**Norman L. Reimer**
**Executive Director**

June 18, 2018

The Honorable Judge John Tinder (Ret.)
Chair, Indiana Task Force on Public Defense
309 West Washington Street, Suite #501
Indianapolis, IN 46204
By Email: JDT@JohnDanielTinder.com

Dear Judge Tinder,

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I would like to provide to the Indiana Task Force on Public Defense the attached observations and recommendations regarding the ongoing efforts to address the public defense needs of the citizens of Indiana. Since commissioning the Sixth Amendment Center in 2015, NACDL has worked to examine the challenges and successes of Indiana's county-focused public defense delivery system. In addition to our engagement of the Sixth Amendment Center, NACDL has conducted a two-day training program exclusively for the state's public defense attorneys, supported efforts for the development and analysis of a state-wide public survey, and conducted court observations in eight counties. This investment is driven by NACDL's commitment to supporting the development of strong, healthy, and effective public defense systems that assure all those who stand accused have access to the effective counsel guaranteed in our Constitution.

As the Task Force works to examine its findings and make recommendations for how the state can best serve its community, NACDL hopes the attached memorandum describing our observations and pairing it with our sixty years of advocacy, investigation, training, and public defense reform efforts will provide some helpful assistance.

We look forward to reading the Task Force's recommendations and stand ready to help bring about needed changes to improve Indiana's public defense system. If you have any questions regarding our findings and recommendations, please feel free to contact us at: 202-865-8600.

Sincerely yours,

Cc: Kathleen Casey, Staff Attorney, Indiana Public Defense Commission
(By email: Kathleen.Casey@pdcom.in.gov)

## I. Introduction

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association that promotes a society where all individuals receive fair, rational, and humane treatment within the criminal justice system. To that end, NACDL seeks to identify and reform flaws and inequities in the criminal justice system, redress systemic racism, and ensure that its members and others in the criminal defense system are fully equipped to serve all accused persons at the highest level. Founded in 1958, NACDL's thousands of direct members and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys -- including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges -- are dedicated to advancing the proper, efficient and fair administration of justice. As the nation's preeminent criminal defense bar, NACDL is keenly interested in supporting the development of strong, healthy, and effective public defense systems that assure all accused persons have access to the effective counsel guaranteed by the Constitution.

NACDL has published numerous reports relating to the state of public defense, including state focused reports in Louisiana (State of Crisis), South Carolina (Summary Injustice and Rush to Judgment), and Florida (3 Minute Justice); a three-part examination of public defense in America (Gideon at 50 Parts 1, 2 and 3); and an examination of the Federal Indigent Defense System (Federal Indigent Defense 2015: The Independence Imperative ). NACDL has also filed amicus briefs related to the provision of indigent defense services in state and local courts including *Hurrell-Harring v. State of New York*, *Tucker v. Idaho* and *Kuren v. Luzerne County* (PA). NACDL hopes that its national perspective drawn from sixty years of advocacy, investigation, training, and public defense reform efforts will be helpful to the Task Force.

## II. The State's Obligation to Ensure an Effective, Constitutional Public Defense.

In its 1963 ruling that the Fourteenth Amendment required the State of Florida to provide counsel to Clarence Earl Gideon, the United States Supreme Court made clear that the obligation to fulfill the Sixth Amendment at the state and local level rested wholly with the state. While the *Gideon* decision did not describe or prescribe how each state was to fulfill its constitutional obligations, the Court did make clear that the ultimate responsibility for providing public defense lies with the state. States may elect to wholly or partially delegate decisions about the structure, oversight, and funding of public defense systems to their counties, but doing so does not eliminate the state's overarching responsibility to assure that the counties provide the resources, support, and structure necessary for a constitutionally effective defense.[1]

[1] See e.g. *Duncan v. State of Michigan*, No. 07-242 CZ (2007)("While it's true the defendants have delegated the responsibility for funding and administering the indigent defense programs to the counties, it does not mean that [the State] defendants are off the hook." Motion to Dismiss hearing transcript at p. 35, May 15, 2007). *Duncan* was a class action case which asserted the state abdicated its responsibility for providing indigent defense to individuals in Michigan by delegating that responsibility to the counties without providing sufficient oversight or funding. After six years of litigation, the plaintiff's voluntarily dismissed the suit because the state had created a new infrastructure for public defense which included performance standards

Indiana's current public defense delivery system accords much independence to its counties, including the decision of whether or not to participate in the state system, and as a result, what, if any, standards will be applied to their system. While Indiana has a long-standing, proud history of favoring local rule, the desire to grant independence to counties regarding how public defense is provided in their communities cannot allow the state to abdicate its obligation to assure meaningful representation. As the state considers reforms to its system, it is of paramount importance that the state takes a leadership role in setting standards for proper representation and in assuring sufficient funding for this constitutionally mandated obligation. Current practices of providing reimbursement for up to 40% of the expenses localities incur in defending felony matters, while providing no similar reimbursement for the costs associated with misdemeanor representation is highly problematic. In 2017, over 400,000 misdemeanor cases were before Indiana's trial courts and made up 51.6% of all new criminal filings. By contrast felony matters comprised approximately 25% of the new criminal case filings.[2] The failure to fund representation in misdemeanor cases has enormous consequences, not only because misdemeanor charges can result in jail, but because it is now well recognized that even minor misdemeanor charges can result in life altering collateral consequences[3].

There are numerous concerns that arise when localities are required to provide most or all of the funding for their community's public defense. Critical in this assessment is the fact that localities generally lack the same powers and authority of the state to levy taxes or undertake additional steps to generate and sustain a meaningful stream of public defender funds. As well, local oversight and local funding can often undermine the independence of the public defense function, where centralized, state-level funding and oversight can serve as an important buffer between the local defenders and the local judiciary.

Furthermore, ensuring the right to counsel requires the state to assure not merely that counsel is present, but also effective. In outlining the minimum standard for effective assistance of counsel, the United States Supreme Court made clear having, "a person who happens to be a lawyer . . . present at trial alongside the accused . . . is not enough to satisfy the constitutional command… an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."[4] The Sixth Amendment guarantees that give meaning to the "right to counsel" include a requirement that counsel have the requisite skill, experience, and knowledge to provide meaningful representation for the case to which they are assigned[5] and have adequate

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relating to training, attorney-client contact, and counsel being present at first appearance. http://www.aclumich.org/article/midc-brings-hope-michigans-indigent-defense-system (last visited June 15, 2018).

[2] https://publicaccess.courts.in.gov/ICOR/ (last visited June 13, 2018).

