1) and four members of the general public (that represented business interests, faith-based organizations, etc.).

¹² For a copy of the Governor's Advisory committee report and context, please see: <http://sixthamendment.org/michigan-governors-advisory-commission-recommends-sweeping-changes-2/>

delivered to all indigent adults in this state.”¹³

Another state to receive assistance under the proposed project is Utah. Utah is one of only two states¹⁴ that provide no state funding for the right to counsel. County-based systems remain entirely decentralized with no oversight by state government. Without objective, standards-based evaluation, there is no means to determine whether the county-based systems adequately fulfill the state’s Sixth Amendment obligations and, if not, what must be done to remedy the situation.

A unique opportunity to address Utah’s issues currently exists. In 2009, the Utah Judicial Council – the state court’s highest policymaking body – created the Study Committee on the Representation of Indigent Criminal Defendants to examine the delivery of indigent defense services in appellate matters. The Committee determined that many of the issues affecting the quality of appellate representation were rooted in the deficiencies at the trial-level.¹⁵ Therefore, the Judicial Council reconstituted the Study Committee¹⁶ once more in 2011 to study the delivery of indigent defense services at trial.

After a substantial vetting process, the Study Committee asked the 6AC to assist them meet their goals of assessing trial level indigent defense services. The BJA approved representatives of the 6AC to travel to Utah to address a joint hearing of the Utah Senate and House of Representatives on January 22, 2013 to begin the process of

¹³ For a copy of the bill and further context, see: <http://sixthamendment.org/new-michigan-public-defense-reform-bill-introduced/>

¹⁴ The other state is Pennsylvania.

¹⁵ For example, is there an inherent conflict to have the same trial-level attorney who operates on a flat fee contract also provide representation to the same client on direct appeal?

¹⁶ The Committee’s membership includes representatives from the judiciary, the executive branch, the legislature, the attorney general’s office, the prosecuting attorneys’ association, the criminal defense bar, and the association of counties, among other stakeholder groups.

educating them about their constitutional obligations under the Sixth Amendment and the importance of the *Ten Principles*. Subsequently, the legislature and the Study Committee authorized an evaluation of public defense in ten representative counties should funding be made available.

The SDSP proposes that decisions on at least three other states be made in consultation with BJA. In addition to the more involved technical assistance requests listed above, the SDSP will notify BJA of all quick “help desk” requests we receive from the field. These may involve short phone calls on how a particular jurisdiction handles a particular issue. Because of the quick nature of these requests, we will simply notify BJA of all requests and our responses.

The SDSP will also work with the four awardees from BJA’s FY2012 *Answering Gideon’s Call* solicitation to capture and publish lessons learned from their projects. The 6AC is already working with the Delaware State Public Defender under their *Gideon* grant assessing the conflicts system against the *Ten Principles*. In 2012, the judiciary gave up the administration of the Delaware conflicts system to comply with *Principle 1*. Unfortunately, shifting the conflicts system to the State Public Defender has caused new conflict issues. The 6AC may propose that Delaware adopt a model akin to Massachusetts’ Committee for Public Counsel Services (CPCS) – another *Gideon* grant awardee. A paper of lessons learned on how conflict assigned counsel systems best function also fits in with a third *Gideon* grant awardee – Harris Texas (Houston) assigned counsel system. Finally, the fourth recipient was the Michigan State Appellate Defender Office (SADO). The 6AC is intimately familiar with all aspects of the Michigan system and will be able to determine how that project can fit in with the “lessons learned” paper.

2. Training & Education: The SDSP will engage in approximately three training sessions at the local, state or regional level. Because fundamental change is most possible when policymakers are educated about the judicial underpinnings of the *Ten Principles* and the systemic benefits of implementing them, the SDSP will develop a *Ten Principles* training module that will be employed in at least three jurisdictions (including Mississippi and Utah). Potential training targets include, but are not limited to, judges' associations, state Supreme Court justices, executive branch personnel, Legislators, bar organizations, and indigent defense providers or individuals responsible for the oversight of indigent defense services. We will explore coordinating with local law schools and organizations to present training, as The Defender Initiative did in helping to organize a conference in 2012 in South Carolina.

Additionally, since one priority training area for BJA is to introduce public defenders and the defense bar to evidenced-based practices in delivery of indigent defense services, the SPSD will develop a matrix for measuring the impact of institutionalizing one or more of the *Ten Principles* that can then be replicated in other jurisdictions. We will present a web-based training on this so that defense providers can participate on their own schedule. Both SUSL and 6AC have experience in web-based training.

3. Publications and resources: The SDSP will produce at least three publications about evaluating the health of indigent defense systems and promising practices for implementation. The SDSP will look for practices and policies that can be shared with jurisdictions nationwide and will publish a document that will be instructive for other jurisdictions. We will also maintain a web page that provides relevant information

stemming from this project. Final decisions about topics will be made in conjunction with BJA, but potential papers may include: implementation of uniform indigency standards (*Principle 3*, in part); how states provide attorneys at initial court appearances such as arraignments and bail hearings (also *Principle 3*, in part); systemic advantages to continuous representation by the same attorney (*Principle 7*); standards limiting caseloads for defenders (*Principle 5*); and/or a paper on best practices regarding training and evaluation against performance measures (*Principles 9 & 10*). 6AC staff and The Initiative Director have extensive experience writing evaluation reports and op-ed articles, as well as journal and law review articles.

