

Wyoming public defender budget woes intensifying with increase in capital cases

By David
Carroll

Pleading the Sixth: The cost of providing competent death penalty representation is expensive due in no small part to the additional Sixth Amendment responsibilities placed on states by the U.S. Supreme Court. Because of this, even well-structured right to counsel systems will falter when the projected number of capital cases increases seven-fold, as is occurring in Wyoming. But the resulting budget shortfall in the state is even more intensified given that the Office of the Public Defender began the fiscal year with a mandated budget cut. While the agency seeks supplemental resources, the 6AC questions whether the lack of independence for the defense function is the root cause of Wyoming's funding crisis.

All Wyoming state agencies, including the [Office of the Public Defender](#) (OPD), were mandated to take an 8% budget cut at the start of the current fiscal biennium (2013-2014). In most two-year periods, OPD operates on a biennium budget of approximately \$11.2 million, meaning the system started the current budget cycle with approximately \$900,000 less than the prior two fiscal years. Despite that budget cut, OPD received what the system believed was an appropriate line item budget to handle capital case representation over the ensuing two years; having only to defend one death penalty case over the prior four years, the agency believed the trend would continue and that \$300,000 would be sufficient going forward. However, prosecutors have already pursued seven death-eligible cases, causing OPD to spend more than double their appropriated capital case budget with 3.5 months still to go in the current biennium. This has set off a financial crisis being felt throughout the statewide public defender system, as first reported in the [Star-Tribune](#), and explained below.



Public Defense in Wyoming

As is the case in other western states like [Nevada](#) and [Idaho](#), Wyoming recognized early in its history the importance to the fair administration of justice of having a qualified attorney with the time, training and resources to mount an adequate defense. Even before Wyoming became a state, the 1876 Compiled Laws of the Territory of Wyoming provided that if the accused “be without counsel and unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the accused at all reasonable hours.” That law, requiring the indigent accused to be appointed not just one attorney, but two attorneys, existed in Wyoming until the late 1970s when the Office of the Public Defender (OPD) was first established.

OPD is an executive branch agency whose chief executive, the state public defender, directs the delivery of all right to counsel services across the state, both primary and conflict services, from the main OPD office in Cheyenne. Fourteen branch public defender offices (with full time and part time staff attorneys) provide the majority of services, although the agency also contracts with private attorneys to handle conflict cases.

[Statutory language](#) requires the funding of indigent defense services to be a hybrid state and county responsibility, with 85% of the OPD appropriation coming from state general funds and 15% from counties. But, whereas most hybrid state-county systems require budgets to be advocated for on many fronts (e.g., in Ohio, funding for right to counsel services must be battled at the state legislature *and* in the vast majority of Ohio's 88 counties), the same Wyoming statute authorizes OPD to bill individual counties a prorated share of their state budget based upon an

equitable formula that takes into account such factors as population, property valuation, and level of serious crime. Thus all indigent defense budget battles occur at the state level.

Wyoming's independence issue

National criminal justice standards require the [independence of the indigent defense function](#), and recommend that the best method of insulating the system from political or judicial interference is to establish an independent, nonpartisan commission responsible for overseeing all right to counsel services. Wyoming has no such commission.

Instead, [WY Stat. § 7-6-103](#) calls for the governor to not only directly appoint the state public defender, but also vests the governor with the hiring authority over all full time and part time assistant public defenders “with the advice of the state public defender, the district judge of the district and the boards of county commissioners in the district.” In other words, without the insulation afforded by an independent commission, the potential for political interference reaches down into the ranks of the staff lawyers and brings with it the potential for undue judicial and local political interference as well.

Here is how undue political interference occurs in a state indigent defense system without a commission. Say a governor requires all executive departments to take an 8% cut, as was done in Wyoming. The problem is that, unlike other aspects of the criminal justice system, public defenders do not control their own workload and are constitutionally required to defend all people appointed to them from the court. Therefore an 8% budget cut is impossible to implement if it is not met by an 8% cut in workload – at least it is impossible if one is concerned about maintaining parameters of ethical representation. And, since the bulk of an indigent defense system’s expenditures are personnel costs, the 8% cut must come at the expense of staff (whereas other executive branch agencies could make non-staff related cuts to absorb the mandated reduction) resulting in fewer attorneys available and no corresponding decrease in the number of clients requiring their services. But, despite the ethical considerations, the public defender that is appointed directly by the governor is more likely to accept the 8% cut rather than risk being replaced by someone who will do what the executive orders.

