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M E M O R A N D U M

TO: CHIEF JUDGE TIMOTHY C. EVANS

FROM: CHICAGO APPLESEED FUND FOR JUSTICE
CHICAGO COUNCIL OF LAWYERS

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DATE: JUNE 14, 2013

RE: CONSTITUTIONAL VIOLATIONS IN COOK COUNTY: DENYING A PUBLIC DEFENSE TO INDIGENT CRIMINAL DEFENDANTS WHO POST BOND

INTRODUCTION

Recent investigation in the Criminal Courts of Cook County confirms that criminal defendants across Cook County are routinely denied state-appointed counsel in criminal cases, simply because they have posted a bond to secure release from custody. This practice flatly violates the Sixth Amendment to the U.S. Constitution. Immediate reform is necessary to ensure that criminal prosecutions in Cook County comply with the federal Constitution.

The solution to this constitutional problem is simple: the Illinois Legislature and the Illinois Supreme Court have established a framework for determining indigence and for appointing counsel in criminal proceedings that guarantees that criminal prosecutions in Cook County will comply with the Sixth Amendment. The Cook County Criminal Courts need to adhere to this framework strictly.

The following memorandum sets out investigative findings relating to the current practices for determining the indigence of criminal defendants in Cook County. It then provides applicable federal constitutional standards and discusses the landscape of Illinois law on the issue of state-appointed counsel for indigent criminal defendants. The memorandum concludes with a proposed General Order that would ensure an end to the repeated constitutional violations currently taking place across Cook County.

A. INVESTIGATIVE FINDINGS

The investigative findings reported here describe current practices in Cook County criminal courts regarding the appointment of counsel. These findings are based on court observation and interviews with Cook County practitioners representing the state, the judiciary, and the public and private defense.

The decision to appoint or deny a public defender typically occurs at a preliminary hearing in Cook County. Preliminary hearings are held daily across the County at all the branch courts and at the George N. Leighton Criminal Court building. In situations where the criminal defendant has posted bond, the denial of a state-appointed public defense follows a basic pattern: the defendant's name is called and the defendant appears before the judge; the judge notes that the defendant has posted bond; and the judge then informs the defendant that because bond has been posted, the defendant will need to hire a private attorney. The initial decision to deny a public defense is based solely on the defendant's ability to post a bond, without consideration of evidence of indigence.

Responses to denials of state-appointed counsel vary substantially. Some defendants inform the judge that they have an attorney. Others say they are looking for a lawyer and intend to retain one before their next court date. Many others point out that they cannot afford to hire a private lawyer, despite having posted bond. A portion of those who cannot afford a lawyer point out that the bond posted does not belong to them and has been provided by family, a friend, or another creditor.

Our court observers have found that statements of indigence are given little to no consideration by Cook County criminal courts. In situations where judges do further consider claims of indigence, that examination is cursory and wholly insufficient. For example, in one recent instance where a defendant explained that she had no job and could not hire an attorney, the judge asked, "Who bought your clothes?" When the defendant replied that she had bought herself the clothes she was wearing, the judge simply reiterated that she would not be assigned a public defender and would have to hire her own attorney.

In most cases, however, the judge carries out no questioning at all if a defendant has posted bond. Typically, the judge simply recommends that the defendant retain one of the private bar attorneys standing in the courtroom—lawyers who pay fees to local bar associations for the privilege of standing in Cook County criminal courtrooms to represent clients who are denied a public defense. In most cases, the defendant agrees to sign over whatever bond has been posted to the private bar attorney.

In the substantial number of cases that follow the above practice, where a defendant is denied a public defense because bond has been posted, there is no substantive hearing about the defendant's financial ability to retain an attorney. Nor are defendants permitted to complete the standard state affidavit that describes assets and liabilities, which would permit the courts to determine whether the defendant can actually pay to retain an attorney.

