

INDIGENT DEFENSE

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House Bill 4529 (Substitute H-3)
House Bill 4530 without amendment
Sponsor: Rep. Tom McMillin
Committee: Criminal Justice

Complete to 6-18-13

A SUMMARY OF HOUSE BILLS 4529 & 4530 AS PASSED BY THE HOUSE 6-13-13

House Bill 4529 would create a new act to establish a system for the local delivery of indigent criminal defense services independent of the judiciary by which all eligible adults would be guaranteed the right to assistance of counsel as provided under the United States and Michigan Constitutions. A detailed description follows later.

House Bill 4530 would amend the Code of Criminal Procedure (MCL 775.16) to revise provisions pertaining to the appointment of counsel to conform to provisions within the Michigan Indigent Defense Commission Act created by House Bill 4529 (or Senate Bill 300). The bill is tie-barred to House Bill 4529 (or the identical Senate Bill 300), meaning that it could not be enacted without one of those bills also being signed into law.

Much of the current process detailed in Section 16 of the code would be eliminated. Instead, when a person charged with having committed a crime (rather than just a felony) appears before a magistrate without counsel, the person would have to be advised of the right to have counsel appointed. If the person states he or she is unable to procure counsel, the magistrate must appoint counsel, if the person is eligible for appointed counsel under the new act. (The bill would apply the appointment of counsel to all criminal cases, not just felonies.)

The Senate bills are identical to the House-passed versions of House Bills 4529 and 4530.

House Bill 4529 would create the Michigan Indigent Defense Commission Act. Briefly, the act would establish a commission that would develop and oversee the implementation of minimum standards for the effective representation of indigent adults by local indigent criminal defense systems. Each system would be required to pay a share towards providing indigent services that met the minimum standards, with the state picking up the balance for a local system if needed. The bill would provide mechanisms for resolving disputes between the MIDC and a local system regarding a system's plan and/or cost analysis to implement the required services and for when a system breaches its duty to provide the services. Every local unit of government and every trial court in the state would be required to comply with a system's approved plan.

Michigan Indigent Defense Commission

The bill would create a 16-member Michigan Indigent Defense Commission (one non-voting member) as an autonomous entity within the judicial branch of state government, prescribe membership requirements, and provide for commission duties and powers. Members would be appointed by the governor, with at least two of the appointees being nonattorneys and not more than three judges serving at any one time. The bill would exclude from appointment to the MIDC any individual receiving compensation from the state or an indigent criminal defense system for providing prosecution of or representation to indigent adults in state courts.

Any portion of appropriated funds remaining at the end of a fiscal year would not lapse to the General Fund, but be carried forward in a work project under provisions of the Management and Budget Act for use in the following fiscal year. Confidential case information would be exempt from public disclosure under the Freedom of Information Act.

The MIDC would propose minimum standards for the local delivery of indigent criminal defense services providing effective assistance of counsel to adults throughout the state. "Adult" would mean (1) an individual 17 years of age or older or (2) under certain circumstances, an individual less than 17 at the time of the commission of a felony.

"Indigent criminal defense services" or "services" would mean local legal defense services provided to a defendant when the defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction (this would begin with the initial court appearance) and the defendant is determined to be indigent. Services would not include those provided under the Appellate Defender Act.

"Effective assistance of counsel" or "effective representation" would mean legal representation that is compliant with standards established by Michigan appellate courts and the U.S. Supreme Court.

Duties and Authority of the MIDC

The duties and authority of the MIDC would include the following:

- Developing and overseeing the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure consistency in the delivery of services in the state consistent with the safeguards of the US and state Constitutions and the new act, and to guarantee the right of indigent defendants to the assistance of counsel as provided in the state and federal Constitutions. The MIDC would have to emphasize the importance of services provided to juveniles under the age of 17 who are tried (or who may be sentenced) in the same manner as adults and also provided to adults with mental impairments.
- Investigating, auditing, and reviewing the operation of services to assure compliance with the MIDC minimum standards, rules, and procedures.
- Hire an executive director and assign that individual with certain duties.

- Establish procedures for the receipt and resolution of complaints, and also for the implementation of recommendations from the courts, other participants in the criminal justice system, clients, and members of the public.
- Establishing procedures for the mandatory collection of data concerning the MIDC's operation, each individual attorney providing services, each indigent criminal defense system, and the operation of services.
- Establishing rules and procedures for indigent criminal defense systems to apply for grants to bring a system's delivery of services into compliance with MIDC minimum standards.
- Establishing procedures for annually reporting to the governor, legislature, and supreme court. The report would include, but not be limited to, recommendations for improvements and further legislative action.

