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REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL CASES: A CONSTITUTIONAL CRISIS IN MICHIGAN AND OTHER STATES?

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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CONTENTS

MARCH 26, 2009

Page

OPENING STATEMENTS

The Honorable Robert C. "Bobby" Scott, a Representative in Congress from the State of Virginia, and Chairman, Subcommittee on Crime, Terrorism, and Homeland Security 1
The Honorable Louie Gohmert, a Representative in Congress from the State of Texas, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 4
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary 10
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Member, Subcommittee on Crime, Terrorism, and Homeland Security 11

WITNESSES

Judge Dennis Archer, Chairman of Dickinson Wright, PLLC, former Michigan Supreme Court Justice, Past President, American Bar Association, and Past President, State Bar of Michigan, Detroit, MI
Oral Testimony 14
Prepared Statement 16
Mr. David J. Carroll, Director of Research, National Legal Aid & Defender Association, Washington, DC
Oral Testimony 51
Prepared Statement 54
Ms. Nancy J. Diehl, Past President of the State Bar of Michigan, and Chief of the Trial Division, Wayne County Prosecutor's Office, Detroit, MI
Oral Testimony 63
Prepared Statement 66
Mr. Erik Luna, Professor, Washington and Lee University School of Law, Lexington, VA
Oral Testimony 68
Prepared Statement 71
Ms. Regina Daniels Thomas, Chief Counsel, Legal Aid and Defender Association Juvenile Law Group, Detroit, MI
Oral Testimony 78
Prepared Statement 80
Ms. Robin L. Dahlberg, Senior Staff Attorney, American Civil Liberties UNION, NEW YORK, NY
Oral Testimony 83
Prepared Statement 86

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Louie Gohmert, a Representative in Congress from the State of Texas, and Ranking Member, Subcommittee on Crime, Terrorism, and Homeland Security 5
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary 11

Page

APPENDIX

Material Submitted for the Hearing Record 107

OFFICIAL HEARING RECORD

MATERIAL SUBMITTED FOR THE HEARING RECORD BUT NOT REPRINTED

A study submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Chairman, Committee on the Judiciary. The study, entitled "A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis," Evaluation of Trial-Level Indigent Defense Systems in Michigan, June 2008, National Legal Aid & Defender Association, is not reprinted in this hearing record but is on file with the Subcommittee and also can be accessed at:

http://www.mynlada.org/michigan/michigan_report.pdf.

REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL CASES: A CONSTITUTIONAL CRISIS IN MICHIGAN AND OTHER STATES?

THURSDAY, MARCH 26, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:08 a.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Nadler, Jackson Lee, Gohmert, and Goodlatte.

Staff present: Bobby Vassar, Subcommittee Chief Counsel; Karen Wilkinson, Majority Counsel; Kimani Little, Minority Counsel; Rich Hertling, Minority Deputy Chief of Staff; and Sarah Kish, Minority Staff Assistant.

Mr. SCOTT. Good morning, the Subcommittee will now come to order. And I am pleased to welcome you today on the hearing before the Subcommittee on Crime, Terrorism and Homeland Security on the title, "Representation of Indigent Defendants in Criminal Cases: A Sixth Amendment Crisis in Michigan and Other States?"

The criminal justice system has been referred to as a three-legged stool, supported by judges, prosecutors and defense. If you remove one of those three legs, the stool collapses. We are here to talk today about the third leg of the stool, the defense, and whether that leg has collapsed in Michigan and other states.

The National Legal Aid & Defender Association recently completed a yearlong study of indigent defense systems in 10 diverse Michigan counties. They concluded that not one of the 10 was providing constitutionally adequate indigent defense. The constitutional problems facing the state indigent defense systems in Michigan are not unique to Michigan and they are not new. In 1999, a Department of Justice report concluded that indigent defense was, quote, in a chronic state of crisis.

A 2004 study by the American Bar Association similarly found that caseloads for public defenders far exceeded national standards in many cases, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases. A recent

New York Times article reported that public defenders' offices in at least seven states either had refused to take new cases or had filed lawsuits to limit their caseload.

Everyone agrees that indigent defense, as a whole, needs more funding. The studies clearly show that lack of adequate funding has led to excessive and questioned caseloads; insufficient pay for defense attorneys; lack of proper training and oversight of defense attorneys; insufficient funding for investigators, experts and mental health professionals; lack of independence by defense and ultimately the wrongful conviction of innocent men and women.

And the case of Eddie Joe Lloyd shows why we cannot accept this situation. In the early 1980's, he sent a letter to the Detroit Police suggesting that he had information on a murder case. He wrote the letter from his bed in the Detroit Psychiatric Institute, where he had been committed. To make a painfully long story short, he so-called confessed to the killing, was charged with murder and appointed a lawyer.

The lawyer was paid $150 for pretrial preparation and investigation. The lawyer paid $50 to an ex-felon to investigate the case. The lawyer made no inquiry into Mr. Lloyd's mental state, did not investigate the crime scene and hired no experts. Eight days before the trial, he withdrew from the case; a new attorney was appointed and they went to trial. The new attorney did not cross-examine the police officer who took the so-called confession, he offered no defense witnesses, and he gave a closing argument that lasted less than 5 minutes.

Mr. Lloyd was quickly convicted, served 17 years in prison before DNA evidence exonerated him. He died a couple of years after his release. Wayne County ended up paying $4 million to Mr. Lloyd's estate to settle the case, and the real perpetrator has never been found.

The situation has not improved over the last 20 years. The NLADA's report found that, in some counties, defense attorneys still were paid only $270 to investigate and prepare for a murder trial. Many experienced defense attorneys refuse to accept appointments in these cases because they know it is impossible to competently represent someone for that amount of money.

Lack of funding also results in excessive caseloads for many defense attorneys. Some defense attorneys, appointed by judges, accept far more cases than they can competently handle just to make a living wage. Some public defenders' offices take far more cases than they can handle because they fear that if they object their office will be closed or the supervisor fired. Many systems have no ceiling limits on the number of cases that can be assigned to an attorney.

Other problems are less related to funding but are caused by the structure of the system. We use the word system very broadly. One of the problems, especially in states like Michigan, is that they delegate to the counties all of the responsibility for indigent defense at the trial level, and there is no organized system. It is a hodgepodge of local practices with little or no adherence to any standards and little or no oversight. Not surprisingly, when faced with limited budgets, many courts focus on efficiency and speed of process rather than competent representation.

Such a practice came under criticism in the NLADA's report involving the selection of defense attorneys by the very same judge who would be presiding over the case. This practice created an untenable conflict of interest with the defense attorney, who, depending on the facts of the case, could be forced to choose between keeping his employer, the judge, happy by processing the case very quickly or abiding by his ethical responsibility to competently represent his client, which might include many complicated pretrial motions and a long trial.

Researchers estimate that between 80 and 90 percent of all state criminal defendants rely on indigent defense system for counsel. This is a staggering number and likely to go only higher with our increasing rate of unemployment and lost savings.

While indigent defense system—if our indigent defense systems fail, they will drag the entire criminal justice system down with them. So assuming the situation has reached the level of constitutional crisis, as some of our witnesses will suggest, what is the solution?

The right to counsel is a constitutional right; it cannot be ignored. Funding is a big part of the answer, but who should pay? How much of the burden should be on the Federal Government? Do we make the situation worse by giving billions of dollars to states for local law enforcement and prosecutors while not requiring states to use a portion of that money for their indigent defense system? Do we need to condition money to states on compliance with certain standards, such as the ABA's Ten Principles? Those involved with the system have to do their part in ensuring the constitutional right to counsel is met.

In 2006, the ABA issued an ethics opinion stating that public defenders were ethically held to the same standards as other attorneys. If they could not competently handle all of their cases, they must withdraw or refuse to take new cases. And we need to enforce this opinion.

And how do we stop elected judges, who are vulnerable to political forces, from contributing to the problem? Judges, perhaps more than anyone else, are in the best position to ensure the sixth amendment is not violated in their court. And as officers of the court, prosecutors also have an ethical obligation to ensure that justice prevails.

This problem has been growing for decades and little has been done. Do we ignore the problem until the ACLU or others file lawsuits in all 50 States? We need to take a hard look at these questions, and I look forward to hearing from our witnesses about the problem and what we need to do to start heading in the right direction.

I know that many people wanted to be heard today but could not be accommodated on the panel because of time limitation. I hope to continue this dialogue in the future and provide all who wish to make statements an opportunity to be heard.

To that end, numerous organizations and individuals, including Edward Pappas, president of the State Bar of Michigan, the National Association of Criminal Defense Lawyers, and the Michigan State Appellate Defender Office have submitted written statements of transcripts for the record. The Michigan Campaign for Justice

has also submitted a package for the record that includes statements from numerous groups and individuals.

I am going to read the list of groups that have taken the time to write statements for this hearing because the list reflects the importance of this issue to many diverse groups. Those groups include the Detroit branch of NAACP, the Brennan Center for Justice at the NYU School of Law, Michigan Council on Crime and Delinquency, Criminal Defense Lawyers of Michigan, Michigan Jewish Conference, National Association of Social Workers, Michigan County Social Services Association, Association of Children's Mental Health, Michigan Judges Association, Michigan Association for Children with Emotional Disorders, Michigan Innocence Clinic, Citizens for Traditional Values, Prison Fellowship for Michigan, and the Michigan Council of Private Investigators. And without objection, all of these statements will be included in the record.

Now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. If I might ask the Chair a question—that excellent opening statement, what were the three legs of that three-legged stool? Judges——

Mr. SCOTT. Prosecution and defense.

Mr. GOHMERT. Okay, thank you.

Mr. SCOTT. The judge is recognized—— [Laughter.]

Mr. GOHMERT. All right——

Well I just think I have been part of that system that—you got your appellate courts, you have got your juries, you have got your witnesses—it seems to be a pretty complex three-legged stool. But today's hearing is supposed to focus on the legal representation of indigents in state and local criminal prosecutions. This hearing was called in response to a recent report that alleged that the State of Michigan systematically failed to provide adequate representation to indigent criminal defendants.

June 2008, the National Legal Aid & Defender Association, or NLADA, released a report entitled, "Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis." The NLADA reportedly conducted a year-long study of 10 counties in Michigan.

Michigan's system for indigent defendants requires county governments to provide lawyers for poor defendants in criminal prosecutions. Counties meet this responsibility in various ways. Many counties in Michigan utilize a flat-fee contract system where private attorneys agree to accept all or a fixed portion of the indigent defendant cases for a predetermined fee. Other counties have dedicated county-funded public defender offices to represent indigent defendants. Some counties have a mixed-system with both types of lawyers.

The report takes great issue with the flat-fee system and argues that it creates a conflict between a lawyer's ethical duty to zealously defend each client and their financial self-interest to take on numerous clients to maximize profit. The report also alleged a number of other deficiencies in Michigan's indigent defense system. Those reported deficiencies included judges hand-picking defense attorneys, defense lawyers being appointed to cases for which they were unqualified and the failure of defense attorneys to properly prepare for trials or sentencing hearings.

Although many observers have taken this report at face value, there have been many—been some criticism of its accuracy. One public defender in Ottawa County, the guy who was the subject to the report, wrote a series of critiques of the report for various Michigan newspapers. I have here an article from the Holland Sentinel by Joseph Legatz, about such situation and ask unanimous consent that it be concluded or, I am sorry, included in the record.

Mr. SCOTT. Without objection.

[The information referred to follows:]

HAVEN TRIBUNE Opinion

101 N. Third Street, Grand Haven, Michigan 49417

Paul C. Bedient, Pi

Report on public defenders flawed

BY JOSEPH C. LEGATZ

Special to the Tribune

The report filed by the National Legal Aid and Defender Association (NLADA) concerning public defender services in Michigan (Editorial: "Study should be given a look," *Grand Haven Tribune*, June 25) is so poorly researched and written that it is of no value to those of us who care about indigent defense services in our state. Instead of being a professionally done blueprint for needed change, the report is a hatchet job based on ignorance and deliberate distortion.

I have read and analyzed the entire 126-page report. Further, I can speak from personal knowledge about those parts of the report that deal with defense services in Ottawa County, one of 10 counties NLADA visited. First, the NLADA evaluators did not bother to gather objective data about the performance level of the Ottawa County defenders (for example, prison commitment rates, reversals on appeal, bar grievance complaints, rates of not guilty verdicts or dismissals, client satisfaction, etc.) Second, the evaluators did not observe the defenders in action in court, in interaction with their clients, or in interaction with others in the criminal justice system (such as prosecutors, judges, probation officers, and police officers.) Third, the evaluators spent very little time actually talking to various public defenders. My experience was typical. I set aside 2 1/2 hours (9:30 a.m. to noon) for the evaluator, with the lunch hour and the entire afternoon also available if needed. The evaluator was done, and left my office, in well under an hour. She did not want to hear about the many positive aspects of our program.

So much for a so-called "year long study." What took a long year to accomplish was not the actual study of defender systems in Michigan, but the writing of a false and misleading report.

The NLADA report unfairly criticizes the Ottawa County defender program in two important ways. First, in Ottawa County walk-in arraignment day for

A LITTLE BIT MORE

ance tickets for relatively minor offenses is sometimes referred to as "McJustice," which means nothing more than those defendants are given immediate, same-day access to an attorney if they want to resolve their case that day without the hassle of returning to court over and over again. The program is client oriented and client driven; and frankly, not everyone wants to take the time to go to a fancy restaurant for a seven-course meal. Some people want the quick, but decent service of a McDonalds, and they might to have that choice. At the same time, if a "McJustice" defendant wants her/his case defended in a traditional way (client interviews, witness interviews, research, motion hearings, trials, etc.), then the public defender does that. In other words, "McJustice" as used in the Ottawa County misdemeanor defender program in the District Court, is not a negative, evil, or disrespectful word. It simply shorthand for prompt access to proper legal advice.

NLADA certainly knew the truth about "McJustice", but chose to distort its meaning beyond all recognition, concluding that in Ottawa County all defendants, both misdemeanants and felons, are rushed through the system in violation of their basic rights. As explained above, that simply is not true. Further, "McJustice" has nothing whatsoever to do with felony defendants, or how felony cases are handled in Ottawa County. A professional evaluation report should not contain these mistakes. It is clear the unfair distortion of "McJustice" was done deliberately in an effort to validate the conclusion NLADA had reached long before its field evaluators first set foot in Michigan: No public defender program in Michigan is acceptable. The effort fails.

But there's more. The report manages to get even worse. Based on one remark by a defender about the decent working relationship between the public defenders and the prosecutor's office, NLADA loudly proclaims there is no proper adversarial relationship in the system. The clear meaning of the lawyer's statement was that defenders in Ottawa County accomplish many things for their clients based on honest discussions with the prosecutor's office. Some examples are: Full discovery without having to file needless motions, dismissals based on information uncovered by the defense, and follow up police work suggested by defense lawyers that actually benefits defendants. NLADA wrongfully jumped to the conclusion that because we defenders have this good working relationship with the prosecutors and police, we don't properly advocate for our clients. Actually, that relationship, and the favorable defense results it produces, proves exactly opposite. NLADA knew this to be true, but deliberately chose to hide the truth.

Further, NLADA failed to observe any of the many hotly contested trials and motion hearings that occur each year in Ottawa County. They failed to note the thousands of ways in which the Ottawa County public defenders fight for their clients, day in and day out, year after year. Contrary to the shallow and misleading reporting by NLADA, advocacy is the true sense of the word is alive and well in Ottawa County.

It is unfortunate that an opportunity to improve public defender services in Michigan has been lost because the NLADA report is so inaccurate and over the top. The report is so bad it will only be thrown in wastebaskets or put through shredders all across the state.

At the same time, all of us in the criminal justice system in Ottawa County are open to change, and we are specifically open to change, and we are specifically open to improvements in our defense programs. That's why Circuit Court Administrator Kevin Bowling said the county will examine the report and make every effort to implement improvements. That will be done, but the improvements are likely to be locally conceived because the NLADA report is of minimal value because of its serious deficiencies.

Finally, Ottawa County does very well when honestly evaluated in light of the Michigan State Bar *a Public Defense Delivery System*, which adds one additional standar to the national *Ten Principles of a Public Defense Delivery System* as published by the American Bar Association.

We fully comply with seven of the eleven principles:

1. The public defense function is independent.

3. Defense attorneys are prompt ly appointed.

4. Defense counsel has sufficient time, and a confidential space, in which to meet the client.

6. Defense counsel's ability and experience matches the complexity of the case.

7. The same attorney continuously represents the client until case completion.

8. There is parity between the defense and prosecution with respect to resources, and defense counsel is an equal partner in the justice system.

11. One function of defenders is to advocate for programs that improve the system and reduce recidivism.

We largely comply with two additional principles:

5. Defense counsel's workload is controlled to permit quality representation.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency.

One principle does not apply at all to Ottawa County:

2. High caseloads require both a defender's office and participation by the private bar.

We do not comply with on principle:

9. Defense counsel is provided with and is required to attend continuing education.

I can legitimately claim that the Ottawa County defender program does well when judged by state and national standards. But much more important than a good scoreard is the simple truth that most of the time our public defender program works, and it works very well. Will we nonetheless try to improve it? You bet we will. But in the meantime we have nothing to fear from the NLADA report.

Joseph C. Legatz is an Otta...

PRINTTHIS

Tuesday, July 15, 2008

Editorial Rebuttal

State public defender report is 'over the top'

The report by the National Legal Aid and Defender Association on public defender services in Michigan ("Report: Public defender offices underfunded," June 18) is so poorly researched that it is of no value to those of us who care about indigent defense in our state.

In Ottawa County, one of the 10 counties the association visited, the evaluators did not gather objective facts about the level of performance of the Ottawa County defenders (such as prison commitment rates, reversals on appeal, bar grievance complaints). Second, the evaluators did not observe the defenders in action in court or in interaction with their clients.

Third, the evaluators spent little time actually talking to the public defenders. I set aside 2.5 hours for the evaluator, with the lunch hour and the entire afternoon also available if needed. The evaluator was done, and left my office, in well under an hour. She did not want to hear about the many positive aspects of our program.

Then to compound the crime, the association unfairly criticized the Ottawa County program. First, in Ottawa County, there is a walk-in arraignment day for those with appearance tickets for minor offenses. These defendants are given immediate, same-day access to an attorney if they want to resolve their case that day, without the hassle of returning to court over and over again. If the defendant tells the attorney the case needs to be investigated and defended, that is done.

The National Legal Aid and Defender Association distorted this process beyond all recognition, concluding that all defendants, both misdemeanants and felons, are rushed through the system in violation of their basic rights. That is not true.

It is unfortunate that an opportunity to improve public defender services in Michigan has been lost because the report is so over the top.

Joseph C. Legatz

Attorney at Law

Grand Haven

hollandsentinel.com

My Take - Study unfairly criticized defense attorneys

By Joseph Legatz
Grand Haven
Posted Jul 12, 2008 @ 10:19 PM

Ottawa County, MI — The report filed by the National Legal Aid and Defender Association (NLADA) concerning public defender services in Michigan ("Study shows Michigan violating constitution when providing lawyers" in the June 18 Sentinel) is so poorly researched and written that it is of no value to those of us who care about indigent defense services in our state.

I have read and analyzed the entire 125-page report. Further, I can speak from personal knowledge about those parts of the report that deal with defense services in Ottawa County, one of 10 counties NLADA visited.

First, the NLADA evaluators did not bother to gather objective data about the performance level of Ottawa County defenders (for example, prison commitment rates, reversals on appeal, bar grievance complaints, rates of not guilty verdicts or dismissals, client satisfaction, etc.). Second, evaluators did not observe the defenders in action in court, in interaction with their clients or in interaction with others in the criminal justice system (such as prosecutors, judges, probation officers and police officers). Third, the evaluators spent very little time actually talking to the various public defenders.

My experience was typical. I set aside 2 1/2 hours for the evaluator, with the lunch hour and the entire afternoon also available if needed. The evaluator was done, and left my office, in well under an hour. She did not want to hear about the many positive aspects of our program.

So much for a so-called "year long study." What took a long year to accomplish was not the actual study of defender systems in Michigan, but the writing of a false and misleading report.

The NLADA report unfairly criticizes the Ottawa County defender program in two important ways. First, in Ottawa County walk-in arraignment day for those who have received appearance tickets for relatively minor offenses is sometimes referred to as "McJustice," which means nothing more than those defendants are given immediate, same-day access to an attorney if they want to resolve their case that day without the hassle of returning to court over and over again. The program is client-oriented and client-driven. Frankly, not everyone wants to take the time to go to a fancy restaurant for a seven-course meal. Some people want the quick but decent service of McDonald's, and they ought to have that choice.

At the same time, if a "McJustice" defendant wants her/his case defended in a traditional way (client interviews, witness interviews, research, motion hearings, trials, etc.), then the public defender does that. In other words, "McJustice," as used in the Ottawa County misdemeanor defender program in district court, is not a negative, evil or disrespectful word. It is simply shorthand for prompt access to proper legal advice and the availability of a prompt resolution of a case if that's what the defendant wants.

NLADA certainly knew the truth about "McJustice," but chose to distort its meaning beyond all recognition, concluding that in Ottawa County, all defendants, both misdemeanants and felons, are rushed through the system in violation of their basic rights. As explained above, that simply is not true. Further, "McJustice" has nothing whatsoever to do with felony defendants, or how felony cases are handled in Ottawa County. A professional evaluation report should not contain mistakes of this magnitude.

It is clear the unfair distortion of "McJustice" was done deliberately in an effort to validate the conclusion NLADA had reached long before its field evaluators first set foot in Michigan: no public defender program in Michigan is acceptable. However, their effort to prove this as to Ottawa County fails.

But there's more. The report manages to get even worse. Based on one remark by a defender about the decent working relationship between the public defenders and the prosecutor's office, NLADA loudly proclaims there is no proper adversarial relationship in the Ottawa County criminal justice system. The clear meaning of the lawyer's statement was that defenders in Ottawa County accomplish many things for their clients based on honest discussions with the prosecutor's office. Some examples are: full discovery without having to file needless motions, dismissals based on information uncovered by the defense and follow up police work suggested by defense lawyers that actually benefits defendants. NLADA wrongfully jumped to the conclusion that because we defenders have this good working relationship with the prosecutors and police, we don't properly advocate for our clients. Actually, that relationship, and the favorable defense results it produces, proves exactly the opposite. NLADA knew this to be true, but deliberately chose to hide the truth.

