Washington and Lee Law Review Online

Volume 72 | Issue 1 Article 3

7-15-2015

Representation by Counsel or Access to Defense Resources: Utah's Single Source Approach to Indigent Defense

John P. Gross
University of Alabama School of Law

Representation by Counsel or Access to Defense Resources: Utah's Single Source Approach to Indigent Defense

John P. Gross*

Abstract

The State of Utah has a unique way of providing representation in criminal cases to defendants who are too poor to hire an attorney. In Utah, there is no statewide funding or supervision of indigent defense. Each county, city, or town is responsible for creating and funding their own indigent defense delivery system. Utah is one of only two states in the United States—Pennsylvania is the other—that fails to provide state funding or oversight of indigent defense. But what makes Utah truly unique is the way in which counties and municipalities are required to structure their indigent defense delivery systems. Utah's Indigent Defense Act (IDA) mandates a single-source approach to the provision of indigent defense: indigent defendants who require additional "defense resources" to adequately prepare for trial, such as investigators or expert witnesses, must agree to be represented by the county or municipality's "defense service provider." A defendant who elects to retain private counsel is not entitled to additional funds from the county or municipality for any additional "defense resources."

This "single-source approach" does not affect those defendants who are too poor to hire an attorney or those defendants wealthy enough to both retain counsel and pay the cost of whatever additional defense resources are necessary to adequately prepare for trial. But for defendants who are marginally indigent, who have the financial resources to retain counsel but are unable to afford additional "defense resources," the single-source approach forces them to waive either their Sixth Amendment right to

* Assistant Professor of Clinical Legal Education, Director of the Criminal Defense Clinic, the University of Alabama School of Law.

counsel of choice or their Fourteenth Amendment right to "the basic tools of an adequate defense."

Defendants have the right to select an attorney who will be the architect of their defense, but they also have the right to "the raw materials integral to the building of an effective defense." Utah's single-source approach to indigent defense ignores the fact that these rights are two separate and distinct constitutional rights and conditions a defendant's access to additional resources on a waiver of their right to counsel of their own choice. Now that the Supreme Court of Utah has decided that the IDA's single-source approach is constitutional, marginally indigent defendants in Utah who wish to retain counsel, but also need additional defense resources to adequately prepare for trial, have no other option than to appeal to the Federal Courts. Whatever decision is ultimately reached by the United States Court of Appeals for the Tenth Circuit, it is abundantly clear that the IDA's single-source approach to indigent defense is yet another legislative effort to avoid adequately funding an indigent defense system that would seem to have "no other purpose or effect than to chill the assertion of constitutional rights."

Table of Contents

I. Introduction

The State of Utah has a unique way of providing representation in criminal cases to defendants who are too poor to hire an attorney. In Utah, there is no statewide funding or supervision of indigent defense. Each county, city, or town is responsible for creating and funding its own indigent defense delivery system. Utah is one of only two states in the United States—Pennsylvania is the other—that fails to provide state funding or oversight of indigent defense.[1] But what makes Utah truly unique is the way in which counties and municipalities are required to structure their indigent defense delivery systems. Utah's Indigent Defense Act (IDA) mandates a single-source approach to the provision of indigent defense:[2] indigent defendants who require additional "defense resources" to adequately prepare for trial, such as investigators or expert witnesses, must agree to be represented by the county or municipality's "defense service provider."[3] A defendant who elects

1. AM. CIVIL LIBERTIES UNION OF UTAH, FAILING GIDEON: UTAH'S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM, 4 (2011) [hereinafter FAILING GIDEON], http://www.acluutah.org/images/Failing_Gideon.pdf; *see also Indigent Defense Systems, Utah*, SIXTH AMENDMENT CTR., http://sixthamendment.org/the-right-to-counsel/state-indigent-defense-systems/utah/ (last visited June 8, 2015) (on file with the Washington and Lee Law Review).