Commission policies would have to be placed in an appropriate manual, made publicly available on a website, and made available to all attorneys and professionals providing services, the supreme court, the governor, the Senate Majority Leader, the Speaker of the House of Representatives, the Senate and House appropriations committees, and the Senate and House fiscal agencies.

Minimum Standards for Local Delivery of Indigent Criminal Defense Services

The minimum standards would have to be designed to ensure the provision of services that meet constitutional requirements for effective assistance of counsel. A proposed minimum standard would be submitted to the state supreme court, but only after a public hearing on the standard. A proposed minimum standard would become final when approved by the supreme court. If the court failed to approve or disapprove a proposed standard within 180 days, the standard would not be approved. Opposition to a proposed standard could be submitted to the court, but once approved, a minimum standard could not be challenged through the appellate procedures established by the bill.

"Effective assistance of counsel" or "effective representation" would mean legal representation that is compliant with standards established by Michigan and federal appellate courts.

The minimum standards, rules, and procedures established by the MIDC would have to effectuate the following:

- Delivery of services independent of the judiciary yet ensuring that judges would be permitted and encouraged to contribute information and advice concerning the delivery of services.
- Services consisting of both an indigent criminal defender office and the active participation of other members of the state bar if the caseload were sufficiently high.
- That trial courts assure each criminal defendant is advised of the right to counsel. All adults, except those appearing with retained counsel or who have waived counsel, must be screened for eligibility under the act. Counsel must be assigned as soon as indigency is determined.

In establishing the minimum standards, rules, and procedures, the following principles must be adhered to:

- Defense counsel provided sufficient time and space where attorney-client confidentiality is safeguarded.
- Defense counsel's workload controlled to permit effective representation. Economic disincentives or incentives that impair the ability to provide effective representation must be avoided. The MIDC could develop workload controls to enhance the ability to provide effective counsel.
- Defense counsel's ability, training, and experience match the nature and complexity of the assigned case.
- Continuity of counsel provided whereby the same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. Indigent criminal defense systems could exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
- Require defense counsel to attend continuing legal education relevant to the counsel's indigent defense clients.

Indigent Criminal Defense Services and Determination of Indigency

The bill would establish requirements for the application for, and appointment of, indigent criminal defense services. For instance, a preliminary inquiry regarding, and the determination of, the indigency of a defendant must be made no later than at the defendant's first appearance in court. In determining whether a defendant is entitled to the appointment of counsel, the court must consider whether the defendant is indigent and the extent of his or her ability to pay, as outlined in the bill.

A defendant would be considered to be indigent if he or she is unable, without substantial financial hardship, to obtain competent, qualified legal representation on his or her own. Substantial financial hardship would be rebuttably presumed if the defendant receives personal public assistance (this would include participation in the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance, or resides in public housing, earns an income less than 140 percent of the federal poverty guidelines, or currently serving a sentence in a correctional institution or receiving residential treatment in a mental health facility).

If a defendant did not meet the criteria for the presumptive threshold, he or she would be subjected to a more rigorous screening process to determine if his or her particular circumstances would result in a substantial hardship if required to retain private counsel.

A defendant would be responsible for applying for indigent defense counsel and for establishing indigency and eligibility for appointed counsel. Oral and written statements for use in the criminal proceeding and material to the issue of indigency would be made under oath or equivalent affirmation.

Indigent Criminal Defense System or "System"

The term would mean either the local government that funds a trial court combined with each and every trial court funded by that local government or, if a trial court is funded by more than one local unit of government, those local units, collectively, combined with each and every trial court funded by those local units of government.

No later than 180 days after the state supreme court approves a standard, each indigent criminal defense system (system) would have to submit a plan to the MIDC for the provision of indigent criminal defense services in a manner determined by the MIDC. An annual plan would have to be submitted on or before February 1 of each year thereafter.

The plan would have to specifically address how the MIDC minimum standards would be met and include a cost analysis. The standard to be addressed would be those approved by the supreme court not less than 60 days before the annual February 1st submission date. The cost analysis would include the funds in excess of the local share, if any, necessary to allow its system to comply with the minimum standards. A system could submit to the MIDC an estimate of the cost to develop the plan and cost analysis; upon approval, the MIDC would have to award the system a grant to pay the approved costs for the plan and cost analysis.

Approval or disapproval of a plan or cost analysis, or both, would have to be determined by the MIDC within 60 days of submission. If either or both were disapproved, the system would have to consult with the MIDC and submit a new plan, cost analysis, or both within 30 calendar days of the mailing date of the official notification of disapproval. If after three submissions a compromise had not been reached, the dispute would have to be resolved as provided in the bill.

The commission would be required to submit a report to the governor and legislature to request legislative appropriations for the funds necessary to implement the plan for each approved system and would have to make the information used to create the report available to each of those entities.