Further, NLADA failed to observe any of the many hotly contested trials and hearings that occur each year in Ottawa County. They failed to note the thousands of ways in which Ottawa County public defenders fight for their clients, day in and day out, year after year. Contrary to the shallow and misleading reporting by NLADA, advocacy in the true sense of the word is alive and well in Ottawa County.

In fact, Ottawa County does very well when honestly evaluated in light of the Michigan State Bar Association's Eleven Principles of a Public Defense Delivery System. We fully comply with seven of the 11 principles and arguably comply with two more of the standards. One does not apply to us at all. We do not comply with one standard (required continuing education).

In short, I can legitimately claim that the Ottawa County defender program does well when judged by both state and national standards. But much more important than a good scorecard is the simple truth that most of the time our public defender program works, and it works very well. Will we nonetheless try to improve it? You bet we will. But in the meantime, you can be certain that we have a very good public defender program in Ottawa County, and the NLADA report can be safely filed in a wastebasket or run through a shredder.

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Mr. GOHMERT. Thank you.

Public defender stated that the NLADA "researchers" failed to gather objective facts about performance of county public defenders, did not observe the defenders in court proceedings and failed to spend much time actually speaking to public defenders about their experiences. One letter to the editor, the public defender wrote that the NLADA researchers deliberately distorted facts "in an effort to validate the conclusion that it reached long before its field evaluator stepped foot in Michigan. No defender '—and that would be no public defender program in Michigan—' is acceptable."

I have copies of these articles, and I would appreciate those being included.

In addition to the media coverage of the NLADA report on Michigan, there have also been news articles describing the burdensome workload of public defenders in other states. According to a recent article from *The New York Times,* the public defenders' offices in at least seven states are refusing to take on new cases or have sued to limit the number of cases assigned to each attorney, citing overwhelming workloads.

However, this is not a new problem. Over the last decade, a number of states have taken measures to reform their indigent defense systems. In 2002, Texas conducted an overhaul of the state's county-based system of providing lawyers for poor defendants. This decision came after a study found that some defendants had waited months before getting a lawyer and that some attorneys weren't qualified or underpaid.

Under the new system, Texas sets aside state money, up to $19.7 million, to help its 254 counties pay for indigent defense. In 2003, Georgia created an 11-member state board to oversee its public defender's office. It also committed the state to increase funding to help counties meet the cost of providing indigent defense.

More recently in 2008, South Carolina took steps to improve its patchwork indigent defense system. The new system created public defender positions whose pay and benefits are on par with government prosecutors. The new system is designed to provide accountability, both for money and the quality of representation that defendants get.

I understand that the speaker of the Michigan House and the chairman of the Michigan House Judiciary Committee recently agreed to create a new subcommittee which will focus on issues surrounding legal representation for indigent criminal defendants in Michigan. That is all positive developments. I urge the Michigan subcommittee to look at the innovative ways that other states have reformed their indigent defense services.

This is a state problem that warrants a state and not a Federal solution. But once again we are rushing to step in to a state matter in a state court. And having personally been a judge back at the time when this study was conducted in Texas, it sure appeared to me that the study had reached their conclusions and then did their study and that they came and talked to me; they talked to some defense attorneys and not others. They didn't bother to come sit in and watch full trials to see what kind of defense was being provided.

They actually underrated some of the quality defense work that was being done by some defense attorneys. There are some defense attorneys, or as it appeared to me, probably shouldn't have been doing defense work. And that should be taken care of and addressed through both local state bars and state systems.

So, I think it does help put attention to this issue, one that deserves attention, because we should not be locking up innocent people. Everyone should have a proper defense. That is constitutionally provided and mandated and is part of, in my estimation, actually having due process.

So I appreciate the witnesses being here today. I appreciate the hearing, but I do not want to lose sight of the fact that the Federal Government shouldn't be dictating to the states, even if there are some states that are willing to sell their constitutional soul in order to get Federal money.

With that, I yield back.

Mr. SCOTT. Thank you.

The Chairman of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman. As we can see, this Subcommittee, which is very important, is constituted of representatives from Michigan, Texas, Virginia, New York and it is very instructive to me. I have been favorably impacting on Judge Gohmert during the course of our careers here on the Judiciary Committee, and I am looking forward for all of us working together on how we can improve this part of the justice system that requires that we provide counsel for those who clearly aren't able to provide adequate counsel themselves. And it is important and a delicate matter.

I welcome former mayor of Detroit, Dennis Archer, who was the first African-American president of the American Bar Association. I remember it was Justice Kennedy that, at that meeting of the bar, that welcomed him into his leadership role, which he has been discharging with great ability across the years.

I also remember, Mr. Mayor, when you and I and Trudy were in Richmond for the swearing in of the first African-American governor of Virginia. And you are now sitting in the seat that was occupied by the late John Hope Franklin, who of course passed, and whose contributions here were enormous, particularly in the University of Michigan, the segregation cases, where he—where I last heard him, he was on the witness stand for about an hour and a half. And the lawyers—nobody wanted to have any cross-examination or further inquiry with him when he, in his great style and experience and wisdom, delivered his remarks.

But this is important. And how we relate, as the judge indicated, to our state peers is important too. We think, in Michigan, we have worked a way out on that. I was with legal defenders last fall in Michigan and I think it may have had something to do with this hearing that we have got here, because there is a great story. And I ask unanimous consent that this study by the National Legal Aid & Defender Association be made part of the record, that——

Mr. SCOTT. Without objection, so ordered.*

Mr. CONYERS [continuing.] That we begin to understand this sort of underside of the justice system. And so I am happy to see everybody here. And I will ask unanimous consent that my written remarks be entered into the record.

Mr. SCOTT. Without objection.

[The prepared statement of Mr. Conyers follows:]

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*Note: The information referred to, "A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis," Evaluation of Trial-Level Indigent Defense Systems in Michigan, June 2008, National Legal Aid & Defender Association, is not reprinted in this hearing record but is on file with the Subcommittee and also can be accessed at http://www.mynlada.org/michigan/michigan__report.pdf.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The right of a criminal defendant to legal counsel is one of the hallmarks of our Constitution. Over 45 years ago, in *Gideon v. Wainwright,* the Supreme Court held that States must appoint counsel when a defendant can not afford one. States are struggling to meet this constitutional mandate.

In many States, including my home state of Michigan, lack of proper funding for indigent defense systems has created a crisis. It is in this context that I would like to make three important points about the deficiencies in the indigent defense system, especially as it pertains to Michigan.

First, funding for indigent defense must increase. Last year, the National Legal Aid and Defender Association, NLADA, studied indigent defense in 10 counties in Michigan.

The title of their report, *"A Race to the Bottom: Speed and Savings over Due Process: A Constitutional Crisis,"* says it all. They found that none of the counties were providing competent representation to indigent defendants.

Instead, they found that Michigan ranks 44th out of 50 States in public defense funding. Michigan spends only $7.35 per capita, which is 38 % less than the national average.

In parts of Wayne County, an appointed attorney will get only $270 for preparing and investigating a murder one case.

Some lawyers no longer accept murder cases, because they can't "do the job right" for this amount of money.

In 2004, the American Bar Association found that caseload sizes for public defenders far exceeded national standards in many States.

According to the NLADA report, some appointed defense lawyers in Michigan have caseloads that are 5 times higher than the national average. They can only spend an average of 32 minutes on each case. This is not acceptable.

Second, we all suffer from an underfunded public defense system. The risk of wrongful convictions increases when systems value speed and assembly-line due process over competent legal representation.

Researchers at the University of Michigan studied 340 documented exonerations of innocent defendants. Each defendant served an average of ten years in prison before release.

The authors could not estimate the number of false convictions in the last 15 years, but made a "plausible guess" that the number "must be in the thousands, perhaps tens of thousands."

Not only are we paying to imprison innocent men and women, but the real culprits are roaming our streets free to commit more crimes.

Third, we know what we need to do. Back in 1974, the Department of Justice released a report with guidelines for indigent defense. Groups like the NLADA and the ABA have also issued guidelines and standards for States to consider.

The ABA has distilled the most important of these guidelines into its Ten Principles. We need to listen to these experts.

I sincerely hope that this hearing will allow us to examine this problem with an eye toward finding meaningful solutions. So I look forward to hearing from our distinguished witnesses.

Mr. SCOTT. I understand the Chairman of the Constitution Subcommittee has a brief statement. This is obviously almost joint-jurisdiction between our two Subcommittees, so I appreciate him letting me Chair the hearing.

The gentleman from New York.

Mr. NADLER. Well, thank you, and I appreciate the statement by the gentleman, and I appreciate this hearing.

Let me just say I wasn't planning to make a statement, but I want to make a very brief comment on what I heard in the opening statement from Judge Gohmert. I don't know what the best means of financing indigent defense is, but I was rather startled to hear that the responsibility is entirely on the states.

This is a Federal constitutional right we are dealing with and the Federal Government has the responsibility of making sure that right is vindicated either by funding indigent defense or making—or assuring that the states fund it adequately, one way or the other. But it is a state—it is the United States Constitution, it is a Federal Constitution responsibility, and we can't get by by simply saying it is up to the states if they don't do the job properly. We can delegate it to the states assuming they do the job properly, but if they don't, we must either mandate and enforce that they do it properly or do it ourselves or some combination of both.

I thank you. I yield back.

Mr. SCOTT. Thank you.

Without objection, all Members can make opening statements part of the record at this point.

We have a distinguished panel of witnesses here today to help us consider the important issues before us, and I ask each of the witnesses to recognize the little timing device in front of them, which will start with green, go to yellow, and then to red after 5 minutes are up.

Our first panelist will be Dennis Archer, who is currently the chairman of Dickinson Wright, a large Detroit-based law firm with offices throughout the United States and Canada. He served two 4-year terms as mayor of the City of Detroit, was named public official of the year by Governing magazine. He was an associate justice in the Michigan Supreme Court and was named the most-respected judge by Michigan Lawyers Weekly. He served as president of both the Michigan Bar Association and the American Bar Association. He received his Bachelor of Science degree in education from Western Michigan University and Juris Doctorate from Detroit College of Law.

After he testifies, our next panelist will be David Carroll, who is director of research and evaluation for the National Legal Aid & Defender Association. He conducted indigent defense assessments in numerous counties and states and has provided assistance in the Nevada Supreme Court task force on indigent defense and the Idaho State Criminal Justice Planning Commission. He and the NLADA also worked with the Louisiana Bar Association to improve indigent defense in post-Katrina New Orleans. He has an undergraduate degree from the University of Massachusetts at Boston and a masters degree in philosophy from Boston College. He received the Philosophy Department book award for excellence in ethics, social and political philosophy.

Our next panelist will be Nancy Diehl, who is a career Wayne County prosecutor with over 25 years of experience. She is the chief of their trial division, past president of the State Bar of Michigan and serves on numerous boards and committees, including the Judicial Tenure Commission, the Governor's Task Force on Children's Defense, the Guidance Center and Kids-TALK. She serves as chair of the Wayne County Council Against Family Violence and has co-authored four booklets relating to children and the legal defense system—in the legal system. She has received her undergraduate degree from Western Michigan University and Juris Doctorate from Wayne State University of Law.

Our next panelist is Erik Luna, who will be introduced by the gentleman, my colleague from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Well, thank you, Mr. Chairman, for holding this hearing, and thank Chairman Conyers for his keen interest in this subject.

I am pleased to introduce one of my newest constituents, who I have, in fact, not had the opportunity to meet yet but I am delighted that he is here. He is a distinguished educator. Erik Luna is the professor of law at Washington and Lee University School of Law, and he graduated summa cum laude from the University of Southern California. He also received his J.D. with honors from Stanford Law School, where he was an editor of the Stanford Law Review.

Upon graduation, he was a prosecutor in the San Diego District Attorney's Office and a fellow and lecturer at the University of Chicago Law School. In 2000, Professor Luna joined the faculty at the University of Utah College of Law where he was named the Hugh B. Brown chair-in-law and was appointed co-director of the Utah Criminal Justice Center.

Professor Luna has served as the senior Fulbright Scholar to New Zealand, and he has been a visiting professor with the Cuban Society of Penal Sciences in Havana, Cuba. In 2007, he was a visiting scholar at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. Professor Luna is an adjunct scholar with the Cato Institute and a member of the U.S. Chamber of Commerce's working group on criminal law issues. In early 2009, Professor Luna accepted a permanent faculty position at Washington and Lee University School of Law, and I am delighted to welcome him to my district and to this hearing today.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you, Mr. Goodlatte.

Our next panelist will be Regina Daniels Thomas, native Detroiter. She received her Bachelor of Science degree from Tennessee State University and Juris Doctorate from Vanderbilt University School of Law. She has many years of experience representing children in various types of hearings, including abuse and neglect hearings as well as delinquency hearings. She was appointed assistant attorney general in Michigan, representing the Michigan Department of Human Services in child protection proceedings. She now works as chief counsel in the Juvenile Law Group and for the—working with the Legal Aid and Defender Association in Detroit is responsible for about 50 percent of juvenile delinquency work in Wayne County.

Our final panelist will be Robin Dahlberg, who is a senior staff attorney for the ACLU. She has served as lead counsel in class-action lawsuits, challenging the constitutionality of public defender services in Connecticut, Pennsylvania and Montana. Each lawsuit has resulted in increased resources for and improved administration of public defender programs. She currently is lead counsel in a class-action lawsuit challenging public defender programs in three Michigan counties. She has advised on reform efforts in Oklahoma, Massachusetts, Louisiana, Nevada, Texas, Florida, Kentucky and Maine. She serves on the board of directors of the Michigan

Campaign for Justice and is a graduate of Stanford University and New York University School of Law.

Our first witness will be Judge Archer.

TESTIMONY OF JUDGE DENNIS ARCHER, CHAIRMAN OF DICKINSON WRIGHT, PLLC, FORMER MICHIGAN SUPREME COURT JUSTICE, PAST PRESIDENT, AMERICAN BAR ASSOCIATION, AND PAST PRESIDENT, STATE BAR OF MICHIGAN, DETROIT, MI

Judge ARCHER. Good morning, I want to thank the Chairman of the Judiciary Committee, the Subcommittee Chair, the Ranking Member and the Members of the Subcommittee for scheduling this important hearing on the crisis in providing counsel for indigent criminal defendants.

I am here today on behalf of the American Bar Association, for which I served as president in 2003-2004. I also appear in my capacity as past president of the State Bar of Michigan, as a former mayor of the City of Detroit, as a former justice of the Michigan Supreme Court and as a practicing attorney.

In 1963, then Minnesota attorney general, Walter Mondale, led 22 state attorneys general in filing an amicus brief in support of Earl Gideon's handwritten request to the United States Supreme Court for an attorney. Earl Gideon's unlikely allies recognized that Gideon's request went to the very heart of American justice and fundamental fairness. No one should face the prospect of losing his or her life or liberty without the guiding hand of counsel.

More than five decades since *Gideon v. Wainwright*, the American Bar Association has developed important standards and guidelines, establishing what competent counsel must do to adequately represent his or her clients. It has published white papers describing the state of public defense in America, and finally, the American Bar Association has provided technical assistance to every state to improve its systems for delivering competent indigent defense counsel to those in need.

Thirty years ago, the American Bar Association recommended that the Federal Government establish and fund an independent, nonprofit Center for Defense Services to administer matching grants and other programs to strengthen the services of public defenders, private assigned counsel and contract defenders. The American Bar Association envisioned that the proposed center would be funded by Congress and be governed by an independent board of directors appointed by the United States president. Establishing such a program is still a goal of the American Bar Association.

In an effort to speak directly to policymakers, we developed an ABA Ten Principles of a Public Defense System. The Ten Principles describe what a sound public defense system must look like. I have attached the ABA Ten Principles to the hearing record in my longer and written report. It is a constitutional floor below which no system should go. These Ten Principles provide a template to measure a system's health, diagnose what is wrong with it and then prescribe how to fix it.

The Ten Principles are now used across the country in jurisdictions large and small. They have been used to improve public de-

fense systems in Nevada, Montana and even post-Katrina Louisiana. And they have been used to evaluate the health of existing systems, more recently that of my home state, Michigan.

Michigan fails nearly all of the principles. The ABA report recommended that to fulfill the constitutional guarantee of effective assistance of counsel, the Federal Government should provide substantial financial support to provide indigent defense services in state criminal and juvenile delinquency proceedings. While some Federal funding reaches state criminal defenders and defenders' office under the Byrne Grant, Justice Assistance Grant programs, indigent defense services have remained a "poor stepchild," compared to state prosecutors and prosecutorial resources funded through the administration of those programs. The ABA believes that state indigent defense should be made a priority area of support for these critical Federal programs.

Let me briefly describe to you what is happening in Michigan. Two years ago, the National Legal Aid & Defender Association, with the State Bar of Michigan, conducted the first comprehensive study of the state's public defense system in response to a bipartisan request by the Michigan legislature. The report's conclusions were devastating, describing a system failing nearly every way. This in a state that once led the Nation in providing assigned counsel to its citizens.

In the 1850's, Michigan became the first state to provide paid appointed counsel to indigent criminal defendants. It placed the cost and method of providing counsel on county government, a policy that was practical and efficient in the 1800's. Today, that method of funding has resulted in a patchwork of underfunded, unaccountable systems where the private bar remains the primary method of providing counsel.

The noble, practical and constitutional vision expressed by Earl Gideon and those 22 attorneys general remain unfulfilled. In Michigan, our counties cannot fund our public defense system. Likewise, we know that states cannot fund their systems without help from the Federal Government.

We are all in this struggle together. We, at the ABA, know that learned lessons can be shared and implemented. The result will not only be a justice system that meets our standards of fundamental fairness, but a system that is effective and efficient at all levels and in all corners of our country.

Thank you.

[The prepared statement of Judge Archer follows:]

PREPARED STATEMENT OF DENNIS ARCHER

STATEMENT OF

DENNIS ARCHER

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON CRIME, TERRORISIM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

of the

U.S. HOUSE OF REPRESENTATIVES

for the

Hearing on Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and other States

March 26, 2009

Good morning. I want to thank the Chairman of the Judiciary Committee, Representative John Conyers, the Subcommittee Chair, Representative Bobby Scott, the Ranking Member, Representative Louie Gohmert, and the Members of the Subcommittee for scheduling this important hearing on the crisis in indigent defense for criminal defendants today. I am Dennis Archer and I am pleased to appear today on behalf of the American Bar Association (ABA), for which I served as President in 2003-2004. I also appear in my capacity as past President of the State Bar of Michigan, as a former Mayor of the City of Detroit, and as a former Justice of the Supreme Court of Michigan.

Led by Walter Mondale, then Attorney General of Minnesota, 22 State Attorneys General in 1963 filed an Amicus brief in support of Earl Gideon's handwritten request to the United States Supreme Court -- for an attorney. Earl Gideon's unlikely allies recognized that Gideon's request went to the very heart of our country's sense of justice and fundamental fairness. No one should face the prospect of losing his or her life or liberty without the guiding hand of counsel.

Indeed the United States Supreme Court has held that the right to counsel is the seminal right that makes meaningful all the other rights guaranteed to us by our Constitution.

But, how meaningful is advice whispered in a crowded hallway minutes before trial? How thoughtful is advice spread over staggering caseloads? How independent is the advice given by attorneys beholden to judges for their daily work and the essential tools of their profession – investigators and experts? And, how guiding is the hand of a poorly trained lawyer?

Over the five decades since *Gideon*, the ABA has played an instrumental role in developing standards and guidelines setting forth what competent counsel must do to adequately represent his or her clients. It has published white papers describing the state of public defense in America and, finally, the ABA has provided technical assistance to every state attempting to improve its public defense delivery systems. Those efforts have not been enough.

Too many states still fall far below an adequate standard, and my home state, Michigan, a state that has led the country in so many important ways, is one of the worst.

Thirty years ago, the ABA recommended that the federal government establish and fund an independent, non-profit Center for Defense Services to administer matching grants and other programs to strengthen the services of public defenders, private assigned counsel, and contract defenders. As envisioned by the ABA, the proposed Center would receive funds directly from Congress and be governed by an independent Board of Directors appointed by the President. The establishment of such a program continues to be an ABA goal.

In an effort to speak directly to policy-makers, we developed the *ABA Ten Principles of a Public Defense System*. Their straightforward language describes what a sound public defense system must look like. It is the constitutional floor below which no system should go. These 10 Principles provide a template to measure a system's health, find what is broken, and then tell how to fix it. They are now used across the country in jurisdictions large and small. They have

been used to guide the improvement of public defense systems in Nevada, Montana, and even post-Katrina Louisiana. And they have been used to evaluate the health of existing systems – most recently that of my home state, Michigan. Michigan fails nearly all of the *Principles*. I have attached the ABA Ten Principles, which I request be made part of the hearing record.

In 2003 and 2004, the ABA held hearings across the United States to honor *Gideon*'s fortieth anniversary. The resulting report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (2004), concluded that "indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction." The ABA report recommended that in order to fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings. While some federal funding reaches state criminal defenders and defender offices under the Byrne Grant and Justice Assistance Grant programs, indigent defense services have remained a "poor stepchild" compared to state prosecutors and prosecutorial resources funded through the administration of those programs. The ABA believes that state indigent defense should be made a priority area of support for those critical federal programs.

Rules of professional responsibility, underscored by a recent ABA ethics opinion, require defenders and their supervisors to provide competent services and not to accept excessive caseloads that undermine the quality of their representation. However, the relentless assignment of new cases routinely prevents adherence to this admonition. And the situation has gotten much worse due to the economic downturn.