2. UTAH CODE ANN. § 77-32-303 (LexisNexis 1992).

3. *Id.* § 77-32-303(2); *see also* State v. Steinly, No. 20120715, 2015 WL

to retain private counsel is not entitled to additional funds from the county or municipality for any additional "defense resources." This "single-source approach" does not affect those defendants who are too poor to hire an attorney or those defendants wealthy enough to both retain counsel and pay the cost of whatever additional defense resources are necessary to adequately prepare for trial. But marginally indigent defendants who have the financial resources to retain counsel, but are unable to afford additional "defense resources," are forced by the single-source approach to waive either their Sixth Amendment right to counsel of choice or their Fourteenth Amendment right to "the basic tools of an adequate defense."

II. Utah's Indigent Defense Act and Access to Additional Defense Resources

The United States Supreme Court has held that defendants who are "too poor to hire a lawyer" are entitled to counsel[4] and that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."[5] Utah's IDA recognizes the state's dual obligation to provide counsel and the raw materials integral to the building of an effective defense. Pursuant to the IDA, "indigency" in Utah means that a person "does not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing or other necessities."[6] One question, however, that has consistently arisen when interpreting the IDA is whether defendants who are able to retain counsel are also entitled to "additional defense resources" if they can demonstrate that they are indigent.

337633, ¶ 23 (Utah Jan. 27, 2015); State v. Earl, No. 20120991, 2015 WL 337554, ¶ 25 (Utah Jan. 27, 2015) (describing Utah's "single source approach to indigent defense resources").

4. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

5. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

6. UTAH CODE ANN. § 77-32-202(3)(a)(i) (LexisNexis 2015).

The Supreme Court of Utah first addressed this issue fifteen years ago in *State v. Burns.*[7] In *Burns,* the defendant was charged with the murder of her six-month-old son by starvation and dehydration. The defendant claimed that her child, who suffered from Down Syndrome, congenital heart disease, and chronic pulmonary disease, died as a result of these medical conditions. The defendant's father paid for her bond as well as counsel to represent her, but was unable to afford the cost of a medical expert—something that defense counsel felt necessary to provide effective representation. As a result, defense counsel moved for the appointment of a state-funded expert witness. At that time, the IDA required that each county, city, and town "provide counsel for every indigent person who faces the substantial probability of the deprivation of his liberty"[8] and "provide the investigatory and other facilities necessary for a complete defense."[9] The trial court held that to have access to funds for expert assistance, an indigent defense provider, not private counsel, must represent defendants.

The Supreme Court of Utah found that "the only requirements for receiving public assistance for expert witnesses are proof of necessity and establishment of indigence."[10] The court explained that "[n]umerous other states with comparable statutes have held similarly."[11] The court also noted that "[w]hile who is paying for a defendant's attorney may be a factor in the determination of indigency, it is not the determinative factor."[12] In reversing the defendant's conviction, the court concluded that the trial court had "erroneously insisted on packaging indigent assistance" with representation by a defense service provider.[13]

The year following the Supreme Court of Utah's holding in *Burns*, the IDA was amended. The amended version of the IDA required legal counsel be assigned "to represent each indigent

7. 4 P.3d 795 (2000).
8. UTAH CODE ANN. § 77-32-1(1) (LexisNexis 1990).
9. *Id.* § 77-32-1(3).
10. *Burns,* 4 P.3d at 801.
11. *Id.* at 803 n.6.
12. *Id.* at 802.
13. *Id.*

and . . . provide the legal defense services necessary for an effective defense."[14] In *State v. Parduhn*[15] the Supreme Court of Utah addressed whether the amended IDA had effectively overruled *Burns*. Once again, relying on the plain language of the statute, the court held that the IDA requires local governments to provide an indigent defendant with funding for necessary defense resources even when private counsel represents the indigent defendant.