[3] See NACDL's Report, Collateral Damages, documenting the stigmas and policies that relegate tens of millions of American's to second class status because of their arrest or conviction. According to the National Inventory on Collateral Consequences, individuals convicted of misdemeanor offenses in Indiana face up to 229 collateral consequences from their conviction. https://niccc.csgjusticecenter.org/search/?jurisdiction=19 (last visited June 15, 2018).

[4] Majority opinion by Justice O'Connor in *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[5] *Id.*

resources and reasonable caseloads[6] to allow the lawyer to meet the standards for constitutional representation.[7]

Adequately resourced, skilled, and trained counsel helps protect against wrongful convictions, because attorneys are able to conduct thorough investigations and make meaningful challenges to improper forensic sciences and faulty investigative techniques. Attorneys with proper caseloads and support have the ability to assure meaningful examinations of government conduct, and can thereby preserve the Fourth, Fifth, and Sixth Amendment rights of the greater community. Counsel with sufficient time, education, and experience can assist in identifying and addressing underlying conditions such as substance abuse, mental illness, and trauma, which allows for the use of treatment, services, and diversions to help reduce recidivism. The intervention and actions of counsel can also help mitigate the myriad collateral consequences that often attend convictions of even the most minor of crimes[8]. For all of these reasons the presence of meaningful and effective representation protects the state's coffers, promotes public safety, and increases the community's confidence in its justice system.

It is also vitally important that counsel be made available to the accused at the earliest stages of the legal process. Constitutionally, the right to counsel applies to all critical stages of the proceedings.[9] Important rights are inevitably lost when counsel is not available or able to be secured in the early stages of a case. Without the representation of counsel, accused persons often experience extended time in custody because there is no attorney to advocate for the client's release and critical evidence is lost as bruises heal, video footage is erased and essential witnesses disappear. Early appointment of counsel provides the necessary safeguards to protect against injustice.

## III. Hallmarks of a Constitutionally Sufficient Public Defense Delivery System as Applied to Indiana.

Every state and county has unique features, needs, and resources and as a result there is no one-size-fits-all solution to public defense. Despite the variations, there are some fundamental principles that define the elements of a strong, constitutional public defense delivery system including the American Bar Association's *Ten Principles of an Indigent Defense Delivery System* ("ABA Ten Principles"), and all decisions regarding what type of public defense deliver system should be implemented must be driven by the primary goal: to provide meaningful, effective, and zealous representation to all those who stand accused and are unable to employ counsel. As the Supreme Court recognized in *Gideon*:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal,

[6] Securing Reasonable Caseloads: Ethics and Law in Public Defense, Norman Lefstein, ABA SCLAID (2011). See also NACDL and the ABA's joint report, The Rhode Island Project (2017).
[7] See e.g. ABA Standards for Defense Function, Standards 4-3.2, 4-3.6, 4-4.1, and 4-1.3(e).
[8] See *supra* FN 3.
[9] *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

> quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. [10]

Indiana's long standing commitment to the right to counsel is evidenced by its legal history. The courts have interpreted the Indiana Constitution to provide that an accused's right to counsel attaches upon arrest, not (as is the case federally) upon the commencement of formal proceedings.[11] When combined with the Sixth Amendment guarantees afforded under the U.S. Constitution, Indiana has strong protections designed to safeguard those who stand accused. Due to the diverse nature of the state, however, the public defense systems are not uniform throughout. The state's 92 counties are a mix of urban centers, rural locales, and communities that fall somewhere in between. As a result, the public defense delivery system used by each county reflects the specific needs of the community it serves. Under the current structure in Indiana, counties may opt to use an institutional defender, enter into one or more contracts with individual attorneys or firms, use a system of court appointments, or any combination of the same. Counties can also choose to become members of the Public Defense Commission ("the Commission") (whereby they may receive up to 40% of the costs associated with providing public defense in certain classes of cases, in exchange for which they agree to be held to specified standards), or they can choose to operate independently (and thus operate without supervision, without state-approved standards, and without supplemental state funding). This has led to troubling results.

In 2015 NACDL commissioned the Sixth Amendment Center to conduct an evaluation of trial-level services in Indiana. The resulting report, The Right to Counsel in Indiana: Evaluation of Trial Level Indigent Defense Services, published in the fall of 2016, documented observations in eight (8) counties selected as a representative sample of the state[12]. In the fall of 2017 and the spring of 2018, NACDL staff traveled to Indiana to conduct additional court observations[13], focusing primarily on initial hearings in

[10] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
[11] *Taylor v. State*, 289 N.E.2d 699, 704-04 (IN 1997), Indiana Const. Art. I, Sec. 13.
[12] The Sixth Amendment Center report focused on: Blackford, Elkhart, Lake, Lawrence, Marion, Montgomery, Scott, and Warwick Counties.
[13] NACDL staff attended proceedings in: Allen, Brown, Clark, Dearborn, Marion, Monroe, St. Joseph, Tipton, and Vanderburgh Counties.

misdemeanor and low level felony offenses. These proceedings were selected because they often represented a person's first formal contact with the court system and provided an opportunity to observe cases that were often unregulated by Commission standards. Additionally, NACDL staff attended the listening tours in Evansville and Clark County, read the transcripts from the remaining listening tours, and reviewed supplemental materials in order to get a better understanding of what public defense looks like throughout the state. It is against this backdrop that NACDL offers its recommendations for how Indiana can better serve those haled into criminal court without the means to pay for counsel.

Although the NACDL staff focused on different counties than those studied by the Sixth Amendment Center two years ago,[14] many of the troubling observations and findings remain the same, suggesting the problems are widespread and have changed little since publication of the Sixth Amendment Center's report.

a. State Responsibility

**Principle:** As noted earlier, ultimate responsibility for assuring fulfilment of the right to counsel rests wholly with the state. The state must assure that each person accused has access to a lawyer who meets the requirements of the Sixth Amendment, which includes assuring that counsel has adequate skill, resources, and time to provide effective representation.

**As applied in Indiana**: One of the Commission's stated purposes is to "[a]dopt guidelines and standards for indigent defense services…" to ensure a uniform quality of service for Indiana's indigent community without regard to location.[15] Currently 68 counties are members of the Commission (59 of which are currently eligible for reimbursement), with all of the state's largest counties participating.[16] Although the Commission offers reimbursement of up to 40% of the costs incurred for public defense of certain enumerated offense types, including felony and juvenile cases,[17] all counties, whether or not they participate in the Commission, are currently required to pay 100% of the costs for misdemeanor public defense representation.