The ABA believes that the need is urgent. A chronic, persistent indigent defense crisis has reached a point of system breakdown in a number of states and lawyers increasingly have sought relief in the courts, often unsuccessfully. For example, last year in Knoxville, Tennessee, the public defender filed a motion to limit the office's overwhelming caseload. However, judges refused to rule on the motion for more than eight months and, finally, despite uncontroverted evidence, rejected all relief. Just last month in Kentucky, a declaratory action filed by that state's Department of Public Advocacy was dismissed, although that agency's excessive caseload has repeatedly been documented. The judiciary is not responding to the crisis; the legislature must.

Let me briefly describe to you what is happening in Michigan. Two years ago the National Legal Aid and Defender Association in conjunction with the State Bar of Michigan conducted the first comprehensive study of the state's public defense system in response to a bi-partisan, joint resolution passed by both chambers of the Michigan legislature. The report's conclusions were devastating, describing a system failing in nearly every way. For example, a judge in Oakland County indicated that because attorneys are not barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. In the district court in Chippewa County, there is no confidential space for an attorney to meet his or her client. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others talk in the corridor. Another example takes place in Grand Traverse Country, where the judiciary forces public defense attorneys to provide

certain legal services for which they are not compensated if they wish to be awarded public defender contracts. This in a state that once led the nation in providing assigned counsel to its citizens.

In the 1850's Michigan became the first state to provide paid appointed counsel in criminal cases. It placed this cost and the method of providing counsel on the county government, a choice that was practical and efficient in the 1800's. Today, that method of funding has resulted in a patchwork of underfunded, unaccountable systems where the private bar remains the primary method of providing counsel.

I sat on the Michigan Supreme Court when serious challenge to this system came before the Court. That effort attempted to raise the level of attorney fees paid to the private bar to handle the criminal cases in Detroit. The fees had not changed in over twenty years – during a period of extreme inflation. The challenge went to the very heart of the system itself, because the fees were relied on to fund the entire public defense system in Detroit, in every case from homicides to homelessness. From these fees, attorneys had to pay not only their salary, but all the tools of the trade – their training, libraries, computers, support staff – indeed all those things necessary to be effective. In homicide cases, if you did what was needed, attorneys earned as little as $10 an hour. Sadly, the reform attempt was not successful. After I left the Court, Judge Tyrone Gillespie was appointed as a master to make findings on the adequacy of the fees paid in the criminal courts of Detroit. Almost 15 years after he made them, all of the failings he found still remain, and the changes he recommended have yet to be made.

I have attached a summary of Judge Gillespie's report that I request be made part of the hearing record.

When fees are not reasonable and do not even cover the overhead of the attorney, one devastating result is that experienced attorneys are driven from the roster and those who remain are forced to accept crushing caseloads to earn sufficient money to stay on the lists. When turnover is high, training is impossible, serious cases go without competent counsel and our system that depends on equal adversaries cannot function.

And the noble, practical, and constitutional vision expressed by Earl Gideon and those 22 Attorneys General remains unfulfilled.

In Michigan our counties cannot fund our public defense system. Likewise we know that the states cannot fund their systems without help from the federal government.

We are all in this struggle together. We at the ABA know that learned lessons can be shared and implemented. The payoff will be not only a justice system that meets all our standards of fundamental fairness, but a system that is effective and efficient at all levels and in all corners of our country.

Thank you for the opportunity to appear today. I would be glad to answer any questions you may have.

ATTACHMENT 1

TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

ABA Standing Committee On Legal Aid And Indigent Defendants

2001-2002

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Manchester, NH

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TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System*. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled "The Ten Commandments of Public Defense Delivery Systems," which was later included in the Introduction to Volume I of the U.S. Department of Justice's Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5. Defense counsel's workload is controlled to permit the rendering of quality representation.

6. Defense counsel's ability, training, and experience match the complexity of the case.

7. The same attorney continuously represents the client until completion of the case.

8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9. Defense counsel is provided with and required to attend continuing legal education.

10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1 **The public defense function, including the selection, funding, and payment of defense counsel,[1] is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.[2] To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.[3] Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.[4] The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.[5]

2 **Where the caseload is sufficiently high,[6] the public defense delivery system consists of both a defender office[7] and the active participation of the private bar.** The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.[8] The appointment process should never be *ad hoc*,[9] but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.[10] Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.[11]

3 **Clients are screened for eligibility,[12] and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.** Counsel should be furnished upon arrest, detention, or request,[13] and usually within 24 hours thereafter.[14]

4 **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.[15] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.[16] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.[17]

5 **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.[18] National caseload standards should in no event be exceeded,[19] but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.[20]

6 Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.[21]

7 The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.[22] The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.[23] Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.[24] Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,[25] and separately fund expert, investigative, and other litigation support services.[26] No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.[27] This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.[28]

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel,or contract defenders should be supervised and periodically evaluated for competence and efficiency.[29]

NOTES

[1] "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

[2] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1(D).

[3] NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

[2] Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

[5] ABA, *supra* note 2, Standard 5-4.1

[6] "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

[7] NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

[8] ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[9] NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[10] ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

[11] NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

[12] For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

[13] NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

[14] NSC, *supra* note 2, Guideline 1.3.

[15] American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

[16] NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

[17] ABA Defense Function, *supra* note 15, Standard 4-3.1.

[18] NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

[19] Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter "Death Penalty"].

[20] ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter "Appellate"], Standard 1-F.

[21] Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

[22] NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

[23] NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

[24] ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

[25] NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

[26] ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

[27] ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

[28] NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(c); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

[29] NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

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ATTACHMENT 2

STATE OF MICHIGAN

IN THE SUPREME COURT

86099

IN THE MATTER OF THE RECORDER'S COURT BAR ASSOCIATION, THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, WOMEN LAWYERS ASSOCIATION OF MICHIGAN, and THE SUBURBAN BAR ASSOCIATION,

Petitioners,

v

WAYNE COUNTY CIRCUIT COURT AND RECORDER'S COURT,

Respondents,

and

WAYNE COUNTY,

Intervening Respondent.

REPORT OF SPECIAL MASTER - HONORABLE TYRONE GILLESPIE

RECEIVED
APR 3 1991
CORBIN R. DAVIS
CLERK SUPREME COURT

FINDINGS OF FACT

FINDINGS OF FACT

A. The Third Circuit and the Recorder's Court of Detroit were merged in 1987. The Chief Judges of each court still sit as Chief Judge of their courts, but they interchange as Executive Chief Judge.

There are 29 Recorder's Court judges and 35 Circuit Court judges.

The Recorder's Court of Detroit has jurisdiction of all criminal matters arising out of crimes charged in the City of Detroit. Since the merger a panel of five judges from the circuit court are assigned for arraignment and trial purposes to the Recorder's Court so, in essence, it is one court for the county handling all criminal matters within the county. If a defendant is not a resident of Detroit, he or she technically under Local Court Rule 6.102 could demand arraignment before one of the circuit judges, but practically the judges operate interchangeably between the two courts in criminal matters on an assigned basis.

The procedure, upon arrest, is that the defendant is arraigned on the warrant before a magistrate or judge in the 36th District Court, either in the city or out county. At that point it is determined whether the defendant will be incarcerated or bonded and whether he demands or is unable to hire counsel. In the event that he or she wants counsel, the matter is assigned to an assignment judge, which judge is assigned by the Executive Chief Judge for a brief period of one week. This position is not provided for by statute and some judges refuse the assignment.

Consequently, not all judges serve in this capacity. The assignment judge assigns the defendant an attorney from either the public defender's office (which takes 25% of the cases) or from a list of over 600 attorneys who have indicated desire for assignments. Assigned counsel are notified of their appointments by telephone and have 24 hours to appear at the clerk's office to pick up paperwork. If they do not appear in time and have not made other arrangements, the case is reassigned. In addition to the order of appointment, the lawyer is given an early discovery packet that includes the police investigator's report (warrant request), the defendant's prior record, and a standard signed discovery order. In January, 1990, a sentencing guidelines calculation was added to the discovery packet.

Preliminary examinations are scheduled for 7-10 days after arraignment on the warrant. Since early discovery packets are available on the third day after the arraignment, counsel has 4-7 days to confer with the defendant and review the case. If no lawyer appears for the preliminary examination, the case is assigned to "house counsel", a standby lawyer who is assigned to be available in District Court to cover such situations. On occasion, the defender office has been removed from a capital case by a district judge for refusing to conduct a preliminary examination without additional discovery and other counsel was appointed. If the case is bound over, arraignment on the information (AOI) occurs in seven days if the defendant is in jail and fourteen days if the defendant is free on bond. Thus the total

time elapsed from the appointment of counsel to AOI is 17 days in jail cases and 24 days in bail cases. If the defendant pleads guilty at AOI, sentencing is set for 10 days later.

If the defendant is bound over, he or she is next required to appear before one of the executive floor judges who will arraign him or her on the information or indictment. If at that time the defendant stands mute or pleads not guilty, the case is assigned to a judge for trial. The attorneys then meet with the trial judge to establish a trial track for motions to quash, Walker hearings and trial date and other preliminary matters.

The Chief Judge of the Recorder's Court is responsible for moving the docket and he may, and often does if there is an overload, remove a case or cases to his docket for disposition. If the trial lasts for more than three days, the Recorder's Court automatically allows $300 per day for trial time. In circuit court, the attorney must apply to the Chief Judge for extraordinary fees which are often allowed in whole or in part. Many attorneys are reluctant to ask for extraordinary fees or compensation for unusual expenses, fearing that such requests may prejudice their standing or possibilities for assignment with the judges and, accordingly, pay such costs themselves. Petitions for extraordinary fees are filed in two percent of the cases and are rarely granted in full. The Public Defender's Office is rarely granted any fees beyond the schedule amounts.

B. The present system of paying for assigned counsel on a flat fee basis has merit for the following reasons:

1. The system shortens the time between arrest and disposition, thus alleviating some of the pressure for more jail space.
2. The system tends to keep the docket moving and in better control by speeding resolution and disposition of cases.
3. If a client is pled guilty quickly, the compensation is very adequate as it represents payment for only three or four hours of attorney time.
4. Frivolous motions are reduced as there is no financial incentive to do work which merely takes time.
5. Alternative resolutions, such as work release and probation, are encouraged.
6. Dismissals of weak cases occur at an early stage.
7. Much judicial time in review of schedules and expense accounts is eliminated.
8. Padding of hourly accounts is eliminated.
9. The system is administratively easier to operate.

The negative side of paying assigned counsel on a flat fee basis is:

1. The system encourages attorneys who are not conscientious to persuade clients to plead guilty as attorneys compensation is not improved materially by trial. This discourages use of the full panoply

of constitutional rights.

2. While the system discourages the filing of frivolous motions, it also gives disincentive to file serious motions, as no additional compensation is paid for greater effort.

3. The system discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial and will assent to a guilty plea to a higher charge.

4. While the flat fee system is not directly related, the fact that guilty pleas are well rewarded allows assigning judges to appoint favorites to a volume of cases. One case was cited where an assigning judge appointed a female attorney, with whom he was friendly, to the majority of his assigned cases which required only pleas to be entered.

5. The system also supports a group of substandard attorneys, estimated to be 10 to 15% of the criminal bar, to operate without offices, secretaries, files, from pocket notes and to make a living on guilty pleas.

C. At the beginning of 1990, there were 630 attorneys eligible for appointment. One hundred eighty-six of those did not receive appointments, leaving four hundred forty-four who were appointed in 1989. One hundred seventy-seven attorneys who were not on the eligible list did receive assignments; forty-five

attorneys on the list receiving appointments received $1,000 or less.

The total sum paid for services was $7,130,333 in 1989. Seventy attorneys, about 12% of those eligible for appointment, were paid $3,556,662, or approximately 50% of the total payments made. $1,777,674 of the amount paid to the first seventy attorneys was paid to attorneys not qualified to try capital cases.

The payments of the first seventy attorneys break down as follows:

Over $100,000	1 attorney	$148,102*
Between $90,000 and $100,000	1 attorney	91,264
Between $80,000 and $ 90,000	1 attorney	81,510
Between $70,000 and $ 80,000	4 attorneys	302,149
Between $60,000 and $ 70,000	5 attorneys	325,147
Between $50,000 and $ 60,000	10 attorneys	555,123
Between $40,000 and $ 50,000	11 attorneys	476,665
Between $30,000 and $ 40,000	37 attorneys	1,580,633
Total	70 attorneys	$3,556,662

* Public Defender's Office

Eighty-five percent of the criminal cases in both the Recorder's Court and the Circuit Court require assigned counsel. There are about 12,000 assignments annually in Recorder's Court and 3,400 annually in Wayne Circuit. Indigent defense fees approximate three and-a-half percent of Wayne County's General Fund.

D. The finance situation in Wayne County is extremely fragile and an increase in sums paid for attorneys fees for the indigent could have serious financial repercussions. Wayne County at the close of its fiscal year, November 30, 1987, had a deficit of $134 million in its general fund and an additional debt of

$56 million owed to the State from previous loans to help the county's deficit situation.

In order to rectify this situation, the County, in 1988, negotiated the debt settlement agreement with the State of Michigan, wherein the county was able to borrow $120 million from the State Emergency Loan Board and the county received permission to borrow $103 million in fiscal stabilization bonds.

As conditions for the debt settlement agreement, the county, pursuant to state law, its charter and the additional debt settlement agreement, is required to maintain a balanced budget.

A failure on the part of Wayne County to maintain a balanced budget would require it to pay 10% interest on the sum owing to the state, e.g., $10 million, and may result in the state invoking the provisions of the legislation authorizing the solvency package and place the county in receivership.

In 1989, the county's budget for indigent attorney fees was $13.2 million for circuit, Recorder's, and probate courts, and expenses were approximately $16.7 million, an overrun of approximately $3 1/2 million.

The county budgeted approximately $15.8 million for indigent attorney fees for 1990 -- $9.2 million for Circuit and Recorder's Courts and $6.6 million for probate.

In 1989, by comparison, the county budgeted approximately $12.9 million for the prosecutor's office. The prosecutor's office, of course, has no rent factor in its budget. It also has no factor for investigations or fringe benefits and has some income

through grants and forfeiture money which amount to $5- or $6 million a year.

The county receives no reimbursement from the state or any other source for the sums spent on attorneys fees for the indigent. The county has fiscal responsibility for payment of indigent attorney fees, but has no authority to effect the rate structure. The county addresses indigent attorney fees as a priority in its budget process.

E. From the testimony, the average overhead rate in the Detroit area varies from $35 to $45 an hour. Several attorneys who have been assigned to high publicity, complex cases which have resulted in protracted trials have not been paid enough to meet overhead. Some reported receipt of less than $15 per hour on critical cases.

On the other hand, attorneys with no secretaries, no offices and working from telephone contacts may be paid $675 for a non-capital case in which there was a guilty plea which might be concluded in less than three hours.

F. There is no screening process for indigent defendants in Circuit or Recorder's Court and consequently 87% of the criminal cases in Wayne County require the assistance of appointed counsel. It was the opinion of several witnesses that any attempt to set up standards of indigency or to attempt to recover all or part of the fees paid for defense counsel appointed would be counterproductive. No experiments were reported which would verify these opinions.

Experiments in Genesee County of "loaning" attorney

services to defendants who are unable to pay in full for representation have been somewhat successful. This system would refer a defendant who pleads indigency to an assignment attorney who works for the system. The assignment attorney would determine what, if any, assets are available to the defendant to fund the defense. If the defendant is employed or has other assets, the attorney would take an assignment of the assets or note payable over a period of time from the defendant. On some occasions, a credit card has been used. In any case, the payment of the attorney's fee is guaranteed by the court and collection, if any, is made by the assignment attorney. It has been the experience in some counties that 10% of assessed attorney fees are collected from defendants, usually as a condition of probation.

G. The Federal Court for the Eastern District of Michigan reimburses assigned attorneys at a rate of $75 an hour. There is no distinction made between in-court and out-of-court time and expenses are routinely reimbursed.

Testimony revealed that in Wayne County, when extraordinary fees are requested and allowed, the Chief Judge in Recorder's Court utilizes a figure of $300 a day which is fairly automatic. The Chief Judge in Wayne Circuit computes such fee at $35 an hour.

The fees paid for expert witnesses such as psychologists, psychiatrists, medical experts, interpreters, investigators and other supplemental requirements are so low as to make their services unavailable without supplementation of funds by the

attorney. Some costs, such as postage, copy and local travel, are never reimbursed.

H. Wayne County's fee schedule is unique in Michigan. All other schedules in the state are event based. Only Wayne County pays a flat fee based on the potential maximum sentence. Under this system, the amount paid bears an inverse relationship to the amount of effort expended. The lawyer who puts three or four hours into a case may earn $200 per hour; a lawyer who engaged in a protracted jury trial may earn as little as $12 an hour under the Wayne County system.

The flat fee schedule had a decided impact on the Public Defender's Office, which operates in Wayne County, on the same basis as an attorney who accepts appointments in private practice. The result has been a diminution of funds to run that office to the extent of about $200,000 per year.

I. Several witnesses claimed that the schedule currently in effect, which has the result of rewarding a guilty plea and providing disincentive for going to trial, is in some measure supporting overcharging and stiffness in the prosecutor's office in negotiation of pleas as the prosecution is aware that the defense lawyer is at a personal disadvantage by going to trial as it will cost him money personally. No witnesses were called from the prosecutor's office, consequently such statements went unrebutted. These thoughts do sound facially logical and certainly in the realm of probability.

J. From a review of the Prosecuting Attorneys Association Report for 1989 (Pl. Ex. 35) and the State Bar Association Defender and Services Committee Report for 1989 (Pl. Ex. 36) the following information would appear. The reliability of the information was not tested.

The annual budget for prosecutors in Michigan in 1989 was $61.5 million. The annual budget for prosecutors in Wayne County was $14,110,982, or 23% of the total state budget for prosecutors. The state population was shown to be 9,201,716 according to the 1980 census. Wayne County's population was shown as 2,337,240 or 25.4% of the state population. There were 73,857 felony warrants issued in Michigan. 19,024 of such warrants, or 25.75%, emanated in Wayne County. The above figures are fairly consistent, however the statewide budget for felony defense in the state totalled about $22.5 million. The amount spent in Wayne County on felony defense was listed as $9.26 million, or 41% of the state total budget for defense. This figure was affirmed by the testimony of Mrs. Lannoye as to the Wayne County expenditure.

It is interesting to note that statewide the budget for defense is 36% of the budget for prosecution, which does not include rent, investigations and other factors before mentioned.

K. Under the present system of assigning attorneys, there are at all times over 400 attorneys willing to take assignments which is a number that is entirely adequate.

It appears that in a few complex and unpopular cases, such as the famous Easter Case, the judges have had to use their

personal influence with good attorneys to persuade them to take the case.

The Detroit Bar Association has made a giant step toward improving the quality and capability of the defense bar in organizing the Criminal Advocacy Program (CAP) which was testified to by Judge Ravitz and others and funded by 1% of the assigned counsel fees. Judges and competent trial attorneys have lent their support by teaching in this program.

The plaintiffs allege that good attorneys are dropping out of the assignment program because of low fees. This was not borne out by the testimony as a problem in Wayne County. It was shown that a few very capable attorneys who have made their reputations as superior defense attorneys are taking more private work because it is undenied that private, criminal practice pays infinitely better than assigned work. Typical of this phenomena was Thomas Loeb, a witness in this case, who has become a very well known and highly capable defense attorney who no longer seeks assignments because he commands sufficient private clients to occupy his time. There have been some drop out of attorneys seeking assignments, but that has not been in Wayne County.

Assigning judges are well aware of the competent attorneys and tend to assign them to a number of cases. This may cause an imbalance in income of attorneys depending on assignments but, in all probability, it is to the advantage of the defendants that the best lawyers are assigned most often.

L. The 1982 recommendation on assigned attorneys fees was a carefully considered plan of compensation on an event basis. It had the endorsement of attorneys and judges. Fear on the part of Wayne County Administrators induced them to dissuade the Chief Judges from putting it into effect because of a possible impact on the budget.

Criminal defense does not have great popular appeal and administrators and supervisors, when allocating limited money, are not inclined to give top priority to defending people who have committed crimes.

The current schedule was developed by George Gish at the direction of Judge Roberson. The schedule was adopted by Judge Roberson and Judge Kaufman with the best of motives of moving their crowded dockets and keeping the jail from overcrowding.

The record reflects little change in case movement since the advent of the present schedule. There are a few more guilty pleas. There are more short bench trials, known as "long pleas", due to the hard position on plea bargaining taken by the prosecutor. Due to lack of plea bargaining, the success rate on trial has dropped. On cases that go to trial, 63.5% of murder charges result in conviction of lesser offenses. 76.7% of all assault with intent to murder charges are reduced. The Wayne County bench trial rate is 15 times higher than the state average.

RECOMMENDATIONS

RECOMMENDATIONS

1. That the fixed fee schedule based on maximum possible sentence be found unreasonable in that it only includes one factor of what this Court found to be the test of reasonableness in WOOD v D.A.I.I.E., 413 Mich 573, 588 (1982). That decision did not determine "reasonableness" in a criminal context but discussed reasonableness in a general context.

The factors to be considered, as in that case defined, are:

1. The professional standing and experience of the attorney;
2. The skill, time and labor involved;
3. The amount in question (in this case maximum potential sentence.
4. The results achieved;
5. The difficulty of the case;
6. The expenses incurred;
7. The nature and length of the professional relationship.

Having found the schedule based solely on maximum possible sentence unreasonable, several alternatives could be offered.

A. That a study be made of reasonable time involved to defend each of the crimes in the present schedule, thus establishing a norm similar to those used by garages in estimating repair work. If the fee request submitted falls within the norm, it would be automatically approved for the time expended at a reasonable rate of $60 to $70 per hour. Excesses would have to be justified.

B. Do as the plaintiff asks and install the Jobes Committee report with a reasonable escalator based on inflation since 1982.

C. Direct the court to devise an alternative plan within a reasonable time which would: (1) compensate attorneys

fairly for time spent, and (2) put no pressure on defendants to plead guilty. It is believed that Mr. Gish could do that if so directed knowing of the criticism of the present plan and in the parameters of present sums expended.