The court's opinion in *Parduhn* addressed three cases that involved nearly identical facts and legal issues. Each of the three defendants involved had been deemed indigent by the district court at the time of their initial appearance, and the Salt Lake Legal Defenders Association had been assigned to represent them. Despite being found indigent, they were able to retain private counsel. But in doing so, the defendants exhausted their limited financial resources. This exhaustion resulted in a request for additional funds from the trial court to secure the services of investigators and other expert witnesses who were considered necessary for an effective defense. The court held that the IDA required local governments to provide an indigent defendant with funding for necessary defense resources, even when private counsel represented that defendant. The court found that despite the amendments to the IDA, the plain language of the statute still made a distinction between legal counsel and "defense resources."[16]

Most recently, in 2012, the Utah legislature responded to the court's ruling in *Pardhun* by once again amending the IDA. The IDA's current version explicitly states that if a county or municipality has established an indigent defense provider, then "the county or municipality may not provide defense resources for a defendant who has retained private counsel."[17] It seems clear that the "single-source approach" required by the IDA is designed as a cost-control measure for counties and municipalities that

14. UTAH CODE ANN. § 77-32-302(1) (LexisNexis 2008).

15. 283 P.3d 488 (Utah 2011).

16. *Id.* at 499 ("We first hold that out conclusion in *Burns*—that local governments are statutorily required to provide an indigent defendant with funding for a necessary defense resource, even when the defendant is represented by private counsel—remains good law.").

17. UTAH CODE ANN. § 77-32-303(2) (LexisNexis 2012).

enter into flat-fee contracts with an indigent defense provider. Counties will no longer have to pay any additional expenses toward defense resources for defendants who retain private counsel. Once a county enters into an exclusive contract with an indigent defense provider, then it will know with absolute certainty how much money it will spend on indigent defense. Considering the rising costs of providing indigent defense, as well as the uncertainty associated with those costs, it is not surprising that the legislature has adopted the single-source approach.[18]

III. Recent Developments: State v. Earl[19] *and* State v. Steinly[20]

The Supreme Court of Utah was recently called upon to decide whether the "single-source approach" to providing indigent defense required by the 2012 amendments to the IDA was constitutional. In *State v. Earl* and *State v. Steinly*, both decided in January 2015, the court concluded that "[a] defendant who opts out of public representation has also opted out of public defense resources, and nothing in the Constitution requires a different result."[21]

The defendant in *Steinly* claimed that the "single-source approach" violated "his constitutional right to counsel of his choice" because it denied to him "access to necessary defense

---

18. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 484 (2007)

> Although a lack of data precludes precise calculations of the increase in total number of cases assigned to indigent defense counsel, it appears by a conservative estimate that the number of cases more than doubled—and may have even tripled—between the early 1980s and the beginning of this century.

See also Jacqueline McMurtie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. MICH. J.L. REFORM 773, 786 (2006) (noting that "the increase in the use of the contract system is primarily based upon an attempt by funding authorities to reduce costs in the face of increased prosecutions").

19. No. 20120991, 2015 WL 337554 (Utah Jan. 27, 2015).

20. No. 20120715, 2015 WL 337633 (Utah Jan. 27, 2015).

21. *Id.* ¶ 22; *Earl*, 2015 WL 337554, ¶ 24.

resources."[22] Similarly, the defendant in *Earl* claimed that she had a right to "the resources necessary to prepare and present a complete and effective defense," which cannot be conditioned on representation by an indigent defense service provider.[23] In both cases, the Supreme Court of Utah upheld the constitutionality of the IDA, reasoning that there was not a constitutional right to what the court characterized as "unbundled legal services."[24] The court found no problem with the legislative decision "to couple the availability of defense resources with the retention of government-funded counsel."[25]

A. The Right to Counsel and the Right to Defense Resources are Separate and Distinct Constitutional Rights

The Supreme Court of Utah begins its analysis of the constitutional issues raised by the defendants in *Earl* and *Steinly* by claiming that "[t]he constitutional right to counsel encompasses the prerogative of choosing counsel of one's choice and of receiving resources necessary to an adequate defense"[26] and cites to the United States Supreme Court's decision in *Ake v. Oklahoma*[27] in support of that claim. What the Supreme Court of Utah overlooks is that the holding in *Ake* was based on the Due Process Clause of the Fourteenth Amendment and not the Sixth Amendment right to counsel. While the appellant in *Ake* raised claims regarding a denial of his Sixth Amendment right to counsel, the United States Supreme Court made it clear that its holding was based on the defendant's due process rights under the Fourteenth Amendment and not on his right to counsel under the Sixth Amendment: "Because we conclude that the Due Process Clause guaranteed to *Ake* the assistance he requested and was denied, we have no occasion to consider the applicability

22. *Steinly*, 2015 WL 337633, ¶ 18.