In rare situations where a defendant posts bond and has been provided a public defense, the court sometimes orders that bond funds be used to reimburse the Cook County Public Defender's Office. Such an order to reimburse is made at the disposition of the case. Typically, the Assistant State's Attorney moves for the reimbursement when filing for payment of fees, fines, and costs. The amount of the reimbursement varies, and it tends to be left to the judge's discretion and reflects the complexity of the case and the amount of the bond held on deposit. Often the court orders reimbursement without considering the defendant's financial circumstances, or whether a third party posted bond on behalf of the defendant.

B. CONSTITUTIONAL VIOLATIONS

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The U.S. Supreme Court in *Gideon v. Wainwright* recognized the "Sixth Amendment's guarantee of counsel" as "'fundamental and essential to a fair trial.'" 372 U.S. 335, 342 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). Since then, the Supreme Court has held consistently that the Sixth Amendment guarantees an indigent criminal defendant the right to state-appointed counsel in criminal cases. *Gideon*, 372 U.S. at 344-45; *see also Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Scott v. Illinois*, 440 U.S. 367, 373–374 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). In no uncertain terms, the Supreme Court has established that failure to appoint counsel as required by the Sixth Amendment stands as a jurisdictional bar to a valid conviction, rendering constitutionally infirm all convictions in which the indigent criminal defendant is not represented by appointed counsel. *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *see also Custis v. United States*, 511 U.S. 485, 494 (1994).

The Sixth Amendment imposes on the state a responsibility to appoint counsel whenever a criminal defendant is indigent. The criminal defendant has no obligation to request appointed counsel. *See*, *e.g.*, *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."); *see also Uveges v. Commonwealth of Pennsylvania*, 335 U.S. 437, 441 (1948).

The Supreme Court and other federal courts have discussed at length the standard for determining whether a criminal defendant is indigent within the meaning of the Sixth Amendment such that counsel must be appointed. Six related principles can be drawn from the federal case law:

- First, the definition of indigence under the Sixth Amendment is a question of federal law. *See*, *e.g.*, *Barry v. Brower*, 864 F.2d 294, 299 (3d Cir. 1988) ("The standard of indigency is necessarily a federal one."). State determinations of indigency must adhere to federal standards.

- Second, indigency for purposes of the Sixth Amendment is defined by reference to a common-sense examination of whether the criminal defendant before the court has the financial means to hire a lawyer to provide constitutionally adequate representation and thus guarantee a fair trial. As the Supreme Court wrote in *Gideon* itself, ""[R]eason and reflection require us to recognize that in 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." 372 U.S. at 344. "The Constitution requires states to meet a 'present' need for counsel," which means that "the 'present' financial inability to obtain counsel . . . defines indigence for Sixth Amendment purposes[.]" *Barry*, 864 F.2d at 299-300. The Supreme Court has explained that "'[i]ndigency' means actual or functional indigency; it does not mean comparative poverty *vis-à-vis* comparative affluence." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (citing *James v. Valtierra*, 402 U.S. 137 (1971)).

- Third, because indigence concerns the defendant's ability to retain a competent lawyer, the standard for indigence "is not equivalent to total destitution." *Barry*, 864 F.2d at 299. An accused may be indigent although he has assets. *See*, *e.g.*, *Thiel v. Southern Pacific Co.*, 159 F.2d 61, 61 (9th Cir.1946). Moreover, an accused who has some money to contribute toward a criminal defense still may be indigent for Sixth Amendment purposes. *See*, *e.g.*, *Hanson v. Passer*, 13 F.3d 275, 278 (8th Cir. 1994) ("A criminal defendant who can afford to contribute some amount to the expense of his defense but who cannot afford to hire counsel because his own resources are inadequate either to pay a retainer or to assure private counsel of full payment is functionally akin to an indigent defendant and equally entitled to court-appointed counsel.").