In order to participate in the Commission's reimbursement plan, however, counties are required to meet certain standards relating to caseloads, and utilize Commission approved public defense plans. As a result, 26% of the state's counties (primarily small and medium

[14] The only county visited by both the Sixth Amendment Center and NACDL Staff is Marion County, the largest county in the state. Marion County accounts for approximately 1/5 of the total funds the Public Defender Commission expends annually for indigent defense service reimbursements.
[15] Statutory Duties of the Commission.
[16] Public Defense Commission, "About Your County" https://www.in.gov/publicdefender/2383.htm (last visited June 15, 2018).
[17] IC-33-40-6-5(a)(2) Amount of reimbursement for indigent defense services. The counties will also be reimbursed for appellate transcripts (if the approved comprehensive plans include provisions for appellate services), mental health matters, and the cost of insurance premiums. In addition to excluded misdemeanors and misdemeanor related expense from reimbursement, expenses incurred from post-conviction proceedings, CHINS and termination of parental rights matters, and self-insurance programs are also ineligible for reimbursement. Commission Guidelines Related to Non-Capital Case, 7 (2017).

sized jurisdictions) have opted not to participate in the Commission. As well, because the Commission (and thus the state) provides no support or oversight for misdemeanor representation, the current system leads to an accused's access to justice being dictated by ***where*** he or she is prosecuted. Such a system of justice by geography erodes public trust not only in the public defense system, but the criminal justice system as a whole. No one should face a different level of representation (and thus likely a different outcome), or have counsel with a different amount of time or standards for practice merely based on where in the state he or she is facing charges.

**Recommendation:** One of the key reforms is the need for state-wide support for high quality, constitutionally effective public defense. This will require the state to take on a greater role in assuring adequate funding, guidelines, supervision, resources, and support is provided to those appointed to represent the accused.

b. Independence

**Principle:** The public defense function including the selection, funding, and payment of defense counsel is independent of judicial and political influences.

In order to have a healthy, vibrant, and effective public defense system, defense counsel must be able to exercise independent judgement, challenge the court, pursue defenses, seek resources, and question practices and policies, by putting the needs of individual clients first. Neither those leading the public defense systems on a state-wide or local level, nor the individual attorneys assigned cases should be placed in a position in which they are beholden to a member of the judiciary. Defense lawyers cannot be placed in positions where their obligations to be zealous advocates for their clients is tempered by fear that a judge or locality will decline to renew their contract, cut their budget or staffing, or deny them appointments. Systems that allow judicial officers to play an outsized role in the selection, retention or termination of public defense attorneys, the oversight of public defense budgets or staffing decisions, or the day-to-day operations of public defense attorneys are wholly inappropriate and violate the first of the ABA's Ten Principles. These requirements are just as true for members of the private bar accepting court appointments as they are for institutional defender offices.

**As applied in Indiana:** It is vital that any reforms to the current public defense delivery system in Indiana include steps that insulate public defense providers from undue judicial influence. Currently, Indiana Code section 33-40-7 governs the creation and composition of Public Defender Boards. The board is tasked with recommending the fiscal budget for the county's public defender's office, appointing the county public defender, and submitting a report to the county and judges regarding the operation of the county's public defender's office, including information about caseload and expenditures.[18]

The Indiana Public Defense Commission Standards have strict prohibitions on judges (active or on senior status[19]) serving as members of these boards, recognizing that it is

[18] IC 33-40-7-6(a) Duties of Board.
[19] Public Defender Commission Minutes, June 14, 2017.

vital that the defense be able to operate independent from the judiciary.[20] While the stated goal is to assure independence, the practical application of the statutory provision interferes with that goal. The Indiana Code expressly provides that the board consist of three (3) members, with the county executive appointing one member and "[t]he judges who exercise felony or juvenile jurisdiction in the county shall appoint by majority vote the other two (2) members."[21] By placing the judiciary in charge of selecting two of the three members of the public defense board, the court, through these selections, effectively controls the board and thus, through its chosen representatives controls issues relating to the budget, the internal operations of the office, and by extension, staffing decisions within the local public defender office. However, there is no corresponding role the judiciary plays in the oversight, operations, or funding of the prosecutorial function.

Notably, the Indiana Public Defender Commission itself reflects a greater balance amongst political parties as well as branches of the government, with 3 of its 11 members being appointed by the governor, 3 by the Chief Justice, 2 each by the House and Senate, and 1 by the Indiana Criminal Justice Institute. Unfortunately, the Commission's current composition includes only 2 women, and few persons of color among its 11 members.

According to data from the U.S. Census Bureau, 50.7% of Indiana's population is female and 85.6% of the population is white.[22] According to information from the Prison Policy Initiative, while blacks make up just over 9% of Indiana's population, they account for 34% of its prison and jail population.[23]

**Recommendation**: Changes to Indiana's public defense delivery system must assure judges neither directly nor indirectly control operations of the local or state public defender system. The selection of defenders (in institutional offices, by contracts, or by individual case assignments) should not fall under the oversight or control of any judicial official. To the extent oversight boards are used, steps should be taken to assure no branch of the government has a majority of votes, with efforts made for representation to include a diversity of political parties as well as a diversity of race, ethnicity, and gender that reflects the demographics of the community in general and the population that the public defense function is serving.[24] Those selected to serve should be knowledgeable about and show a demonstrated commitment to public defense.

c. Caseloads

**Principle:** Defense counsel's workload is controlled to permit the rendering of quality representation.

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[20] "The Commission believes that the goal of independence as stated in Standard 5-1.3 of ABA Providing Defense Services can be substantially achieved by a county public defender board established under either I.C. 33-40-7-3 or I.C. 36-1-3." Standard A. County Public Defender Board, Standards for Indigent Defense Services in Non-Capital Cases (2016).

[21] IC 33-40-7-3

[22] U.S. Census Bureau, Quick Facts About Indiana, population estimates for July 1, 2017, https://www.census.gov/quickfacts/IN (last visited June 15, 2018).

[23] Prison Policy Initiative, https://www.prisonpolicy.org/profiles/IN.html (last visited June 15, 2018).

[24] See e.g. NLADA's Guidelines for Legal Defense Services 2.10.

Effective public defense delivery systems assure caseloads are regularly monitored and assessed to assure defenders have the necessary time, staffing, and resources to devote to the meaningful representation of each individual client and are not forced to pick and choose or triage clients in an effort to manage their limited time and resources.

**As applied in Indiana:** Current Commission Standards set forth caseload maximums that apply to all cases and counsel participating in the Commission's reimbursement program. Notably, the Commission's caseload standards go beyond the broad categorization of cases (misdemeanor, felony, appellate, and juvenile cases) set forth by the 1973 National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards)[25]. Such an action reflects the Commission's recognition that the NAC standards are overly broad, and failed to recognize that within these categories there are cases of varying seriousness and complexity requiring differing levels of time. The Commission also notably provides differing caseload numbers for attorneys who have adequate support staff (such as investigators, paralegals, and social workers) and those that do not. Indiana is also currently undergoing a workload study that will allow further refinement of these caseload provisions to reflect the unique needs and practices in Indiana.