These objectives could be reached by:

1. Conference with the Chief Judges.
2. A letter to the Recorder's and Circuit Court requesting a restudy of the present plan recognizing its weaknesses as defined by these hearings.
3. An Order of Superintending Control.

2. That the Supreme Court in an opinion in this case, or another appropriate case, bring to the attention of the legislature that convictions for felonies are under laws passed by the state, that appeals are to state courts and from state courts and all Michigan prison inmates are state prisoners. Such appeals should, therefore, be state funded.

Circuit and Recorder's Court judges, unless specially assigned, have no control or even knowledge, during the appellate process of the work performed by the assigned attorneys but are expected to approve payment therefor from their respective counties. Each circuit has a different rate or method of payment. In Jewell v Maynard, 383 SE2d 536 (1989), the Supreme Court of West Virginia, in a case with facts very similar to those posed here, called upon the state of West Virginia to pay $45 an hour for out-of-court work and $60 an hour for in-court work in spite of a statute which provided for $20 an hour for out-of-court work and $25 for in-court work and gave the legislature one year to implement the decision. Prior attempts to obtain money for appeals in Michigan have become snarled with debates on judges salaries and

pensions and have been pushed back by the legislature and thereafter forgotten. It seems appropriate that, if due process in Michigan is to be maintained, the state should include the cost in the budget.

In the matter of In re Frederick, SC No. 90310, which was heard by this Court on March 7, 1991, this precise issue was raised. Frederick was appointed to defend an indigent, David Cook, on appeal. The Court of Appeals found no law to effect payment for his services. This Court must find the system to pay Frederick. If this Court finds Frederick must be paid, then it must be decided by whom.

The mechanism for designating attorneys for appeals was set up in detail in MCL 780.711 et seq. (the Appellate Defender Act). In this Act, section MCL 780.717 provides for contracts for special assistant appellate defenders, but does not provide for single appointments of non-contract attorneys.

The Supreme Court could clarify in an appropriate opinion that it was the intent of the legislature to set up an appellate scheme to handle all appeals to the Michigan Court of Appeals and to the Michigan Supreme Court between the State Appellate Defender's Office and the Michigan Appellate Assigned Counsel Service.

That having been decided, then the legislature should be called upon to correct the glaring funding omission of the Appellate Defender Act.

If this were accomplished not only would the system in Wayne County be relieved, but also the system in every county of

the state where the counties are with great difficulty bearing a burden on strained budgets which properly belong to the state.

3. The discussion in the previous recommendation is in reference only to appeals from the 55 circuit courts and Recorder's Court of Detroit.

There is another problem in that each of the 55 circuits has a different plan for compensation of assigned counsel for trial in that circuit. Even the Recorder's Court and the Third Circuit for Wayne County have slight differences in their plans.

As a result of these differences, all Michigan defense representation is not equal. Indigent defendants charged in counties that pay assigned counsel very low rates are treated differently than those defendants who can afford to hire their own attorneys. They are also treated differently than defendants in counties that provide skilled representation. Much of the information on these problems has been gathered by the Supreme Court Administrator and MAACS and should be amenable to fast assembly.

It is recommended that this Wayne County study be expanded to encompass the assignment of counsel throughout the entire state to unify the hodgepodge of plans for indigent representation that now exist.

While much of the information has already been gathered for such a study by existing organizations, it is the recommendation that such study be conducted by an independent group or agency to diminish any appearance of empire building. Too, such a study must consider the responsibilities and sensitivity of

sitting judges who must accept the recommendations, as it is their responsibility to operate their courts efficiently and economically. It is also their responsibility to convince county supervisors to fund the program.

4. In Wayne County, the chief judges should be encouraged to devise a plan to eliminate the criticism of assigning attorneys who operate from their cars and by telephone and live on payment for pleas and waivers.

Likewise chief judges should be made aware that the Supreme Court is aware that instances exist of appointment of attorneys who have personal relationships with assigning judges and that such appointments are not favored. There is, of course, no criticism of those judges who have had to use personal relationships to obtain competent counsel for hard cases.

5. It should be pointed out that MCL 780.711, § 2 specifically puts the supervision of the state agencies whose duties are the operation and management of appellate defense under the State Court Administrator. In practice, it does not operate that way.

If the appellate services were centralized in the Supreme Court Administrator's Office and funded by the state, much of the problems on the appellate level statewide would disappear.

At the trial level, if the 55 circuits were operating under standard rules for those utilizing public defender offices, and a separate set of standards for those not using the public defender system, most of the grievances of the plaintiffs in the Wayne County case would be met.

It is hoped that the comment and recommendations herein contained will be helpful in the solution and not part of the problem posed by this case.

-- Tyrone Gillespie
Special Master

Dated: March 18, 1991

Mr. SCOTT. Thank you.
Mr. Carroll?

TESTIMONY OF DAVID J. CARROLL, DIRECTOR OF RESEARCH, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, WASHINGTON, DC

Mr. CARROLL. Thank you, Congressman Conyers, Subcommittee Chairman Scott, Ranking Member Gohmert and the entire Subcommittee for calling today's hearing. Your concern regarding the state's failure to ensure a meaningful right to counsel, as illus-

trated by Michigan's failure to fulfill its constitutional duties under *Gideon*, is shared by everyone who expects the criminal justice system to produce verdicts that are fair, correct, swift and final.

Many of the systemic deficiencies identified more than three quarters of a century ago by the U.S. Supreme Court in the Scottsboro Boys case still permeate the criminal courts of Michigan today—judges handpicking defense attorneys, lawyers appointed to cases for which they are unqualified, defenders meeting clients on the eve of trial and holding nonconfidential discussions in courtroom corridors, failure of defenders to properly prepare for trial and sentencing, attorneys violating their ethical obligation to zealously advocate for clients and a lack of sufficient time, training and resources to properly prepare for a case in the face of a state court system that values speed over due process.

Michigan is just one of seven states that requires its counties to shoulder the entire burden for paying for the right to counsel at the trial level. Since less affluent counties tend to have a higher percentage of their population qualifying for public defender services, the counties most in need of indigent defense services are often the ones that can least afford to pay for it. Indigent defense systems in cash-strapped counties are too often under-resourced, which in turn increases the opportunity for mistaken convictions and waste of taxpayers' dollars. Financially strained counties often choose low bid, flat-fee contracts which pay a single lump sum regardless of how much or too often how little work the attorney does or how many cases he or she is assigned.

Forty-one of Michigan's 83 counties now use such a system. These flat-fee contracts are more often than not entered into between a public defender and the judge before whom he will practice, in direct violation of the ABA standards requiring independence of the defense function. Attorneys in such systems quickly learn that filing motions make trials longer, reduces the attorney's profit and incurs the judge's displeasure. Without regard to the necessary parameters of ethical representation, the attorney's caseload creeps higher and higher, and the attorney is in no position to refuse the dictates of the judge or risk his ability to put food on his family's table.

One of the most glaring aspects of Michigan's failed sixth amendment policies is what passes for justice in Michigan's District Court. This is where all misdemeanors are heard and where all felony charges begin. Poor people are routinely processed through the criminal justice system without ever having talked to a lawyer.

The district courts employ a variety of means to avoid their constitutional duties, including using uninformed waivers of counsel, requiring defendants to speak to prosecutors before appointing counsel and using the threat of personal financial strain through the imposition of unfair fines, all of which are documented in the NLADA report, "A Race to the Bottom."

And as harmful as inadequate representation is for adults, it is even more detrimental for children. Children who come in contact with delinquency courts too often have been neglected by the professionals and institutions that are supposed to help at-risk children succeed. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he

disposes of cases as quickly as possible, the message of neglect and worthlessness continues and the risk that the juvenile will commit more and worse crimes increases. Thus, inadequate representation in the juvenile system can have the perverse effect of actually decreasing public safety and increasing the chance that young people will fall into a lifetime of crime and imprisonment.

Although we are focusing today on the sixth amendment crisis in Michigan, I could be talking about the crises related to public defender work overload in Kentucky, Tennessee, Missouri or Florida, or the lack of enforceable standards in Mississippi, Maine, Arizona, Utah or South Dakota. Our focus could have been on the difficult decisions county managers face in Ohio and Nevada when state government continually breaks its promise of financial support for the right to counsel or the way elected officials unduly impact the independence of defense providers in Illinois or New Mexico.

We could have discussed the prevalence of flat-fee contracts in rural California or highlighted how a judge in Pennsylvania financially benefited from unfairly sending juveniles to detention centers, in part because the State of Pennsylvania has completely washed its hands entirely of its constitutional obligations under *Gideon*. Instead of focusing on Michigan, we could just have easily been hearing on the failure of state policymakers in New York to ensure *Gideon*'s promise in the hundreds of town and village courts, despite the passage of nearly 3 years since New York's then Chief Justice Kaye declared the system in crisis and in need of a complete overhaul.

In sum, the sixth amendment crisis is not limited to Michigan. It is national in scope and will require Federal involvement to ensure the fundamental constitutional right. In *Gideon v. Wainwright*, the U.S. Supreme Court stated the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

Thank you very much.

[The prepared statement of Mr. Carroll follows:]

PREPARED STATEMENT OF DAVID J. CARROLL

Written Testimony

to the U.S. House of Representatives
Committee on the Judiciary Sub-Committee
on Crime, Terrorism, and Homeland Security

Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?

David Carroll

Director of Research & Evaluation
National Legal Aid & Defender Association

March 26, 2009

NATIONAL LEGAL AID & DEFENDER ASSOCIATION

The Human Impact

Eddie Joe Lloyd

In 1985, Eddie Joe Lloyd was convicted in Detroit of the rape and murder of an under-aged girl. The evidence of his guilt was overwhelming – Eddie Joe Lloyd's written confession gave specific information about the crime scene only the perpetrator could have known. Police also had him on tape admitting to the brutal act. It was a slam dunk case; the jury took less than an hour to convict him of 1st degree felony murder. Lamenting the lack of the death penalty in Michigan, the judge sent Eddie Joe to a maximum security prison for the remainder of his life without the possibility of parole – a measured and appropriate sentence for such a heinous crime. Justice was served… Except for one small problem—Eddie Joe Lloyd was innocent.

The road to Mr. Lloyd's wrongful conviction began with a letter he drafted to the police suggesting that he had pertinent information on the case. The letter was not unique. Eddie Joe was convinced that he had the supernatural ability to solve crimes and wrote letters to the police offering his services on previous occasions. The particular letter that set in motion his wrongful conviction was written from his bed at the Detroit Psychiatric Institute where he was non-voluntarily committed. The police interrogated Eddie Joe on at least three separate occasions at the mental health facility. Mr. Lloyd was never offered a lawyer during these interviews, during which time, as it turned out, the police officers "allowed Lloyd to believe that, by confessing and getting arrested, he would help them 'smoke out' the real perpetrator." They fed him salient information about the crime scene to make his confession more believable.

The high ethical demands of representing a capital case combined with the paltry compensation paid to lawyers in 1985 Detroit left the Wayne County district court two pools of attorneys from which to fulfill Mr. Lloyd's constitutional right to counsel – 1) those who saw accepting court-appointments and zealously defending poor people as part of an attorney's professional and ethical duty to the Bar, despite the significant personal financial loss it imposed; or 2) those who maximized their economic return on court-appointed cases by taking on as many assignments as the courts would allow while disposing of them as quickly as possible. With such a high profile case as this – Detroit had been under curfew in the months that followed the crime – the appointing judge assigned a lawyer who would not put up too many hurdles to getting Mr. Lloyd off the streets and behind bars for good.

Aiding the goal of quick convictions, Wayne County only paid a single flat fee of $150 to court appointed attorneys to cover the entire cost of pre-trial preparation and investigations. In Eddie Joe Lloyd's case, his attorney gave $50 to a convicted ex-felon to serve in the capacity of investigator and pocketed the extra $100 to cover the rest of his pre-trial expenses. Not surprisingly, the "investigator" conducted no independent inquiry into Mr. Lloyd's confession or his mental state. The lawyer too failed to interview both Mr. Lloyd's doctors and his family members about Eddie Joe's history of delusions of grandeur. And no independent investigation of the police canvass of the crime scene occurred – a simple endeavor that would have shown a number of "facts" in Mr. Lloyd's original letter to be incorrect and that later admissions only matched the police's prevailing theory of the case at the time and not the true particulars of the crime. No expert was retained to explain Mr. Lloyd's mental history to the jury or to challenge the state's expert testimony that Eddie Joe was competent despite his non-voluntarily committed status at the state facility. In 1985 Detroit, such defense expert witnesses were rarely granted by the court, and if they were, the measly reimbursement basically eliminated from testifying any decent expert other than one willing to donate his time from testifying. Whether or not Eddie Joe's attorney knew this to be the case from past experience, he never bothered to ask the court for an expert. And, despite the U.S. Supreme Court's ruling in *Miranda v. Arizona*, Lloyd's court-appointed attorney never appropriately challenged at pre-trial hearings the uncounseled custodial interrogations at the mental health facility at pre-trial hearings.

Then, eight days before trial, Eddie Joe Lloyd's attorney suddenly withdrew from the case. But that apparently was a mere inconvenience to the court, which quickly hand-selected another attorney who saw no ethical problem with starting the trial in approximately one week's time, since the original attorney had done "all the necessary" pre-trial work. This second attorney did not even bother to meet with Mr. Lloyd's original court-appointed attorney before trial or to cross-examine on the stand the police officer who was most responsible for Eddie Joe's coerced confession on the stand. In fact, Mr. Lloyd's new defense lawyer did not call a single defense witness to testify. His closing argument clocked in at less than five minutes. Post-conviction, Mr. Lloyd received another court-appointed lawyer to conduct his direct appeal. This one never even bothered to make a cursory visit to Eddie Joe in prison or to raise ineffective assistance of counsel claims against the two trial attorneys. After his direct appeal, Eddie Joe wrote the court to suggest he had not received an adequate defense, an act that spurred his appellate attorney to write a letter to the judge saying that Eddie Joe's claims should not be taken seriously because he was "guilty and should die."

Eddie Joe Lloyd fortunately experienced a few years of freedom after serving 17 years in prison for a crime he did not commit, before passing away from medical complications at the age of 54. Eddie Joe's freedom was secured thanks to the efforts of The Innocence Project – a non-profit legal clinic at the Benjamin N. Cardozo School of Law that handles post-conviction cases where DNA evidence still exists in cases tried before the advent of DNA sciences – working in conjunction with local Michigan attorney Saul Green. For failing to provide an adequate defense up front, Wayne County cost its tax payers $4 million in a settlement agreement with Mr. Lloyd's estate. Sadly, the DNA evidence that completely exonerated Eddie Joe Lloyd has not led to a match on any law enforcement database. More than twenty years after the crime, the whereabouts of the real perpetrator remain unknown.

The Right to Counsel in America

> *"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."*
>
> **U. S. Supreme Court Justice Hugo Black**
>
> *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)

As world events unfold daily in far off places like Afghanistan, Iraq and Pakistan, the words of U.S. Supreme Court Justice Hugo Black speak to the core values that distinguish the United States from those countries under the repression of dictatorships, theocracies and despots. We are different. Unlike tyrannies, the Constitution of the United States of America promises those accused of crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common – whether we are conservative or liberal, white or black, rich or poor. We entrust our government with the administration of a judicial system that guarantees equal justice before the law – assuring victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.

In the case of *Gideon v. Wainwright*, the United States Supreme Court concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty.

The Problem

The Court's "obvious truth" has been obscured or lost at the hands of state governments in the intervening 46 years. Litigation concerning the failure to meet *Gideon's* mandate in state and local jurisdictions is escalating.[1] In 2004, the American Bar Association (ABA) declared that "indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[2]

Both the United States Supreme Court and the United States Department of Justice have indicated that standards should serve as guideposts in the administration and assessment of indigent defense representation to prevent such injustices.[3] The American Bar Association's "Ten Principles of a Public Defense System" distill the voluminous national standards to their irreducible minimum and represent the most widely accepted and used version of national standards for indigent defense.[4] The ABA Principles require, among other things, the institutional independence of the defense function, caseload controls, attorney qualifications, accountability and continuous representation of clients by the same attorney throughout the life of the case.

The failure of most states to enact measurable standards of competency and to monitor compliance has produced justice systems in which results are dictated by a person's income-level and the jurisdiction in which the crime is alleged to have been committed, rather than the factual merits of the case. And, since the overwhelming percentage of criminal cases require publicly-financed lawyers,[5] the failure to adequately fund and effectively administer public defense delivery systems results in too few lawyers handling too many cases in almost every criminal court action in the country. Under this scenario, courts face backlogs of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers' expense. Failing to do the trial right the first time also means endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools and training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

The failings of our nation's right to counsel systems are particularly acute in juvenile courts – where funding is most limited and public defender caseloads most exorbitant. At-risk juveniles, in particular, require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems that increase the risk that they will eventually be brought into the adult criminal justice system. These are commonly children who have been neglected by parents and exist without support structures that channel children in constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he dispose of cases as quickly as possible, the message of neglect and worthlessness continues, and the risk of recidivism and an escalation of misconduct increases.

A Closer Look at Independence

The very first ABA Principle requires independence of the defense function from the judiciary. While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult for even the most well-meaning judges to maintain their neutrality. Having judges maintain a role in the supervision of indigent defense services creates the appearance of partiality -- creating the false perception that judges are not fair arbitrators. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and not on a public defender's desire to please the judge in order to maintain his job. When the public fears that the court process is unfair, people are less inclined to show up for jury duty or to come forward with critical information about crimes.

> *"[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."*
>
> ***Powell v. Alabama***

In far too many regions of the United States, judges either contract directly with attorneys to provide defense services or are given complete authority to assign attorneys to cases without regard to whether the lawyer is qualified to render competent representation. Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to "keeping the judge happy" rather than zealously advocating for their clients. And, in jurisdictions that place a high emphasis on celerity of case processing, the defense attorneys simply understand they are not to do anything that will slow down the pace of disposing of cases, lest they risk the pay that a judge has been able to secure for them. Attorneys learn that filing of motions increases the life of cases – and the judge's displeasure – which in turn leads to fewer appointments or out-right termination of a contract. Over time, the defense attorney is indoctrinated into the culture of the judge's courtroom that triages the responsibilities all lawyers owe their clients. Without regard to the necessary parameters of ethical representation, the caseload creeps higher and higher. The attorney is in no position to refuse the dictates of the judge.

National standards call for the creation of independent, statewide oversight commissions. These commissions should have full regulatory authority to promulgate, monitor and enforce binding standards over the entire indigent defense system. During the past 20 years there has been a slow but steady trend to the creation of such indigent defense commissions across the United States. Currently, 22 states have commissions established to oversee the delivery of the right to counsel statewide; another six have partial commissions covering only a portion of right to counsel services (e.g., an appellate commission).

A National Crisis: State Chief Justices Speak Out

New York

"Having studied published materials and gather information from scores of knowledgeable witnesses, the Commission has convincingly concluded that the existing system [of indigent defense in New York] needs overhaul.... I have not seen the word 'crisis' so often, or so uniformly echoed by all sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties' efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color."

— Chief Judge Kaye, (State of the Judiciary, February 6, 2006)

"Last spring, the Commission on the Future of Indigent Defense Services ... issued its final report unanimously concluding that New York's indigent defense system is in severe disarray and should be replaced with a statewide system governed by consistent regulations and standards. Although most defenders are dedicated and diligent, the Commission documented how the system is so poorly designed, so badly fractured between the State and localities, and so overburdened that only a complete overhaul would suffice."

— Chief Judge Kaye, (State of the Judiciary Message, 2007)

Nevada

"What is particularly alarming to all of us is the constant creep and degradation of funding for the [indigent defense] systems in [rural] communities."

— Chief Justice James Hardesty, (hearing of the Nevada Supreme Court Indigent Defense Commission, January 6, 2009)

New Mexico

"There are three essential parts of the criminal justice system, the courts, the prosecutor, and the defender. I have been quoted in the newspaper as characterizing the criminal justice system as like a three-legged stool.... When one leg is weakened, you know what happens. You end up on the floor. Well, we are not on the floor yet, but we are not far off. The fiscal needs of the public defender are so dire, their situation seems so hopeless, that many times prosecutions cannot go forward due to lack of sufficient personnel. We in the Supreme Court grant extensions in criminal prosecutions every week, by the dozen, most of the time because the public defender is so far behind. I ask for your help, not because we favor criminal defendants over the prosecution, but because without your help, the system will collapse. When that happens, when delay becomes so pervasive, those who suffer the most are the victims of crime, twice victimized if you will, their hope of justice a mere illusion."

— Chief Justice Richard Bosson, (State of the Judiciary Message, January 20, 2005)

Virginia

"The issue of funding for court-appointed counsel has been a major concern for many years ... Court-appointed counsel in Virginia are the poorest paid in the nation, and we must work hard to eradicate this problem."

— Chief Justice Hassell, (State of the Judiciary Message, 2005)

Washington

"Unfortunately, our public defender systems in this state are not in good shape—I wish I could say otherwise, but I can't. Because almost the entire financial responsibility for providing counsel is being borne by local government, we have a situation where no two defender systems in Washington are the same. The result is that we have a crazy quilt of systems. Although the systems in some counties are better than in others, the most common feature that these systems share is public defender caseloads that are too large, a lack of training, and proper supervision for public defenders, and, almost always, a lack of adequate support services. The system, in other words, is broken and in crisis."

— Chief Justice Gerry L. Alexander, (State of the Judiciary Message, January 18, 2005)

North Dakota

"I will not belabor you with all of the deficiencies of our present contract [indigent defense] system other than to underscore that in addition to the conflict of interest resulting from judges operating the indigent defense system, we are woefully underfunded and finding it increasingly difficult to interest attorneys in providing contract services.... Although lack of resources is not the only problem, this lack of funding has exacerbated the flaws inherent in our current system."

— Chief Justice Gerald VanderWalle, State of North Dakota (State of the Judiciary Message, January 5, 2005)

Massachusetts

"[A]ccess to justice in this Commonwealth is not always equal....[O]ur system of representation for criminal defendants is severely strained. We cannot fulfill the constitutional mandate of Gideon unless we provide adequate resources to make that possible. Consider this fact: the average loan burdening a law school graduate is more than twice the annual salary of new prosecutors and public defenders. How can we expect new lawyers to accept and remain in these critical positions when compensation is so low?"