23. *Earl*, 2015 WL 337554, ¶ 20.

24. *Steinly*, 2015 WL 337633, ¶ 21; *Earl*, 2015 WL 337554, ¶ 23.

25. State v. Earl, No. 20120991, 2015 WL 337554, ¶ 22 (Utah Jan. 27, 2015); State v. Steinly, No. 20120715, 2015 WL 337633, ¶ 20 (Utah Jan. 27, 2015).

26. *Steinly*, 2015 WL 337633, ¶ 19; *Earl*, 2015 WL 337554, ¶ 21.

27. 470 U.S. 68 (1985).

of the Equal Protection Clause, or the Sixth Amendment, in this context."[28] This misreading of *Ake* resulted in the Supreme Court of Utah proceeding under the assumption that the right to counsel of one's choice and the right to the resources necessary for an adequate defense are "bundled" together in the Sixth Amendment.

While the Sixth Amendment guarantees indigent defendants the right to counsel,[29] the Fourteenth Amendment's Due Process and Equal Protection clauses require that indigent defendants have "an adequate opportunity to present their claims fairly within the adversary system."[30] The Supreme Court has viewed discrimination against indigent defendants as a violation of the Equal Protection clause, the Due Process clause, or both. For example, in *Griffin v. Illinois*,[31] the denial of a transcript to an indigent defendant on appeal was held to be both a violation of the Equal Protection clause because it was a form of discrimination based on wealth and of the Equal Protection clause because appellate review played an integral part in the determination of guilt or innocence.[32] In *Ake*, the Court made it clear that an indigent defendant should have "a fair opportunity to present his defense" based on the belief "that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[33]

The Supreme Court of Utah next cites *United States v. MacCollom*[34] for the proposition that the right to counsel of one's choice and the right to receive resources to mount an adequate defense "are qualified ones."[35] Those two rights are indeed qualified, but the decision in *MacCollom* deals with the denial of a transcript to an indigent defendant who was making a

28. *Id.* at 87 n.13.

29. Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

30. Ross v. Moffitt, 417 U.S. 600, 612 (1974).

31. 351 U.S. 12 (1956).

32. *Id.* at 18.

33. Ake v. Oklahoma, 470 U.S. 68, 76 (1985).

34. 426 U.S. 317 (1976).

35. State v. Steinly, No. 20120715, 2015 WL 337633, ¶ 19 (Utah Jan. 27, 2015); State v. Earl, No. 20120991, WL 337554, ¶ 21 (Utah Jan. 27, 2015).

collateral attack on his state conviction in federal court. *MacCollom* does not address a defendant's Sixth Amendment right to counsel of choice at trial in any way. Nevertheless, the Supreme Court of Utah comes to the conclusion that "[w]hen a defendant elects an avenue that steers away from the public representation provided by the government, he [or] she has received the private counsel of his [or] her choice and has no constitutional right to defense resources from a secondary source backed by government funding."[36]

The Supreme Court of Utah then cites *Wheat v. United States*[37] for the proposition that the "right to choose one's own counsel is circumscribed in several important respects."[38] Yet none of the factors that the United States Supreme Court identified in *Wheat* as justifications for limiting a defendant's choice of counsel are present in *Earl* or *Steinly*.[39] The defendants in *Earl* and *Steinly* had counsel that were members of the bar, had been retained, were willing to represent them, and had no conflicts of interest that would affect their ability to represent them.

B. Choosing Between Constitutional Rights

The Utah Supreme Court next points out that the United States Supreme Court has not "prescribed a single orthodoxy for the provision of the defense resources required by the Sixth Amendment."[40] They then cite *Ake* for the proposition that "the decision on how to implement this constitutional guarantee" has

36. *Steinly*, 2015 WL 337633, ¶ 19; *Earl*, WL 337554, ¶ 21.

37. 486 U.S. 153 (1988).

38. *Steinly*, 2015 WL 337633, ¶ 20; *Earl*, WL 337554, ¶ 22.