Despite these steps, there are some disconcerting aspects to Indiana's current caseload monitoring practices that must be addressed to assure effective representation.

*Misdemeanors and Non-Commission Member Counties*

The Commission caseload standards for each member county are created with the presumed goal of ensuring that these levels permit attorneys to meet with clients in a reasonable amount of time after appointment; conduct timely and thorough investigations; research and file necessary motions; conduct discovery; meet with clients regularly to discuss case progress and case resolution options as well as potential direct and collateral consequences of those resolutions; and have the ability to effectively litigate and defend each case. Unfortunately, the caseload limits only apply to cases counted by the Commission. While the Commission has guidelines for misdemeanor caseloads, when determining whether an individual attorney or a system is in compliance with their caseload standards, misdemeanor cases are not included in that calculation.[26] Additionally, as counties may opt not to participate in the Commission's reimbursement program, there is no state-wide enforcement of caseload caps.

Notably, aggregate data from a statewide survey conducted in cooperation with the Task Force's public comment efforts, revealed more than half of the defenders responding felt they did not have "sufficient resources to do their job to the level they aspire," with one full- time public defender revealing "[c]aseload is so large that I can barely provide a *minimum level* of representation."[27]

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[25] 1973 U.S. Department of Justice funded initiative. NAC Standard 13.12 proscribes caseload limits (for a single attorney in a single year) of 150 felonies or 400 misdemeanors or 200 juvenile delinquencies or 25 appeals (or if an attorney has a mixed caseload a corresponding percentages of these numbers).

[26] Public Defender Commission Minutes, December 13, 2017.

[27] Indiana Task Force on Public Defense Stakeholder Survey – Executive Summary (Draft) 5, (2018)(emphasis added).

Under current practices, the Commission requires counties seeking to participate to have plans that provide for sufficient staffing to meet the caseload requirements set forth in the Commission's guidelines. While tying county funding to the provision of sufficient numbers of attorneys and staff creates an incentive to meet the caseload terms, because the current structure is an opt-in process, those counties failing to meet the standard can simply opt out of receiving state funds, and also avoid supervision. As a result, there is no mechanism to either compel them to assure sufficient numbers of attorneys and support staff are utilized, or to support and assist those jurisdictions to address the matter.

*Denial or Delay of Counsel as a Means of Caseload Management*

In many places across the country efforts to reduce court caseload and incarceration rates have taken the form of pretrial diversion programs, policies to not seek jail for certain low-level offenses, and decriminalization of minor infractions. In Indiana, however, the effort to reduce the number of cases a public defender office receives has taken a very different and problematic turn.

In one jurisdiction an accused appeared before a judicial officer for his initial hearing and requested an attorney be appointed to represent him. Rather than determine if he qualified for court-appointed counsel, the judicial officer directed the defendant speak with the prosecutor first to see if they could "work out" the case, assuring the defendant that if he was unable to resolve the case, he was welcome to return to the court and request counsel. On a number of cases during this same court session, NACDL staff observed the court direct those who were without counsel to first meet with the prosecutor. When later asked about the reason for this practice, the judicial officer explained that he knew the public defenders in his jurisdiction had caseloads that were too high, and he wanted to help alleviate their caseloads by only appointing counsel to cases that could not be resolved through the accused negotiating directly with the prosecutor.

In two other jurisdictions the court advised those who were appointed counsel at their initial hearing to return to court on another date 3 to 6 weeks later to "meet with your attorney."[28] Rather than encouraging defendants to contact their lawyers immediately after court so they could discuss their cases, identify evidence and witnesses, gather records, capture recollections before memories fade or are altered, connect to services, and discuss steps to help mitigate their cases, courts expressly directed defendants to wait as much as a month and a half for their first meeting with their lawyers.

When asked about the practice, a prosecutor in one of the jurisdictions explained that the public defenders had so many cases there was simply no time for them to be able to answer calls and meet with clients outside of court. The prosecutor further indicated that in the weeks that passed between case assignment and the next court date/client meeting date,

[28] Similar information can be found on the Lake County Public Defender's website, where individuals are advised that at their initial hearing the court will appoint counsel to those eligible and that their next court appearance will be the Formal Appearance where, among other things, "[y]ou usually will meet the lawyer assigned to your case for the first time during this proceeding."

the public defender attorneys rarely made contact with the prosecutor to discuss the case, although such contacts would occur with private bar members in retained cases.

It was apparent in these instances the process being utilized was intended to help the defense attorneys manage their caseloads, but beliefs about what may ease pressures and contribute to the "efficient" administration of cases also creates cultures where the denial of counsel is seen as an act of benevolence as opposed to a constitutional violation.

**Recommendation:** Any changes to the public defense delivery system must strengthen mechanisms to adequately control and monitor attorney caseloads and provide for support staff as necessary to offer not only assistance to the attorneys in managing their workload, but also to benefit from the specialized expertise that investigators and social workers bring to a case.

Caseload adjustments should be made to assure they adequately reflect the complexity of the cases being undertaken, and are reflective of the time required in Indiana to provide constitutionally effective representation.

Steps must also be taken to better monitor those providing public defense representation on a "part-time" basis to assure their caseload numbers are consistent with the percentage of their time being devoted to public defense work. The current practice of treating all part-time public defender caseloads as one-half those of full-time defenders may over or under count the percentage of their time being devoted to these cases.[29]

As the obligation to assure effective and meaningful representation is ultimately the state's responsibly, to the extent any practice remains in which counties can opt not to be Commission members, they should still be subject to caseload limits in order to guarantee a uniform quality of service throughout the state.

Additionally, steps must be taken to assure that judges are educated on the down-stream effects of delayed contacts between attorneys and clients and that courts end all practices that either direct or suggest that an accused speak with a prosecutor prior to seeking the appointment of counsel.

d. Compensation and Parity

**Principle:** There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

The right to counsel also encompasses the right to have conflict free counsel. This not only means counsel free of a traditional conflict of interest but includes having counsel whose commitment to his or her client does not compete against the attorney's financial interests in operating their practice and earning a living wage.[30] Rates of compensation paid to

[29] Public Defense Commission Standards for Indigent Defense Services in Non-Capital Cases (Commission Standard), Standard J

[30] According to the ABA's Task Force on the Financing of Legal Education, those graduating law schools in academic year 2012-2013 had an average student loan debt of $88,000 if attending a public school and

public defense providers must be sufficient to attract and retain quality counsel. Attorneys must not be forced to decide between providing the effective representation the constitution demands and being able to operate their businesses and earn a living wage.