A similar dynamic appears to have impacted the debate around a supplemental appropriation. Earlier this year, the Wyoming state public defender, Diane Lozano, requested an emergency \$500,000 supplemental appropriation to cover the burgeoning costs of the death representation. The Governor however reduced her request to just \$200,000.

Many statewide indigent defense systems oftentimes have legislative appointees on their oversight commissions. Because of this, there is an institutionalized conduit between the public defense system and the legislature such that communication is ongoing, rather than only occurring during legislative hearings or having to necessarily go through the governor’s office. So, without such a statewide commission, it is not surprising that the Wyoming legislature lopped off another \$59,000, transferring the resources from OPD to the state Tourism Board. As reported to the 6AC, the Wyoming Tourism Board decided to absorb their 8% mandated budget reduction with a \$59K cut in printing and distributing brochures for local rodeos – something the state legislature apparently did not want to sacrifice – leading some local advocates to claim that the legislature prioritized rodeos above the constitutional imperative to provide competent representation to each and every indigent person that faces a loss of life or liberty at the hands of the criminal justice system.

How seven capital cases dramatically impacted OPD’s budget woes

In [three separate cases](#), the U.S. Supreme Court determined that for death penalty representation to be deemed effective, counsel has an obligation to conduct a thorough investigation, including looking into prior convictions that may be used as aggravators and mitigating factors about a defendant’s background. As pointed out in the *Star-Tribune* article, such requirements can quickly add up monetarily if the defendant is from a different state or country, requiring OPD to pay for substantial travel and/or out-of-state assistance.

Moreover, the U.S. Supreme Court also suggests that prevailing national standards, including the American Bar Association [Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases](#), are guideposts that “no one can misunderstand” in deciding if counsels’ performance is unreasonable, and thus deficient. The ABA *Guidelines* detail not only the parameters of ethical performance that attorneys must have the time to consider applying to each particular case, but also the systemic safeguards that must be in place to ensure an attorney operating in that system is “free from political influence and under conditions that enable them to provide zealous advocacy.” These systemic safeguards include, but are not limited to: no fewer than two attorneys on each case; access to professionals trained in screening for mental or psychological disorders; appropriate resources for experts and investigations; attorney qualification standards; and limited workload.

Thus, the state’s failure to appropriately fund the indigent defense system in general, and capital case representation in particular, is having far-reaching impacts on other parts of the indigent defense system as resources are triaged to the most serious cases at the expense of non-capital adult cases and juvenile delinquency matters. For example, in Wyoming, capital case resources are in the same budget line as all other professional services, including contract attorneys who handle the bulk of the OPD’s conflict cases, contract investigators, and all expert services for all of OPD cases. So until money is secured for all of the capital cases, OPD is stuck having to use money for those other purposes to pay for the capital case costs – reportedly having to reduce the use of experts in non-capital cases and reduce reliance on contract defenders to keep non-capital caseloads from getting excessive.

Conclusion

In [Gideon v. Wainwright](#), the U.S. Supreme Court made it incumbent upon states through the Fourteenth Amendment to provide Sixth Amendment right to counsel services to any person of limited means facing a possible loss of liberty at the hands of the criminal justice system. The 6AC was established to assist states meet their constitutional obligations. And, because the constitution currently affords states the freedom to decide for themselves whether to impose the death penalty in adult cases, we also work with policymakers in death penalty states to understand the further constitutional requirements – and the added financial impact – that policy decision entails.

Wyoming appears to have neglected the imperative to keep the capital defense representation free from undue political interference. And even though at the time of this writing, all of the seven death cases have been resolved with plea bargains or convictions to sentences less than death, the potential for catastrophic cases to continue to impact all representation in Wyoming will remain until the state’s independence issue is remedied.