

TESTIMONY OF WILLIAM J. WINTERS III
DECEMBER 14, 2009

I. INTRODUCTION

I am privileged to serve as President of the Wayne County Criminal Defense Bar Association (WCCDBA) a group of over 300 of the most highly skilled and experienced criminal defense attorneys in Michigan. The WCCDBA represents lawyers who practice in the criminal division of the Wayne County Circuit Court, Michigan's busiest and most specialized criminal court. Our members handle the vast majority of the most serious criminal cases in the state.

The WCCDBA has long been in the forefront of the struggle to obtain adequate compensation for attorneys who take on the often thankless task of defending the poor. The WCCDBA, and its predecessor organization, the Recorder's Court Bar Association, have been the lead plaintiffs in *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110 (1993) and *Wayne County Criminal Defense Bar v Chief Judges of Wayne Circuit Court*, 468 Mich 1244 (2003).

The views expressed herein are solely my own and are not shared by all members of the WCCDBA.

I have been engaged in the practice of criminal law since 1982, beginning as a student intern¹ at the Misdemeanor Defender Office when the criminal division of Detroit's 36th District Court was held in the Frank Murphy Hall of Justice. After gaining several years of invaluable experience in the high-volume, fast-paced reality of a major metropolitan criminal justice system, I became the Office's Chief Assistant Defender responsible for training and continuing legal education.

I have been a solo practitioner since 1988 concentrating almost exclusively in criminal defense. I have successfully defended thousands of felony cases and have handled some of the most notorious and shockingly brutal cases in Wayne County. In sum, I am thoroughly familiar with the criminal division of the Wayne County Circuit Court and the way Defender Offices, including the criminal division of the Detroit Legal Aid and Defender Association, generally operate. My experience comes not from the ivory towers of academia, nor from a layperson's idealized wish-list, but from over 25 years of real-world experience.

I seek no job and want no salary or elective office. My goal is be a servant of the People, as exemplified by one of my role models, Benjamin Franklin. I hope that the reader will therefore accept my views as sincere and honest expressions of how the proposed "Michigan Public Defense Act" may impact the people who are most likely to be affected by a fundamental and sweeping change in the present system: the poor and underprivileged.

¹ I am a graduate of the Detroit College of Law, an institution which produced some of the finest trial lawyers in Michigan before its ill-considered move to East Lansing and subsequent incarnation as the "Michigan State University College of Law."

I admire the zeal and relentless determination of the architects of the proposal. We share most of the same goals. Indeed, I hold in great esteem the skills and dedication of the lawyers who have worked so hard on this proposal to improve the quality of justice in our state.

II. THE NATURE AND PURPOSES OF THE MICHIGAN PUBLIC DEFENSE ACT

A. Impetus for Change

The Michigan Legislature in 2006 authorized a study of indigent defense services in Michigan. The National Legal Aid and Defender Association (NLADA) report, also referred to as the “Carroll Report” was prepared after a year-long study of ten representative counties in Michigan. Included in the report was an evaluation of indigent services in Wayne County. The report concluded that the system of providing indigent services in Wayne County is “constitutionally inadequate.”

It is beyond question that the Carroll Report raises serious questions about the state of indigent defense in Michigan. The issue is whether adequate consideration has been given to the proposed methods of improving the system, particularly as they relate to the appointment of counsel and the unique status of the Criminal Division of the Wayne County Circuit Court.

The Carroll Report concluded that there is no single “cookie cutter” indigent defense model that guarantees adequate representation. The issue becomes whether Wayne County should be melded into a system that includes counties with vastly dissimilar populations and volumes of criminal filings.

B. House Bill No. 5676

The act calls for a fundamental change in the way defense counsel are appointed and compensated. Nearly a half-century after *Gideon* was decided, we are now urged that the state, and not the county, has funding responsibility and control over appointed defense counsel.

Obviously, the most basic questions are where this money will come from and who will “monitor” counsel’s performance.

Section 2(b) of the proposed act intends to “ensure the system is free from **undue** political interference and conflicts of interest. (Emphasis supplied).

At the outset, one might very well ask what amount of “due” political interference in the proposed system is acceptable to proponents of the bill. By use of the term “political,” I take it to mean a *Webster’s* definition as “competition between competing interest groups or individuals for power and leadership in a government or other group.”

It is undeniable reality that competition between interest groups in our state, especially in these disastrous economic times, is at an all-time high. Coupled with an unfortunate and embarrassing recent history of internecine squabbling in the Michigan Supreme Court, the prognosis for future cooperation among competing interest groups is a fantasy.

This is especially troubling when one considers § 2(e) of the act which hopes to “ensure that adequate state funding of the state public defense system is provided and managed in a fiscally responsible manner.” Which interest groups will willingly cede funding to the system

without a fight and which legislators will have the political courage to fund lawyers for criminals over education, health care or infrastructure? Where will we get the money to fund this system?

