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Robert C. Boruchowitz
Seattle University School of Law

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February 2013 Bar Bulletin

50 Years after *Gideon v. Wainwright*

County Plan Would End Nonprofit Defender Program

By Robert C. Boruchowitz

How should King County, which many people think has the finest county-based public defender system in the country, celebrate the 50th anniversary next month of the *Gideon v. Wainwright* decision establishing that states must provide counsel for poor people in felony cases?

Rather than celebrating that anniversary and congratulating the four existing nonprofit defender offices that have been recognized as among the best in the nation, King County Executive Dow Constantine has proposed to close those programs and replace them with two county government divisions. His idea is to end by July 1 the highly regarded program that has been in place for 42 years. The proposal would have to be approved by the County Council.

On January 16, the King County Bar Association Board of Trustees passed a resolution voicing its "grave concerns" about the proposal "regarding independence, conflicts of interest and disruption." The Board also expressed its ongoing support for a public defense system that maintains independence, and avoids conflicts and client disruption, and said it "will play an active role in the ongoing debate over this issue."

Not yet addressed in the proposal, which was developed without any public input or discussion, is how the disintegration of the existing offices would affect their work in Seattle Municipal Court, which relies on three of the four offices to provide representation for more than 5,000 people each year, or their work in state sex offender commitment cases. In fact, the Municipal Court judges have written to Constantine urging a "more collaborative and deliberative process" and saying it is impossible to make such a dramatic switch by July.

The County's position is that because of a proposed lawsuit settlement on pension rights under which the defenders in the four offices will be recognized as county employees with benefits as of July, it cannot keep the nonprofit structure. But the lawyers for both the County and the plaintiffs have said that the settlement does not require a change in the nonprofit structure.

The County acknowledges that the structure of public defense is not part of the settlement, which must be approved by the County Council and the Pierce County Superior Court, but says "it is untenable and without precedent to have hundreds of County employees working for several large private organizations."

Yet County Budget Director Dwight Dively told Seattle Weekly that there are various possibilities for public defense after the settlement, including "multiple" county agencies that might have "government structures different from traditional county agencies." According to the paper, he said an agency might be run by its own board or commission as a public development authority.

The directors of the four defender offices sent a letter to the King County Council stating, "Re-structuring is not required by the Dolan decision and not necessary to ensure public defenders receive fair pension and medical benefits." They pointed out that their employees now are receiving Public Employee Retirement System benefits and there is no need to change the structure. They also pointed out that Washington State Bar Association employees are in PERS, but WSBA is independently governed. Furthermore, Public Defender Service employees in Washington, D.C., receive federal benefits, but are not federal employees.

The four directors called the implications of Constantine's plan "breathtaking" and "appear not to have been weighed adequately." The offices urge that the County "not fix what is not broken, and retain the independent agency structure, with its established cost controls, its known performance record, and the stability for clients and employees that continuity provides."

The offices point out that they currently have insurance naming the County as a beneficiary and that they are open to new business practices such as pooling certain functions.

The Washington Attorney General's Office has written to the lawyers for the parties in the lawsuit, opposing the settlement on several grounds, including that the Department of Retirement Systems was not a party to the suit. The letter asks the parties to withdraw their settlement, offers to consult on any new negotiations, and promises to oppose the settlement if it is not withdrawn.

The Washington Defender Association, representing 1,200 defenders in the state, sent a letter to the County expressing its concern about the proposal and its impacts on clients and the system. Several members of the WDA board raised doubts at their January meeting about the proposal's plan to resolve complex issues of technology integration and conflicts of interest in less than six months.

There has been no claim that there is a problem with the existing system. Late King County Prosecuting Attorney Norm Maleng in 2006 described Seattle's defenders as "the finest in the country." In 1978, a national study, "Criminal Violence, Criminal Justice," referred to Seattle as setting the standard for criminal defense, noting the use of investigators, social workers, an appeals section, and senior lawyers to consult on difficult questions of law or strategy.

