The Collaboration for Justice:

Chicago Appleseed Fund for Justice
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Ensuring the Public Defense of Indigent Criminal Defendants in Cook County

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The Criminal Justice Advisory Committee (CJAC) is a joint group composed of members of the Chicago Appleseed Fund for Justice and the Chicago Council of Lawyers. The CJAC has been engaged in a two-year project to ensure that indigent criminal defendants in Chicago's felony preliminary hearing courtrooms receive the public defense required by the Sixth Amendment to the U.S. Constitution and by Illinois law.

In 2013, the CJAC conducted court watching and interviews with government stakeholders that highlighted a serious problem in the administration of justice in Cook County: criminal defendants who posted bond—but who were by all objective measures indigent—were routinely denied a public criminal defense, in violation of the Sixth Amendment and Illinois law. For the past two years, the CJAC has worked closely with Chief Judge Timothy C. Evans and other stakeholders in Cook County to institute reforms to correct this problem.

While additional work remains, there are early and clear indications that our reform efforts, along with Cook County judges' receptivity to change, have increased access to a public defense for indigent criminal defendants and improved adherence with Constitutional and statutory requirements.

This policy brief describes the CJAC's efforts thus far to reform the way in which judges evaluate indigence in Cook County. It first sets out the constitutional and state-law issues at stake when criminal defendants are denied a public defense. It then illustrates the problems in Cook County identified by the CJAC and discusses

the CJAC's work with Chief Judge Evans to enforce existing constitutional and state law requirements in indigence determinations. Finally, it describes the CJAC's current proposal to Chief Judge Evans for permanent reforms, which we hope will be implemented by the end of 2015.

THE LEGAL BACKGROUND

The CJAC's investigation in 2013 of Chicago's preliminary hearing courtrooms revealed that indigent criminal defendants who posted bond were regularly denied a public criminal defense simply because they had access to funds to pay a bond. That practice flatly violated the Sixth Amendment to the U.S. Constitution.

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 consistently has held that the Sixth Amendment guarantees an indigent criminal defendant the right to state-funded 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 categorically requires that the states 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 only question, then, is what it means for a criminal defendant to be indigent. The Supreme Court and other federal courts have described the standards as follows:

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

- Second, indigence 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*, "[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.

- 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 some 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 strongly suggested that the ability of a criminal defendant to obtain money for bail does not at all establish non-indigence 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.2d at 296 (holding that an "uncontradicted financial inability to secure counsel" demonstrated by an affidavit makes a criminal defendant "indigent as a matter of law").

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 non-indigence. Instead, the Sixth Amendment requires states to evaluate whether the accused has the financial means to retain a constitutionally adequate defense lawyer.

An evaluation of indigence need not be exhaustive—an evaluation is constitutionally-adequate 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, and the court must consider, other evidence demonstrating the defendant's ability to pay before state-appointed counsel can be denied.

The practice of denying a public defense simply owing to a defendant's ability to post bond also violates Illinois law. 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); *see also id.* (explaining that, 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."). 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); *see also People v. Castile*, 71 Ill.App.3d 728, 730 (Ill. App. 1st Dist. 1979) ("The 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.").

In 2013, the practice in preliminary hearing courtrooms throughout Chicago's branch courts undoubtedly conflicted with these federal constitutional standards and Illinois law in a large number of cases. Certain judges presumed that the ability to post bond demonstrated a lack of indigence; they failed to consider financial affidavits demonstrating indigence; and they denied appointed counsel without a determination of indigence. These routine denials of a public defense infected numerous Cook County criminal convictions with serious constitutional error, and cried out for a solution.

ROUTINE VIOLATIONS OF THE RIGHT TO APPOINTED COUNSEL IN COOK COUNTY, AND REFORM EFFORTS

This Part discusses the CJAC's reform efforts, which have been undertaken in close collaboration with Chief Judge Evans and the Office of the Chief Judge of the Circuit Court of Cook County. Substantial progress has been made in a short period of time.

A. Discovery of the Constitutional Problem in 2013

During investigations conducted by the CJAC in 2013, it became clear that criminal defendants across Cook County routinely were denied state-appointed counsel in criminal cases. These findings were based on court observation and interviews with Cook County practitioners representing the state, the judiciary, and the public and private defense bars.

For defendants who have been charged with committing a felony offense in Chicago, their first court appearance is at Central Bond Court, which is held at the George N. Leighton Criminal Courts Building, commonly known as "26th and California." There, a judge presides over a bond hearing and sets bail. Observers and practitioners report that, as a matter of course, public defenders represent all defendants who have not retained private counsel for the proceedings.