— Chief Justice Margaret Marshall, (Address to the Massachusetts Bar Association, January 24, 2004)

Louisiana

"I admonish you [the State Legislature] to simply do the right thing. Provide for a workable and adequately funded indigent defense system, so that another victim does not have to go through the agony of an overturned conviction and repeat of grueling trial testimony, or so that an innocent person is spared the ordeal of an unjust conviction and punishment."

— Chief Justice Pascal Colagero, (State of the Judiciary Message, May 3, 2005)

Hawaii

"We are, however, finding it increasingly difficult to secure private attorneys who can afford to represent indigent defendants at the current statutory rate. It is clearly insufficient to cover even the most basic overhead expenses, let alone provide appointed-counsel fair compensation for their time... I realize that criminal defense attorneys and those accused of crimes do not have much of a popular constituency, but we need to remember: first, that attorneys perform a vital and necessary role in the administration of justice; second, that persons accused of crimes face the awesome power of the State; and, third, any system of justice worthy of the name must assure that an individual's liberty is not taken away without putting the prosecution's evidence to the time-honored tests of examination, cross-examination, and proof beyond a reasonable doubt. I, therefore, implore you to examine and address this issue during this legislative session before it reaches the kind of constitutional crisis that has occurred and is occurring in other jurisdictions."

— Chief Justice Ronald Moon, (State of the Judiciary Message, January 26, 2005)

Alabama

"I want to make sure poor defendants are getting a good solid criminal defense and that Alabama's tax dollars are being spent wisely... Everyone is entitled to equal justice under the law. We believe that establishing an indigent defense commission will not only make that an inspirational ideal but a true foundation of our court system in Alabama."

— Chief Justice Sue Bell Cobb (August 20, 2008)

A Spotlight on Michigan:
Summary of *A Race to the Bottom* — Speed & Savings over Due Process

The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan's denial of its constitutional obligations has produced myriad public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county – giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one's crime is alleged to have been committed instead of the factual merits of the case – NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

These conclusions were reached after an extensive year-long study of indigent defense services in ten representative counties in partnership with the State Bar of Michigan and on behalf of the Michigan Legislature under a concurrent resolution (SCR 39 of 2006). To ensure that a representative sample of counties was chosen to be studied, and to avoid criticism that either the best or worst systems were cherry-picked to skew the results, NLADA requested that an advisory group be convened to choose the sample counties. Created by SCR 39-sponsor Senator Alan Cropsey, the advisory group was composed of representatives from the State Court Administrator's Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges. Ten of Michigan counties were studied: Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne. The advisory group ensured that the county sample reflected geographic, population, economic and defense delivery model diversity.

The report opens with a retelling of the first right to counsel case in America – the case of the "Scottsboro Boys" in 1932, (*Powell v. Alabama*). Chapter I presents an overview of our findings and concludes that many of the systemic deficiencies identified over three quarters of a century ago in the Scottsboro Boys' story permeate the criminal courts of Michigan today: judges hand-picking defense attorneys; lawyers appointed to cases for which they are unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in public courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trials or sentencings; attorneys violating their ethical canons to zealously advocate for clients; inadequate compensation for those appointed to defend the accused; and, a lack of sufficient time, training, investigators, experts and resources to properly prepare a case in the face of a state court system that values the speed with which cases are disposed of over the needs of clients for competent representation.

Chapter II presents the obligations that all states face under *Gideon v. Wainwright* – the mandate to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation. Unfortunately, the laws of Michigan require county governments to pay for the state's responsibilities under *Gideon* at the trial-level without any statewide administration to ensure adequacy of services rendered. This stands in contradistinction to the majority of states, thirty of which relieve their counties entirely from paying for the right to counsel at the trial-level.

Collectively, Michigan counties spend $74,411,151 (or $7.35 per capita) on indigent defense services; 38 percent less than the national average of $11.86. Michigan ranks 44th of the 50 states in indigent defense cost per capita. The practical necessity of state funding and oversight for the right to counsel is premised on the fact that the counties most in need of indigent defense services are often the ones that least can afford to pay for it. The financial strains at the county level in Michigan have led many counties to choose low-bid, flat-fee contract systems as a means of controlling costs. In low-bid, flat-fee contract systems an attorney agrees to accept all or a fixed portion of the public defense cases for a pre-determined fee – creating a conflict of interests between a lawyer's ethical

duty to competently defend each and every client and her financial self-interests that require her to invest the least amount of time possible in each case to maximize profit. Chapter II ends with a documentation of Michigan's historic, but ultimately ineffective, struggles to implement *Gideon*, including previous reports, case law, state bar actions and pending litigation.

The United States Supreme Court extended the right to counsel to misdemeanor cases in two landmark cases: *Argersinger v. Hamlin* and *Alabama v. Shelton*. The third chapter of the report documents abuses of the right to counsel found throughout Michigan's misdemeanor courts - the district courts. People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to "get out of jail" for time served prior to meeting or being approved for a publicly-financed defense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures. district courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution. In fact, the emphasis on speed of case processing has led one jurisdiction – Ottawa County – to colloquially refer to the days on which the district court arraigns people as "McJustice Day" (their terminology, not ours). Our general observations across the state suggest that the Ottawa local vernacular is apt for describing Michigan's valuing of speed over substance.

The American Bar Association's *Ten Principles of a Public Defense Delivery System* constitute the fundamental standards that a public defense delivery system should meet if it is to deliver – in the ABA's words – "effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." To show the interdependence of the ABA *Ten Principles*, NLADA chose one jurisdiction – Jackson County – around which to explain the importance of the *Principles* and to document how Michigan counties fail to meet them. That analysis, set forth in Chapter IV extensively details how judicial interference impacts attorney workload and performance. In so doing, Jackson County becomes the poster child for reform in the state – not because county officials and policy-makers are inured to the problems of the poor, but because they fail to provide constitutionally adequate services despite their desire to do so.

Chapter V is a documentation of how the other representative counties fail the ABA *Ten Principles* highlighted in the previous chapter. This section begins with an analysis of how Bay County is devolving from a public defender model into a flat-fee contract system because of undue political interference. The chapter also recounts the lack of an adversarial process in Ottawa County, where indigent defense services has devolved to the point where defense attorneys call the prosecuting attorney and ask him to have law enforcement conduct further investigations rather than conducting independent investigations themselves. Despite the overall dedication and professionalism of thousands of citizens employed in the police and prosecution functions in Michigan, it is simply impossible to always arrest and prosecute the right defendant for the right crime and mete out accurate and just sentences in every instance. Without a functioning adversarial justice system, everyday human error is more likely to go undiscovered and result in the tragedy of innocent people being tried, convicted and imprisoned.

In addition, Chapter V discusses many other systemic deficiencies in the delivery of the right to counsel across the state, including:

- The failure of the representative counties to ensure that their public defenders are shielded from undue judicial interference, as required by *Principle 1*. In Grand Traverse County, for example, the judiciary forces public defense attorneys to provide certain legal services for which they are not compensated if they wish to be awarded public defender contracts.
- The failure of the representative counties to manage and supervise its public defense attorneys' workload as required by ABA *Principles 5* and *10*. In Oakland County, one judge indicated that because attorneys are not

barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance and sometimes struggle with. Beyond that nothing is done to ensure the rendering of quality representation.

- The failure of the representative counties to provide public defense attorneys with sufficient time and confidential space to attorney/client meetings as required by *Principle 4*. The district court in Chippewa County, for example, provides no confidential space within which an attorney may meet with clients. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others will talk softly in the corridor.
- The failure of Michigan counties to adhere to ABA *Principles 6* and *9* requiring that public defense attorneys have experience and training to match the complexity of the case. It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers. Even the training provided in the large urban centers is inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against and present scientific evidence and testimony of expert witnesses.
- The failure of the representative counties to provide indigent defense clients with vertical representation, i.e., continuous representation by the same attorney from the time counsel is appointed until the client's case is resolved as recommended in ABA *Principle 7*. Judges in Wayne County, for example, spontaneously appoint attorneys in courtrooms as "stand-ins" when attorneys fail to appear or remove the appointed attorney from the case and appoint an attorney who happens to be in the courtroom.

One of the reasons why *Gideon* determined that defense lawyers were "necessities" rather than "luxuries" was the simple acknowledgement that states "quite properly spend vast sums of money" to establish a "machinery" to prosecute offenders. This "machinery" – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without appropriate resources, the defense is unable to play its role of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching. Chapter VI looks specifically at the ABA *Ten Principles*' call for parity of the defense and prosecution functions. In detailing the great disparity in resources all across the state, the report notes that an NLADA representative had the privilege of attending a conference of the Prosecuting Attorneys Association of Michigan (PAAM) in which prosecuting attorneys made presentations on how prosecutors are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult. The deficiencies of the prosecution function highlight how exponentially worse is the underfunding of the defense function.

Conclusion

Although the Sub-Committee Hearing focuses on the Sixth Amendment crisis in Michigan, NLADA could have focused on the crises related to public defender work overload in Kentucky, Tennessee, Missouri or Florida, or the lack of enforceable standards in Mississippi, Maine, Arizona, Utah or South Dakota. Our focus could have been on the difficult decisions county managers face in Ohio or Nevada when state government continually breaks promises of financial support for the right to counsel or the way elected officials unduly impact the independence of defense providers in Illinois or New Mexico. We could have discussed the prevalence of flat fee contracts in rural California, or highlighted how a judge in Pennsylvania financially benefited from unfairly sending juveniles to detention centers, in part, because of the failure of the defense function to effectively advocate for its clients in a state that has washed its hands entirely of its constitutional obligations under *Gideon*. Instead of focusing on Michigan, this could just have easily been a hearing on the failure of state policy-makers in

New York to ensure *Gideon's* promise in the hundreds of town and village courts, despite the passage of three years since New York's then-Chief Justice Kaye declared the system in crisis and in need of a complete overhaul.

Our constitutional rights extend to all of our citizens, not merely those of sufficient means. The majority of people requiring appointed counsel are simply the unemployed or underemployed – the son of a co-worker, the former classmate who lost her job, or the member of your congregation living paycheck-to-paycheck to make ends meet. Though we understand that policy-makers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed due to insufficient funds.

About NLADA

The National Legal Aid & Defender Association (NLADA) is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

NLADA serves the equal justice community in two major ways: providing first-rate products and services and as a leading national voice in public policy and legislative debates on the many issues affecting the equal justice community. NLADA also serves as a resource for those seeking more information on equal justice in the United States. For more information visit www.nlada.org.

1 The ACLU successfully sued the State of Connecticut in Rivera v. Rowland, resulting in significantly increased the staff of the state's public defender system, doubling the rates of compensation paid to special public defenders and substantial enhancement of training, supervision and monitoring of state public defender attorneys. See: www.aclu.org/criminjustice/gen/10138prs19990707.html?s_sec=RSSS. The ACLU also successfully sued Allegheny County, Pennsylvania (Pittsburgh) resulting similar reform in the settlement decree for Doyle v. Allegheny County Salary Board. In 2004, NACDL filed a class action lawsuit against the State of Louisiana alleging systemic denial of counsel in Calcasieu Parish (Anderson v. Louisiana). For more information see: "Justice Failing in Calcasieu Parish: Lawsuit Seeks Systemic Reform and Relief for Defendants Deprived of Constitutional Rights." In Lavallee, et al., v. Justices in the Hampden Superior Court, et al., 442 Mass. 228, SJC-09268 (Massachusetts) See: www.masslawyersweekly.com/signup/gw/Fulltext.cfm?page=ma/opin/sjc/1013904.htm. New York City and State were sued in 2002 for claims relating to the low rate of compensation paid to assigned counsel who represent minors and indigents in both family and criminal actions in New York County Lawyers' Association v. State, 763 N.Y.S.2d 397, 414 (N.Y. Sup. Ct. 2003). Quitman County, an impoverished Delta community, sued Mississippi in 1999, alleging that the state law requiring local governments to pay for indigent defense was a violation of the U.S. Constitution and the Mississippi Constitution. The state supreme court rejected the county's contention, however, and refused to find unconstitutional the state's failure to provide any funding for indigent defense.

2 American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise* available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

3 Wiggins v. Smith, 539 US 510 (2003) and Rompilla v. Beard 545 US 374 (2005).

4 American Bar Association, Ten Principles of a Public Defense System, from the introduction, at: http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprincipletbookfinal.pdf.

5 Throughout our country, more than 80% of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, Defense in Criminal Cases at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, Indigent Defense at 1 (1996). See generally: Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997).

Mr. SCOTT. Thank you.
Ms. Diehl?

TESTIMONY OF NANCY J. DIEHL, PAST PRESIDENT OF THE STATE BAR OF MICHIGAN, AND CHIEF OF THE TRIAL DIVISION, WAYNE COUNTY PROSECUTOR'S OFFICE, DETROIT, MI

Ms. DIEHL. Let me try that again. Good morning, thank you to Chairman Conyers, Subcommittee Chair Scott, Ranking Member Gohmert and all of the Members of the Subcommittee for convening this very important hearing. I am Nancy Diehl and I am

honored to be here today on behalf of the Wayne County Prosecutor's Office, Detroit, Michigan, as well as on behalf of the State Bar of Michigan as a former president.

You could say that the reason I am a prosecutor is because of Perry Mason. I grew up on Perry Mason. He defined the role of defense attorneys for years. Each show ended with justice being served. When I was in high school, when I knew I was going to be a lawyer, I knew that I would be a defense attorney. He had inspired me to right the wrongs by defending the accused. I started at the Misdemeanor Defenders Office while I was in law school and continued there as a lawyer when I graduated in 1978.

I learned defense strategy in the depths of the Detroit criminal court building—the Frank Murphy Hall of Justice. But I also learned that it was the prosecutor who seemed to wield an awful lot of power in the courtroom. My dream of righting wrongs seemed to be better suited on the other side. To make a long story short, I was appointed an assistant Wayne County prosecutor in 1981.

Because our system of American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the arresting officers' tactics, the police investigation, the lawfulness of any search and seizure, the eyewitness identification procedure, credibility of evidence and prosecutor's theory of a case. Arguably, it is because of this strong adversarial process that the United States is in the forefront of cutting-edge public safety technologies, like DNA, technologies that help to exonerate the innocent and to convict the guilty. However, in many jurisdictions in our country and certainly in the state of Michigan, we are lacking these checks and balances.

In Michigan, the present fee structure in Wayne County does not appropriately compensate defense lawyers. The common lament from the lawyers is that the plan does not reimburse adequately for the time necessary to prepare, interview witnesses and to handle the trial. When you look at the present fee schedule and take a look at the typical time it takes for a lawyer to handle a capital case—it is a case with a life maximum—it ends up working out to approximately $10 an hour.

That is just unfair, and that unfair compensation has resulted in the Wayne County experienced lawyers refusing to take any assigned cases at all or severely limiting the number of cases that they are willing to take. The present fee schedule also encourages abuse. It forces the lawyers to take on too many cases in order to earn enough money to support themselves, and they don't have the time to effectively represent their clients.

When there is an inadequate defense, bad things can happen. If the defense is ineffective, evidence may be admitted that should not have been. If proper preparation and cross-examination are lacking, an innocent person may be convicted. If the wrong person is convicted, it means a guilty person remains free to continue to commit crimes. An unskilled defense attorney also puts an additional burden on an already too burdened prosecutor. It becomes part of our responsibility to try to watch out for the rights of the accused.

Ineffective representation also prolongs the appellate process. Cases are drawn out over long periods of time. Cases are reversed

based on ineffective assistance of counsel. Prisoners remain incarcerated for crimes they did not commit. New trials are granted. There is no closure for victims and their families; their wounds are reopened. Memories fade and justice is less likely to be served.

In closing, let me state that our criminal justice system works best with both a strong prosecution and a strong defense. This ensures that the rights of all citizens are protected.

In these most challenged economic times, prosecutors themselves are increasingly strapped for resources that we need to be effective. As stated in the NLADA June 2008 report, "A Race to the Bottom," "It is our general observation that prosecuting attorneys in Michigan are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult."

Prosecutors and defenders both need additional resources to ensure that the criminal justice system operates fairly and appropriately. To uphold our Nation's principles of law and to promote public safety, we must come together and find a remedy that adequately funds both. Justice demands no less.

Thank you.

[The prepared statement of Ms. Diehl follows:]

PREPARED STATEMENT OF NANCY J. DIEHL

KYM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

1200 FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226-2302

TEL: (313) 224-5777
FAX: (313) 224-0974

TESTIMONY

NANCY J. DIEHL
CHIEF, TRIAL DIVISION, WAYNE COUNTY PROSECUTOR'S OFFICE
PAST PRESIDENT, STATE BAR OF MICHIGAN (2004-2005)

SUBCOMMITTEE ON CRIME, TERRORISIM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY
of the
U.S. HOUSE OF REPRESENTATIVES

Hearing on Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?

March 26, 2009

Letterhead printed in-house.

KYM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

1200 FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226-2302

TEL: (313) 224-5777
FAX: (313) 224-0974

What if You Can't Afford Perry Mason?
A Prosecutor's Role in Ensuring Justice

I want to start by expressing my gratitude to the Chairman of the Judiciary Committee, Representative John J. Conyers, Jr.; the Subcommittee Chair, Representative Robert C. Scott; the Ranking Member, Representative Louie Gohmert; and the Members of the Subcommittee for convening the very important hearing today on the Representation of Indigent Defendants in Criminal Cases. I am Nancy Diehl and am honored to appear before you today on behalf of the Office of the Prosecuting Attorney in the County of Wayne, Michigan. I also appear today as a past President of the State Bar of Michigan.

You could say that the reason I am a prosecutor is because of Perry Mason. I grew up on Perry Mason, who for years defined the role of defense attorneys. Each show ended with justice being served. In high school when I decided I was going to be a lawyer, I knew that I would be a defense attorney. Perry Mason had inspired me to right the wrongs by defending the accused. I started at the Misdemeanor Defenders Office while still in Law School and continued there as a lawyer after graduation in 1978. I learned defense strategy in the depths of the Detroit criminal court building—the Frank Murphy Hall of Justice. But I also learned that the prosecuting attorney seemed to wield a lot of power in the courtroom. My dream of righting wrongs seemed to be better carried out on the other side! Long story short, I was appointed an Assistant Wayne County Prosecutor in 1981.

Because American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the arresting officers' tactics, the police investigation, the lawfulness of any searches and seizures, the credibility of the evidence, and the district attorney's theory of the case to improve the overall quality and effectiveness of law enforcement itself. Arguably, it is because of a strong adversarial process that the United States is in the forefront of cutting edge public safety technologies – like DNA evidence – that help to exonerate the innocent while convicting the guilty. In many jurisdictions in this country, we have lost such checks and balances.

The present Wayne County fee schedule does not appropriately compensate defense attorneys. The common lament is that the plan does not reimburse adequately for the time necessary to prepare, interview witnesses, and handle the trial. The present fee schedule for time spent on defending capital cases (penalty is life) works out to be somewhere around $10.00 an hour! This unfair compensation has resulted in Wayne County experienced defense lawyers no longer willing to accept any assigned cases

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KYM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

1200 FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226-2302

TEL: (313) 224-5777
FAX: (313) 224-0974

or severely limiting the number of cases they are willing to take on. The present schedule also encourages abuse. It forces lawyers to take too many cases in order to earn enough money to support themselves, and they are not able to effectively represent all of their clients.

When there is an inadequate defense, bad things can happen. If the defense is ineffective, evidence may be admitted that should not have been. If proper preparation and cross-examination are lacking, an innocent person may be convicted. If the wrong person is convicted, a guilty person remains free to continue to commit crimes. An unskilled defense attorney puts an additional burden on an already too burdened prosecutor. It means that the prosecutor must try to watch out for the rights of an accused. Ineffective representation also burdens the appellate process. Cases are drawn out over long periods of time. Cases are reversed based on ineffective assistance of counsel. Prisoners remain incarcerated for crimes they did not commit. New trials are granted. There is no closure for victims and their families. Their wounds are reopened. Memories fade and justice is less likely to be served.

In closing, let me state that our criminal justice system works best with both a strong prosecution and a strong defense. This insures that the rights of all citizens are protected. In these most challenging economic times, prosecutors themselves are increasingly strapped for the resources required to be effective.

As stated in the National Legal Aid & Defenders Association (NLADA) June 2008 report, ***A Race to the Bottom***:

> *It is our general observation that prosecuting attorneys in Michigan are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult.*

Prosecutors and defenders both need additional resources to ensure that the criminal justice system operates fairly and appropriately. To uphold our nation's principles of law and to promote public safety, we must come together and find a remedy that adequately funds both. Justice demands no less.

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Mr. SCOTT. Thank you.
Mr. Luna?

TESTIMONY OF ERIK LUNA, PROFESSOR, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, LEXINGTON, VA

Mr. LUNA. Thank you, Chairman Conyers, Subcommittee Chairman Scott, Ranking Member Gohmert, Members of the Committee and Subcommittee. I appreciate the opportunity to speak with you today.

I want to begin by expressing my agreement with much of the critical commentary in this area, including the opinions of my fel-

low panelists. There are American jurisdictions where the accused receives the facade of legal representation, which at best meets the letter of *Gideon* but certainly not its spirit, and at worst it fails to maintain even the pretense of constitutional compliance.

The ABA and other organizations have proposed solutions to the problems of indigent defense that are, by and large, unobjectionable, placing the onus on elected and appointed officials of the relevant states. After all, state and local governments are the ones who are directly responsible for the current dilemma, and they have the power to solve it by providing the necessary resources for defense counsel, by paring down their bloated penal codes and reducing lengthy sentences and by being more prudent in the enforcement of criminal laws on the street and in courtrooms.

I have concerns with one recommendation, however, the notion that Congress should become directly involved presumably by funding indigent representation in state criminal justice systems. This might sound like a good idea, but it may be motivated by a widely held and erroneous assumption, namely that any crisis in America necessarily requires congressional action. Indeed, there are circumstances when Federal involvement might not only fail to improve a particular problem but may exacerbate a larger structural infirmity.