39. In *Wheat*, the United States Supreme Court mentions four instances where the Sixth Amendment right to counsel is circumscribed: 1) when the advocate selected by a defendant is not a member of the bar; 2) when the defendant wishes to be represented by an attorney he or she cannot afford; 3) when a defendant wishes to be represented by an attorney who declines to represent him or her; and 4) when the defendant wishes to be represented by an attorney who has a previous or ongoing relationship with an opposing party. *Wheat*, 486 U.S. at 159.

40. *Steinly*, 2015 WL 337633, ¶ 20; *Earl*, WL 337554, ¶ 22.

been left to the states.[41] In *Ake*, the Court specifically rejected the idea that an "indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own."[42] That being said, the fact that states are free to experiment with how they provide indigent defendants with defense resources does not mean that they can require an indigent defendant to waive their constitutional right to be represented by counsel of their own choosing to have access to additional defense resources. The freedom to experiment does not encompass the freedom to make defendants choose which of their constitutional rights to assert.

The United States Supreme Court has stated that a statutory provision that has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them" is "patently unconstitutional."[43] Whatever goal a legislature might have, they cannot pursue that goal "by means that needlessly chill the exercise of basic constitutional rights."[44] The Court has also held that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."[45] The Court has called a situation where a defendant is forced to surrender one constitutional right to assert another has been called "intolerable."[46]

---

41. State v. Steinly, No. 20120715, 2015 WL 337633, ¶ 20 (Utah Jan. 27, 2015); State v. Earl, No. 20120991, WL 337554, ¶ 22 (citing Ake v. Oklahoma, 470 U.S. 68, 83 (1985)).

42. *Ake*, 470 U.S. at 83.

43. United States v. Jackson, 390 U.S. 570, 581 (1968).

44. *Id*. at 582.

45. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); *see also* North Carolina v. Pearce, 395 U.S. 711, 738 (1969) (Black, J., concurring in part and dissenting in part).

46. Simmons v. United States, 390 U.S. 377, 394 (1986)

> Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

C. The Right to Counsel of Choice is not Encompassed by the Right to the Effective Assistance of Counsel

The Supreme Court of Utah did not address the right to counsel of choice pursuant to the Sixth Amendment in *Earl* or *Steinly*. The court framed the constitutional question as "whether the defense available to indigents through the exclusive source of a public defense is adequate."[47] The court concluded that both defendants failed to demonstrate "that the panoply of resources provided by the public defense made available in Salt Lake County falls short of the fundamental requirement of 'the basic tools of an adequate defense.'"[48] But the United States Supreme Court has made it clear that when the right to be assisted by counsel of one's choice is wrongly denied, the quality of the representation that a defendant receives is irrelevant.[49] The Supreme Court of Utah confuses the right to counsel of choice with the right to effective counsel.

While an indigent defendant may not have the right to an attorney of his or her own choosing,[50] a defendant who can afford to hire counsel does have a Sixth Amendment right to choose who will represent him or her. The Supreme Court made it very clear in *United States v. Gonzalez-Lopez*[51] that the Sixth Amendment right to the assistance of counsel includes "the right of a defendant who does not require appointed counsel to choose who will represent him."[52] This right is distinct from the right to a fair trial.[53] The Court held that the erroneous denial of a defendant's

47. State v. Steinly, No. 20120715, 2015 WL 337633, ¶ 21(Utah Jan. 27, 2015); State v. Earl, No. 20120991, WL 337554, ¶ 23 (Utah Jan. 27, 2015).

48. *Steinly*, 2015 WL 337633, ¶ 21; *Earl*, WL 337554, ¶ 23.

49. United States v. Gonzalez-Lopez, 548 U.S. 140, 148 (2006).

50. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("[W]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." (citing Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting))).

51. 548 U.S. 140 (2006).

52. *Id.* at 144.

