

# Oral Testimony

to the U.S. House of Representatives  
Committee on the Judiciary Sub-Committee  
on Crime, Terrorism, and Homeland Security

## *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?*

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# DAVID CARROLL — ORAL TESTIMONY

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**T**hank you Committee Chairman Conyers, Sub-Committee Chairman Scott, Ranking Member Gohmert and the entire Sub-Committee for calling today's hearing. Your concern regarding the states' failure to ensure a meaningful right to counsel — as illustrated by Michigan's failure to fulfill its constitutional duties under *Gideon* — is shared by everyone who expects their criminal justice system to produce verdicts that are fair, correct, swift and final.

Many of the systemic deficiencies identified more than three-quarters of a century ago by the U.S. Supreme Court in the "Scottsboro Boys" case still permeate the criminal courts of Michigan today: judges hand-picking defense attorneys; lawyers appointed to cases for which they are unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trial and sentencing; attorneys violating their ethical obligation to zealously advocate for clients; and, a lack of sufficient time, training and resources to properly prepare a case in the face of the state court system that values speed over due process.

Michigan is one of seven states that require its counties to shoulder the entire burden for paying for the right to counsel at the trial-level. Since less affluent counties tend to have a higher percentage of their population qualifying for public defense services, the counties most in need of indigent defense services are often the ones that can least afford to pay for it. Indigent defense systems in cash-strapped counties are too often under-resourced, which in turn increases the opportunity for mistaken convictions and waste of taxpayer dollars. Financially strained counties often choose low-bid, flat-fee contracts, which pay a single lump sum regardless of how much or how little work the attorney does or how many cases he or she is assigned. Forty-one of Michigan's 83 counties use such a system.

These flat fee contracts are more often than not entered into between a public defender and judge — in direct violation of ABA standards requiring the independence of the defense function. Attorneys in such systems quickly learn that filing motions makes trials longer, reduces the attorney's profit and incurs the judge's displeasure. Without regard to the necessary parameters of ethical representation, the attorney's caseload creeps higher and higher. The attorney is in no position to refuse the dictates of the judge or risk his ability to put food on his family's table.

The case of the late Eddie Joe Lloyd is but one example of Michigan's failure to ensure justice. The appointing judge in that high profile rape and murder case picked an economic-minded lawyer who did minimal research and then withdrew eight days before the trial; his replacement willingly took the case with only a week to prepare and never called a single defense witness at the trial. Mr. Lloyd spent 17 years in prison before being found innocent based on DNA evidence. Mr. Lloyd's case ultimately cost Wayne County tax payers \$4 million in a wrongful conviction settlement.

One of the most glaring aspects of Michigan's failed Sixth Amendment policies is what passes for justice in Michigan's district courts — where all misdemeanors are heard and where all felony charges begin. Poor people are routinely processed through the criminal justice system without ever talking to a lawyer. The district courts employ a variety of means to avoid their constitutional duties including: uninformed waivers of counsel, requiring defendants to speak to prosecutors before appointing counsel, and using the threat of personal financial strain through the imposition of unfair fines — all of which are documented in NLADA's report, *A Race to the Bottom*, which I ask to be entered into the record.

As harmful as inadequate representation is for adults, it is even more detrimental for children. Children who come in contact with delinquency courts too often have been neglected by the professionals and institutions that are supposed to help at-risk children succeed. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he dispose of cases as quickly as possible, the message of neglect and worthlessness continues, and the risk that the juvenile will commit more — and worse — crimes increases. Thus, inadequate representation in the juvenile system can have the perverse effect of actually decreasing public safety and increasing the chance that young people will fall into a lifetime of crime and imprisonment.

Although we are focusing today on the Sixth Amendment crisis in Michigan, I could be talking about the crises related to public defender work overload in Kentucky, Tennessee, Missouri or Florida, or the lack of enforceable standards in Mississippi, Maine, Arizona, Utah or South Dakota. Our focus could have been on the difficult decisions county managers face in Ohio or Nevada when state government continually breaks promises of financial support for the right to counsel or the way elected officials unduly impact the independence of defense providers in Illinois or New Mexico. We could have discussed the prevalence of flat fee contracts in rural California, or highlighted how a judge in Pennsylvania financially benefited from unfairly sending juveniles to detention centers, in part, because of the failure of the defense function to effectively advocate for its clients in a state that has washed its hands entirely of its constitutional obligations under *Gideon*. Instead of focusing on Michigan, this could just have easily been a hearing on the failure of state policy-makers in New York to ensure *Gideon's* promise in the hundreds of town and village courts, despite the passage of three years since New York's then-Chief Justice Kaye declared the system in crisis and in need of a complete overhaul.

In sum, the Sixth Amendment crisis is not limited to Michigan. It is national in scope and will require Federal involvement to ensure this fundamental constitutional right. In *Gideon v. Wainwright* the U.S. Supreme Court stated, “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.”

In closing, I would again thank the Subcommittee for shedding light on this important issue.