After the bond hearing, prosecutors may elect to proceed to a preliminary hearing before a judge for a determination that probable cause exists to hold the case over for trial.[1] In Chicago, felony preliminary hearings are held daily at five branch courts located throughout the city. The preliminary hearing judge (who is a different judge than the one who set bail) is responsible for appointing the public defender to represent indigent defendants.

In 2013, the denial of a state-appointed public defender followed a basic pattern: the defendant's name would be called and the defendant would appear before the judge; the judge would note that the defendant had posted bond; and the judge would then inform the defendant that because bond had been posted, the defendant would need to hire a private attorney. The initial decision to deny a public defense often was based solely on the defendant's ability to post a bond, without consideration of any other evidence of indigence.[2]

Responses to denials of appointed counsel varied substantially. Some defendants informed the judge that they had an attorney. Others stated they were looking for a lawyer and intended to retain one before their next court date. Many others pointed out that they could not afford to hire a private lawyer. And a portion of those who could not afford a lawyer noted that the bond posted did not belong to them and had instead been provided by a family member, a friend, or another creditor.

Court observers found that statements of indigence were given little to no consideration by preliminary hearing judges. In situations where judges did consider claims of indigence, those examinations often were cursory. For example, in one 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, judges engaged in no questioning at all if a defendant had posted bond. Typically, the judge simply recommended 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

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[1] Alternatively, the prosecutor may elect to obtain an indictment from the grand jury.

[2] Ironically, most if not all defendants who request and are denied a public defender at a preliminary hearing *were* provided one at their first court appearance, the bond hearing, at which the bond is set.

to represent clients who are denied a public defense. In many cases, the defendant agreed to sign over whatever bond has been posted to the private bar attorney.

Although the CJAC's court-watching was limited to felony preliminary hearing courtrooms in Chicago, criminal defense attorneys described to the CJAC that the issue arises in misdemeanor cases as well. In particular, misdemeanor defendants frequently are released on their personal recognizance without the need to pay a cash bond (referred to in Cook County as an I-Bond). Defense attorneys told the CJAC that in some instances when misdemeanor defendants were released on bond (whether an I-Bond or cash bond), they were denied public defenders with little or no inquiry into their actual indigence or financial status. Thus, in some instances, it appears that the fact that the defendant arrived at a preliminary hearing at their own liberty rather than from pretrial detention was taken by a judge as proof that the defendant was not indigent, even though that fact has little or no bearing on the defendant's financial resources or ability to pay for a constitutionally-sufficient defense.

In the substantial number of cases where a defendant was denied a public defense because bond had been posted, there was no substantive hearing about the defendant's financial ability to retain an attorney. Nor were defendants requesting a public defender given or asked to fill out the standard affidavit that describes assets and liabilities, which would permit the court to determine whether the defendant could actually pay to retain an attorney.

In sum, claims of indigence were routinely ignored. The status quo called out for serious reform.

B. Implementing General Administrative Order 2013-11

The CJAC brought the problem to the attention of Chief Judge Evans in June 2013 through a memorandum summarizing the constitutional issues and the evidence gathered during court watching.

The CJAC described the recurrent violations of the Sixth Amendment occurring in Cook County and the failure of some Cook County judges to conduct proper indigence hearings. In addition, the CJAC explained that a defendant's ability to make bail alone could not establish that appointed counsel is not necessary under the Sixth Amendment. The CJAC further explained the framework under Illinois law for providing a public defense to indigent criminal defendants.

The Office of the Chief Judge moved quickly to address the problem. On August 13, 2013, Chief Judge Evans issued General Administrative Order 2013-11 ("GAO"), which required judges throughout Cook County to protect the constitutional rights of criminal defendants and commanded strict compliance with Illinois law. The GAO provides:

> In all cases in which the defendant requests appointment of the public defender pursuant to 725 ILCS 5/113-3, the court shall require the defendant to sign and submit an "Application, Affidavit and Order to Defend as an Indigent Person" (Form No. CCG 0690), or other such form as is established by the supreme court or this court, containing sufficient

> information to ascertain the assets and liabilities of that defendant. The circuit clerk is hereby authorized to assist the defendant in the completion of the affidavit. The court shall consider the information set forth in this affidavit, any further information from the defendant, and information from the state in deciding whether to appoint the public defender.

The GAO was distributed to all judges who hear criminal and quasi-criminal matters in Cook County. The memorandum enclosing the GAO specifically noted that it was issued in response to credible reports of the denial of public defenders solely on the basis of a criminal defendant's status on bond.