An indigent criminal defense system would be required to maintain not less than its "local share," defined to mean the system's average annual expenditure for such services in the three fiscal years immediately preceding the creation of the MIDC, excluding money reimbursed to the system by those determined to be partially indigent. The state would have to pay any excess funding needed by a system to bring it into compliance with the MIDC minimum standards via grants funded by legislative appropriation. A system's duty of compliance with the terms of the plan would be contingent upon receipt of a grant in the amount contained in the approved plan and cost analysis.

A system would have to comply with the terms of the grant (in regards to bringing its system into compliance with the minimum standards for effective assistance of counsel) within 180 days after receiving funds from the MIDC. The MIDC would have to issue a

zero grant to any system that was not awarded a grant to reflect that the system will receive no grant funds.

No system would be required to expend its local share if it were able to meet the minimum standards for less than that share; however, the local share would not be reduced by the lower expenditure.

In addition, the state would have to appropriate funds to the MIDC for grants to the local units of governments for the reasonable costs associated with data required to be collected under the bill that is over and above the local unit's data costs for other purposes.

The MIDC could apply for and obtain grants from any source to carry out the bill's purposes. All funds, from any source, would be state funds and be appropriated as provided by law.

Dispute Resolution

The bill would establish a mechanism, including the use of a mediator, to resolve disputes if the commission does not approve a plan and/or cost analysis after the third submission. Mediation costs would be paid equally by the parties.

If mediation fails to resolve the dispute, the mediator could submit to the MIDC a recommendation on how to resolve the issue within 30 calendar days of the conclusion of the mediation. The MIDC would then approve a final plan and/or cost analysis considered to be appropriate within 30 days, and the indigent criminal defense system would have to implement that plan.

However, a system aggrieved by the final plan, or the MIDC, could bring an action seeking equitable relief in the circuit court in which the system is located as provided in the bill. This would include the ability of the MIDC to seek equitable relief if a system breached its duty to comply with an approved plan. The action could not challenge the validity, legality, or appropriateness of the minimum standards as approved by the state supreme court.

The court could approve, reject, or modify the submitted plan and/or cost analysis and issue any orders necessary to obtain compliance with the bill. A court could enforce the order through its enforcement remedies, including, but not limited to, contempt powers. The court could order the state to undertake the provision of indigent criminal defense services in lieu of the local system. If a system breaches its duty to comply with an approved plan, the court could order the MIDC to provide services on behalf of that system.

If the MIDC is ordered to provide the services, the system would be ordered by the court to pay a certain portion of the state's costs the MIDC determined to be necessary to bring the system into compliance with the minimum standards as follows: 10 percent in the 1st year, 20 percent in the 2nd year, 30 percent in the 3rd year, and 40 percent in the 4th

year; not more than the dollar amount calculated for the 4th year would be paid in the 5th or subsequent years.

A system could resume providing services at any time and would therefore not be required to pay the above assessment. The system would have to pay at least its share.

Reporting requirements

The commission would be required to quarterly publish and make available to the public on a website its annual report, budget, and a listing of all expenditures. The annual report and salary information could be published on an annual basis. "Expenditures" would mean all payments or disbursements of MIDC funds, received from any source, made by the MIDC.

Miscellaneous Provisions

- Apply both the Freedom of Information Act (with some exceptions for client confidentiality) and the Open Meetings Act to the MIDC.
- Specify that the bill is not to be construed to overrule, expand, or extend decisions reached by the U.S. or state Supreme Courts regarding the effective assistance of counsel.
- Specify that nothing in the bill is to be construed to override certain Headlee provisions within the state constitution regarding unfunded state mandates on local governments.
- Specify that the failure of an indigent criminal defense system to comply with statutory duties under the bill does not create a cause of action against the government or system, and statutory duties imposed that create a higher standard than that imposed by the U.S. or state constitutions do not create a cause of action against a local governmental unit, indigent criminal defense system, or the state.
- Specify that violations of MIDC rules that do not constitute ineffective assistance of counsel under the U.S. or state constitutions would not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance or counsel.

FISCAL IMPACT:

House Bill 4529 (which is identical to Senate Bill 300) would have an indeterminate fiscal impact on state government. The bill would require the state to pay the costs for local indigent criminal defense systems to develop their compliance plans and cost analyses. The bill would require the state to grant funding to local indigent criminal defense systems to pay a portion of their costs for executing the plans to comply with minimum standards established by the MIDC. The portion paid by the state would be the amount in excess of the local share, as the bill prohibits local systems from expending more than their local share.