**As applied in Indiana:** Currently Commission Standards call for pay parity to assure Chief and Deputy Public Defenders are paid salaries commensurate with the prosecutors in their jurisdiction.[31] This is an important practice that should be maintained in any future system. Nevertheless, because defense counsel's salary and funding is limited to local funds, the ability to earn a living wage and maintain a functioning system varies by county, and in some cases creates incentives which undermine constitutional representation.

*County Hopping and Robust Private Practices as a Means of Survival*

At one listening tour stop, court actors noted that the public defenders in their area were often not in court because they were working in multiple counties in order to maintain a caseload sufficient to sustain their practice, and/or to obtain health benefits.[32] The impact of this practice is not limited to the absence of counsel at the early stages of a case. As one judge explained to NACDL staff, the court cannot set hearings on emergent issues very quickly because the court knows defense counsel may not be able to return to the jurisdiction within 24 hours to attend the proceeding because he or she has commitments in other counties. It is easy to recognize the related problems that arise when attorneys are working assigned counsel cases in multiple jurisdictions. These challenges include the inability to meet with clients in the areas where the clients live and work, and time taken away from client representation that is expended in traveling among jurisdictions.

Others noted that being underpaid created incentives for attorneys to subsidize their court-appointed practice with a robust private practice. A practitioner in Clark County described:

> [M]y biggest fear is that person A who is indigent, who has a Level 2 Felony gets Susie Q as her attorney and then Susie Q can't make ends meet, so she gets a private Level 2 [client] and the private Level 2 is getting jail visits, the private Level 2 is getting the correspondence and going over the discovery and the PD Level 2 is like, let's get it done, let's get it done, let's get it done.[33]

Managing standards and demanding compliance will not save a system if attorneys cannot afford to work diligently for their court-appointed clients.

*The Accused as a Potential Revenue Stream*

Another concern that emerges from an underfunded system is the method employed locally to generate funds, with counties often turning to user fines and fees to defray the

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$127,000 if attending a private school. By contrast, in AY 2005-06, student debt for public and private law school graduates was $66,000 and $102,000 respectively.

[31] Commission Standard G.

[32] Clark County Listening Tour, 9:1-10:4.

[33] Clark County Listening Tour 9:19-10:4. *See also Id.* at 10:5-23.

costs of the system. While Indiana statute allows localities to do so, the practice creates an inherent tension between those accused and those defending them.[34]

In Indiana NACDL staff observed defense attorneys openly viewing clients as a potential revenue stream for the system. At a listening tour stop in Evansville, one attorney noted that it would be helpful to "amend the [bond] statute[35] to require the judge to take the fees for the public defender fund out [of the bond posted by the defendant] first," before applying the bond to pay for probation fees and court fees.[36] He continued by noting that his suggestion did raise a conflict because the defense would be "asserting that the money should go to us instead of [the] probation fees,"[37] but neglected to note that the proposed amendment created another conflict in that the amendment encouraged the imposition of a cash bail at the outset so as to create that source of revenue. This type of practice dis-incentivizes attorneys from asking courts to lower bonds or to release clients on non-monetary bonds. When the NACDL staff spoke to a chief public defender about the issue of underfunding, he remarked that he was brainstorming ways to "generate more public defender fees for people using the system" to help keep the office afloat.

**Recommendation:** Maintain pay parity practices for chief and deputy public defenders and pursue pay parity for all office staff in institutional defender offices. Pay parity not only serves to attract and retain high quality, experienced defenders and staff, but sends a vital message to all facets of the criminal justice system and the communities they serve that the defense function is considered as important and valued as the prosecution. It is only where there is balance in resources, experience, and expertise that the adversarial system can properly perform its role. When defender offices are under-resourced, understaffed, and under-experienced, they are unable to provide effective advocacy, perform their essential role as a check on the government, and provide the nature and caliber of representation that can reduce recidivism. The consequences of inadequate representation are evidenced by overcrowded jails, wrongful conviction, and pervasive injustice that undermine confidence in the criminal justice system and negatively impacts communities. Steps must be taken to better fund attorneys accepting appointments through contracts or individual case assignments to reduce their need to take on multiple contracts or to practice in multiple jurisdictions in order to maintain their practices. Court appointed attorney pay, whether obtained via contracts or by individual case appointments, must allow for sufficient payments to enable attorneys to cover overhead expenses and earn a living wage.

Funding at a state level must be sufficient to eliminate the conflict that is inherent in situations in which attorneys are reliant on funds generated from the clients they are appointed to represent, whether those be in the form of assignments or liens on cash bonds, or from court fees and fines assessed following convictions.

[34] IC 33-40-3-6; Commission Standard D.
[35] IC 35-33-8-3.2.
[36] Evansville Listening Tour 72:7-73:23.
[37] *Id*. at 72:10-23.

The inherent problem when counties rely upon those being prosecuted to fund the system prosecuting them is the incentive to utilize cash bonds, to impose fines, and to pursue convictions in the name of assuring funding of the system itself. While it may seem appropriate to have system users pay for the system, this imposes a disproportionate burden on those who are least able to afford to shoulder those costs. It is important to recognize that the subconscious and conscious impact of this process is to incentivize prosecution and conviction as means to support the system. This is a fundamental abuse of the criminal justice system. Accused persons already face the additional collateral consequences that that result from a conviction (such as limited employment opportunities or eligibility for benefits) and the hidden expenses of court appearances (such as lost wages from time spent in court rather than at work or for additional transportation or child care costs arising from those appearances). To then impose additional fees and fines to help underwrite the system is a best counterproductive. .

e. Standards

**Principle:** Defense counsel is supervised and systemically reviewed for quality and efficiency according to nationally and locally adopted standards.

In order to assure that the quality of representation across the state meets the mandates of the Sixth Amendment, it is important for there to be uniform, enforced standards of practice. These guideposts help assure that appointed counsel and those they are entrusted to represent have clear expectations of the service to be provided. Standards should comport with generally recognized principles such as the ABA's Criminal Justice Standards for the Defense Function, state ethical rules, and the provisions for effective representation identified by state and federal courts. The standards must assure that defenders are actively engaged in representation as early as possible, including involvement in all critical stages of the case such as decisions relating to bail.

It is insufficient, however, for the state to simply create standards. It must also properly fund these systems so that the standards can be met. It must provide the financial support that allows defenders to be meaningful and engaged participants in the court process. Indiana's constitution dictates that the right to counsel attaches upon arrest, however this standard cannot be met if there is not sufficient funding to allow defenders to participate in the earliest stages of the case.

