Michigan Law
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Michigan Innocence Clinic

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Office of Administrative Counsel
Michigan Supreme Court
Lansing, MI 48909
Submitted by e-mail: ADMcomment@courts.mi.gov

Re: **ADM File No. 2015-27: Proposed Minimum Standards for Appointed Counsel**

Dear Sirs/Madams:

I am writing to express my support of the Proposed Minimum Standards for Appointed Counsel issued by the Michigan Indigent Defense Commission. I view these standards as a small, but very important, first step toward an indigent defense system that will fulfill the promise of *Gideon v Wainwright*, 373 US 335 (1963).

I am the director of the Michigan Innocence Clinic at the University of Michigan Law School, which began operations in January 2009. So far, the Clinic has freed nine wrongfully convicted men and two women, and we have done largely by finding evidence that was never found by trial counsel.

From 1992 to 2000, I was an assistant defender at the State Appellate Defender Office (SADO) in Detroit, where I handled nearly 200 indigent criminal appeals from around the state. Of those appeals randomly assigned to me, we were able to exonerate and free five of those clients by presenting new evidence of complete innocence that trial counsel had failed to present.

The common thread of the cases we have taken in the Michigan Innocence Clinic and the innocent clients I represented at SADO is some of the very worst lawyering one can possibly imagine. I will describe just one of these cases to illustrate the point.

In the mid-1990s, I was assigned to represent a man named Harold Wells, who had been sentenced to four years in prison for receiving and concealing stolen property, namely a stolen car. Mr. Wells was convicted after a bench trial in Wayne Circuit Court lasting only 30 minutes.

The prosecution called only two witnesses, both police officers. The first officer testified that he was patrolling Detroit late one evening when he saw a car run a stop sign. The officer followed the car, ran the plates, which came back as a stolen car, and initiated a chase. The car came to an abrupt stop, and the driver and two passengers bailed out. The officer caught the two passengers, a teenage boy and a teenage girl, but the driver jumped a fence and disappeared into the night. The officer could only describe the driver as a black male with brown pants.

The prosecution's only other witness, another officer, testified that he heard the first officer's dispatch and, some 15 minutes later, approximately a quarter-mile away, saw a black male wearing brown pants walking down the street. The officer arrested that man, who turned out to be Harold Wells.

And that was the prosecution's entire case—that Harold Wells was seen wearing brown pants about 15 minutes after a black male wearing brown pants ran off into the night a quarter-mile away. Appointed defense counsel did no real cross-examination, did not make an opening statement, presented no witnesses, and barely made a closing argument.

Immediately after the case was assigned to me at SADO, I did the most elementary thing that trial counsel had never bothered to do: I read the police report. In that police report, I learned that when Harold Wells was taken to the police station that night, the two juveniles who had been arrested earlier said, "That's not him." We found one of those juveniles, who not only confirmed that Harold Wells was not the man driving the stolen car; she told us that she had given the police the name and address of the man who the driver.

As a result of our very brief investigation, Harold Wells, who had no criminal record, was freed after serving approximately 18 months in prison for a crime to which he had no connection all. In addition to the incalculable damage to Mr. Wells' life, it cost Michigan approximately $50,000 to incarcerate Mr. Wells for those 18 months, while the real car thief remained at large.

In Mr. Wells' case, trial counsel had not even bothered to read the police report. Unfortunately, my experience in scores of cases has taught me that it is not at all uncommon for appointed trial attorneys in Michigan to show up for trial completely unprepared. When that happens, we all pay.

Harold Wells' story is merely illustrative of the train wreck that is our system of indigent defense in this state. Unfortunately, I have more such stories, and so do many other lawyers in the state.

The Proposed Minimum Standards do not cure all of the deficiencies that have led to injustices such as the Wells case. But they amount to a good start toward a better system.

Proposed Standard 2(C) would have made all of the difference in the Wells case because it would have required the attorney to obtain the relevant documents, including the police report which revealed that the passengers in the car told the police that Mr. Wells was not the driver. Proposed Standard 3 would have required Mr. Wells' attorney to perform reasonable investigation, and a reasonable investigation based on the information in the police report would have led the attorney directly to the juvenile passenger who would have not only cleared Mr. Wells at trial but also would have named the man who was the actual driver.

Proposed Standards 1 and 3 are particularly important because they would require criminal defense attorneys to learn relevant Michigan law, become aware of forensic and scientific issues that arise in criminal cases, take continuing legal education courses, and request the assistance of experts when appropriate. I am especially heartened by these proposals because so many of the cases we are currently handling or have already won in the Michigan Innocence Clinic involve convictions based heavily on outdated, discredited, or newly controversial forensic and medicolegal science.

For example, we have one exoneration in a case in which a client was convicted of Child Abuse based on a claim of Shaken Baby Syndrome (SBS), and we are currently litigating several other such cases. As this Court recently recognized, SBS has in recent years become a controversial diagnosis and it is therefore incumbent for a defense lawyer in an SBS case to consider consulting medical experts who may contradict the prosecution's expert's claim that the infant was shaken. *See People v Ackley*, 497 Mich 381, 391-92 (2015) (recognizing the controversy surrounding SBS diagnoses and holding counsel ineffective for failing to obtain an expert). Yet we continue to see cases in which defense counsel was apparently completely unaware that an SBS diagnosis could be challenged. By requiring appointed defense counsel to attend CLE, learn about forensic science developments, and consult experts when appropriate, the proposed standards would help a great deal.

Proposed Standard 4 would also help prevent wrongful convictions by requiring that counsel be appointed as soon as the defendant is determined to be indigent. As the 2008 NLADA Report, *A Race to the Bottom*, amply documented, many counties have routinely delayed appointing counsel to indigent defendants charged with minor crimes with the entirely predictable effect that they will plead guilty at a first appearance in order to get out of jail as quickly as possible before they lose their jobs and/or their homes. This system leads to countless wrongful convictions of misdemeanors because the pressures to plead are the same whether the defendant is guilty or innocent of the charged crimes. And the person who pleads guilty under such pressure is then saddled with a criminal record for the rest of his or her life. If the court must provide counsel right away, that attorney can help the indigent defendant get out of jail on bond so he or she can decide rationally whether to enter a plea or fight the charges.

In sum, I support the MIDC's Proposed Standards in full, and I would urge the Court to adopt them as written.

Sincerely,

David A. Moran