4. Policy development: The 6AC is a national leader in raising awareness about critical issues in public defense toward the goal of strengthening state and local indigent defense services using the *Ten Principles* through its national blog *Pleading the Sixth* (PT6). PT6 charts the successes and failures in our nation's efforts to provide a meaningful right to counsel. By providing historical, legal, and a standards-based context to local and national news stories, 6AC's goal is to provide its readers with the most useful and current information possible — placing critical tools into the hands of those with the power to enact positive change.

What do we mean by this? Policymakers in California, for example, may feel the issues facing them locally are unique, or at least wholly detached from the criminal justice policy debates in, say, Missouri. 6AC has come to learn, however, that this is simply not the case. PT6 puts the 6AC's exhaustive experience into context with today's news stories. In doing so, it connects the dots from one jurisdiction to the next, making lessons learned in one place relevant to all. PT6 will be expanded upon in this grant to

create additional web content that increases the SDSP partners' ability to educate people about the *Ten Principles* through increased use of other multimedia tools (e.g., videos, podcasts).

Capabilities and Competencies: [REDACTED], the 6AC Executive Director, has over fifteen years' experience providing technical assistance about the right to counsel to state and local governments, supreme courts, and bar associations, all across the country. He was selected by BJA to lead the first-ever national webinar on indigent defense standards in March of 2011. As a Senior Research Associate at the Spangenberg Group, then as the Director of Research for the National Legal Aid & Defender Association (NLADA), and now at the 6AC, [REDACTED] has been a part of nearly all significant state-level indigent defense systemic advancements over the past 15 years.

Since 2003, [REDACTED] has worked with [REDACTED] on indigent defense systems reform, first at NLADA and now as Deputy Director of the 6AC. [REDACTED] worked with the U.S. Government Accountability Office, consulting on their congressional assignment to report how federal funding is spent on state criminal justice systems and how much of that funding reaches indigent defense systems. [REDACTED] has led numerous standards-based assessments of indigent defense systems, including studies in the District of Columbia, Idaho, Louisiana, Michigan, New York, Ohio, Tennessee, and elsewhere.

[REDACTED] is a Professor from Practice and Director of The Defender Initiative at Seattle University School of Law. Before joining the faculty, he was Director of The Defender Association in Seattle for 28 years. He was a founding member of the American Council of Chief Defenders and is an active member of the ABA Indigent Defense Advisory Group. He is co-author of a National Association of Criminal Defense

Lawyers (NACDL) publication, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts." As a faculty member, he supervises law students on independent study projects including research on right to counsel issues. In January 2014, [REDACTED] will launch a Right to Counsel Clinic, which will provide additional opportunities for collaboration with the 6AC on specific research questions.

SUSL Associate Professor [REDACTED] will provide social science services to SDSP on an as-needed basis. Before joining the faculty in 2007, [REDACTED] taught in the Sociology and Criminal Justice departments at Seattle University where she was honored with the 2007 Criminal Justice Faculty Appreciation Award. She taught courses in Research Methods, Statistics, Law, Society and Justice, Family and Society, and Deviance and Social Control. [REDACTED] earned her doctorate in Sociology studying alternative plea-bargaining systems.

The SDSP site work may, at times, require additional professional contractors. Specific contractors will be based on availability. One who has authorized us to use his name in this proposal is [REDACTED], a clinical professor at the University Of Southern California Keck School Of Medicine's Institute of Psychiatry, Law, and Behavioral Science. [REDACTED] is the former Chief Deputy Director of the Los Angeles County Department of Mental Health and a nationally recognized expert on health law and medical-legal issues.

Plan for Collecting the Data Required for Performance Measures: Although the grant solicitation states that specific performance measures and outcome measures need not be determined prior to a grant being awarded, the SDSP puts forth the following plan to demonstrate our understanding of successful measures. Under the technical

assistance (TA) section of the grant, we consider the following to be appropriate indicators: number of TA requests received during the current reporting period; number of TA requests completed during the current reporting period; number of site visits completed; number of agencies that rated the TA services by SDSP as satisfactory or better; and number of reports submitted to requesting agencies after site visits.

Potential performance measures under the “training and education” section of the grant include: percentage of training requests completed; number of policymakers educated; number of training requests received from state and local policymakers during the current reporting period; number of training requests completed during the current reporting period; number of *Ten Principles* adopted as policy within a jurisdiction.

Performance measures under the “publications & research” area may include: number of research papers completed; number of copies downloaded from website; and number of jurisdictions using our research papers to implement change locally.

The final topic area, “policy development,” is perhaps most suited for the type of data BJA is requesting. The SDSP will commit to an annual number of stories (40 per year) and podcast/webcasts (12 per year). We will meet target increases in subscriptions to the 6AC notification lists (including those connected through Facebook or Twitter) by 25% in each of the three years of the grant. We will track, using Google analytics and other online resources, the frequency and depth of engagement of our readership for each story produced (by analyzing unique page views and the ratio of new vs. returning visitors). Finally, we will produce statistics on the number of readers that go on to read other 6AC’s blog posts or webpages through their initial contact (by studying time per visit, bounce rate, traffic patterns, etc.).