**As applied in Indiana**: While the Commission and the Indiana Code set forth experience-based and/or educational requirements for attorneys to be eligible to handle various degrees of felony offenses and specialized case types[38], there are no institutionalized standards of performance that provide guidelines and expectations such as how quickly attorneys should make contact with incarcerated clients or what types of pretrial motions attorneys should consider filing. While experience matters, experience alone is not sufficient. Without performance standards it becomes difficult to provide objective measures of performance and quality of representation, especially as outcomes of criminal cases are not wholly reflective of the quality of the representation. In addition to the lack of

[38] Commission Standard E.

objective measures, current practices make it difficult for supervisors to provide the support needed to conduct more subjective evaluations and feedback of attorney work.

In jurisdictions where the Chief Public Defender also carries a substantive caseload, there are risks that arise from a lack of supervision. When speaking to one chief public defender about the juvenile court in his jurisdiction, the chief admitted he did not understand how the juvenile court worked, did not have time to observe court and speak to the juvenile court judges about his attorneys' work, and simply trusted that the attorneys assigned to this specialty would let him know about any problems that arose.

One of the purposes of having a chief public defender is to have someone to focus on systemic issues, build relationships between the defense and other stakeholders, and recognize and address issues in representation. While dependence upon self reporting by attorneys may flag issues the attorneys encounter with respect to other court actors, such a process fails to provide any means of assessing whether the attorneys themselves are providing adequate representation.

This is a particular concern because the direction on the Indiana Government's website advises individuals who feel their attorney is not providing proper representation to file "a complaint with the Disciplinary Commission, [as] that organization is the only organization that can prosecute attorneys."[39] This directive is unlikely to effectively address issues that may cause clients to feel that they are not well represented.

**Recommendation:** With ever changing developments in technology, forensic and social science, and increasing specialization of law enforcement officers and prosecutors, it is vital defenders remain current in these fields. As a result, state standards should include provisions for regular training of defenders and their support staff, with the commensurate financial support to assure that training is available and accessible.

Experience and training requirements should continue to be used to help assure attorneys have the necessary skill and experience to handle complex cases, but these should be supplemented with performance based standards that provide attorneys, their supervisors and their clients with clear understandings of expectations relating to the representation.

Additionally, sufficient staffing, and the funding necessary to support such staffing, must be provided to whatever agency is tasked with the creation and implementation of standards. That agency must also have the resources to provide ongoing training to attorneys and to establish a mechanism to monitor compliance with the standards, and periodic revision of the standards as warranted.

[39] "What Do I Do if My Public Defender Isn't Working on My Case the Way I Would Like?", Indiana Government Frequently Asked Questions, Judicial System, https://faqs.in.gov/hc/en-us/articles/115005055427-What-do-I-do-if-my-public-defender-isn-t-working-on-my-case-the-way-I-would-like- (last visited June 15, 2018).

f. Early representation

**Principle:** Defense counsel is assigned, notified of appointment, and actively engaged in representation as soon as feasible after the clients' arrest, detention, or request for counsel.

**As applied to Indiana**: Based on NACDL staff's court observations, as well as information provided in the listening tour and public survey community feedback, at or near the apex of the Indiana's issue of underfunding, underpaying, and understaffing its public defense delivery systems is that defense counsel is not present at one of the most critical stages of in a client's case – the initial hearing. In *Powell v. State of Alabama*, the Supreme Court addressed the importance of when counsel is appointed,

> [D]uring perhaps the most critical period of the proceedings against these defendants, **that is to say, from the time of their arraignment until the beginning of their trial**, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[40]

As previously stated, Indiana has laudably expanded this right so that the right to counsel attaches "when a suspect is in custody and before any formal proceedings have been initiated."[41] And yet, in many jurisdictions, defense counsel is not present during initial hearings. Counties have cited a lack of funding as a reason not to provide defense counsel for the accused at initial hearings, but yet, the county believes it necessary to ensure the presence of a prosecutor at these proceedings, despite an explicitly delineated lack of statutory obligation.[42] The presence of the prosecutor suggests the county appreciates the need for the State to have a representative – to provide the court with the procedural history of the case, inform the court of the accused's criminal record, and at times educate the court about supplementary witness statements or events that are not detailed in the affidavit. If the State needs a representative in order to ensure that the court is properly informed of relevant information, how much more does the accused, who is *entitled* to counsel following their arrest, need counsel to help guide them through the process?

Multiple studies and reports have been published detailing the extensive direct and collateral consequences that are implicated at the moment bail is considered – the imposition of longer sentences, the loss of housing, employment, child custody, and increased recidivism rates, to name a few.[43] Having counsel present at the initial hearing

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[40] *Powell v. State of Alabama*, 287 U.S. 45, 57-60 (1932) (emphasis added).
[41] *Taylor v. State*, 689 N.E. 2d at 703 (internal quotation marks omitted).
[42] Indiana Rules of Criminal Procedure 10.1. Presence of Prosecutor: Except for the initial hearing where evidence is not presented, the Prosecuting Attorney or a deputy prosecuting attorney shall be present at all felony or misdemeanor proceedings, including the presentation of evidence, sentencing or other final disposition of the case.
[43] E.g. Lowenkamp, VanNostrand, Holsinger, The Hidden Costs of Pretrial Detention, (Nov. 2013); Heaton, Mayson, Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, (July 2016); Sacks, Ackerman, "Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?" Criminal Justice Policy Review, Vol. 25, p. 62 (2012); Human Rights Watch, "Not in it for Justice."

can not only mitigate the abovementioned consequences, but also has been found to "increase the accused sense of fairness about the process."[44] When NACDL staff attended initial hearings, defendants were heard making incriminating statements about their case in an attempt to provide information to the court, and observed instances of defendants asking the court to release them with the request ignored simply because they did not have counsel.[45] NACDL Staff also observed individuals electing to plead guilty to charges in order to resolve the case, even though they had not received a comprehensive advisement of rights or any explanation of the consequences of waiving those rights, including any discussion of potential collateral consequences.

**Recommendation**: Fundamentally, the state's standards should assure that at any hearing before a judicial officer in which the prosecution is present, the defendant must be represented as well. This will require the state to provide sufficient funding, staffing, and resources to assure defenders are present and actively engaged.
As noted in earlier sections, the current practices, wherein defendants wait 3 to 6 weeks to return to court and speak to their lawyers for the first time, have substantial negative consequences: repeated continuances burden courts, witnesses, defenders and the clients; repeatedly delay incentivizes even innocent persons to accept plea agreements before cases have been fully investigated and evaluated; and the passage of time results of loss of evidence and inability to locate witnesses.