To help conceptualize this issue, let us consider the congressional funding of indigent defense in a given jurisdiction as a sort of bailout. Although nowhere near as provocative as the recent corporate bailout, a sixth amendment bailout has a particular troubling aspect. The primary bailee, state legislatures, have it within their means to meet their constitutional obligations but have chosen not to do so, doubtlessly because such actions would be viewed as bad politics.

There is a real question of fairness if the Federal Government were to bail out states that have failed to hold up their constitutional responsibility. Why should citizens in a state that meets its sixth amendment-based financial obligations have to pay for the state that does not? Under many circumstances, it would be unthinkable for the Federal Government to provide funding to a state precisely because it violates the constitution.

Imagine, for example, a county sheriff's department that has the ability to provide inmates adequate food, clothing, shelter and so on but refuses to do so for political reasons. The appropriate response would not be to provide the sheriff Federal funds so that he may maintain humane conditions of confinement. Instead, he should be given an ultimatum: meet the constitutional requirements or face, among other things, civil rights litigation.

A congressional bailout in the current context may also create a perverse set of incentives. If a given state does not bear the full cost of its criminal justice decisions, instead is able to externalize a politically disagreeable expense on another entity, in this case passing along the funding of state indigent defense to the Federal Government, state officials may have little incentive to temper their politically self-serving decisions that overextend the criminal justice system. And along the way, a troubling precedent is set for those states that have, in fact, met their financial obligations.

Now, this is more than just a public policy question. It is an issue of federalism, a basic constitutional principle that limits the power of the national government and prevents Federal interference with the core internal affairs of the individual states, including the ordinary administration of justice.

Federalism is not a law-and-order, anti-defendant, political gimmick but instead applies to all forms of Federal involvement in state affairs, whether Congress wants to incentivize or even command local police and prosecutors to pursue particular crimes or instead seeks to fund and possibly direct indigent representation in state courts. There are numerous arguments in favor of federalism in this area, such as the value of local decision-making in a pluralistic society, where citizens of different jurisdictions are likely to have distinct views on the substance and process of criminal justice.

Federalism and its allied doctrine, the separation of powers, create multiple levels of government, all duty bound to the people rather than to each other. This provides structural checks on every level of government, preventing the accumulation of too much power in too few hands, a problem that may not seem relevant here but all too often manifests itself in the criminal justice system.

Now all of this may be cold comfort for indigent defendants and their counsel in financially delinquent states. But to be absolutely clear, federalism in no way relieves a jurisdiction of its obligations to comply with other constitutional principles, such as the right to counsel.

So let me reiterate: the states can and must ensure that criminal defendants receive the type of representation demanded by the sixth amendment. And that said, Congress can play a meaningful but limited role, as evidenced by today's laudable hearing. It also can provide a role model function by paring back its own criminal justice system by reducing the over 4,500 or near 4,500 Federal crimes in the U.S. Code, especially those that duplicate state laws or dispense with traditional constraints on culpability and as well as reforming the Federal sentencing system that is in dire need of overhaul.

And by doing that, Congress would be providing a valuable and perfectly constitutional service to the states. The Federal Government would be a role model, not a dictator or an underwriter.

Again, thank you for the opportunity to speak today, and I look forward to answering any questions that you may have.

[The prepared statement of Mr. Luna follows:]

PREPARED STATEMENT OF ERIK LUNA

Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?

Testimony of

Erik Luna
Professor of Law, Washington and Lee University School of Law
Adjunct Scholar, The Cato Institute

Before the

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary
United States House of Representatives

Delivered on

March 26, 2009

Chairman Scott, Ranking Member Gohmert, and Members of the Committee and Subcommittee, thank you for the opportunity to speak today on the subject of the representation of indigent defendants in criminal cases. My name is Erik Luna, and I am a law professor at Washington and Lee University School of Law and an adjunct scholar with the Cato Institute.[1] I specialize in criminal law, criminal procedure, and allied areas of law and public policy. In my allotted time, I will briefly discuss some concerns about the possibility of federal involvement in the criminal defense function in state criminal justice systems.

1. THE CONDITION OF INDIGENT DEFENSE REPRESENTATION

To begin, however, it is important to express my agreement with much of the critical commentary in this area, including the opinions of my fellow panelists. There are American jurisdictions where the accused receives the facade of legal representation, which at best meets the letter of *Gideon*[2] but certainly not its spirit, and at worst fails to maintain even the pretense of constitutional compliance.

The report that inspired today's hearing paints a somber picture of indigent defense in Michigan.[3] Some of the problems are directly attributable to parsimonious decision-making, including inadequate attorney compensation and the lack of resources for investigators, expert witnesses, and support staff. Other problems are derivative of deficient funding, such as excessive caseloads for defense lawyers and the absence of meaningful training programs. Still other problems may have some loose causal connection to insufficient funding but are more properly ascribed to individual behavior and structural choices – grossly incompetent and unethical lawyering, for instance, or undue judicial involvement and interference with the defense function.

Michigan is not alone, however, as chronicled in a series of reports commissioned or written by the American Bar Association and its Standing Committee on Legal Aid and Indigent Defendants (ABA Standing Committee).[4] The accounts are disconcerting to those who care about criminal justice, describing in detail the state failures to meet the basic principles of public defense delivery systems enumerated by the ABA and analogous state bodies.[5] Although one might quibble with some of the assertions made by the authors, by and large the reports and principles are unobjectionable, as are most of the proposed solutions to the problems of indigent defense.

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[1] All opinions expressed and any errors herein are my own.

[2] Gideon v. Wainwright, 372 U.S. 335 (1963).

[3] NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN, A RACE TO THE BOTTOM SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (June 2008).

[4] *See* ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS (Dec. 2004). *See also* "State and Local Indigent Defense Studies & Reports," ABA Standing Committee on Legal Aid and Indigent Defendants, *available at* www.abanet.org/legalservices/sclaid/defender/reports.html#sta.

[5] See, e.g., ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002); STATE BAR OF MICHIGAN, ELEVEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Apr. 2002).

2. REPORT RECOMMENDATIONS

The ABA Standing Committee has recommended that state governments increase their funding for indigent representation and provide resource parity between prosecutors and defense attorneys.[6] Likewise, the Michigan report calls upon state government to fulfill its financial responsibility for indigent representation rather than passing on the bill to the individual counties.[7] Other recommendations are not explicitly fiscal in nature, although their dictates may involve funding of some sort: the creation of state organizations to provide oversight of indigent defense, the obligation of defense counsel to refuse excessive caseloads, the elimination of judicial interference or even vindictiveness against defense counsel, and the active involvement of state and local bar associations in evaluating, monitoring, and reforming indigent defense systems.[8]

In general, the recommendations mirror the problems detailed in the reports. They also place the onus to act upon the entities most liable for the current status quo. For instance, state bar associations often are responsible for licensing attorneys and ensuring their continued education and compliance with ethical and legal standards. In such cases, bar associations must accept at least part of the blame for system-wide failures of professional responsibility in indigent representation – and in the end, they may be in the best position to remedy such failures.[9]

The most culpable entities, however, are the elected and appointed officials of the relevant states. They are the ones who fail to provide sufficient funds for indigent representation and enact the sometimes dubious criminal laws and punishments that fill state penal codes. Likewise, state and local officials make the choices that overload the system with arrests and prosecutions. These officials also have the power to provide the necessary resources for defense counsel, to pare back their bloated penal codes and reduce lengthy sentences, and to be more prudent in the enforcement of criminal laws on the streets and in courthouses.

Within constitutional constraints, state officials ought to be encouraged to meet their obligations, whether by increasing funding of indigent representation or by reducing the number of criminal cases and thus the need for defense counsel. If they refuse to do so, these officials should be held to answer in the appropriate tribunal pursuant to a simple but essential ideal: A jurisdiction may not deprive individuals of their liberty through a process that denies basic rights, including the Sixth Amendment right to counsel.

Along these lines, today's hearing may serve a laudable agenda: investigating the problem of indigent representation in state criminal justice, placing the spotlight on those states with deficient systems and encouraging them to comply with their constitutional obligations, and even providing fodder for judicial decision-making. I would like to raise some concerns, however, if the objectives of the hearing prove far broader. Specifically, the ABA Standing Committee has recommended that the federal government provide substantial financial support for indigent

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[6] GIDEON'S BROKEN PROMISE, *supra*, at 41.

[7] *See* RACE TO THE BOTTOM, *supra*, at 1-13.

[8] *See* GIDEON'S BROKEN PROMISE, *supra*, at 42-45.

[9] Admittedly, law schools bear some blame and should also be called upon to provide solutions.

representation in state criminal justice systems, including the creation of what looks to be a rather large entity to administer these funds.[10]

3. SIXTH AMENDMENT BAILOUT

On its face, federal funding might appear to be a sound public policy to address the dilemma of indigent representation in various places around the nation. But it may be motivated by a widely held and erroneous assumption, namely, that a crisis in America necessarily requires congressional action. Indeed, there are circumstances where federal involvement might not only fail to improve a particular problem but may also exacerbate a larger structural infirmity. To help conceptualize the issue, let's consider congressional funding of indigent defense in a given jurisdiction as a sort of *bailout*. This may be a loaded term in the current state of affairs, but such action would meet the basic definition: one entity (the federal government) rescuing another entity (a state) from its financial distress.

The institutional beneficiaries of a Sixth Amendment bailout, state lawmakers, are not viewed with the jaundiced eye currently focused on corporate America. Nonetheless, a bailout of those states that fail to meet their constitutional duties has a distinctly troubling aspect, given that they could meet their obligations by: [1] fully financing indigent representation through increased taxes or the diversion of funds allocated for other items; or [2] reducing the number of defendants and thus the need for indigent representation by means of decriminalization, diversion, lower sentences, and tempered enforcement. The states have chosen neither option, however, doubtlessly because such actions are viewed as bad politics.

There is a real question of fairness if the federal government were to bail out states that have failed to hold up their constitutional responsibilities: *Why should citizens in a state that meets its Sixth Amendment-based financial obligations have to pay for a state that does not?* Under most circumstances, it would be curious (if not perverse) for the federal government to provide funding to a state precisely because it violates the Constitution. Imagine, for instance, a county sheriff's department that has the ability to provide jail inmates adequate food, clothing, shelter, and so on, but refuses to do so for political reasons. Or imagine a police department that systematically violates the Fourth Amendment rights of pedestrians and motorists. The appropriate response would not be to provide these entities federal funds to, respectively, maintain humane conditions of confinement and refrain from conducting illegal searches and seizures. Instead, they should be given an ultimatum: Meet the constitutional requirements or face, among other things, civil rights litigation.

In its title, the Michigan report uses the phrase "race to the bottom," presumably in reference to the tendency of counties to use the least expensive and most efficient means of providing indigent representation. However, a different set of incentives might arise from congressional funding of state indigent representation. If a given state does not bear the full costs of its criminal justice decisions and instead is able to externalize a politically disagreeable expense on another entity – in this case, passing along the funding of state indigent defense to the federal government – state officials may have little incentive to temper their politically self-serving decisions that extend the criminal justice system. In a worst-case scenario, those states

[10] GIDEON'S BROKEN PROMISE, *supra*, at 41-42.

that have met the constitutional requirements may be tempted to skimp on their own budgeting for indigent representation with an eye toward receiving federal support.

To be sure, these are only broad and somewhat abstract public policy considerations, stated in the absence of a concrete budget proposal, not the inexorable results of federal funding for state indigent defense. Opposing arguments may point to hopelessly dysfunctional political processes at the state level, for instance, or various legislative techniques that might avoid perverse incentives for funding recipients. My mind remains open on this issue, and, of course, the devil of any legislation would be in its details. Nonetheless, Congress should consider the unintended consequences and inter-jurisdictional equity of absorbing the costs owed by a given state, resulting from the political choices and neglect of its officials, when that state can and, in all good conscience, should pay the bill.

4. FEDERALISM

Another concern involves the constitutional principle of federalism. Grounded in the text and context of the nation's charter, federalism limits the powers of national government and prevents federal interference with the core internal affairs of the individual states. As James Madison famously wrote in *The Federalist No. 45*, the powers delegated to the federal government would be "few and defined,"

> exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[11]

Federalism was enshrined in the U.S. Constitution by specifically enumerating the powers of the federal government[12] and declaring that all other powers were "reserved to the States respectively, or to the people."[13] Since the founding, the Supreme Court has stated on a number of occasions that the federal government does not have a general police power.[14]

Among the areas that the Framers sought to reserve to the states was "the ordinary administration of criminal and civil justice."[15] The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism.[16] In fact, it was unthinkable to the Framers that the federal government would adopt a full-scale penal code, let alone displace or otherwise interfere with the state criminal justice systems.[17] As Chief Justice John Marshall would later opine, Congress "has no general right to punish murder committed within any of the State," and "it is clear that Congress cannot punish felonies

[11] THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

[12] *See* U.S. CONST. art. 1, §8.

[13] U.S. CONST. amend X.

[14] *See, e.g.*, Brown v. Maryland, 25 U.S. 419, 443 (1827); United States v. Lopez, 514 U.S. 549, 566 (1995).

[15] THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[16] *See* U.S. CONST. art. 1, §8, cl. 6 (counterfeiting); U.S. CONST. art. 1, §8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations); U.S. CONST. art. 3, §3 (treason).

[17] *See, e.g.*, RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983).

generally."[18] In more recent times, the Supreme Court has reiterated these limitations on federal involvement in local criminal justice matters, given that the "[s]tates possess primary authority for defining and enforcing the criminal law." As such, constitutional concerns are raised whenever Congress effects "a significant change in the sensitive relation between federal and state criminal jurisdiction."[19]

There are numerous arguments in favor of federalism in this area. In a pluralistic society like ours, citizens in different jurisdictions are likely to have distinct views on the substance and process of criminal justice. State and local decision-makers are more likely to be attuned to such preferences, given their closeness to constituents and the greater opportunity of citizens to be involved in state and local government, including the legal system. Unencumbered by national dictates, states may even become laboratories of experimentation in criminal justice. In the oft-repeated words of Justice Louis Brandeis, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[20] Should individuals find unbearable the local or state approach to crime and punishment, federalism allows them to vote with their feet, so to speak, by moving to another county or state.

These benefits may be impeded by federal interference with state criminal justice systems, which inevitably implicate norms and values that vary by jurisdiction. Most importantly, it may jeopardize "the principal benefit of the federalist system,"[21] the protection of individual liberties. Federalism and its allied doctrine, the separation of powers, create multiple layers of government, all duty-bound to the people rather than to each other. This provides a structural check on every level of government, preventing the concentration of power and the ensuing danger of oppression. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[22]

All of this may be cold comfort for indigent defendants and their counsel in financially delinquent states. But to be clear, federalism in no way relieves a jurisdiction of its obligations to comply with other constitutional principles, such as the right to counsel. So let me reiterate: The states can and must ensure that criminal defendants receive the type of representation demanded by the Sixth Amendment. What federalism restricts is the involvement of Congress in the internal affairs of the states, allowing each jurisdiction to make independent decisions that comport with citizen preferences, including those with regard to crime and punishment. Above all, it checks tyranny by preventing the accumulation of too much power in too few hands, a problem that may not seem relevant here but all too often manifests itself in criminal justice systems.

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[18] Cohens v. Virginia, 18 U.S. 264, 426, 428 (1821).

[19] *Lopez*, 514 U.S. at 561 n.3 (internal citations omitted).

[20] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[21] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[22] *Id. See also Lopez*, 514 U.S. at 553.

5. CONCLUDING THOUGHT

I would like to conclude today with a recommendation of my own: The federal government should drastically downscale its criminal justice portfolio, including the funding it provides state and local law enforcement. Federalism is not a law-and-order, anti-defendant political gimmick. It is a fundamental principle, grounded in the Constitution, that restricts federal involvement in state affairs, whether Congress wants to incentivize and even command local police and prosecutors to pursue particular crimes or instead seeks to fund indigent representation in state courts.

In turn, I would encourage Congress to reexamine the federal criminal justice system. According to a recent estimate, there are at least 4,450 federal crimes in the U.S. Code,[23] a number that would be outrageous in a jurisdiction with a general police power. Particularly troubling are those crimes that duplicate state laws or dispense with traditional constraints on culpability, such as a *mens rea* requirement.[24] Moreover, the federal sentencing is in dire need of a make-over to replace the virtually incomprehensible U.S. Sentencing Guidelines scheme as well as the inflexible and often draconian mandatory minimum sentences.[25]

By reforming the federal criminal justice system, Congress would be providing a valuable and perfectly constitutional service to the states – the federal government as role model, not dictator or underwriter.

Again, thank you for the opportunity to speak today, and I look forward to answering any questions you may have.

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[23] John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26, June 16, 2008, *available at* www.heritage.org/Research/LegalIssues/upload/lm_26.pdf. *See also* ABA TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998).

[24] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AMERICAN UNIVERSITY LAW REVIEW 704 (2005).

[25] *See, e.g.*, Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 25 (2005).

Mr. SCOTT. Thank you.
Ms. Thomas?

TESTIMONY OF REGINA DANIELS THOMAS, CHIEF COUNSEL, LEGAL AID AND DEFENDER ASSOCIATION JUVENILE LAW GROUP, DETROIT, MI

Ms. THOMAS. Good morning, I would like to thank Chairman Conyers, Subcommittee Chair Rob Scott, Ranking Member Gohmert and Members of the Subcommittee for holding this hearing today. I am Regina Daniels Thomas and I am honored to appear on behalf of the Legal Aid and Defender Association of Detroit, Michigan.

In most counties where counsel is provided for juveniles, the system compromises on a daily basis the ability of attorneys to provide adequate and competent representation. Society has already recognized that children are different and incompetent to make decisions about a number of life issues.

Add this reality to the fact that the children who find themselves in juvenile court come from some of the most challenging backgrounds, and you have a recipe for disaster. Our clients come from educational environments that are failing them; communities where violence occurs regularly; environments of abuse and neglect. Our clients also have to deal with poor health, mental illness and domestic violence.

The children and families we see in court are surviving, not living. They are not savvy when it comes to the juvenile justice system, and they lack the knowledge to navigate the system to achieve successful outcomes. I would like to tell you what happens on a daily basis in our juvenile court.

On a typical day in juvenile court, you will find hundreds of children and parents attempting to navigate a system which is already operating at full capacity. Attorneys are handed a stack of files and told, "these are your cases for the day." Attorneys meet their clients in the hallways if they are not in custody and in holding if they are in custody, in an area that is not private, no matter what the offense is.

Both of these meetings are superficial, and the amount of time that is spent is limited. The amount of information that is gathered is minimal at best and does not take place in an environment that is confidential. These meetings are further limited by the court's desire to move cases forward as quickly as possible.

Based upon these meetings, attorneys have to help their clients decide very quickly and with very little information how to proceed on a case. The attorneys must also determine if there are any mitigating circumstances or viable defenses. Is the client competent? And what, if any, are the collateral consequences of a child-client being found responsible?

Most of these answers to these questions can be garnered with proper time and adequate training, but that is not what is taking place in Michigan. Attorneys are expected to, on a daily basis, do exactly what *Gideon* doesn't stand for.

I have personally encountered children with cognitive deficiencies who have pled to offenses where I have, after meeting them, questioned their competency. One young man in particular was charged with unarmed robbery. The charging document described the incident as one in which the child-client put his hand in the pocket of

a schoolmate and took $3 and a cell phone. This was his second offense, and he was already a committed youth.

A cursory review of the court file yielded information that the young man had been involved in a serious car accident some years prior and did in fact have a closed-head injury which caused him to be cognitively impaired. One specific area which was affected was his impulse control. Despite the fact that this child was already a committed youth, I believe the issue of competency needed to be addressed.

The court disagreed and pointed to the fact that the client had already pled responsible to the charge of unarmed robbery on a previous occasion. This young man required treatment intervention beyond what is typically available within the juvenile justice system, but with limited options to divert this case to a more appropriate forum, the county and the state have undertaken the responsibility to provide services.

The lack of competent representation is not specific to court-appointed attorneys in juvenile delinquency cases. I have also personally observed retained counsel have a child-client with organic brain damage plead to an offense as charged because he had cases in another courthouse and wanted to resolve the matter as quickly as possible.

While these cases on their face seem extreme, this sort of thing occurs on a routine basis, particularly in cases where developmental delays are not immediately apparent. There is also a problem with continuity of representation. In the current system, particularly in the largest county in the state of Michigan, a child will meet a minimum of two attorneys prior to his actual court date.

All of these issues have created what I call a perfect storm for our clients. Adequate, competent advocacy during and after trial increases the odds of clients involved in the juvenile justice system to succeed once they reach adulthood. Without adequate, competent representation, the chips are being stacked against these children in an environment where involvement in the juvenile justice system is no longer confidential and rehabilitative but is open and punitive.

And the consequences of being involved are increasing, consequences such as being unable to enter the armed forces, the inability to enter a nursing program, problems with immigration status, the inability to apply for certain types of jobs and even the inability to take advantage of advanced educational opportunities. These consequences are preventing children from being able to become productive adults living successful lives.

Thank you.

[The prepared statement of Ms. Thomas follows:]

PREPARED STATEMENT OF REGINA DANIELS THOMAS

ORAL TESTIMONY

REGINA DANIELS THOMAS
CHIEF COUNSEL – JUVENILE LAW GROUP
LEGAL AID AND DEFENDER ASSOCIATION, INC.

SUBCOMMITTEE ON CRIME, TERRORISIM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY
of the
U.S. HOUSE OF REPRESENTATIVES

Hearing on Representation of Indigent Defendants in Criminal Cases:
A Constitutional Crisis in Michigan and Other States?

March 26, 2009

I sincerely thank the Chairman of the Judiciary Committee, Representative John J. Conyers, Jr.; the Subcommittee Chair, Representative Robert C. Scott; the Ranking Member, Representative Louie Gohmert; and the Members of the Subcommittee for holding the hearing today on the Representation of Indigent Defendants in Criminal Cases. I am Regina Daniels Thomas and am honored to appear before you today on behalf of the Legal Aid and Defender Association, Inc. of Detroit, Michigan.

