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Scales of justice can be tipped by spending on prosecutions, public defenders

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It's an undeniable maxim of American criminal justice: the government almost always wins.

When campaign season rolls around, district attorneys invariably point to conviction rates north of 90 percent. In San Diego County, where District Attorney Summer Stephan next faces voters in 2022, the prosecutor's office boasts of convicting almost 19 of every 20 defendants.

Questions about the fundamental fairness of the criminal justice system have resurfaced in the aftermath of the Memorial Day killing of George Floyd by Minneapolis police and the nationwide protests that ensued.

Top among them is whether poor defendants are woefully over-matched when it comes to their legal defense.

Researchers have sounded alarms for years that prosecutors enjoy huge advantages when it comes to criminal trials. Prosecuting attorneys dictate charges, they have near-limitless resources and they have the weight of lengthy prison terms or even the death penalty when negotiating pleas.

The disparity between prosecutors and public defenders is nowhere more apparent than in their budgets.

In San Diego County, for example, the district attorney spends more than double what the public defender spends each year, even though 80 percent of criminal defendants cannot afford to hire their own lawyer.

While the amount of money and staffing each side employs does not make an apples-to-apples comparison — prosecutors and indigent defense attorneys perform separate functions — it can show how committed local and state policymakers are to ensuring equity in jurisprudence.

Gain an in-depth look at the economy, including industry-specific outlooks, as well as best practices for resiliency during unprecedented times.

There's no question that as a general proposition, indigent criminal defense is vastly underfunded," said Clark Neily, an attorney and criminal justice scholar at the Cato Institute, a libertarian Washington D.C. think tank.

"Are prosecutors equipped with enough leverage to get anybody to plead guilty? The answer to that is yes," Neily said. "That should be deeply troubling."

Stephan rejected the idea that prosecutors overcharge defendants or otherwise pressure them to plead guilty to lesser crimes. The San Diego district attorney said her lawyers file only those charges they can prove beyond a reasonable doubt.

“I love jury trials; that is the best of our democracy, but our system is not set up for that,” she said. “If somebody wants a jury trial we should give it to them, but in my experience it’s usually the defense who believes it’s in their best interest to plead guilty.”

Randy Mize, a career public defender in San Diego County, was promoted to the top post in 2017.

Mize acknowledged the high percentage of guilty pleas entered by his clients. But at the same time, he noted there are more diversion and rehabilitation programs than ever before, new ideas in behavioral health and substance-abuse remediation and special housing assistance for those in need.

“My office has four in-house mental health clinicians assessing our clients for appropriate mental-health care, treatment and alternatives to incarceration,” Mize said. “We have eight substance-abuse assessors who locate and assist our clients into appropriate treatment.”

Both the district attorney and public defender said they have additional programs they hope to add to their menu of services in the near future.

But revenue shortfalls resulting from the COVID-19 pandemic have pushed those initiatives to the back burner for now. The Board of Supervisors will consider budget recommendations from them and other department heads during hearings next month.

By the numbers.

Ensnared in the highest echelons of the Hall of Justice overlooking Broadway, the San Diego County District Attorney’s Office spends almost two and half times what its rival over on nearby B Street invests to defend indigents.

Stephan’s budget recommendation this year is \$217 million and 991 full-time employees — the same level of staffing but about \$8 million more than last year. She’s not sure that added money will survive the Board of Supervisors hearing next month.

The office has 315 lawyers and 130 investigators to review cases that have been presented for prosecution by police and sheriff’s deputies.

In 2018-19, the most recent fiscal year for which data were available, Stephan won convictions in 94 percent of about 11,300 felony cases. Almost three-quarters of those were settled before a preliminary hearing.

Eighty percent of some 22,000 misdemeanor cases ended in convictions.

“The conviction rate should only be used as a measure to be sure we are not putting before the jury things that we could not prove beyond a reasonable doubt,” Stephan said.

Every arrest doesn’t result in a prosecution. The District Attorney’s Office rejects just over 30 percent of the cases that police and sheriff’s investigators bring to prosecutors.

Only 1 in 5 defendants can afford their own lawyer. The rest rely on public defenders.

Mize is slated to spend \$92 million in the county public defender's office this year. He oversees a staff of 400, including about 240 attorneys and 57 budgeted investigator positions. He also has the flexibility to hire temporary investigators when need be.

"We have never had to tell an attorney no due to budget constraints," he said.

In addition to the focus on diversion programs and housing assistance his office has made in recent years, Mize said he is proud of the role his public defenders play in and out of San Diego County courtrooms.