C. Continued Violations of the Sixth Amendment in Cook County

The CJAC continued its court-watching efforts after the promulgation of GAO 2013-11. Despite marked improvements after the enactment of the GAO, court watchers still observed practices that violated the Sixth Amendment.

A supplemental memorandum to Chief Judge Evans, dated December 16, 2013, summarized new reports from court watchers and the media that judges conducting preliminary hearings continued to deny appointment of the public defender based on a defendant's ability to post bond. The December memo cited at least one instance in which a judge announced at the beginning of his call that, *as a rule*, a defendant who posted a bond would not get a public defender. It also documented numerous other examples in which judges denied a public defense solely on the basis of a posted bond, in violation of the Sixth Amendment, Illinois law, and the GAO.

In December 2013, Chief Judge Evans met with CJAC representatives Malcolm Rich and Ali Abid to articulate a plan by which judges who were still engaged in offending practices would receive continuing education in early 2014. CJAC learned that judges hearing criminal matters in Cook County received this continuing education on the constitutional and statutory requirements for conducting indigence hearings.

Specifically, representatives from CJAC were informed at a later meeting with Chief Judge Evans that judges considering the appointment of counsel were informed of the relevant Illinois and constitutional law and that the posting of a bond by a criminal defendant could not preclude the appointment of a public defender. Judges were instructed that they must receive information in the form of affadivits and any additional testimony from defendants about their ability to pay and consider any extenuating circumstances counseling in favor or against the appointment of a public defender. The CJAC was told that this training also involved judges simulating actual preliminary hearings, including the sort of questions and findings that should be used when assessing whether to appoint a public defender.

Despite this training and some improvements in compliance, continued court watching in 2014 uncovered ongoing non-compliance with the Constitution, Illinois law, and the GAO. The following examples from July 2014 are illustrative of these continued problems:

- CJAC court watchers observed a judge begin her call without asking criminal defendants questions about their financial means when making determinations about whether to appoint them public defenders. Only after a court watcher was identified by courtroom staff did the judge change her approach, asking questions on the record about the criminal defendants' financial affidavits before making a decision about whether to appoint a public defender.

- Another judge appeared to at least be referencing financial affidavits provided by defendants to assess whether the defendants were indigent. Despite this, the judge held no indigence hearings and made no record of indigence determinations. In other cases, this judge appeared to make indigence assessments simply based on a defendant's answer to the question of whether the defendant was employed, rather than an examination of the defendant's actual ability to pay for a criminal defense.

- A third judge conducted similarly cursory indigence evaluations, and in two instances sent criminal defendants to private bar attorneys without asking any financial questions of the defendants at all.

D. The Latest Reform Efforts

In November 2014, the CJAC pointed out the continuing denials of a public defense that had been observed in a third memorandum to Chief Judge Evans. That memorandum proposed a new solution to ensure compliance with the Sixth Amendment, Illinois law, and the GAO.

THE CJAC'S SOLUTION

The CJAC recommended that Cook County criminal courts presume that criminal defendants are indigent if their available income falls below 250% of the federal poverty level. In addition, the CJAC recommended adopting a worksheet that would be used in all indigence hearings in Cook County.

A. Presuming Indigence at 250% of Federal Poverty Guidelines

The CJAC recommended that judges assessing whether a defendant is indigent and should have the benefit of a public defense should presume that the defendant is indigent if that defendant's available income falls below 250% of the federal poverty level established by the United States Department of Health and Human Services. The CJAC advocated a presumption of indigence based on an objective test to ensure that individuals who cannot afford to hire counsel are provided the public defense commanded by the Sixth Amendment and Illinois law. In addition, this approach promised to dramatically simplify indigence hearings in the Cook County courts, creating efficiency across the court system.

As the CJAC explained, a presumption of indigence at an available income of 250% of the federal poverty guidelines ensures a public defense in nearly all cases where the defendant truly cannot afford a lawyer, and eliminates the need to engage in

case-by-case adjudication of indigence that burdens Cook County's busy courtrooms. This proposed bright-line rule also ensures uniform application of the law across Cook County.

Based on 2014 numbers, a presumption of indigence at 250% of the federal poverty guidelines would entitle a criminal defendant to a public defense if he or she has a family of four and has less than $4,900 per month in available income. This figure focuses on the criminal defendant's available income, excluding necessary living expenses and resources that might be provided by friends and non-immediate family. The Sixth Amendment right to a public defense is a personal one and cannot turn on resources provided by third parties.