This proposal could be taken far more seriously if its proponents summoned the political courage to fund this new system with an increased tax on legal products and services which directly and disproportionately contribute to crime: the beer, wine and spirits industry and casino “gaming” interests. These purveyors of misery and despair have enjoyed a tax haven in our state for far too long. A fair and reasonable tax is overdue, but these competing interest groups are apparently off-limits because they are too powerful to take on. Instead, proponents take the easy way out: they want defendants, most of whom are desperately poor, to fund the system.

I therefore start with the presumption that any statewide public defense system will be chronically underfunded, and that “policies” and “standards” will be enacted without adequate resources. Administrators and bureaucrats-- the generals who plan strategy from the safety of the rear will get comfortable salaries and nice benefits while the soldiers, the lawyers who actually fight the battles in the trenches, will be left with less money and more “oversight” from people who’ve never set foot in a courtroom.

To further illustrate the hopeless illusion of freedom from “undue” political interference, the bill will allow the governor, itself a quintessentially political position, to appoint the nine members of the commission. Interestingly, **two** members will be upon the recommendation of each of the following: the Michigan Supreme Court, the State Bar of Michigan and the Criminal Defense Attorneys of Michigan. Yet the Michigan Judges’ Association, the Michigan District Judges’ Association and the governor get **one** recommendation.

And the Wayne County Criminal Defense Bar Association? Proponents apparently have concluded that the lawyers who handle the vast majority of criminal cases in Michigan are incapable of making such recommendations or that their input is unnecessary. This naked power-grab demonstrates that “political interference” is a fact of life and must be acknowledged, not swept under a rug of unrealism. The WCCDBA has fought political battles in the past against the abolition of Recorder’s Court and against legislative encroachment into judicial affairs and we will continue to do so. We have a rich tradition of fierce advocacy and independence, and many of us feel no need to accept some centralized, Politburo-style czar who mandates “performance standards.”

This “state public defender” will be appointed by the commission under § 8 of the act. Are we to believe that this person will be free from “political interference?” How about “regional directors” appointed by the state public defender under § 2(t) and § 11? No *quid pro quos*, no backroom deals?

Will campaign contributions to political or judicial candidates be prohibited? Of course not, because these contributions are considered “free speech.” Who among us is so pure and above reproach that we can avoid the appearance of political intrigue?

III. PRACTICAL REALITIES

Any indigent defense delivery system is only as good as the people who work in it. No policy or procedure can eliminate human nature. Nepotism, cronyism and favoritism have existed forever and no legislation can eliminate these distinctly human traits. Any frank

discussion about changing a system must start with these basic principles. I can find slackers and incompetents in any system you choose. The issue is whether a statewide system is the best method to ensure that seasoned lawyers can earn a sufficient income to continue to accept these appointments, and thereby use their experience to benefit their clients

Under § 11 of the act, the regional defender is to “monitor workloads” and ensure “case assignments are fairly distributed.” Are these extra levels of bureaucracy essential to the sound operation of the criminal justice system?

I know personally how a system like this might operate. The patient, diligent lawyers will end up with the problem cases and clients, while the fast-buck artists grab the low-hanging fruit. What measures will be in place to ensure that these dedicated lawyers who can handle these difficult cases are compensated fairly? The regional defender will have the benefit of going home at 5pm each day after spending a full day “administering” in the office. The dedicated lawyers will still be making jail visits, returning phone calls and preparing the next day’s closing argument after a full day in trial.

How many active homicide, CSC I, or armed robbery cases should each lawyer handle? Should all lawyers be limited to the same number? How about “go-to” lawyers—the lawyers who accept a case after two or three previous lawyers have been “fired” by the defendant?

When a spectacularly high-profile case comes through, who gets to choose the lawyer? What criteria will be used to decide?

Any roster of “assigned counsel” as defined in § 3(c) must of necessity be limited so that attorneys will have sufficient caseloads to maintain expertise in this highly specialized area of the law. Who will select these attorneys? On what basis will an administrator evaluate an attorney’s performance?

Some people in sparsely populated areas of the state may not understand these issues. We in Wayne County, the most densely populated county in the state, deal with these problems on a daily basis. That’s why many of us prefer local control of our own affairs. The system presently in place, while far from perfect, is preferable to the creation of an unwieldy and unresponsive bureaucracy.

IV. LOCAL CONTROL

It is undeniable that there are serious problems with the way indigent services are delivered in some parts of our state. The issue is quite simply a lack of funding. I recognize there are problems and abuses within Wayne County and we in the WCCDBA have taken active steps to resolve these issues. We partner with the State Appellate Defender Office and the Wayne County Criminal Advocacy Program to operate the Continuing Legal Education Center at the Frank Murphy Hall of Justice. We provide on-site, daily research attorneys and computerized legal research. We offer mentoring programs, internet access, technical support and training programs for our members. We act as a conduit for the exchange of information and regularly meet with court administration, prosecutors and the bench to improve the quality of justice in our court. We have instituted a mechanism to mediate case assignment disputes. We are heavily involved in community activities and constantly work to reduce recidivism and expand sentencing alternatives.