In those counties where counsel is provided the system compromises on a daily basis the ability of attorneys to provide adequate and competent representation. Competent representation means that an attorney trained in the nuances of juvenile representation has resources to actually defend the case and a caseload that will allow the attorney to do the work that is required to provide zealous advocacy for children who find themselves charged with a delinquent act in Michigan.

Society has already recognized that children are different and incompetent to make decisions about a number of life's issues. Add this reality to the fact that the children who find themselves in Juvenile Court come from some of the most challenging backgrounds and you have a recipe for disaster. Our clients come from educational environments that are failing them, communities where violence occurs regularly, and environments of abuse and neglect. Our clients also have to deal with issues of poor health, mental illness and domestic violence. The children and families we see in court are surviving not living. They are not savvy when it comes to the Juvenile Justice System and they lack the knowledge to navigate the system to achieve successful outcomes.

A typical day in juvenile court will find hundreds of children and parents attempting to navigate a system which is operating at full capacity. Attorneys are handed a stack of files and told these are your cases for the day. Attorneys meet their clients for the first time in the hallways of the court house if the client is not in custody. If the client is in custody, the attorney meets his client in the holding area where other children are present regardless of the seriousness of the offense charged. Both meetings are superficial in that the amount of time spent is limited, the amount of

information gathered is minimal at best and does not take place in a confidential environment. These meetings are further limited by the courts desire to move cases forward as quickly as possible. Based upon this meeting attorneys have to help their clients decide, very quickly and with very little information, how to proceed on a case. Does the client accept the plea offer? Should the matter be set for trial? Do you request a judge or judge and jury? The attorney must determine if her client actually committed the offense charged. The attorney must also determine if there are any mitigating circumstances or viable defenses. Is the client competent? What if any are the collateral consequences of my child client being found responsible? Most of the answers to these questions cannot be answered in that first meeting and without adequate training. But attorneys are expected to on a daily basis to do just that and the children and families involved are the ones who suffer. The answers to these questions can be determined through follow up meetings but burgeoning caseloads can make this difficult.

I have personally encountered children with cognitive deficiencies who have pled to offenses where I have after meeting them questioned their competency. One young man was charged with unarmed robbery for the second time. The charging document described the incident as one in which the child client put his hand in the pocket of a school mate and took $3.00 and a cell phone. This was the second offense for the young man who was already a committed youth. A cursory review of the court file yielded information that the young man had been involved in a very serious car accident some years prior and did in fact have a closed head injury which caused him to be cognitively impaired. One specific area which was effected was his impulse control. Despite the fact that this child was already a committed youth I believed the issue of competency needed to be addressed. The court disagreed by pointing to the fact that the client had already pled responsible to the charge of unarmed robbery on a previous occasion with very similar circumstances. This young man required treatment intervention beyond what is typically available within the Juvenile Justice System but with limited options to divert this case to a more appropriate forum the county and the State have undertaken the responsibility to provide services. The lack of competent representation is not specific to court appointed counsel in Juvenile Delinquency cases. I have personally observed retained counsel have a child client with organic brain damage, which is the result of a seizure disorder, plead to an offense as charged because he had cases in another courthouse and wanted to resolve this matter as quickly as possible. While these cases on their face seem extreme this sort of thing

occurs on a routine basis particularly, in the case where developmental delays are not immediately apparent.

Those are the cases where the child is perhaps behind a few grades in school or, has a diagnosed mental illness, is prescribed psychotropic medications, or lives in an environment where he or she has otherwise been neglected or abused. Not having the opportunity to meet with your client for a significant period of time and not being properly trained prevents the attorney who seeks to represent children from being able to discover this information and present it to the court when appropriate.

There is also a problem with the continuity of representation. In the current system, particularly in the largest county in the State of Michigan, a child will meet a minimum of two attorneys prior to his actual trial date. What happens after trial is even more troubling. There is very little advocacy taking place in the area of having child clients placed in the least restrictive environment where they can receive services. The inability of counsel to be familiar with community based services which would allow a child to remain in the community with no risk to safety and receive treatment at a fraction of what it costs to have a child in a residential treatment facility causes an increased cost to a system which is already struggling financially.

All of these issues have created the perfect storm for our clients. Adequate competent advocacy during and after trial increases the odds for clients involved in the Juvenile Justice System to succeed once they reach adulthood. Without adequate competent representation the chips are being stacked against them in an environment where involvement in the Juvenile Justice System is no longer confidential and rehabilitative but is open and punitive and the consequences of being involved are increasing. Consequences such as being unable to enter the armed forces, the inability to enter a nursing program, problems with immigration status, the inability to apply for certain kinds of jobs and even the inability to take advantage of advanced education opportunities. These consequences are preventing children from being able to become productive adults living successful lives.

Mr. SCOTT. Thank you.
Ms. Dahlberg?

TESTIMONY OF ROBIN L. DAHLBERG, SENIOR STAFF ATTORNEY, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, NY

Ms. DAHLBERG. Thank you, thank you, Chairman Scott—but thank you, I am sorry—thank you, Chairman Conyers, Sub-

committee Chairman Scott and Ranking Member Gohmert, as well as other Members of the Subcommittee.

I am pleased today to testify on behalf of the American Civil Liberties Union, its 53 affiliates and its more than 500,000 members nationwide concerning the failure of states, such as Michigan, to adequately fund and administer their indigent defense programs. The inadequacies of such programs are of concern not only to the ACLU and this Subcommittee but to all Americans who expect their criminal justice system to produce fair and accurate results in the most cost-effective manner.

Researchers estimate that between 80 and 90 percent of all of those accused of criminal wrongdoing by state prosecutors must rely upon state indigent defense programs for representation. As a result, the failure of states to adequately fund and administer their indigent defense programs infects the entire criminal justice system.

Poorly performing indigent defense programs compromise public confidence in the criminal justice system. In 2007, more than 80 percent of those surveyed nationwide reported little or no confidence in that system.

When public defenders do not have necessary resources, they cannot engage in adversarial advocacy. Without adversarial advocacy, their clients are wrongfully convicted, they plead guilty when they should not, and they spend too much time in jail or prison.

For example, Michigan resident Allen Fox received a 12-month sentence for trying to steal two cans of SPAM from a convenience store. Mr. Fox sat in jail for 6 months before he saw an attorney. Michigan resident Darryl Lynn Blakely was forced to pay—actually I should say the relatives of Michigan resident Darryl Lynn Blakely were forced to pay Mr. Blakely's court-appointed attorney $2,500 to ensure that he received a 2-year sentence for unlawful driving of an automobile. At their first meeting, Mr. Blakely's attorney told him that if he did not pay the money, he would receive a 5-year sentence.

Poorly performing indigent defense systems perpetuate racial disparities in the criminal justice system. People of color are more likely than Caucasians to live in poverty, to have to rely upon indigent defense systems when charged with criminal wrongdoing and more likely to feel the consequences when such programs are underfunded and poorly administered. In 2007, both nationally and in Michigan, African-Americans were three times more likely than Latinos and five times more likely than Caucasians to be jailed or imprisoned.

Poorly performing indigent defense programs waste taxpayer dollars. To the extent underfunded programs result in wrongful conviction, unnecessary incarceration, inappropriate sentences and legal errors, taxpayers must pay—taxpayers are responsible. For example, I believe Subcommittee Chairman Scott mentioned the case of Eddie Joe Lloyd, released from a Michigan prison after DNA testing confirmed his innocence. He spent 17 years in jail because his lawyer did not present a defense. His wrongful conviction cost Michigan taxpayers over $4.5 million.

In 2007, Patrico Ramonez was released from Michigan prison after the United States Court of Appeals for the 6th Circuit ruled

that his public defender had failed to interview witnesses who could have supported his defense. Mr. Ramonez's 7 years behind bars cost Michigan taxpayers approximately one-half million dollars. Between 2003 and 2007, attorneys from the Michigan State Appellate Defender Office found sentencing errors in one third of the guilty plea appeals assigned to their office. By correcting these errors, they saved Michigan taxpayers almost $4 million.

The ACLU would like to encourage—ask Congress to take steps to encourage states to adequately fund their indigent defense programs. As one of my colleagues here mentioned—well, actually, one of my colleagues mentioned that funding of state indigent programs should belong to the states. However, Congress funds to the tune of hundreds of millions of dollars state prosecutorial functions through Byrne Grant programs, through Juvenile Justice Delinquency Prevention Act, through the Juvenile Accountability Block Grant, among others.

We ask that Congress encourage parity between state prosecutorial and indigent defense services by requiring that states that spend Federal funding on prosecutorial services be required to spend comparable funding on indigent defense services.

Thank you.

[The prepared statement of Ms. Dahlberg follows:]

PREPARED STATEMENT OF ROBIN L. DAHLBERG

Testimony of Robin L. Dahlberg
Senior Staff Attorney, Racial Justice Program
American Civil Liberties Union

Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives

The State of Public Defense Services in Michigan

March 26, 2009

Chairman Robert C. Scott, Ranking Member Louie Gohmert and Members of the Subcommittee:

I am pleased to testify on behalf of the American Civil Liberties Union, its 53 affiliates and more than 500,000 members nationwide, concerning the failure of states, such as Michigan, to adequately fund and administer their indigent defense systems. I currently sit on the Board of Directors of the Michigan Campaign for Justice, a broad-based group of organizations and individuals from across the political spectrum fighting for a fair and effective public defense system in Michigan. I am also counsel for plaintiffs in *Duncan v. Granholm*, a lawsuit filed in Michigan state court challenging inadequacies in public defender programs in three Michigan counties – Berrien, Genesee and Muskegon.

Inadequacies in state indigent defense programs are of concern not only to the ACLU and this subcommittee, but also to all Americans who expect their criminal justice systems to produce fair and accurate results in the most cost-effective manner. Researchers estimate that between 80 and 90% of all those accused of criminal wrongdoing by state prosecutors must rely upon state indigent defense programs for representation. As a result, the failure of states to adequately fund and administer these programs infects the entire criminal justice system. It compromises that system's ability to produce justice results, jeopardizes public confidence in that system, perpetuates racial disparities, endangers public safety, wastes taxpayer dollars, and ultimately diminishes the United States in the international community.

American Civil Liberties Union Foundation
125 Broad Street, 17th Floor, New York, New York 10004
www.aclu.org

1. The Sixth Amendment

The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, the accused shall have "the Assistance of Counsel for his defense."[1] In the landmark case *Gideon v. Wainwright*, the United States Supreme Court ruled that this constitutional guarantee requires states to provide counsel to those persons accused by the state of criminal wrongdoing and unable to afford private counsel.[2] The Court subsequently made clear that such persons are entitled to more than just a lawyer standing next to them at trial. Instead, states must ensure that they receive "*effective* assistance of *competent* counsel." [3]

The Court has defined effective assistance of competent counsel as representation that subjects the prosecution's case to "the crucible of meaningful adversarial testing."[4] In so doing, it has noted that the "very premise" of our system of criminal justice "is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[5] If defense counsel is incapable of adequately challenging the state's evidence, "a serious risk of injustice" infects the entire criminal justice process.[6]

2. State Abdication of Sixth Amendment Responsibilities

Many states have never taken the steps necessary to fulfill their Sixth Amendment obligations. Michigan, for example, has delegated to each of its 83 counties the responsibility for funding and administering trial-level indigent defense services. It provides no fiscal or administrative oversight. Michigan does nothing to ensure that the counties allocate the funding and promulgate the policies, programs and guidelines needed to enable their public defenders to provide constitutionally adequate legal representation. As a result, most Michigan county public defense programs are seriously under-funded and poorly administered. For example:

- In 2007, the budgets of the prosecutors in Michigan's Berrien and Genesee counties were nearly three and one-half times greater than the counties' indigent defense budgets. In Muskegon County, the prosecuting attorney's budget was nearly double the county's indigent defense budget.

- A 1999 survey by the U.S. Department of Justice of 100 largest counties in the country found that those counties spent an average of $287 per case to provide representation to indigent persons accused of criminal wrongdoing.[7] In 2006, the Muskegon County finance director issued a letter to the county commissioners stating that the average cost per case should be kept to $130 to $140.

Michigan is not alone. Similar disparities exist in other states. For example:

- In FY 2005, Tennessee's 31 District Attorneys General received approximately $170 million to prosecute indigent persons while its 31 public defender programs received $56 million to defend them.[8]

- A 2007 study concluded that California's 58 counties spent 40% more on prosecutorial services than on indigent defense services.[9]

Without adequate funding, indigent defense programs cannot hire a sufficient number of attorneys and support staff to meet the demand. Insufficient numbers of attorneys and essential support staff, in turn, lead to excessive workloads and no time or money for training or supervision.

Overwhelming caseloads prevent attorneys for poor criminal defendants from meeting with their clients with sufficient frequency, interviewing defense and prosecution witnesses, obtaining and analyzing evidence, visiting the scenes of alleged crimes, consulting with experts, researching case law, filing motions and preparing for trial.[10] A report released in 2000 by the Bureau of Justice Statistics of the United States Department of Justice confirmed that public defenders meet and confer with their clients almost 50% less than do privately retained counsel.[11]

As a result, the poor are frequently provided with counsel in name only. The representation they receive is far from that contemplated by the Supreme Court's definition of "effective assistance of competent counsel."[12]

3. Consequences of Abdication

The failure of Michigan and other states to fulfill their constitutional obligations under the Sixth Amendment is, in part, due to a lack of awareness about the real costs of poor performing indigent defense systems.

a. Loss of Public Confidence

Poorly funded and administered indigent defense programs undermine public confidence in the criminal justice system. The legitimacy of that system is based on its ability to adequately investigate crime, accurately identify offenders and appropriately sanction the convicted. When public defenders do not have the tools to engage in adversarial advocacy, their clients are wrongfully convicted; are incarcerated prior to trial for unnecessarily long periods of time; plead guilty to inappropriate charges and receive harsher sentences than the facts of their cases warrant. For example:

- Michigan resident Allen Fox received a 12-month sentence after pleading guilty to attempting to steal two cans of corned beef from a convenience store. Although the cans in question never left the store, Mr. Fox was arrested after he and the store clerk got into a scuffle. Charged with a felony, Mr. Fox sat in jail for six months before ever meeting an attorney.

- Michigan resident Darryl Lynn Blakely paid his court appointed attorney $7500 to ensure that he received a fair plea agreement. Charged with unlawful driving of an automobile, Mr. Blakely was informed by his attorney at their first meeting that for $7500, the attorney would ensure that Mr. Blakely received a sentence of two years in prison. If Mr. Blakely did not pay, he would spend five years in prison. The judge knew of the payment agreement but did nothing about it.

In response to events like these, public confidence in the criminal justice system has plummeted. Recent public opinion surveys reveal that the American public has less confidence in the system than it does in other public institutions such as organized religion, medical systems, the military, newspapers, organized labor and public schools.[13] In 2007, more than 80% of those surveyed nationwide reported having little or no confidence in the criminal justice system.[14]

b. <u>Perpetuation of Racial Disparities</u>

Poorly performing indigent defense systems perpetuate racial disparities in the criminal justice system. Racial disparities, in turn, create a perception of bias and cast doubt on the constitutional guarantee of equality under the law.

In 2007, both nationally and in Michigan, African Americans were three times more likely than Latinos and five times more likely than Caucasians to be jailed or imprisoned.[15] While a number of complex factors contribute to this disparity, the United Nation's committee charged with overseeing compliance of signatory nations with the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the national Conference of State Court Administrators, representing criminal courts in all fifty states, and several state committees established to study racial disparities have repeatedly identified under-resourced and poorly managed indigent defense systems as one of those factors.[16]

People of color are more likely than Caucasians to live in poverty, more likely to rely on indigent defense systems for representation when charged with criminal wrongdoing, and thus, more likely to feel the consequences of under-funding and inadequate administration of those systems.[17] In fact, a 2000 survey of state prisoners revealed that over three-quarters of African-American prisoners had been represented by public defenders as compared to less than two-thirds of Caucasian prisoners.[18]

In March 2008, the United Nation's CERD committee issued specific recommendations to address this problem:

> The Committee recommends that the [United States] adopt all necessary measures to eliminate the disproportionate impact that persistent systemic inadequacies in criminal defence programmes [sic] for indigent persons have on defendants belonging to racial, ethnic and national minorities, inter alia, by increasing its efforts to improve the quality of legal representation provided to indigent

defendants and ensuring that public legal aid systems are adequately funded and supervised. The Committee further recommends that the [United States] allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake. [19]

c. **Economic Waste**

Poorly performing indigent defense programs waste taxpayer dollars. To the extent under-funded programs lead to wrongful convictions, unnecessary or prolonged pre-trial incarceration, sentences that are not commensurate with the crimes committed and legal errors, taxpayers must pay the consequences. For example:

- Since 1983, more than 340 prisoners have been exonerated around the country. At least one-third were victims of poor lawyering by court-appointed lawyers. That one-third spent approximately 1100 years behind bars,[20] at a cost of $25 million to the American taxpayers.[21]

- One of those exonerees, Eddie Joe Lloyd, was released from a Michigan prison in 2002 after DNA testing confirmed his innocence. His trial attorney, appointed eight days before the commencement of trial, failed to question the details of the police investigation, called no witnesses and gave a five-minute closing argument. Mr. Lloyd spent 17 years behind bars. Michigan taxpayers paid $510,000 for Mr. Lloyd's unnecessary imprisonment, $2,000 for appellate public defender services, $4,000,000 to settle a wrongful conviction lawsuit and unknown amounts for prosecutors and law enforcement officials to defend his conviction on appeal and for appellate courts to adjudicate the case.[22]

- In 2007, Patrico Ramonez was released from a Michigan prison after the United States Court of Appeals for the Sixth Circuit ruled that his public defender had failed to interview witnesses who could have supported his innocence.[23] He spent seven years behind bars. Michigan taxpayers paid $390,000 to incarcerate Mr. Haynes, $11,000 for appellate public defender services and unknown amounts for prosecutors and law enforcement officials to defend his conviction on appeal and for appellate courts to adjudicate the case.[24]

- Between 2003 and 2007, Michigan's State Appellate Defender Office found sentencing errors in one-third of the guilty plea appeals assigned to that office. By initiating proceedings to correct the errors, the attorneys saved Michigan taxpayers $3,675,000 in unnecessary incarceration costs.[25] Pursuant to state statute, however, SADO receives only 25% of all appeals.[26]

In addition, taxpayers must pay for the economic inefficiencies that usually characterize poorly funded and administered indigent defense programs. A number of

studies have concluded that having well-organized public defender agencies under a single statewide entity reduces redundancy and costs by enhancing coordination, uniformity of services, administrative efficiency and planning capacity.[27]

d. Compromising Public Safety

Poorly performing indigent defense programs jeopardize public safety. Public safety suffers when public defenders are unable to mount appropriate defenses, contributing to the wrongful convictions of innocent people. In 132 of the 234 exonerations obtained by the Innocence Project with the use of DNA evidence, the actual criminal has never found -- and presumably remains at large to commit more crimes.[28]

Public safety also suffers when public defenders do not have the resources to advocate for the diversion of non-violent offenders away from jails and prisons into social service programs. In response to a 2005 survey, 60% of state prisoners reported having mental health problems; 42% reported both mental health and substance abuse problems.[29] Studies have shown consistently that diversion programs that address these issues reduce recidivism. A New York City diversion program for convicted felons with serious mental illness decreased the arrests of program participants by approximately 90%.[30] A similar program in Maricopa County, Arizona, reduced the rate of new offenses committed by seriously mentally ill offenders to 5%, nearly one-half the 9% recidivism rate of general population offenders.[31]

Lastly, public safety suffers when public defenders are unable to ensure that their clients receive sentences commensurate with their crimes. Researchers have found that high rates of incarceration actually increase crime by destroying the social and family bonds that guide individuals away from crime, removing adults who would otherwise nurture children, depriving communities of income, reducing future income potential, and engendering a deep resentment toward the legal system. When communities are less capable of maintaining social order through families or social groups, crime rates go up.[32]

e. Violation of International Human Rights Standards

Poorly performing indigent defense programs diminish the standing of the United States in the international community. To the extent that they compromise the right to a fair trial and equal treatment before the courts, they violate the United States' obligation under the International Covenant on Civil and Political Rights, ratified by Congress in 1992.[33] To the extent that they perpetuate racial disparities in the application and availability of indigent defense services, they are inconsistent with United States treaty obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), ratified by Congress in 1994.[34]

4. Recommendations

To maintain public confidence in state criminal justice systems, to promote public safety, to prevent unnecessary public expenditures and to ensure that the United States

meets its international treat obligations, Congress can and should take steps to encourage states, such as Michigan, to adequately fund and administer their indigent defense programs.

Public opinion polls show that voters support a criminal justice system that delivers fair results and that they are willing to commit the tax dollars necessary to accomplish this goal. A 2000 nation-wide public opinion poll showed that 64% of those polled supported the use of taxpayer dollars to provide indigent persons with lawyers. A majority supported reforms to ensure those accused of crime received competent counsel, including proposals that would provide public defenders and prosecutors with the same resources per case (88%); create local oversight commissions to ensure that indigent defense counsel is competent and has adequate resources (78%); establish standards on qualifications for public defenders and court-appointed lawyers (78%); establish public defender offices with full-time professional staff (71%); and ensure that judges and local governments do not appoint attorneys based solely on who charges the least (50%).[35]

The ACLU respectfully requests that Congress consider the following:

- **To encourage parity between state prosecutorial and indigent defense services, require states that receive funding from the federal Justice Assistance Grant Program to use that money to enhance prosecutorial and indigent defense services in equal amounts.**

- **To encourage states to engage in a needs-based analysis when funding indigent defense programs, require the Bureau of Justice Statistics of the United States Department of Justice to collect and publish data on the funding and operation of such programs nationwide.** Many states are unaware of the amount of money they and other states spend on indigent defense services and thus are unable to evaluate effectively the needs of public defender programs. By requiring the Bureau of Justice Statistics to collect such data from states, Congress would be encouraging states to collect the data themselves. The last time the Bureau collected such data was in 1999.

