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In Texas, a novel idea to address the public defender crisis

By Radley Balko

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At The Week, Andrew Cohen writes about the shortage of public defenders, focusing on the situation here in Nashville:

Mike Engle, a public defender in Nashville, stood up in a local courtroom last month and raised a troubling issue that has national resonance. After prosecutors notified a trial judge that they were seeking the death penalty against an indigent defendant named Lorenzo Jenkins, who is accused of murdering three people, Engle asked the judge to assign a private attorney to handle the case on behalf of the defendant.

"Our office," he told the court, "quite frankly lacks the resources to defend a death penalty case."

It's not even a close call, according to Dawn Deaner, Nashville's elected public defender, who supported Engle's motion. "There are maximum caseload standards that are recommended for public defenders in Tennessee," she told *The Tennessean* in December. "If you apply those standards to the number of cases we handled in fiscal year '13, we were 22 lawyers short in our office to be able to handle the workload that we have."

This surely is not what the United States Supreme Court had in mind in 1963 when it first recognized a constitutional right to counsel in *Gideon v. Wainwright*. What the justices did not do in *Gideon*, and what has haunted the court system ever since, is to require states to *enforce* the right to counsel through policies and programs (and most of all funding) that ensures adequate representation in all criminal cases. The result has been catastrophic for millions of Americans who cannot afford their own attorney. There are no precise, recent figures telling us how many indigent defendants need lawyers each year — but in 2007 the figure was at least six million people.

The judge rejected the request, not because it lacked merit, but because "it is also important to recognize the interests of the state of Tennessee." It's an odd bit of balancing. Some made similar arguments when the Supreme Court ruled that defendants have the right to directly questioned the forensic specialists who perform the analyses in their cases—that doing so would

be a huge financial burden on the states and municipalities that run the crime labs. But there's no provision in the Bill of Rights that allows states to ignore our basic rights if respecting them turns out to be a financial burden.

Cohen goes on to explain how the shortage of public defender shortage isn't limited to Nashville or Tennessee, but is in fact a national crisis.

Last spring, the Michigan Court of Appeals allowed a reform lawsuit to proceed on behalf of indigent defendants in three counties there. Reform efforts are also underway in Maryland and New York.

And just days before Engle stood up in that Nashville court, a federal judge in Washington, encouraged by a Justice Department brief supporting indigent defense reform, issued an injunctionagainst two northwest cities after finding that indigent defendants there were not receiving their constitutional right to counsel. The judge's factual findings in that case, styled *Wilbur v. City of Mount Vernon*, are breathtaking: Public defenders, he found, "often spent less than an hour on each case."

At the other end of the country, meanwhile, the Florida Supreme Court issued a ruling last May that highlighted many of the same problems about the sorry state of indigent defense. "We are struck,"the Florida justices wrote, "by the breadth and depth of the evidence of how the excessive caseload has impacted the public defender's representation of indigent defendants. For example," the justices continued, "the number of criminal cases assigned to the public defender has increased by 29 percent since 2004, while his trial budget was reduced by 12.6 percent through budget cuts and holdbacks…"

Fortunately, there may be a solution, or at least a way to stem the bleeding. Over at The Crime Report, Jordan Smith writes about an interesting experiment that's about to take place in Texas: Instead of receiving court-appointed attorneys, defendants will be given vouchers to go out and hire an attorney of their choosing. It could help not only with the shortage of public defenders, it would make public defenders directly accountable to their clients, rather than to the courts that appoint them.

That divided accountability problem gives rise to both the appearance of corruption, and to corruption that's rather obvious. For example, Texas death row inmate Hank Skinner has for years been asking for DNA testing on some crime scene evidence from his case. I wrote about Skinner's case a few years ago. Despite Skinner's pleas, his court-appointed attorney failed to make request the DNA testing at Skinner's trial. The attorney's failure to do so raised some troubling questions about his appointment.