Under the bill, if local indigent criminal defense systems do not comply, the courts could order the MIDC to provide indigent criminal defense services on behalf of the local systems and the systems would be charged a percentage of the state's costs that are necessary to bring the indigent criminal defense systems into compliance with the minimum standards established (i.e., 10% in the first year, 20% in the second year, 30% in the third year, and 40% in the fourth and all subsequent years).

The bill would require the state to provide grant funding to local indigent criminal defense systems to cover costs associated with data collection requirements of the bill. Also, there would be administrative costs associated with the MIDC carrying out its responsibilities, such as, hiring a director and staff, reporting requirements, dispute resolution, and possible law suits.

Because it is not known what the standards would be, what the local systems would need to do in order to meet the standards established, what data collection costs would be, or what administrative/operational costs would be, it is not possible to estimate the fiscal impact at this time.

BACKGROUND INFORMATION AND BRIEF DISCUSSION:

Fifty years ago, the U.S. Supreme Court ruled in *Gideon v Wainwright* that all individuals accused of a crime had the right to an attorney. That right to counsel was also embodied in the Michigan Constitution. However, according to many, the current system is rife with problems and underfunding, often resulting in ineffective representation that in turn results in inappropriate and longer incarceration, increased indigent appeals cases, and at the extreme, wrongful convictions. Problems such as appointed attorneys meeting clients minutes before going before the judge, attorneys forced to meet with clients in hallways and bathroom stalls where there is no privacy, attorneys assigned cases for which they have no knowledge or experience relating to the specifics of the case (e.g., an attorney with no knowledge of immigration law being assigned to represent an immigrant), high case loads and low pay that discourage or make impossible adequate time to prepare a case, and having to ask the judge for funds to investigate a case, to name a few. In addition, there have been allegations that the practice of allowing a judge to select the appointed counsel for a case leads to favoritism in the appointment process, with a judge's "favorite" attorney, or ones that donate to a judge's campaign, receiving plum assignments. Moreover, since each county is free to devise its own system, alone or in conjunction with adjacent counties, there is no statewide uniformity or consistency in delivering indigent defense services.

In 2011, Governor Rick Snyder established the Indigent Defense Advisory Commission by executive order (EO 2011-12) and charged the commission with studying the state's current system (or systems) and making recommendations to the governor and legislature for making improvements to the system that would be fair, consistent, effective, and cost-effective, among other things. Legislation is therefore offered that adopts many of the Commission's recommendations and also encompasses the Ten Principles of a Public

Defense Delivery System previously adopted by the American Bar Association and the State Bar of Michigan.

Supporters feel the legislation addresses many of the weaknesses plaguing the current system, which some consider one of the worst in the nation. As the main bill would charge the state with funding any costs for a local system to meet the minimum standards that would be created, there should be no extra costs to local governmental units. To fail to adopt changes invites lawsuits or sanctions by the U.S. Department of Justice, say supporters. Moreover, the state is already incurring expenses due to inappropriate sentences and longer incarcerations related to ineffective appointed counsel at the trial level and appointed appellate counsel when such sentences are appealed. Others believe the state has a moral and ethical obligation, in addition to the legal obligation to uphold state and federal Constitutional requirements, to guarantee the right to effective representation to all.

Opponents of the legislation cite concerns over particulars of the legislation. For instance, some fear that the legislation will result in a one-size-fits-all approach statewide that would not take the needs of local jurisdictions into consideration. And, some feel that local judges, rather than a commission, are better suited to match a particular attorney with a particular case, as they know the strengths and abilities of the attorneys that participate as assigned counsel. Perhaps the biggest uncertainty for local governmental units is not knowing what the minimum standards will be for a system to meet.

However, the current versions of both the Senate and House packages have addressed some concerns expressed by local governments. For instance, if the MIDC makes changes to any of the minimum standards, the changes must be approved at least 60 days before a local indigent criminal defense system would have to submit its annual plan. That should provide local governmental units sufficient time to finalize cost estimates for meeting a new or different standard.

POSITIONS:

The following entities testified, submitted, or indicated support for an earlier version of the bills but in general support the establishment of a system for the effective representation of indigent adults accused of a crime:

The Michigan Campaign for Justice
Michigan Council on Crime and Delinquency
Michigan Department of Civil Rights
Criminal Defense Attorneys of Michigan
State Bar of Michigan
ACLU of Michigan
Michigan Catholic Conference Indigents
Affected with Mental Disabilities
Indigent Defense Advisory Commission

Michigan District Judges Association

The Michigan Association of Counties is neutral on the legislation as passed by the House. (6-17-13)

The Michigan Judges Association supports the concept, but is neutral on the bill as introduced.

Representatives of Ottawa County and the Wayne County Criminal Bar Association testified in opposition to the bill as introduced.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.