- Fourth, a criminal defendant's ability to post bail does not alone demonstrate that the state is relieved of its Sixth Amendment duty to appoint counsel. Indeed, the Supreme Court has suggested strongly that the ability of a criminal defendant to

obtain money for bail does not at all establish nonindigence when the Sixth Amendment right to counsel is at issue. *See Hardy v. United States*, 375 U.S. 277, 289 (1964) (Goldberg, J., concurring) ("Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer."); *see also Matthews v. Price*, 83 F.3d 328 (10th Cir. 1996) (noting that posting of bond by family "does not, ipso facto, mean that [a criminal defendant] loses his status as an indigent").

- Fifth, the analysis of indigence may be limited to evidence presented in a sworn affidavit setting out the accused's financial information. Federal courts have recognized that "[i]n many cases, the court's inquiry may properly be limited to review of financial information supplied on the standard form financial affidavit." *United States v. Gravatt*, 868 F.2d 585, 589 (3d Cir. 1989); *see also Barry*, 864 F.3d at 296 (noting that "uncontradicted financial inability to secure counsel," such as an affidavit, makes a criminal defendant "indigent as a matter of law").

- Sixth, a state may later require reimbursement of the cost of appointed counsel only in cases where the state establishes that the indigent defendant has become able to pay. *See*, *e.g.*, *Fuller v. Oregon*, 417 U.S. 40, 53 (1974) (holding that where the state provides counsel and the defendant later becomes able to repay the expense incurred by the states in providing the representation, there is no constitutional problem, so long as "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay.").

The Sixth Amendment is violated when a state court presumes that a criminal defendant is not indigent and declines to appoint counsel based solely on the fact that a defendant has posted money for bail. The Constitution does not permit a presumption that posting bond demonstrates nonindigence. Instead, the Sixth Amendment requires states to engage in indigence determinations, to evaluate the accused's financial status holistically, and to evaluate whether the accused has the financial means to retain a constitutional adequate defense lawyer. Such an evaluation of indigence need not be exhaustive—it is constitutionally permissible when it relies upon a simple sworn affidavit that outlines the financial assets of the criminal defendant. Where such an affidavit is submitted and establishes indigence within the meaning of the Sixth Amendment, the state must present other evidence demonstrating that the defendant is able to pay s ability to pay before state-appointed counsel can be denied or before the defendant can be required to reimburse the costs of the criminal defense.

The current practice in criminal courts throughout Cook County is in irreconcilable conflict with these federal constitutional standards. Routinely, judges presume that bail demonstrates nonindigence; they fail to consider affidavits of financial affidavits demonstrating indigence; and they deny state-appointed counsel without a determination of indigence, all in violation of the Sixth Amendment.

These routine denials of a public defense infect numerous Cook County criminal convictions with serious constitutional error.

C. A SIMPLE SOLUTION: STRICT ADHERENCE TO EXISTING ILLINOIS LAW

Fortunately, the prospective solution to this problem is simple: Cook County criminal courts need only adhere strictly to current Illinois law. The Illinois Legislature, the Illinois Supreme Court, and the Illinois Courts of Appeals have established a framework for determining whether the trial courts must appoint counsel for indigent criminal defendants that, if applied, ensures constitutional compliance.

In particular, the Illinois Code of Criminal Procedure provides that "[i]n all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel." 725 ILCS 5/113-3(b). The statute continues that, in order to determine indigence, "[t]he court shall require an affidavit signed by any defendant who requests court-appointed counsel. Such affidavit shall be in the form established by the Supreme Court containing sufficient information to ascertain the assets and liabilities of that defendant." *Id.* Cook County Form No. 0690 is the current affidavit used to establish that an individual wishes to defend as an indigent person, and that form requires a sworn statement providing a complete picture of the criminal defendant's finances. A criminal defendant who demonstrates by this form that he or she cannot afford to retain an attorney to provide constitutionally adequate counsel should be presumed indigent and should be appointed counsel, except where the state presents evidence of the defendant's finances to rebut that presumption.