In 2000, King County had a multi-agency Public Defense Study Oversight Committee, chaired by Judge Michael Spearman. The committee recommended the continuation of King County's independent agency structure. A 2010 study commissioned by the County concluded that the County has "rightfully earned a fine reputation for public defense."

The defender staffs are respected by local government officials and the courts. As an example, Seattle Mayor Mike McGinn recently appointed the deputy director of The Defender Association to be co-chair of the city's new Community Police Commission to help oversee police reforms. Two former defenders, one from Associated Counsel for the Accused and one from The Defender Association, are now Washington Supreme Court justices - Chief Justice Barbara Madsen and Justice Sheryl Gordon McCloud.

This proposal to upend the King County public defense program comes not only on the 50th anniversary of Gideon, but also at a time when nationally there is an effort to address what U.S. Attorney General Eric Holder has described as a crisis in the provision of defender services. The Washington Supreme Court in the ANJ opinion in 2010 wrote: "[I]n some times and places, inadequate funding and troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance." There also is ongoing federal court litigation alleging that the cities of Mt. Vernon and Burlington have provided systemically ineffective defender representation.

King County has escaped the chaos and crisis facing much of the country because its strong nonprofit providers have had the independence to build and maintain outstanding representation and to advocate with the County Council for increased funding when, over the years, a number of county executives have proposed budget cuts.

In the October Bar Bulletin, KCBA President Richard Mitchell and Seattle University Law Professor John Strait wrote that the strength of the county's system "can be traced to a single source: the defender agencies stand independent of political influence." They pointed out that in 1980, Bob Moch, chair of the King County Public Defender Advisory Committee, wrote the King County Council urging that it not create a government public defender office, which was under consideration at the time. Moch drew on the committee's original 1970 report recommending that public defenders be "entirely separate from the government."

The independence of the King County defender program has allowed defenders to develop ground-breaking, client-centered programs and to do some of the most innovative criminal justice reform work in the country. For example, LEAD (Law Enforcement Assisted Diversion), designed by King County defenders in partnership with local prosecutors and law enforcement, diverts drug and prostitution suspects directly to a social service intervention program in the community, in lieu of jail booking and prosecution. The program has seen preliminary successes even with very hard to engage individuals, without the costs of utilizing the justice system.

The Society of Counsel Representing Accused Persons (SCRAP) has the Raising our Youth as Leaders (ROYAL) program, which assists youth of color. The Defender Association developed and obtained funding for The Racial Disparity Project, which spearheaded reforms in handling suspended driver license cases and obtained funding for and coordinates the LEAD program. TDA also runs the state-funded Death Penalty Assistance Center, which provides training and consultation for defenders across the state. With Columbia Legal Services, TDA also developed the nationally recognized TeamChild program, which now is a stand-alone nonprofit helping children caught in the juvenile justice system.

The four nonprofit directors in opposing the new proposal emphasize the lack of independence in the proposed structure, in which the head of public defense would report directly to the County Executive. The proposal includes an advisory group whose duties are not yet defined.

David Chapman, the current director of the County Office of Public Defense (OPD), acknowledged in a meeting with the WSBA Council on Public Defense that he can be removed from office by the executive without cause, and that he would have less political independence in the proposed structure than he did when he was director of ACA.

In a recent blog post, David Carroll, nationally recognized researcher and director of the Sixth Amendment Center, discussed the County's published plan, "Core Principles to Guide Creation of a County Public Defense Agency," which talks about the importance of independence for defenders. He wrote: "Somewhat remarkably, the county concludes that having the chief be a direct county executive appointee meets the ABA Ten Principles demand for independence [- a conclusion] based on a flawed survey of like-sized jurisdictions."

Carroll noted that the County cited Los Angeles as a place where county appointment has yielded independence. He pointed out that a 2009 study of the L.A. Defender found the following:

The lack of independence of the defense function leads to many problems including LACPD misdemeanor attorneys disposing of "1,200 cases per attorney per year, about three times the recommended national maximum." Moreover, since "detainees generally meet their public defenders only a few moments before appearing before the judge, many guilty pleas take place without any investigation into the facts or the opportunity for a full-scale interview."