"Slowly and for the first time in my three-plus decades in the San Diego criminal justice system, we are moving in the right direction," he said. "My attorneys are the best-trained litigators in the state, and we hold prosecutors to their burden of proof."

No state funding

Criminal defendants have not always had the legal right to a lawyer.

The U.S. Supreme Court made that decision in 1963, when justices ruled that anyone charged with a crime must be represented at government expense if they could not afford an attorney on their own.

The landmark decision in *Gideon v. Wainwright* forced states for the first time to set up legal defense teams for indigent people. Many states run their own systems, but California passes the responsibility onto its 58 counties.

The level of funding can fluctuate, depending on the regional economy and tax base. Some areas, like Fresno County, have been sued for failing to spend enough on defense lawyers for indigent people.

In late 2013, 41 of 51 attorneys in the Fresno County Public Defender's Office signed a letter complaining about extreme caseloads. The ACLU of Northern California sued two years later, citing one inmate who spent more than a month in jail before even seeing a lawyer.

The complaint accused Fresno County of forcing public defenders to handle more than 600 clients at a time — four times the number recommended by the National Advisory Commission on Criminal Justice Standards and Goals, a 1970s panel convened to lower crime and promote equity across the states.

The case settled in January with Fresno County agreeing to set minimum public defender's budgets over the next four years, adding \$10 million plus to the budget.

Gov. Gavin Newsom also agreed to boost spending by almost 30 percent for the Office of the State Public Defender, which litigates appeals for death-penalty cases, and to add \$10 million to a state grant program for public defenders across the state.

"California is currently one of only four states that provides no state funding for trial-level public defense services and no mechanism for any state-level training or oversight of trial-level providers," ACLU senior attorney Kathleen Guneratne said at the time.

David Carroll is executive director of the Sixth Amendment Center, a Boston nonprofit that promotes fairness and equal access to justice. He took issue with the funding gap between the District Attorney's Office and the Public Defender's Office.

"They are two separate and different functions, but it does not justify the disparities that I see reported from your numbers in San Diego County," he said.

Carroll said it has taken decades of policies such as the war on drugs and three-strikes laws to develop a system that emphasizes jail over resolving societal problems and pushes people into custody without addressing root causes that lead to crime.

"The criminal justice system is supposed to be adversarial — that's how you improve police work," he said. "But in many parts of the country, many parts of the system are so under-funded it is not an adversarial system any longer."

The 'trial penalty'

High-profile criminal defense attorney Paul Pfingst may have one of the best-informed perspectives among San Diego lawyers when it comes to evaluating the relationship between prosecutors and public defenders.

Pfingst was elected San Diego County district attorney in 1994 and served two four-year terms before losing a close race to Bonnie Dumanis, who recommended Stephan for the interim post when she stepped down mid-term in 2017.

To Pfingst there is little value in comparing the district attorney's and public defender's budgets, because their respective responsibilities are so different.

Pfingst said prosecutors have to investigate many more cases than those that end up in court. They have to handle victims, witnesses and evidence for every referral from police and sheriff's departments; and they must prepare every complaint as if it will land before a jury.

"If you don't make a convincing case you're going to get more trials," he said. "If you cut corners on the investigation, then defense thinks they have a shot at winning at trial."

But Neily, the lawyer and Cato Institute researcher, could not disagree more.

He said the American justice system is weighted in favor of the government. A concept he called the "trial penalty" persistently produces guilty pleas from a majority of defendants who do not want to risk going to trial before a jury of their peers.

"We as a society have come to accept the idea that we can get criminal convictions for cents on the dollar," Neily said. "A criminal trial is very expensive, but a plea bargain is pretty cheap."

The criminal-justice scholar said specific changes to the process could balance the scales, including telling juries what penalty a defendant faces if convicted and holding prosecutors accountable for acquittals the way a ship's captain is blamed for accidents at sea.

Stephan said prosecutors already are held accountable — by her and by judges. If she hears a complaint that one of her lawyers threatened to add charges or go after a defendant's family if they do not accept a plea, she said she personally investigates the claim.

"This is about justice," Stephan said. "It's not about winning, or forcing someone to plead."

The San Diego County district attorney did acknowledge one area where her office needs to keep improving — making sure Blacks, Latinos and other minorities receive the same treatment as White defendants.

“It’s a work in progress,” Stephan said. “Any leader that tells you they’ve got it and they’ve eliminated racism and bias, I don’t think they’re telling the truth.”