53. *Id.* at 146 ("In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel [of the defendant's choice] was erroneous.").

right to his or her counsel of choice is a type of "structural error" which makes it "unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."[54] The Court distinguished between the "the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—and the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed."[55]

D. The Single-Source Approach and the Right to Counsel of Choice

The real constitutional question in *Earl* and *Steinly* is whether the IDA's "single-source approach to indigent defense resources" violates the defendant's right to counsel of choice under the Sixth Amendment. Based on existing United States Supreme Court precedent regarding the right to counsel of choice, Utah's "single-source approach" seems to be unconstitutional. The Supreme Court of Utah reaches a different conclusion by ignoring the Sixth Amendment right to counsel of choice and by incorrectly arguing that the right to additional defense resources derives from the Sixth Amendment rather from the Fourteenth Amendment's Due Process Clause.

Finally, the Supreme Court of Utah's argument that there "is no ground for establishing a new constitutional right to unbundled defense resources"[56] shows that the court does not recognize the separate and distinct right to counsel, the right to counsel of one's choice pursuant to the Sixth Amendment, or the right to the resources necessary for an adequate defense pursuant to the Fourteenth Amendment's Due Process and Equal Protection Clauses. The defendants in *Earl* and *Stanley* were not asking for unbundled legal services but merely the right to retain counsel of their own choosing if they were financially able, and what they were constitutionally entitled to under *Ake*—"the raw

54. *Id*. at 148.

55. *Id*.

56. State v. Steinly, No. 20120715, 2015 WL 337633, ¶ 21 (Utah Jan. 27, 2015); State v. Earl, No. 20120991, WL 337554, ¶ 23 (Utah Jan. 27, 2015).

materials integral to the building of an effective defense."[57] It is the IDA that unconstitutionally bundles the Sixth Amendment right to counsel of choice and the Fourteenth Amendment's guarantee of the basic tools of an adequate defense.

IV. The Economic Inefficiency of the Single-Source Approach

While the Supreme Court of Utah viewed the IDA's single-source approach as "rational" because the state had an interest in making sure that funds for indigent legal defense were not "abused or wasted" and that legal services were provided "effectively and efficiently," there are alternative methods of providing indigent defense that would still satisfy those state interests without limiting the constitutional right to counsel of choice. Before the most recent amendments to the IDA, marginally indigent defendants who had retained counsel could petition the trial court for additional defense resources. The trial court was in a position to judge whether the additional defense resources requested were necessary to ensure an adequate defense so that funds for indigent defense were not "abused or wasted."

The inefficiency of the single-source approach calls into question its rationality. Conditioning access to additional defense resources on the dismissal of previously retained counsel is inefficient for two reasons. First, the time and effort that retained counsel spent on trial preparation must be duplicated by the newly appointed indigent defense provider, which delays the progress of the case.[58] Second, marginally indigent defendants

---

57. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

58. *See* STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-6.2 (3d ed. 1992) (recommending that initially appointed counsel should represent the defendant throughout the trial court proceeding because, among other reasons, relying on a series of lawyers for representation is inefficient because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed); Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 60–61 (1983)

> Another factor affecting the cost of disqualification is the timing. Pretrial preparation may entail considerable effort and expense. Substitute counsel will find it necessary to duplicate many of the tasks undertaken by the disqualified lawyer, creating even greater

must spend their limited resources retaining counsel that will subsequently not be permitted to represent them at trial.

While the Supreme Court of Utah found this approach to be rational, it is only rational from an economic perspective if Utah relies on flat-fee contracts to provide indigent defense. If indigent defense providers were compensated based on the number of cases they handled or by the number of hours spent on a case, then requiring marginally indigent defendants to discharge privately retained counsel and accept representation by an indigent defense provider would increase the costs of providing indigent defense.

The single-source approach makes even less sense when considering that Utah has a statute that authorizes recouping the costs of defending a marginally indigent defendant.[59] A marginally indigent defendant who retains counsel can be forced to repay the state for the cost of any additional defense resources. The IDA gives the trial court the authority to "require a convicted defendant to pay costs."[60] These "costs" include "attorney fees of counsel assigned to represent the defendant, interpreter fees, and investigators' fees."[61] Payment of costs can be made a condition of probation or suspension of sentence.[62]

V. The Importance of the Selection of Counsel

Defense counsel's influence on the strategy pursued both in and out of court cannot be overstated.[63] The Supreme Court has long recognized that a defendant in a criminal case "requires the

---

> expense for the defendant. Of course, if the defendant is indigent, the public must bear the additional financial burden created by a disqualification of defense counsel.