He emphasized that in Cook County, Illinois (Chicago), also cited by the County's plan as having an independent defender, the chief public defender was terminated for trying to ensure reasonable caseloads.

Carroll, urging that King County should move cautiously, noted:

[O]ne major omission from the published work plan: an examination of outside evaluations of the current King County system. For example, noted indigent defense expert and New York University law professor, Kim Taylor-Thompson, wrote in a 2003 law review article, *Tuning Up Gideon's Trumpet*, that The Defender Association of Seattle has an earned reputation for "innovative and client-centered representation."

The potential threats to independence in representation of clients in county defender programs are significant. Recently, a defender in another county sent an email saying, "I just spoke with my supervisor, & I was informed that b/c I'm a county employee, I cannot file a Writ b/c it would be like suing the county.... Apparently, I am going to have to fish around for a private attorney who wants to challenge district court ... any ideas?"

King County has an example of why that "no writ" policy denies effective assistance of counsel. One of the most important cases regarding pre-trial release conditions, *Butler v. Kato* (2007), was decided in an appeal by The Defender Association from the denial of a writ of habeas corpus challenging the District Court's pre-trial requirement that a defendant have chemical dependency evaluation and treatment. The state Supreme Court found that the conditions were not authorized by court rule and violated constitutional rights against self-incrimination and confidentiality.

In May 1982, King County Executive Randy Revelle and Defender Association Deputy Director George Finkle (later a King County Superior Court judge) signed a settlement of the Defender's class action lawsuit against the County over jail conditions for pre-trial detainees. Among other important results of the settlement, the jail was required to achieve medical accreditation and to dramatically improve sanitation practices.

Revelle congratulated the Defender, emphasizing that he relied on its attorneys to hold the County accountable. This kind of recognition and support for the Defender's important and long-recognized advocacy role is difficult to imagine in a future with public defense attorneys directly employed, and their advocacy controlled, by the County.

The existing county ordinance requires the head of OPD to negotiate and monitor contracts with nonprofit defender organizations. The contracts are subject to approval by the County Council. In 2005, responding to advocacy from the agencies, the Council directed that a budget model be developed that would provide some protection for defender resources despite periodic executive efforts to cut the program. The defender offices worked with council and executive staff to create a transparent funding model.

Last February, the County prepared a "Draft Public Defense Service Delivery System Comparison" regarding aspects of the current system to an in-house model and a possible request for proposal. The draft noted that defenders have a high degree of independence and that should the county go in-house, "Systems would have to be put in place to ensure individual attorney independence in defending cases."

Also, the "County would have direct management oversight of attorneys and access to performance data." The report noted that any transition "will have to proceed in a deliberate manner, with coordination and cooperation of all members of the justice system and the public defense stakeholders and attorneys." This report was not discussed with the defender offices or the bar before Constantine unveiled his plan.

Among issues that concern the County is its current obligation to provide the same benefits received by County employees to defender employees, even those who work on city or state cases. Those employees could lose their jobs should the proposal be adopted. But it would be possible to negotiate contract provisions with the four offices to address the County's concerns about liability and funding benefits.

In this 50th year since Gideon, it would be a devastating loss to public defense for the nonprofit offices in King County to disappear.

The Defender Initiative at Seattle University School of Law is holding its Third Annual Public Defense Conference on March 8. Among scheduled speakers are Justice Susan Owens, Justice Sheryl Gordon McCloud, King County Prosecuting Attorney Dan Satterberg, federal defender Tom Hillier, and nationally known professors Norm Lefstein and Kim Taylor-Thompson, both former directors of the federal Public Defender Service in Washington, D.C. The conference will commemorate the 50th anniversary of Gideon v. Wainwright. Information and registration are available at http://www.law.seattleu.edu/Centers_and_Institutes/Korematsu_Center/The_Defender_Initiative/Conferences.xml.

Robert C. Boruchowitz is professor from practice and director of The Defender Initiative at Seattle University School of Law.

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