In addition, having defenders present at the earliest stages increases the likelihood of pretrial release, which reduces the unnecessary financial and human costs associated with pretrial detention, helps those accused remain connected to their employment, homes, and communities, reduces failure to appear and recidivism rates, and overall improves case outcomes.[46]

g. The Absence of Defense Counsel and Negotiating with the Prosecutor

**Principle**: Prosecutors should not communicate with the accused absent a waiver of counsel. The ABA standards relating to the special role of prosecutors provides:

> A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel, or in arranging for the pretrial release of the accused. A prosecutor should not fail to make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.[47]

[44] Colbert, Patenoster, Bushway, Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail, 23 Cardozo L.Rev. 1719 (2001-02).
[45] A common court refrain was, "when you talk to your lawyer, ask your lawyer to bring this up to the court."
[46] See supra FN 37, 38.
[47] ABA Criminal Justice Standard for the Prosecution Function 3.310.

**As applied in Indiana**: NACDL staff noticed that in Indiana courts, the absence of defense counsel tended to invite the enlargement of the role of the prosecutor. In many counties, the only lawyer present for most of scheduled initial hearing and pleas was the prosecutor. In some places, the very first person an accused met and spoke with was not a judicial officer or a defense lawyer, but a prosecutor. The tone set by this practice is one which communicates that the person who has power and control in the court process is the very same person who is leveling the accusation and prosecuting the accused.

In one jurisdiction NACDL staff observed, prior to the commencement of court, a court official enter the courtroom and tell the group of defendants: "the prosecutor will be out in a moment to talk to all of you about your cases and then we will get started." Shortly thereafter the prosecutor told the defendants he would be providing each of them with a copy of their charges, that the court will want to know what they are going to do about an attorney, and their options were to "request a public defender at public expense," "waive your right to an attorney to speak with me to see if we can resolve your case," or hire counsel. While the prosecutor did advise the group that if they did not his plea offer, they could reject it and request or hire counsel, the message and the person delivering it left a clear impression that the fastest way to resolve the case was by waiving counsel and working with the person who was in charge-the prosecutor. After making his announcement, the prosecutor proceeded to speak individually to each of those scheduled for initial hearings. No defense attorney participated or even indicated his presence.[48]

Though the NACDL staff could not overhear all the discussions between the prosecutor and defendants, five of the eight out-of-custody defendants waived counsel. One of the five initially told the prosecutor he wanted a public defender and after making an additional statement that was inaudible in the gallery, the prosecutor could be heard telling the defendant that he suggest "you talk with me first and if you don't like what I have to say, you can go back and request the PD."[49] Another individual was heard telling the prosecutor "you could be my attorney." The prosecutor responded "I can't be your attorney but I am happy to talk with you about your case if you want to" to which the defendant responded "yea." Nothing was ever done to further address whether the defendant did want counsel and just misunderstood the process, whether he meant that he wanted to negotiate with the prosecutor, or whether there was some other misunderstanding of his rights and the choices he was making. When the judge took the bench, the judge was never advised of the confusion and no further steps were taken to determine the defendant's degree of understanding.

During this same docket, one defendant waived his right to counsel, met with the prosecutor for a few minutes, returned to court, and pled guilty to misdemeanor operating under the influence. He received a suspended jail sentence of 365 days (with two days to

[48] Although there was a public defender present in court that day neither he nor the judge gave indication he was there, even to an individual who the court-appointed to that specific attorney.

[49] Another defendant after being asked by the prosecutor "what do you want to do about a lawyer?" asked a question that could not be overheard, after which the prosecutor advised "you are probably okay to talk with me and if you don't like what I have to say, you can go back and request the public defender."

serve for which he had time-served credit), with probation conditions requiring treatment, his driver's license was suspended, and he was ordered to complete community service and pay court costs. During the court's colloquy in accepting his waiver of rights and guilty plea the accused was asked only one question about whether he wanted to waive his right to counsel. There was no discussion with him about the benefits of defense counsel or the role defense counsel could play, no inquiry was made and no warning provided about potential immigration[50] or other collateral consequences of his conviction[51], or the fact that this charge could be used as a predicate offense for future charging enhancements.

The court also, with no further discussion, accepted a waiver of counsel by a 19 year old high school student charged with misdemeanor theft. This was despite the fact that individual had appeared to not fully understand a question on the waiver form which asked him about his highest level of education.[52]

*The Necessity of Defense Counsel's Presence*

Under the ABA Criminal Justice Section Standards for the Prosecution Function, before the prosecutor communicates with an accused, there should be a waiver of counsel entered.[53] When assessing if a voluntary and intelligent waiver has occurred courts are to consider individualized factors "including education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding."[54] Unfortunately, what tends to happen is courts overestimate the accused's understanding of the proceedings, and underestimate the complex nature of the charge and criminal process when viewed through the lens of a layperson. In most of the courtrooms visited by NACDL the staff observed little more than some type of either written waiver form or a video advisement shown en mass to a crowded courtroom, followed by a superficial check for understanding by asking two questions – "'have you read the waiver form [or viewed the video]?' and 'do you understand your rights?'" This is an inadequate method to both explain one's rights and assure they are making informed, meaningful decisions about those rights.

One of the benefits of having defense counsel present and engaged at all stages of the criminal proceedings is that the attorney can meet with an accused and ask open ended questions to gauge understanding. The attorney can explain the long-term consequences of a conviction. He or she can determine whether an accused has legal or factual defenses to their case, whether there are constitutional or statutory provisions that impact the state's

[50] *Padilla v. Kentucky*, 559 US 356 (2010)
[51] Indiana has 229 collateral consequences for misdemeanor convictions. https://niccc.csgjusticecenter.org/ (last visited June 15, 2018).
[52] The accused put N/A on the waiver form's line inquiring as to the highest level of education completed. When asked by the court about the notation he explained it was because he had not yet graduated high school.
[53] See also Indiana Rules of Professional Conduct, Rule 3.8 directing prosecutors shall "(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; [and] (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights."
54 *Iowa v. Tovar*, 541 U.S. 77, 78 (2004).

case, and whether there are evidentiary and witness credibility issues that an individual defendant would be ill-equipped to independently identify and address.

Defenders also provide an opportunity for a meaningful conversation about what someone's rights are and the impact of waiving them. They can apprise defendants of the potential immigration consequences of their charges, and take steps to mitigate those effects. It is these interactions that provide the system with assurances that the accused understands the nature of the court process, fully comprehends the rights they may waive and the consequences they may face. The responsibility of explaining the general and person-specific features of criminal prosecution to the accused is rightfully assigned to the defense attorney. But when defense counsel is not present at these vital, early stages of the case, the responsibility often goes unfulfilled or inadequately met.