The Cook County criminal courts must cease the practice of presuming nonindigence simply because a defendant has posted bail. The Illinois Supreme Court has determined that it is error to deny state-appointed counsel on the ground that the defendant has posted bail, without a separate determination of indigence. *People v. Eggers*, 27 Ill.2d 85 (1963); *People ex rel. Baker v. Power*, 60 Ill.2d 151 (1975). And Illinois appellate courts have long held that "[t]he determination as to a defendant's indigency should be made on the basis of as complete a financial picture as is feasible and the trial court should give consideration to the fact that a defendant need not be totally devoid of means to be indigent, it being sufficient if she lacks the financial resources on a practical basis to retain counsel to represent her." *People v. Castile*, 71 Ill.App.3d 728, 730 (Ill. App. 1st Dist. 1979). While the posting of bond may be *some* evidence that the state may rely upon to rebut the presumption of indigence established by a defendant's affidavit of finances, the defendant's ability to provide bail money *alone* cannot establish that appointed counsel is unnecessary under the Sixth Amendment.

Only by ordering the Cook County criminal courts to adhere to this established framework, already in place in Illinois, can current practices in the criminal courts of Cook County be brought into compliance with federal constitutional standards.

D. PROPOSED GENERAL ORDER

The following is a proposed General Order for the consideration of the Honorable Timothy C. Evans, Chief Judge of the Cook County Circuit Court, which would direct the criminal trial courts to adhere to Illinois law and to the federal Constitution, as described above:

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS

General Administrative Order No:

Subject: AN ORDER TO END THE PRACTICE OF DENYING A PUBLIC DEFENSE TO INDIGENT CRIMINAL DEFENDANTS WHO HAVE POSTED BOND

WHEREAS this court has discovered, based upon court observations, interviews with Cook County practitioners, and review of court transcripts, a widespread practice whereby the Cook County Criminal Courts deny criminal defendants a state-appointed public defender based solely on the fact that these defendants have posted bond, without conducting an indigence hearing; and

WHEREAS the court has further discovered that hearings to reimburse the county for the public defense of defendants are also being conducted based solely on the fact the defendant has posted bond and without reference to an affidavit containing sufficient information to ascertain the assets and liabilities of the defendant; and

WHEREAS the Criminal Courts must, pursuant to 725 ILCS 5/113-3, determine indigence and the right to state-appointed counsel based on a Cook County Form No. 0690 affidavit executed by the criminal defendant and any other evidence pertaining to a defendant's financial circumstances submitted by the defendant or the state; and

WHEREAS the Illinois Supreme Court has held that posting bond does not establish that a criminal defendant can afford a constitutionally adequate criminal defense. *People v. Love*, 177 Ill.2d 550 (1997); and

WHEREAS the Sixth Amendment to the U.S. Constitution requires a criminal defendant who cannot afford to pay for a constitutionally adequate criminal defense to receive state-appointed counsel; and

WHEREAS the U.S. Supreme Court and other federal courts have held that a defendant's ability to post bond, on its own, does not demonstrate nonindigence for purposes of the Sixth Amendment;

IT IS HEREBY ORDERED:

The Criminal Courts of Cook County shall at all preliminary hearings require criminal defendants to execute County Form No. 0690 and provide in that affidavit sufficient information to ascertain their assets and liabilities;

Where a criminal defendant demonstrates by this affidavit that he or she cannot afford to retain an attorney to provide constitutionally adequate representation, the Criminal Courts of Cook County shall presume such defendant indigent within the meaning of the Sixth Amendment and Illinois law and shall appoint counsel;

This presumption of indigence shall be rebuttable in those instances where the State can present evidence in a hearing before the Court that the criminal defendant in fact has the financial means to retain an attorney to provide constitutionally adequate representation; and

This presumption of indigence cannot be rebutted solely by evidence that the criminal defendant has posted bond.

ENTER:

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HONORABLE TIMOTHY C. EVANS,
CHIEF JUDGE
CIRCUIT COURT OF COOK COUNTY

DATED: _____