

[The Cost of a Life: Can Florida Do the Right Thing? Representing the Indigent Accused of Crimes in Florida Courts Today](#)

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Faced with the problem of how to provide legal counsel to those who cannot afford to hire their own attorney after *Gideon v. Wainwright*, states have found three different approaches to meeting this constitutional mandate: (1) *public defender programs* (nonprofit organizations with staff attorneys assigned to the indigent); (2) *contract counsel* (the contracting firm or entity agrees to take all indigent representations for a set time period); and (3) *assigned, court-appointed private practice lawyers*.

They are not mutually exclusive models; for example, a state can have a public defender system as well as having court appointments of attorneys in private practice. Sometimes, things are so varied within a state that the method of providing lawyers to the indigent will depend upon the county. No one single answer to the problem of providing legal counsel to the poor has proven efficient or cost-effective since *Gideon* came down.

Indigent Defense in Florida

In Florida, every county with a population of 35,000 or more must have a public defender program. However, as the [2009 Justice Denied report by the Constitution Project](#) revealed, county budgets across Florida have been slashed steadily over the years, and public defender programs have lost millions of dollars in these budget cuts. Some Florida counties today actually charge indigent convicts fees to cover litigation costs. Others are refusing to take on new indigent defense cases, telling the courts that to do so will be unethical (and unconstitutional) as they simply cannot provide effective counsel given their limited resources.

The financial challenges of providing indigent defense have been serious for over a decade. They have only been exacerbated by continuing judicial expansion of the constitutional right to counsel for the indigent defendant, e.g., to include juveniles (*In re Gault*, 387 U.S. 1, 1967); those charged with misdemeanor crimes that carry jail sentences (*Argersinger v. Hamlin*, 407 U.S. 25 (1972)); and indigent defendants in misdemeanor cases resulting in suspended or probated sentences (*Alabama v. Shelton*, 535 U.S. 654 (2002)).

Combine the expansion of the right with the fact that the right to counsel begins the minute that an individual invokes that right, *Edwards v. Arizona*, 451 U.S. 477 (1981) (which most criminal defendants know is the wise thing to do before answering any questions from the police), and you have a lot of demand for effective legal counsel without enough supply.

Dire Straits of Florida Indigent Defense

[In 2008, Public Defender Bennett Brummer](#), head of Miami-Dade County's Public Defender's Office, took the witness stand and testified before Circuit Judge Stanford Blake that the Miami Public Defender's office did not have the funds it needed, and its attorneys were being forced to

turn down hundreds of cases. He asked for court approval to refuse every case except those involving the death penalty – there just wasn't the money to do anything more. Supporting his position was the formal opinion of the American Bar Association, issued in 2006. [Formal ABA Opinion 06-441](#) advises public defenders to refuse to accept new clients or to withdraw from existing client relationships when excessive caseloads interfere with their ability to provide all of their clients with the high standard of representation provided in the ABA's Model Rules of Professional Conduct (Rules 1.1, 1.3, and 1.4). These Rules direct that a lawyer shall provide competent, diligent representation to a client, and shall consult with the client and keep the client properly informed about the case.

Similar cries were heard from other public defenders through out Florida, and courts – faced with a constitutional command – have found the answer in appointing more and more private practice attorneys to provide legal representation to indigent defendants. Even in death penalty cases, where the defense counsel must meet certain legal prerequisites before representing someone facing capital punishment, more private practice appointments are being seen as a viable alternative.

However, this has not proven to be a solution to the overloaded and underfunded public defender system. Instead, it has merely endangered attorneys already dedicated to providing legal representation for those accused of committing crimes. Private practice attorneys wanting court appointments usually sign their names to a potential appointment list with their local criminal courts, and in the past, they were appointed to criminal cases (capital and otherwise) where the private defender had a conflict.

However, beginning in 2007 when the legal fees provided to court appointed lawyers were cut, fewer and fewer criminal defense attorneys could afford to take these cases. As the abilities of the public defender to provide legal counsel to indigent defendants dried up, so has the number of private attorneys willing to undertake these cases at the lowered legal fees. In many cases, the lawyers would simply go out of business by doing so.

The Example of Gregory Hagopian, Esq.

Faced with being placed between a rock and a hard place, Florida judges have started appointing attorneys regardless of the appointment list. Now, Florida attorneys in private practice risk an expensive and time-consuming criminal court appointment even if they have no desire to undertake the case.

Like [Gregory Hagopian](#), a Bradenton sole practitioner (family law, criminal defense) and former president of the Manatee County Bar Association. In 2008, Chief Judge Lee Haworth Judge of the 12th Circuit Court appointed Greg Hagopian to represent a defendant in a multi-party RICO case, where 16 co-defendants were alleged to be members of the Third Shift gang, trafficking drugs in Manatee County. As part of his appointment, Judge Haworth did declare Florida's law setting attorney compensation unconstitutional, ordering the Justice Administrative Commission to pay Gregory Hagopian \$110 an hour (up from the standard \$75 /hour set under the law).

Hagopian appealed the Judge's appointment. He argued that even at \$110/hour, the big RICO defense case might bankrupt his practice, as well as the appointment being unfair to his other clients, against his own wishes, and forcing him to provide legal services at a fraction of their true value (which he estimates as up to \$100,000 through trial). He lost the appeal, and has been forced to continue in the appointed representation.

Findings of Five Year Study by the Constitution Project

For the past five years, a study of the right to counsel crisis has been undertaken by a Washington, D.C. group, The Constitution Project. In April 2009, their findings were released.

In a report entitled, [Justice Denied: America's Continuing Neglect of Our Right to Counsel](#), they found that in Miami-Dade County, the caseload for the average public defender skyrocketed from 367 felonies in 2006 to nearly 500 felonies in 2009, while the budget of the public defender's office was simultaneously cut by 12.6 percent in just two years (2007-2009).

The purported solution of appointing private lawyers to fill this public defender gap is not appropriate, especially for indigent defendants in death penalty cases. Here, all the problems addressed by the study of the system's failures are exacerbated.

Indigent Defense in a Capital Case

In capital cases, the defense counsel must have specialized knowledge and established experience in death penalty representations. After all, someone's life is at stake. Indigent defense in a death penalty case is the most complex and the more vulnerable aspect of this right to counsel crisis.

These representations are special circumstances, with additional requirements that include: (1) adequate funding for the case; (2) the need for co-counsel or support counsel, since capital cases involve essentially two trials, guilt and sentencing; (3) numerous experts; (4) investigators; (5) interpreters; (6) technological support; (7) adequate time for case preparation, including the logistics of having client involvement.

None of this is being adequately addressed by the State of Florida, or by the federal government. The truth is that appointment of private practice attorneys at all levels of indigent defense is failing miserably as a solution to Florida's right to counsel crisis. Without adequate funding for indigent defense counsel, the protections promised by *Gideon* and its progeny today are simply fantasy, and criminal defense attorneys are risking bankruptcy as they continue in their calling.