As noted above, the presence of counsel early in the cases has pivotal downstream effects – counsel can take pictures of injuries, obtain exculpatory video or audio evidence before it is erased and locate and interview witnesses before their memories fade. Counsel may also identify appropriate treatment needs to help the client address underlying illness or substance abuse issues. The concerns about the lack of counsel at initial hearings is further amplified in jurisdictions in which the court schedules the client's next hearing weeks to months after the initial appearance, with the accompanying instruction that the client should wait until this next hearing to meet their lawyer.

*Negotiating with the Prosecutor*

In addition to defense counsel being absent, NACDL staff observed the improper transfer of the task of negotiating pleas from defense counsel to the unrepresented litigant. In one county, unrepresented defendants were instructed to first go to the prosecutor offices to negotiate their case. For those who were incarcerated, NACDL staff was informed that the prosecutor would meet the accused in their jail cell to discuss the case.

The prosecutor is the defendant's adversary in the criminal process. They are neither responsible for nor capable of providing advice about collateral consequences, potential defenses, nor can they be expected to reduce the coercive pressures that impel many accused persons to enter improvident guilty pleas. The prosecutor should not be eliciting inculpatory information from the defendant, and lacks the training, expertise, or interest to elicit crucial mitigating, and potentially exculpatory information, such as medical history, struggles with substance abuse, and the client's version of events. Issues surrounding potential immigration and other collateral consequences of convictions cannot be explored and investigations into potential legal and factual defenses will not occur. Most importantly, the prosecutor cannot act as advocate for the defendant, and therefore cannot have the conversations necessary to bring about a disposition that is just. The accused cannot fairly be expected to be able to overcome the skill of the State. This was specifically

acknowledged by the Indiana Supreme Court recognized in *State v. Taylor,* "[t]he state is never more awesomely powerful, nor is the individual more vulnerable, than in a criminal prosecution."[55]

When one pauses to think about the steps an effective defense lawyer takes prior to negotiating a plea with the State – i.e. obtaining discovery, comparing the allegations to the client's version of events, speaking to witnesses, reviewing case law, examining records, conducting investigations, and consulting all the latest relevant legal, medical, and science research; it become quickly apparent that a pro-se litigant is at an alarming disadvantage and cannot intelligently engage in negotiation discussions or fully appreciate the long-term consequences of any plea agreement he or she may enter in to.

**Recommendation**: As noted above, all steps must be taken to assure that the defense is present at the earliest stages of court proceedings. This will require the state to provide sufficient funding, staffing, and resources to assure defenders are able to be present and actively engaged in cases. Having defenders present will minimize the risks of individuals opting to negotiate directly with prosecutors in an effort to resolve their cases and will restore a more balanced view of the relative power and authority of the defense and prosecution.

h. Resources

**Principle:** Defense counsel must have access to the resources necessary to have parity with the prosecution and to assure they can provide constitutionally effective representation.

**As applied to Indiana**: In addition to caseload variation, each county can have vastly different levels of resources available to their attorneys. One such resource is access to investigators. An essential part of being able to present a competent defense is having the ability to investigate the allegations made and potential mitigation, to locate witnesses, and to gather and document evidence and information. Records show that while some counties had multiple investigators other counties have no investigators on staff.[56] Moreover, even when investigators are available, NACDL staff was informed that some offices discourage the frequent use of investigators due to cost concerns. A similar practice is employed with regard to use of expert testimony.

When NACDL staff spoke to defenders in some of the jurisdictions visited, it also became apparent another powerful resource was not being used—depositions. Depositions are a valuable discovery tool, allowing attorneys to preview a witness's trial testimony, assess his/her credibility, and more fully prepare for trial, pre-trial motions, and engage in more informed negotiations. Taking depositions, however, can be a costly endeavor as the

[55] *State v. Taylor*, 49 N.E.3d 1019, 1023 (IN 2016). See also, *Powell* "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. He requires the guiding hand of counsel at every step of the proceedings against him." *Powell, supra*, FN 23, at 68-69.
[56] Clark County Listening Tour 24:5-24.

parties must pay for court reporters, transcripts or audio recordings of the depositions, and process servers. One practitioner spoke of intentional efforts to minimize the number of deposition taken to save money.[57] As a result, some clients have attorneys that can prepare for trial with a full arsenal of defenses at the ready due to the knowledge gleaned from depositions, the help of investigators, and the essential testimony of experts, while others are forced to face trial with attorneys with minimal independent knowledge, flying by the seat of their pants, not because of shortcomings in discovery or evidentiary rules, but simply for want of resources to access existing practices. The failure to provide funding to make discovery options equally available to all accused persons creates a two tiered system of justice—one for the well-to-do and another for the poor.

**Recommendation:** Systemic changes must include funding for support staff such as investigators and social workers as well as for use of vital tools such as depositions. In addition, state-wide practice standards should encourage the use of these resources as a regular part of representation.

For attorneys operating under contracts, in order to dis-incentivize bypassing the use of these resources to help maximize the income from these contracts, separate funds should be included in each contract earmarked expressly for the retention of investigators and social workers and for the taking of depositions, with the ability, as may be needed, for those attorneys to seek additional funding from the court for these support services so as to assure all defendants have access to these resources.

## IV. Conclusion

NACDL applauds the work of Indiana's Task Force on Public Defense and the Indiana Public Defender Commission's commitment to improving the ways in which Indiana fulfills its constitutional obligation to provide effective representation to those who stand accused. The year-long effort to bring together subject matter experts, gather input from various components of the criminal justice system, conduct research and investigation, and create opportunities for community input is impressive and will surely be valuable. Hopefully this effort will result in material improvement of the public defense delivery system in Indiana.

NACDL has proposed changes intended to strengthen the State's efforts to fulfill each of the ABA's Ten Principles. These changes are based upon documented reporting and actual field observation. The right to effective assistance of counsel in a criminal case is a fundamental right under the United States Constitution, and one that has been fully embraced by Indiana's constitution and statutes. But the mere articulation of that right does not make it a reality. And it is certainly not a reality throughout much of Indiana's public defense system. That system is in need of immediate and fundamental reform.

This Task Force can lead the way to that reform. Leaders throughout the state must understand the magnitude of the problem and the benefits of addressing it. The Task Force should not shrink from its responsibility to fully describe the inadequacies in Indiana's

[57] *Id.* at 26:17-23.

public defense system, nor should it balk at articulating the indisputable need for state support. The facts, the data, and the human stories all confirm that adequate support for public defense is an investment that saves money, improves lives, promotes safer neighborhoods, and enhances the overall well-being of society.

NACDL stands ready to assist however it can in conveying that message to leaders in all branches of government and to the communities we all serve.