[Skinner's] court-appointed attorney made a strategic decision to disregard his client's wishes, believing the testing would implicate him. That attorney, Harold Lee Comer, was a disgraced former prosecutor who lost his job after he was caught stealing money seized in a drug case. Skinner's trial judge, a friend of Comer's, assigned the attorney to represent Skinner and ordered him to be paid roughly the amount Comer owed the state for his own misconduct. In fact, Comer had actually *prosecuted* Skinner on an assault charge years earlier.

One could argue that it's reasonable to deny a defendant's request for DNA testing years later if he failed to make the request at trial. It's a bit more difficult, but one could also argue that it's reasonable to deny that request even though the defendant *had* asked his attorney to request the testing at trial, but the attorney decided it was against his client's best wishes. But it's a bit ridiculous to argue that a defendant should be denied after he made the request and his attorney attorney—appointed with no input from the defendant, who had previously *prosecuted* the defendant as a DA, and who resigned form his position in disgrace—ignored the defendant's request for testing because he just assumed his client was guilty.

If the proposed policy had been in place at the time, Skinner would have been able to pick and hire his own attorney, presumably one who either believed him, or at least wasn't beholden to a judge to pay him enough to offset the debts he owed to the state.

But the problems with court-appointed counsel aren't always so blatant. From Smith's piece:

The system offers judges the "perverse" incentive to appoint defense attorneys who will keep the docket moving, or who grease the system in other ways, says Marc Levin, director of the Center for Effective Justice at the conservative Texas Public Policy Foundation, which has been vocal about its support for a program of client choice since 2012.

Levin says he's heard stories of attorneys being appointed as payback for generous judicial campaign contributions, or simply because they fail to do any vetting of a prosecution's case before convincing their clients to accept a plea.

Indeed, Levin said he heard one story, involving a lawyer in Harris County, where Houston is located, who was appointed to a case at 9 am and was in front of a judge two hours later, pleading it out.

Smith then explains how the voucher idea came to be:

The state is planning to launch a first-in-the-nation project to return control over indigent appointments to defendants, allowing them to choose their own government-paid attorneys.

Architects of the new system say they hope it will realign the interests of participants, create better lawyer-client communications—and a better defense—and increase the overall effectiveness of, and confidence in, the criminal justice system.

The program, known as the Comal County Client Choice Project, takes its cue from a 2010 Cato Institute report written by law professors Stephen Schulhofer from New York University and David Friedman of Santa Clara University, which proposed, in part, that instead of assigning lawyers to poor criminal defendants, those defendants, like their more affluent counterparts, should have the ability to choose the attorney to represent their interests.

Lefstein, a vocal advocate of client choice who has studied and written about similar systems in place abroad, has been retained by Comal County to help design the new system.

It's a relatively simple concept. But, as far as the Texas stakeholders can determine, it has never before been tried in the U.S.—though it is an approach employed by many commonwealth countries, including in England and Scotland, according to Lefstein.

That such a project had not before been tried in the U.S. seemed odd to Edwin Colfax and his colleagues at the Texas Indigent Defense Commission, which is tasked with helping the state's 254 counties to develop and maintain effective systems of indigent defense.

"It's our business to try to spark innovation and to work with counties that do that," said Colfax, the commission project manager.

When the Cato report came out, the TIDC studied it carefully and began discussing if, and how, client choice might be brought to Texas.

Ultimately, the TIDC approached officials in Comal County with a plan to put the project in play.

So it's a pilot program. But at least intuitively, it seems to make some sense. Ideally, defense attorneys should be answerable only to their clients. There are going to some unavoidable limitations to that ideal when we're talking about public money. But to the extent that we can minimize any possibility of competing loyalties, we should.

Of course, if the core problem is that states, cities, and counties (and for that matter, the federal government) simply aren't devoting enough resources to indigent defense, this isn't going to be enough. Divvying up too little money in more productive ways might improve the system, but it can't overcome the fact that there's too little money to divvy up in the first place. But that's a separate problem. This is an idea worth watching.

Here's the Cato paper that inspired the idea.

(Full disclosure: I worked for the Cato Institute from 2001-2006, and currently have an unpaid affiliation with the organization as a "media fellow.")