59. UTAH CODE ANN. § 77-32a-1 (2015); *see also* State v. Haston, 811 P.2d 929, 937 (Utah Ct. App. 1991) ("Costs, including reimbursement for legal defense fees, may be taxed to the defendant at the court's discretion.").

60. UTAH CODE ANN. § 77-32a-1 (LexisNexis 2012).

61. *Id.* § 77-32a-2.

62. *Id.* § 77-32a-6.

63. *See, e.g.*, Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363 (2003).

guiding hand of counsel at every step in the proceedings against him."[64] Because the defendant bears the consequences of a conviction, selecting counsel to assist in his or her defense is a highly personal choice. The selection of defense counsel has been described as "the most important decision a defendant makes in shaping his defense."[65] In deciding that the "erroneous deprivation of the right to counsel of choice" qualifies as "structural error," the Supreme Court noted the profound effect that the selection of counsel will have on the outcome of a case:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and the style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds—or indeed on whether it proceeds at all.[66]

The Court has also pointed out that the "language and spirit of the Sixth Amendment contemplates that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant."[67] While certain decisions concerning the progress of a criminal case are reserved exclusively to the defendant, defense counsel has the power to decide on trial strategy and tactics, including which witnesses to call, whether and how to conduct cross-examination, which jurors to accept or strike, which trial motions should be made, and what evidence should be introduced.[68]

---

64. Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

65. United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979); *see also* United States v. Nichols, 841 F.2d 1485, 1502 (10th Cir. 1988) ("A defendant's right to choose an attorney is a corollary of the right to decide what type of defense the accused will present.").

66. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (citations omitted).

67. Faretta v. California, 422 U.S. 806, 820 (1975).

68. *Id.*

VI. Utah's Failing Indigent Defense System and the Effect of the Single-Source Approach

Despite the Supreme Court of Utah's suggestion that indigent defendants have access to a "panoply of resources,"[69] Utah's indigent defense system is regarded as one of the worst in the nation. A report by the National Legal Aid and Defender Association found that Utah ranked third to last of the fifty states in per capita spending on indigent defense, spending just $5.22 per person, whereas the national average was $11.86.[70] Because Utah shifts the burden of providing counsel to indigent defendants from the state to counties and municipalities, "a patchwork of models exists across the state."[71] Most counties in Utah "rely on contracts with private attorneys to represent indigent defendants" and "not all of these private attorneys are able to devote all of their time to contracted indigent clients."[72]

A. Flat-Fee Contracts for Providing Indigent Defense

There are three models for the provision of indigent defense services: 1) a public defender office; 2) an assigned counsel program; and 3) contracts with private attorneys. The American Bar Association (ABA) does not endorse the use of contracts "as a viable, separate, 'stand-alone' component for the delivery of defense services."[73] The ABA has found that "the use of flat-fee contracts with competitive bidding by potential providers of services, based solely on a concern for the cheapest possible system" fails "to provide quality representation to the accused."[74]

---

69. State v. Steinly, No. 20120715, 2015 WL 337633, ¶ 21 (Utah Jan. 27, 2015); State v. Earl, No. 20120991, 2015 WL 337554, ¶ 23 (Utah Jan. 27, 2015).

70. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (June 2008), http://www.mynlada.org/michigan/michigan_report.pdf.

71. Marina Lowe, *Indigent Defense in Utah: Constitutionally Adequate?*, 22 UTAH B. J. 22, 24 (2009).

72. *Id.*; *see also* FAILING GIDEON, *SUPRA* NOTE 1, at 3 ("Most Utah counties follow the contract counsel model.").

