

No savings yet from Alabama's reform of its indigent defense payment system

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MONTGOMERY — The cost of providing legal defense for impoverished criminal defendants is expected to rise significantly in 2013, despite the creation of a statewide office to rein in costs.

Alabama is on track to pay \$75.6 million on indigent defense in the 2013 fiscal year, state budget documents indicate. That's compared to \$59.6 million in fiscal 2012, which ended Sept. 30, and \$61.2 million in 2011.

The boost comes despite the creation in 2011 of a state Office of Indigent Defense Services to monitor how much the state spends on providing representation for people too poor to afford a lawyer. But supporters of that reform say the new system is just clearing out the deadwood and setting the stage for savings.

“Once we finish closing out contracts with lawyers under the old system, this should clear up,” said Sen. Cam Ward, R-Alabaster, who sponsored the law that created the new office. “You should finally start seeing some savings.”

But some are not yet convinced that changing the system was a good idea — saying that savings, when they come, will come by hiring lawyers on the cheap.

A basic right

If you cannot afford an attorney, one will be provided for you.

It's a phrase almost everyone has heard on television cop shows, and it's something Americans have long expected of the court system. And rightly so, lawyers and judges say.

“Protecting my right to a fair trial is protecting your right, too,” said Calhoun County Circuit Judge Bud Turner. “It's the most basic right there is.”

It's also a right with a long, painful legal history. In 1932, when an Alabama court convicted nine innocent black men of rape in Scottsboro, the U.S. Supreme Court ruled that defendants have to be provided an adequate defense in capital cases. Rape was a capital crime in Alabama at the time.

Three decades later, a Florida inmate, Clarence Earl Gideon, petitioned the U.S. Supreme Court to overturn his larceny conviction because he hadn't been provided legal counsel. The ensuing case, *Gideon v. Wainwright*, established that every defendant has the right to a lawyer, whether they can afford it or not.

Whether Alabama has lived up to the promise of providing adequate counsel is still a matter of debate. When lawmakers held a press conference Monday to announce an effort to exonerate the Scottsboro Boys, lawyers at the event noted that if the state doesn't do a better job of providing counsel, an event like the 1930s Scottsboro rape trial could easily happen again.

“We still have loopholes, we still have racial discrimination in jury selection, and we still have problems providing effective assistance of counsel,” said Richard Jaffe, a Birmingham lawyer, at the Monday event.

It’s not just criminal defendants who get representation from the state’s indigent defense system. The state also pays for guardians ad litem— lawyers who represent kids who need a representative in custody cases, or older people, low on funds, who are facing commitment hearings.

Lawyers have never given Alabama good marks on its ability or willingness to provide defendants a legal defense. But about 10 years ago, the state started spending more — a lot more — on defense lawyers for the poor. Alabama paid \$30 million for indigent defense in 2005, and twice as much in 2012.

It wasn’t by design. In 2006, the Alabama Supreme Court ruled that the state had to pay lawyers for overhead costs, such as maintaining an office. An American Bar Association study, conducted a few years later, cited that ruling as the reason for the surge.

‘Not a good way to do justice’

It didn’t help that the state lacked a central office to coordinate the state’s indigent defense lawyers, something many other states had. Across the state’s 41 judicial circuits, there’s a hodgepodge of systems. Some counties have public defenders, hired full-time to do criminal defense. Others let judges appoint lawyers on a case-by-case basis. Still others hire defense attorneys on contract often assigning a defender to a single courtroom and requiring them to take all the indigent cases that come to that courtroom.

In 2011 the Legislature finally set up a central state agency — the Office of Indigent Defense Services, or OIDS — to bring order to the chaos. The office set up a statewide, online system for lawyers to file requests for payment and it began reviewing those requests from Montgomery.

A central agency for public defense was something that legal and anti-poverty groups had been advocating for years. But the passage of a bill creating OIDS in 2011, a slim budget year, had some worried that the state would push all districts toward the contract system.

“That’s just not a good way to do justice,” said John Pickens, of the anti-poverty group Alabama Appleseed. He said studies by Appleseed and other groups found that lawyers in a contract system tend to become overloaded with cases.

“The level of representation is not as good, and the zeal of representation was not as good,” he said. Those are problems that can emerge with other systems, he said, but not as often as in contract arrangements.

Pickens said the general consensus among “anybody who cares about indigent defense” is that the public defender system provides the best service.

Open-ended

So far, the new system has fostered more of both public defender and contract systems, while chipping away at the number of appointment systems.

According to figures provided by the OIDS, 26 of the state's 41 circuit courts have contract systems, and six have public defenders' offices. The rest use the appointment system.

The number of contract systems grew by just one, Lauderdale County, though three other counties expanded existing contract systems. Two counties adopted the public defender approach.

One of those was Jefferson County, the state's largest circuit, which made the switch from an appointed system to a public defender system. According to The Birmingham News, state officials expected the cost of Jefferson County's \$12.5 million system to drop by about \$3.5 million.

Ward, the senator who helped create the OIDS, said the goal was always to shift courts toward the public defender model. Ward said he prefers the public defender approach, and he claims it's actually cheaper than the contract model. The Star requested estimates from OIDS to show whether public defender or contract models were cheaper, but those numbers weren't available by Friday.

But in the short term, the change hasn't been cheap at all — yet. Assistant state Finance Director Clinton Carter said the \$15 million increase expected in 2013 is actually the result of the state eliminating payments for overhead costs, and warning lawyers that the change was coming. Lawyers rushed in to file any outstanding requests for payment before the deadline, Carter said.

“We knew this would come out of the woodwork,” Carter said.

Those payments actually came out of the woodwork in the 2012 fiscal year, not this year, Carter said. It was a tight budget year, with the state ultimately raiding a state trust fund for \$437 million to make ends meet. The state simply couldn't afford to pay all the lawyers. So it didn't — holding off payment until this budget year.

Carter said things really should be better in 2014. Per-case costs, he said, are already down.

The state Department of Finance projects that the cost of the system will drop again, to \$58.7 million in 2014, once the old contracts are worked out.

Still, it's a projection, noted Finance Director Marquita Davis. The actual numbers for 2014 could be higher — or lower.

“It's what we consider an open-ended appropriation,” she said. “We don't decide how many people get arrested, but we pay for their defense.”

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