The CJAC's research showed that national best practices for determining eligibility for a public defense strongly support a presumption that criminal defendants are indigent when their available income is less than 250% of the federal poverty guideline. States like Utah and Florida presume that a public defense is warranted in all cases where a defendant's income falls below 250% of the federal poverty guidelines. This standard is further supported by a 2002 paper commissioned by the American Bar Association, which examined the standards used to determine eligibility for public defender representation across multiple states.[3] While some states studied have subjective guidelines that require a case-by-case evaluation of a defendant's "substantial hardship" or "need," many others have deployed objective criteria to create a presumption of indigence and to more quickly determine indigence. In addition to the 250% standard set by Utah and Florida, other states like Tennessee and Washington go further, looking at how much an attorney in the local community would customarily charge for defense services and comparing that to the defendant's resources. Similarly, Indiana and Washington look at the "complexity" of the defense to assess whether the defendant has available income to afford that defense.

The 250% presumption serves to ensure efficiency and fairness. By providing specific, objective criteria for the determination of indigence, the presumption ensures that the determination of whether to appoint a public defender is made based on proper criteria and that like defendants are treated alike across Cook County. The presumption also enables judges to efficiently make indigence determinations by allowing a quick, bright-line assessment of whether the defendant should be presumed indigent, and by ensuring that indigence hearings do not improperly consider the resources of third parties or other irrelevant factors.

In cases where a criminal defendant's available income does not fall below 250% of the federal poverty guideline, the presumption would disappear and a hearing would be required to determine indigence if a criminal defendant requests a public defense. During the hearing, the court would consider factors such as the customary charges in the local community for a competent defense and the complexity of the case. Such a hearing is likely to be required only in a limited number of cases, drastically reducing the courts' workload. After all, individuals who can afford to

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[3] *See* The Spangenberg Group, "Determination of Eligibility for Public Defense," May 2002, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/determinationofeligibility.authcheckdam.pdf (last accessed June 16, 2015).

retain their own attorney will in the vast majority of cases choose to do so. Should an indigence hearing prove necessary in a case where available income is greater than 250% of the federal poverty level, the criminal defendant will assume the burden of proving by a preponderance of the evidence that he or she cannot afford a criminal defense attorney.

B. A Worksheet for Indigence Hearings

The CJAC further recommended that all judges making indigence determinations use a worksheet, following the format of Cook County's financial affidavit, that sets out clear criteria for evaluating indigence, provides numerical guidance to judges, and creates a record regarding each indigence determination. Such a worksheet would promote efficiency, uniformity, and accountability across Cook County's courtrooms. The worksheet provides a template for judges to follow when assessing a defendant's request for appointment of a public defender.

Specifically, the worksheet provides current federal poverty guidelines and requires a judge to note a defendant's available monthly income. Comparing the two figures, the judge can assess whether the defendant should be presumed indigent. The worksheet then requires the judge to note whether the defendant is presumed indigent based on the 250% threshold, whether the judge appointed or denied a public defender, or whether a defendant elected to retain private counsel. Finally, if the judge declines to appoint a public defender when one was requested, the judge must identify the specific factors indicating that the defendant is not indigent from a number of options. These options correspond to the sources of income a defendant must identify when swearing an affidavit of indigence and requesting a public defense.

The CJAC suggested that one copy of this form would be kept in the case file for each criminal defendant and a second would be maintained by the Clerk of the Circuit Court, so that auditing of compliance with GAO 2013-11 could be performed in a single location without disturbing pending case files.

The proposed worksheet would help ensure compliance with GAO 2013-11 and the protection of defendants' constitutional rights throughout Cook County. As the CJAC observed, judges often have denied defendants a public defender based on impermissible criteria such as a defendant's ability to post bond or the assets of friends or non-immediate family. The requirement that judges identify reasons from the worksheet's list of options will ensure that judges make indigence determinations based only on legally-permissible criteria.

The worksheet also promotes efficiency, uniformity, and accountability. Judges in Cook County undoubtedly, in some cases, resorted to a default rule of denying a public defense to defendants able to post bond in order to efficiently move through their calls. The worksheet allows judges to continue to operate efficiently, in a constitutionally-permissible way. Similarly, the use of a standardized worksheet ensures that judges across the various courtrooms in Cook County will be considering the same criteria as with respect to indigence. Finally, while judges should state their findings on the record when declining to appoint a public defender, in those instances where they do not, the worksheet will ensure that such findings nevertheless are made

and recorded. The use of worksheets will allow retrospective examination of judges' compliance with GAO 2013-11 and the Sixth Amendment.