73. STANDARDS FOR CRIMINAL JUSTICE, *SUPRA* NOTE 58, § 5-1.2.

74. *Id.*

Flat-fee contracts have been widely criticized as a method for providing indigent defense services because their primary goal is not quality representation, but instead, cost control.[75] The Arizona Supreme Court even found that in one county, their use violated an indigent defendant's right to counsel.[76]

A recent report by the American Civil Liberties Union of Utah concluded that in each of the nine counties they studied, "the public defender system fails *Gideon* in almost every (if not every) respect."[77] The report found public defenders were "chronically underfunded and overworked, with some handling caseloads that, based on the contract fee, result in $400 (or less) per felony."[78] There was "little or no monies set aside in the public defense budgets for investigative, expert, or other resources necessary to build an adequate defense in many cases."[79] In many of the counties, the county attorney "has a hand in selecting which attorneys will be awarded the public defender contracts."[80] None of the counties had "minimum qualifications or criteria to actually be a public defender."[81] The report characterized Utah's county-by-county public defender system as a "failure" and pointed out that caseloads are so high that they render competent representation impossible and that there is a "systemic

---

75. Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1808 (2000)

> While overwhelming caseloads and inadequate funding plague indigent defense systems of all types, there is a growing consensus in the legal community that low-bid contract systems—under which the state or locality's indigent defense work is assigned to the attorney willing to accept the lowest fee—pose particularly serious obstacles to effective representation;

McMurtie, *supra* note 18, at 787 (noting that the ABA and NLADA have promulgated standards and guidelines for contracting defense services but "the trend has been to award contracts on the basis of cost alone, leading to an erosion of the constitutional principle of the right to counsel and the diminishing of lawyers' professional responsibilities").

76. State v. Smith, 681 P.2d. 1374 (Ariz. 1984).

77. FAILING GIDEON, *supra* note 1, at 7.

78. *Id.*

79. *Id.* at 8.

80. *Id.*

81. *Id.*

deficiency" in providing the investigatory resources necessary for a complete defense.[82]

B. The Choice Between Counsel and Defense Resources for the Marginally Indigent

Marginally indigent defendants are not required to choose between two equally good indigent defense systems, one privately funded and one publicly funded. The choice that marginally indigent defendants face is to either retain an attorney that they believe has the ability to adequately defend them but forgo any additional defense resources, or to be represented by an indigent defense provider who struggles to find the time to adequately represent all of his or her clients but may have access to additional defense resources. Marginally indigent defendants in Utah may conclude that they are better off without additional defense resources if, to access them, an overwhelmed public defender must represent them. The IDA makes an indigent defense provider "an organ of the State interposed between an unwilling defendant" and his choice of counsel.[83]

The IDA's single-source approach is so extreme that it appears to deny indigent defendants the right to additional defense resources even if an attorney who did not receive compensation represented them. The Sixth Amendment guarantees defendants the right to be represented by either a qualified attorney that they can afford "or who is willing to represent the defendant even though he is without funds."[84] The single-source approach completely disregards a defendant's right to counsel of choice, even when an attorney volunteers to represent a defendant *pro bono*, so that counties and municipalities in Utah can limit the costs associated with providing indigent defense through the use of flat-fee contracts.

---

82. *Id.* at 9–10.

83. Faretta v. California, 422 U.S. 806, 820 (1975).

84. United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–25 (1989)).

VII. Conclusion

Defendants have the right to select an attorney who will be the architect of their defense, but they also have the right to "the raw materials integral to the building of an effective defense."[85] Utah's single-source approach to indigent defense ignores the fact that these are two separate and distinct constitutional rights and conditions defendants' access to additional resource on a waiver of their right to counsel of their own choice. Now that the Supreme Court of Utah has decided that the IDA's single-source approach is constitutional, marginally indigent defendants in Utah who wish to retain counsel, but also need additional defense resources to adequately prepare for trial, have no other option than to appeal to the Federal Courts. Whatever decision the United States Court of Appeals for the Tenth Circuit ultimately reaches, it is abundantly clear that the IDA's single-source approach to indigent defense is yet another legislative effort to avoid adequately funding an indigent defense system that would seem to have "no other purpose or effect than to chill the assertion of constitutional rights."[86]

85. Ake v. Oklahoma, 470 U.S. 68 (1985).

86. United States v. Jackson, 390 U.S. 570, 581 (1968).