Our county is unique. It is the most densely populated and highest volume court in the state. We see first-hand the challenges we face and our local officials are more responsive than any centralized authority could be. Although our county faces severe economic deficits, there is no guarantee that our local criminal justice system would be better funded under a statewide system. In fact, it's highly likely we would fare worse. Under the present system, we retain the ability to take direct action, either in our local political arena or in coordination with state and federal agencies, to clean up the abuses once and for all.

V. SOME UNPLEASANT TRUTHS

Some privately retained lawyers-- the "I don't *do* assignment" types-- have a financial interest in maintaining a perception of an incompetent public defense system. This allows them to charge higher fees while denigrating appointed counsel. Indeed, many judges, prosecutors, clerks and lawyers become mystified when a defendant, already appointed a skilled and seasoned lawyer, hires a lawyer with virtually no experience simply because the lawyer is a "paid lawyer." Many of these defendants learn later to their great regret what a mistake they've made. The public defense act offers no mechanism for enforcing the 6th Amendment for these unfortunate defendants. No one cares when a "paid lawyer" botches a case.

Defender organizations also have a financial interest in expanding their reach and securing more cases. It increases revenue and the size of their organization.

Many lawyers in Wayne County resented the implications of the Carroll Report, funded by the NLADA. It concluded that the system for appointing counsel in Wayne County is constitutionally inadequate, yet did not address the well-known problems of the local Defender Office. While I admire and respect David Carroll, he's a scientist, not a lawyer. He's never counseled an 18-year-old defendant to accept a substantial prison sentence rather than risk a mandatory life sentence. He's never lost sleep at night worrying about cases, become detached and distant from his family during a trial, nor become despondent after losing a hard-fought battle. These are facts of life for most lawyers in Wayne County and we deal with these issues with an unfortunate frequency. We don't have the luxury of playing "Monday morning quarterback." We deal in reality.

No one reads a transcript of a trial that ends in an acquittal and few seem to give Wayne County lawyers much credit for the generally outstanding legal representation they provide. Instead, all are lumped together because of two highly publicized horror stories--Eddie Lloyd and Walter Swift. I hear very few criticisms of the trial judge who presided over both of these cases. Instead, these cases and the abhorrent public comments of Lloyd's appellate lawyer are cited as the primary reasons for a fundamental change.

Many lawyers would do well to remain humble with regard to their opinions of other lawyers. It is often the arrogant lawyers who don't like the way a lawyer looks, or speaks, or conducts a trial who are the first to criticize. These "legend-in-their-own-mind" lawyers seem to have been granted divine authority to judge the capabilities of other lawyers and sneeringly look down their noses at another lawyer's performance. I have seen countless examples of how lawyers some might consider oafish or eccentric deliver spectacularly successful results for their

appointed clients.

This is indeed what keeps the system in place in Wayne Circuit Court a vibrant and organic model. Judges are often in the best position to evaluate the skills of a lawyer, and most judges honestly want competent and zealous defense counsel. I've never seen any lawyer penalized for mounting an aggressive defense. The opposite is true: good lawyers are appreciated and attorneys who work hard for their clients are rewarded by the assigning judges.

There are at least thirty pairs of judicial eyes at the Frank Murphy Hall of Justice and a lawyer's reputation gets around very quickly. Judges have the unique ability to "monitor" performance and can make case assignments based on experience and skill level. Rarely does a lawyer even end up before the judge who assigned the case. This is what makes our system unique and why we have a rich tradition of fierce and aggressive advocacy. Indeed, we have produced some of the finest criminal defense attorneys in the nation.

VI. CONCLUSION

Clearly, deficiencies and inequities exist in many courts across the State of Michigan. The question is whether the creation of a state bureaucracy for trial-level indigent defense services is the best way to address these deficiencies. In the appellate context, the legislative creation of the State Appellate Defender Office made eminently good sense. SADO has become an indispensable resource for criminal defense attorneys. There must be well-funded repository of information available to assist lawyers who represent the poor and SADO provides invaluable assistance in this regard. When the Detroit Police Department Crime Lab scandal erupted in September of 2008, Chief Deputy Director Dawn Van Hoek was the first person I called. She has demonstrated a consistent commitment to advancing the cause of justice in Michigan and I am deeply appreciative of the assistance she has given to the WCCDBA.

Yet I remain unconvinced that a public defense czar will be sensitive and responsive to our unique local concerns, and that lawyers for poor people in Detroit will given fair compensation by an often hostile state legislature.

Moreover, I have seen the results of these "reform" efforts before: we once had a court that won national awards for efficiency. It enjoyed the confidence of the community and an outstanding reputation for fairness and justice. Its administrators pioneered computerized tracking systems and lawyers were paid promptly. But some folks in the legislature with a political agenda believed they had a better way of doing things and abolished the Recorder's Court. We are still fighting to regain that efficiency and sense of fairness.

Although I am opposed to the proposed legislation in its present form, I look forward to working with state and local officials to improve the quality of justice for all in Michigan. Please contact me if you have any questions or concerns.

Respectfully submitted.



WILLIAM J. WINTERS III

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