The CJAC's November 2014 memo also noted that additional tools should be provided to aid judges in indigence hearings as well. For instance, it recommended that judges be provided with a script of questions to ask during indigence hearings, as well as a list of inappropriate questions that should not be asked. This would ensure that defendants' constitutional rights do not depend on to whom their case is assigned, or on which day. Judges similarly should be provided with a script or template of findings that should be made on the record when making an indigence determination, such as the defendants' income and other factors that informed the judge's determination.

CURRENT STATUS AND NEXT STEPS

A. Chief Judge Evans Adopts the CJAC's Proposals in Principle

On January 29, 2015, Chief Judge Evans met with representatives from the CJAC to discuss this proposal. In a March 20, 2015, phone call with Malcolm Rich, Chief Judge Evans indicated that he would be willing to incorporate the 250% presumption and the proposed worksheet, and has since worked with members of the CJAC in implementing this solution.[4]

B. Next Steps

Moving forward, the CJAC intends to seek implementation of proposed CJAC reform recommendations. Once these reforms are in place, we will continue court watching to monitor their implementation as well as whether they are asking appropriate questions in cases where indigence is in doubt. The CJAC plans to expand its court watching to misdemeanor courtrooms as well. The CJAC also intends to review the worksheets that will be stored in the Clerk's Office's files to undertake a statistical review of the number of defendants who are granted and denied public defenders, and how many of those denied appointed counsel have posted bond. Finally, the CJAC will keep an open dialogue with the Office of the Chief Judge, the Office of the Public Defender, members of the private criminal defense bar, and other interested parties to identify any shortcomings of the new system and potential solutions to any such issues.

CONCLUSION

The widespread violation of the Sixth Amendment and Illinois law throughout the branch courtrooms in Cook County was a problem crying out for solution. Judges in Cook County regularly used the ability to post bond as a proxy for financial means.

[4] Recognizing that the adoption of this proposal could have implications for the Cook County Public Defender, members of the CJAC reached out to representatives at the Public Defender's office. The Public Defender similarly recognized the need to solve existing problems in indigence determinations and raised no objection to the CJAC proposal.

Presumably they did so owing to the significant number of cases before them each day, and the need to expedite indigence determinations. But this practice not only violated the Constitution, it was faulty as a matter of fact. Numerous colloquies witnessed by the CJAC's court watchers demonstrated that the posting of a bond was not a valid measure of the defendant's ability to pay for his or her criminal defense. Bonds often were paid for by others, like family, friends, or creditors, so the ability to post bond did not define in any meaningful way the ability of a defendant to pay a lawyer. Furthermore, the apparent blanket policy by some judges to deny appointment of a public defender to defendants who post bond suggested that a defendant's constitutional rights might turn on the particular judge that defendant was randomly assigned. In short, the widespread constitutional violations resulted from insufficiently-guided and erroneous exercises of judicial discretion.

The solution proposed by the CJAC and adopted conceptually, thus far, by the Circuit Court serves the need for efficiency by utilizing a bright-line, numerical guideline to determine a defendant's indigence: whether the defendant's income is below 250% of federal poverty guidelines. It also ensures that judges are not considering irrelevant factors such as a defendant's ability to borrow bond money from another or superficial indicia of relative wealth or poverty.

The inability to put court watchers in every branch courtroom and the lack of written records prior to the adoption of the CJAC's proposal makes it impossible to know exactly how widespread this problem was in Cook County. But the regularity with which CJAC court watchers observed this practice in branch courtrooms throughout Chicago makes it clear that an enormous number of constitutional violations took place, and likely did so every day. These violations will be avoided by properly focusing on the criminal defendant's indigence through use of the CJAC proposal. Early court watching since the outset of the CJAC's reform efforts indicate considerable improvement toward compliance with the Sixth Amendment, although concerns persist. The CJAC will continue its reform efforts to ensure that improvements continue and spread throughout Cook County.

This two-year effort to stop routine constitutional violations in preliminary hearing courtrooms in Chicago was a significant undertaking and represents a tremendous step forward for the fair and efficient administration of justice. The CJAC commends Chief Judge Evans for his rapid and diligent response to the problems in the felony branch courtrooms in Chicago , and applauds the efforts of Cook County judges to carry out their duties while protecting the constitutional rights of criminal defendants. The CJAC remains committed to the fair and effective administration of justice in Cook County. To that end, the CJAC will continue monitoring the compliance with GAO 2013-11, Illinois law, and the U.S. Constitution in branch courtrooms going forward through further court watching. In particular, it will seek implementation of CJAC recommendations by the end of 2015, and then monitor judges' implementation of the 250% guideline and use of the worksheet, as well as the Clerk's recordkeeping of indigency affidavits and forms, to ensure that the law is being followed and the process becomes more transparent.

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