- **To ensure that death penalty cases do not monopolize state indigent defense resources, jeopardizing the representation of clients charged with lesser crimes, recreate the federal death penalty resource centers.** In 1988, Congress established such centers to ensure quality representation in capital cases and reduce the financial and administrative burden of such cases on under-resourced state programs. Although the centers proved to be a cost-effective way of handling capital cases, Congress de-funded the centers in 1996.[36]

- **To encourage lawyers to become public defenders, fund the College Cost Reduction and Access Act, Pub. L. No. 110-84, which became law in September 2007.** Sections 203 and 401 of the Act enable lawyers to pursue careers in, among other areas, indigent defense or civil legal aid by forgiving certain types of federal student loans. By funding the Act, Congress would

recognize public defenders as "real lawyers" who provide a valuable service worthy of governmental encouragement.

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1 U.S. Const. Amend. VI.

2 *Gideon v. Wainright,* 372 U.S. 335 (1963).

3 *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added).

4 *United States v. Cronic*, 466 U.S. 648, 656 (1984). *See also Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

5 *Herring v. New York,* 422 U.S. 853, 862 (1975). *See Nix v. Williams*, 467 U.S. 431, 453 (1984) (a criminal conviction is to be the product of an adversarial process, rather than the *ex parte* investigation and determination of the prosecution); *Wheat v. United States*, 486 U.S. 153, 158 (1988) (the right to counsel "was designed to assure fairness in the adversary criminal process").

6 *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). *See United States v. Cronic*, 466 U.S. at 656-57.

7 Carol J. DeFrances, *State-Funded Indigent Defense Services 1999* (Bureau of Justice Statistics, U.S. Dep't of Justice. Wash., D.C.), September 2001/revised October 2001, *available* at http://www.ojp.gov/bjs/pub/ascii/sfids99.txt *(last visited March 20, 2009).*
8 *Resources of the Prosecution and Indigent Defense Functions in Tennessee (*The Spangenberg Group, Boston, Mass.), June 2007, at 17-18, *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7.30.07.pdf *(last viewed on Mar. 20, 2009).*

9 Laurence A. Benner, Lorenda S. Stern, Alex Avakian, *Systemic Factors Affecting the Quality of Criminal Defense Representation, Preliminary Report*, 2007, at 16, *available at* http://www.cwsl.edu/content/news/Preliminary%20Report%20(2).pdf *(last viewed Mar. 20, 2009).*

10 Numerous reports document these common failings of indigent defense systems stemming from inadequate funding and lack of administrative oversight: David Carroll, *Evaluation of Trial Level Indigent Defense Services in Michigan, A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis* (NLADA, Wash. D.C.), June 2008, *available at* http://www.mynlada.org/michigan/michigan_report.pdf *(last viewed on Mar. 23, 2009)*; Laurence A. Benner, Lorenda S. Stern, Alex Avakian, *Systemic Factors Affecting the Quality of Criminal Defense Representation, Preliminary Report*, 2007, *available* at http://www.ccfaj.org/documents/reports/prosecutorial/expert/Benner%20Systemic%20Factors.pdf *(last viewed on Mar. 23, 2009); Final Report to the Chief Judge of the State of New York* (Commission on the Future of Indigent Defense Services, Albany, NY), June 2006, *available* at http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf *(last viewed on Mar. 23, 2009); A Comprehensive Review of Indigent Defense in Virginia* (The Spangenberg Group, Boston, MA), January 2004, *available* at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf *(last viewed on Mar. 23, 2009); Assembly Line Justice: Mississippi's Indigent Defense Crisis* (NAACP Legal Defense and Educational Fund, Inc., New York, NY), March 2003, *available* at http://www.sado.org/fees/2003-02-01-Assembly_Line_Justice.pdf *(last viewed on Mar. 23, 2009); In Defense of Public Access to Justice: An Assessment of Trial-level Indigent Defense Services in Louisiana 40 Years After Gideon* (NLADA, Wash., D.C.), March 2004, *available* at http://www.nlada.org/DMS/Documents/1078863541.49/Avoyelles%20Parsh%20Body%20Text.pdf *(last viewed on Mar. 23, 2009); If You Cannot Afford a Lawyer . . . A Report on Georgia's Failed Indigent Defense System* (Southern Center for Civil Rights, Atlanta, GA), January 2003, *available* at http://www.deathpenaltyinfo.org/jan.%202003.%20report.pdf *(last viewed on Mar. 23, 2009); Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (ABA

Juvenile Justice Center & Mid-Atlantic Juvenile Defender Center, Wash., D.C.), October 2003, *available* at http://www.njdc.info/pdf/mdreport.pdf *(last viewed on Mar. 23, 2009)*; *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (ABA Juvenile Justice Center, National Juvenile Defender Center, Albin Law Firm and Cascade County Law Clinic, Wash., D.C.), October 2003, *available* at http://www.njdc.info/pdf/mtreport.pdf *(last viewed on Mar. 23, 2009)*; ABA Juvenile Justice Center and Juvenile Law Center, *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (October 2003), *available* at http://www.njdc.info/pdf/pareport.pdf *(last viewed on Mar. 23, 2009)*; *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (ABA Juvenile Justice Center, Juvenile Law Center and Youth Law Center, Chicago, Ill.), June 2002, *available at* http://www.njdc.info/pdf/cfjfull.pdf *(last viewed on Mar. 23, 2009)*; *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (ABA Juvenile Justice Center & Juvenile Justice Project of Louisiana, Wash., D.C.), June 2001, *available* at http://www.jjpl.org/PDF/Children_Left_Behind.pdf *(last viewed on Mar. 23, 2009)*; *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas* (Committee on Legal Services to the Poor in Criminal Matters, State Bar of Texas, Austin, TX), Sept. 2000, *available* at http://www.uta.edu/pols/moore/indigent/last.pdf *(last viewed on Mar. 23, 2009)*.

11 Thirty-seven percent (37%) of state prisoners represented by public defenders reported meeting with counsel within a week of their arrest as compared to 60% of prisoners represented by private counsel. Twenty-seven percent (27%) of those represented by public defenders met with their attorneys at least four times before disposition as compared to 58% of prisoners with private counsel. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Bureau of Justice Statistics, U.S. Dep't of Justice, Wash. D.C.), Nov. 2000, *available at* http://www.ojp.gov/bjs/abstract/dccc.htm (*last viewed on Mar. 20, 2009)*.

12 *United States v. Cronic*, 466 U.S. at 656.

13 *Sourcebook of criminal justice statistics Online*, at Table 2.10.2007, *available at* http://www.albany.edu/sourcebook/pdt/12102207.pdf *(last viewed on Feb. 10, 2009)*.

14 *Id.* (2007 data); *Sourcebook of Criminal Justice Statistics 2003*, at Table 2.11, *available at* http://www.albany.edu/sourcebook/pdf/t211.pdf (*last viewed on Feb. 10, 2009)* (2003 data).

15 *Jail Incarceration Rates by Race and Ethnicity, 1990-2007 (*Bureau of Justice Statistics, U.S. Dep't of Justice, Wash. D.C.), June 6, 2008, *available at* http://www.ojp.usdoj.gov/bjs/glance/jailrair.htm (*last viewed on Mar. 5, 2009)*.

16 For the United Nations, *see* Committee on the Elimination of Racial Discrimination, February 18 – March 7 2008, 72nd Sess., *Concluding Observations of the Committee*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (Mar. 7, 2008): http://www.aclu.org/pdfs/humanrights/cerd_concluding_report.pdf *(last viewed Mar. 23, 2009)*.

The most recent resolution of the Conference of State Court Administrators states that the provision of qualified and adequately compensated attorneys to represent the poor in criminal matters as "fundamental to any effort to change reality and perception about bias in the justice system" and concludes that "[w]ithout improvement in this critical area, the reality and perception of bias will continue." Conference of State Court Administrators, *Position Paper on State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness* (National Center of State Court, Williamsburg, VA), Dec. 2001, at 10, *available at* http://cosca.ncsc.dni.us/WhitePapers/racialethnicwhitepapr.pdf *(last viewed on Mar. 20, 2009)*. This paper has been endorsed by the Conference of Chief Justices. Conferences of Chief Justices, *Resolution 28, In Support of State Courts' Responsibility to Address Issues of Racial and Ethnic Fairness*, adopted August 1, 2002 *available at* http://www.consortiumonline.net/Resolutions/CCJRes_No28_8-1-02.pdf *(last viewed on Mar. 20, 2009)*.

For individual state reports, *see, e.g., Report on the Commission of Racial and Ethnic Fairness in the Justice Process* (Baltimore, Maryland), June, 2004, at 28-30, *available at* http://www.courts.state.md.us/publications/racialethnicfairness04.pdf *(last viewed on Mar. 20, 2009); Report of the Oregon Supreme Court on Racial/Ethnic Issues in the Judicial System,* May 1994, at 43, *available at* http://www.ojd.state.or.us/osca/cpsd/courtimprovement/access/documents/rac_eth_TFR.pdf *(last viewed Mar. 20, 2009); Report of the Ohio Commission on Racial Fairness,* 1999, at 39, *available at* http://www.sconet.state.oh.us/publications/fairness/fairness.pdf *(last viewed on Mar. 20, 2009); Final Report of the Utah Task Force on Racial And Ethnic Fairness in the Legal System,* Sept. 2000, at 28, *available at* http://www.utcourts.gov/specproj/retaskforce/Reportfinal.pdf *(last viewed Mar. 20, 2009); Governor Jim Doyle's Commission on Reducing Racial Disparities in the Wisconsin Juvenile Justice System* (Office of Justice Assistance, Madison, WI.), Feb. 2008, at 10-11, *available at* ftp://doaftp04.doa.state.wi.us/doadocs/web.pdf (*last viewed on Jan. 17, 2009).*

17 *See* Terence F. MacCarthy, *Unanimous Resolution,* THE CHAMPION (National Assoc. of Crim. Def. Lawyers, Wash. D.C.), Apr. 1999, at 25, *available at* http://www.nacdl.org/public.nsf/championarticles/99apr02?opendocumen (*last viewed on Mar. 4, 2009*).

18 Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Bureau of Justice Statistics, U.S. Dep't of Justice, Wash. D.C.), Nov. 2000, *available at* http://www.ojp.gov/bjs/abstract/dccc.htm (*last viewed on Mar. 20, 2009).*

19 Committee on the Elimination of Racial Discrimination, February 18 – March 7 2008, 72nd Sess., *Concluding Observations of the Committee,* ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (Mar. 7, 2008): http://www.aclu.org/pdfs/humanrights/ccrd_concluding_report.pdf *(last viewed on Mar. 23, 2009).*

20 Samuel Gross *et al.*, "Exonerations in the United States 1989 through 2003," *Journal of Criminal Law and Criminology* Vol.95, No.2 (2005), p.523, 524.

21 This figure is calculated by multiplying 1100 years by $22,650, the average yearly cost of incarceration in 2001.

22 Dawn Van Hoek, Chief Deputy Director, State Appellate Defender Office, *Penny-Wise and Pound-Foolish: Waste in Michigan Public Defense Spending* (State Appellate Defender Office, Lansing, Michigan), 2009, at 5-6

23 *Ramonez v. Berghuis*, 490 F.3d 482 (6th Cir. 2007).

24 Dawn Van Hoek, Chief Deputy Director, State Appellate Defender Office, *Penny-Wise and Pound-Foolish: Waste in Michigan Public Defense Spending* (State Appellate Defender Office, Lansing, Michigan), 2009, at 11.

25 *Id.*, at 2-3.

26 MCL 780.716.

27 *See, e.g., Evidence for the Feasibility of Public Defender Offices in Texas, available at* http://www.courts.state.tx.us/tfid/pdf/PD%20Feasibility_Final.pdf *(last viwed on Mar. 23, 2009).*

28 *Facts on Post-Conviction DNA Exonerations* (The Innocence Project, NY, NY), *available at* http://www.innocenceproject.org/Content/351.php *(last viewed on Mar. 20, 2009).*

29 Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates* (Bureau of Justice Statistics, U.S. Dep't of Justice, Wash. D.C.), Dec. 14, 2006, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf *(last viewed Mar. 21, 2009.*

30 *The Nathaniel Project: An Alternative to Incarceration Program for People with Serious Mental Illness Who Have Committed Felony Offenses*, The National GAINS Center for People with Co-Occurring Disorders in the Justice System (Policy Research Associates, Delmar, NY), Fall 2002/Revised Summer 2005, *available* at http://gainscenter.samhsa.gov/pdfs/jail_diversion/nathaniel_project.pdf *(last viewed on Mar. 20, 2009).*

31 *Court Advocacy and Jail Diversion Programs Improve Outcomes and Reduce Crime*, BUSINESSWIRE, at 1, *available* at http://www.allbusiness.com/crime-law/crime-statistics-crime-rate/5463671-1.html (*last viewed on Mar. 20, 2009).*

32 Brian C. Renauer, William Scott Cunningham, Bill Feyerherm, Tom O'Connor and Paul Bellatty, *Tipping the Scales of Justice: The Effect of Overincarceration on Neighborhood Violence*, CRIMINAL JUSTICE POLICY REVIEW, Vol. 17, No. 3, Sept. 2006, at 372-4, *available at* http://cjp.sagepub.com/cgi/content/abstract/17/3/362 *(last viewed on Mar. 22, 2009).*

33 UN General Assembly, *International Covenant on Civil and Political Rights, 16 December 1966*, United Nations, Treaty Series, vol. 999, at 171, *available at* http://www.unhcr.org/refworld/docid/3ac6b3aa0.html *(last viewed on Mar. 21, 2009).*

34 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination: resolution adopted by the General Assembly, 22 January 2009*, A/RES/63/243, *available at* http://www.unhcr.org/refworld/docid/4986cfe52.html *(last viewed on Mar. 21, 2009).*

35 Belden, Rossonello & Stewart, *Americans Consider Indigent Defense: Analysis of a National Study of Public Opinion*, Jan. 2002, *available* at http://www.nlada.org/DMS/Documents/1075394127.32/Belden%20Russonello%20Polling%20short%20report.pdf *(last viewed on Mar. 20, 2009).*

36 *See, e.g.*, Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 906-13 (1996); *An Interview with Judge Emmett R. Cox, Chair of the Judicial Conference Defender Services Committee*, THE THIRD BRANCH (Administrative Office of the U.S. Courts Office of Public Affairs, Wash. D.C.), April 1997, *available* at http://www.uscourts.gov/ttb/apr97ttb/cox.htm (*last viewed on Mar. 20, 2009).*

Mr. SCOTT. Thank you, we will now have questions for the panel from the Members under the 5-minute rule.

And we will begin with Mr. Conyers.

Mr. CONYERS. I thank the Chairman for allowing me to proceed in front of him. This is invaluable testimony and what I am hoping, Chairman Scott, is that you and Judge Gohmert will be able to devise a method along with Subcommittee Chairman Nadler to go through all of the 50 states and get a picture of—like we have here in Michigan. And I would yield to either of you if you had any remarks to make about that.

Mr. SCOTT. Well, I will just state this isn't the last hearing we are going to have on this. We are looking closely at Michigan. Most of the witnesses with us today are from Michigan and resulting from the report. But this isn't the last hearing we are going to have.

Mr. CONYERS. What I am suggesting is that we not have 49 other hearings, but that we——

Mr. SCOTT. And I think as we have hearings, we will be able to come to some consensus as to what needs to be done. We have had a lot of recommendations——

Mr. CONYERS. Yes.

Mr. SCOTT [continuing.] Today, so we would expect to follow through on the recommendations.

Mr. CONYERS. Yes, that is also great. But what I am suggesting more particularly is that we try, without antagonizing Judge Gohmert's relations between Federal and state entities, that we get states to do the kind of study that Michigan has already done. We don't have the—but, you know, to hear—to have this across the country I think would be stimulating, not just for us, but I think it would help those who are in this part of the practice of law in all the other states as well.

The other thing I wanted to hear is whether Mayor Archer and Nancy Diehl had any comments having listened to all of the testimony and all of the opening statements if they wanted to put anything on the record about anything that occurred to them.

Judge ARCHER. Mr. Chairman, thank you very much. Let me just indicate that I believe that my colleague from the ACLU made the point that I was going to, to Professor Luna's observation regarding federalism and intervention. But I do believe, when you take a look at the Byrne Grant and you took a look at the Justice Assistance Grant—and I think there was another grant that she spoke about dealing with juvenile delinquency—if there was a tweaking, perhaps of the language, in those Federal grants, it could generate more fairness in terms of how the money is ultimately, when it gets to the states, is fairly distributed, such that a defender's portion could be either more fairly increased—that is one.

Second, I would like to recommend that some consideration be given to asking states like Michigan or others what, if anything, are they going to do about mandatory sentencing that takes away discretion from judges and their ability to give probation where appropriate. What about their review of certain legislation that would reduce the necessity for assigned counsel, which would then create more funds available for the more serious crimes that you would expect to have defenders there and would be able to be trained,

even the prosecutors, as Prosecutor Nancy Diehl mentioned, in terms of adequate training across the board?

There are those that have certain opinions, for example, about the death penalty. I don't think that there is any person who would stand up and say today that, under the laws, if the death penalty is not fairly implemented with competent counsel, with all of the training necessary to be able to assure that if indeed there is a death penalty and it is followed religiously, that then when the—if there is a finding of guilt and a death penalty is imposed that it would be fair and it would work.

If it is not fair, I don't think anybody objectively knowing that it is not fair and seeing where DNA evidence and other evidence has been looked at in other states where you see error, whether it is 2 percent, 3 percent or 5 percent translated to the death penalty, it has enormous consequences. And I do believe that there is room for discussion coming from this Subcommittee and from the overall Judiciary Committee that could have an impact causing states to take a look at themselves in terms of how justice can be fairly implemented.

Mr. CONYERS. Mr. Chairman, could I get enough time to get a reaction from Attorney Diehl?

Mr. SCOTT. Certainly.

Ms. DIEHL. Thank you, two things: The Federal Government certainly does send money to the states via the Byrne Grant, and prosecutors and law enforcement have access to that. We need more money. We don't have enough money from that grant, but I agree it certainly would be a way to assist the indigent defense fund.

And another thing I think that Congress can do and the Federal Government can do in terms of helping the states is to take a look at what the Federal system does in Wayne County. The Federal defenders pay the lawyers $100 per hour. Now, that is something that the Federal Government does. If we could take a look at that and support that in the state system, then we could see that the lawyers would be able to be compensated much more appropriately.

Mr. CONYERS. Thank you, Mr. Chairman. I leave Attorney Luna to the tender questions of Jerry Nadler. But the only thing I wanted to get on the record—I wanted to compliment Attorney Luna for his opposition to mandatory minimum sentencing which is in his statement. He didn't mention it, but I just wanted the record to show that there was at least somebody that stood up for him and his right to bring these opinions or these thoughtful, conservative opinions to the attention of the Committee on the Judiciary.

Thank you very much, sir.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Gohmert?

Mr. GOHMERT. Thank you, Chairman. And I do appreciate the testimony, and I am glad my friend Mr. Nadler is back.

Been an indication earlier by my friend from New York that this is a Federal responsibility. We can delegate it to the states, as he said, but I am not sure that that is the case. I guess we have different views of the Constitution.

It is my understanding these things are reserved for the states and the people to do. And when we talk about three legs, whether

it is judges, prosecutors or defense attorneys, I can't help but observe, based on what I am hearing from up here and from there, if it is a Federal responsibility to make sure defense attorneys are paid, including with Federal funds.

Well then you have got the Fifth Amendment mention of grand juries, which means we need to also fund those, which means we also got to provide them courthouses in which to meet, which means we also under the Sixth and Seventh Amendment need to pay for the juries, because that is another Federal right mentioned.

So we need to make sure that they have adequate place and that we also hire and pay for the clerks who are in charge of securing those jury panels from which juries are picked.

Then we have the sixth amendment right to have witnesses, and actually I guess having been someone who was not doing criminal work at the time but who was assigned to appeal a rather nasty capital murder case, I can tell you my client got proper representation. I gave it all I had and had the case reversed. The major issue was one of not providing adequate witnesses, and it never crossed my mind to demand that the Federal Government should have come in and made sure that the witness the defendant needed was there because that was a state obligation, and for that reason the state's case was reversed.

But then you can't have due process as promised by the Fifth Amendment. You can't have or avoid excessive bail as promised under the Eighth Amendment, unless you have good judges. So we need to pay for good judges from the Federal level as well.

So, you know, as we get to thinking about it, and I use my colleagues and some of the witnesses' line of thinking, sounds like we just need to dismiss the states and take over the entire state and local justice system since these things are mentioned in the Constitution. You know, obviously I am being a little facetious here, but that is where this goes if we decide we are going to step in and take over all these things.

And I do think that there are many criminal defense attorneys who don't get the adequate credit. But nothing concerned me more as a judge then if I thought a defense attorney wasn't doing an adequate job. I didn't want the defense attorney ever appointed again if he was not doing a proper job to represent somebody and have raised those issues before myself where appropriate.

But, you know, if we are going to get in the business of building the courthouses and the jails, and you can't have these due process rights without making sure you have got good law enforcement, which means we are going to have to start taking care of all the salaries for the state, local law enforcement as well, their computer needs and of course the staffing, the computers, the online legal services, all those things. I mean, they are going to come into play.

And I am glad prosecution was mentioned because it seemed to me that oftentime prosecutors were not adequately paid. And so I rarely ever see a criminal defense attorney move over and take the less money and become a prosecutor, but I more often saw prosecutors, when they just couldn't stand it anymore, moving over and making more money as a criminal defense attorney. There are some that didn't do as well but some that did very well.

But I do see where Federal Government can help by perhaps, as Chairman Conyers has indicated, giving the best overall national analysis of what would be the best vehicle to make sure that these rights in our Constitution and Bill of Rights are secured.

And so, you know, here I have used most of my time talking but getting to this point. I am not interested in seeing a lot of studies that have conclusions and then go find facts that they feel like will support it. But I am very interested in any models, any suggestions, that we can provide to the states to help them do a better job of seeing that justice is truly done.

And I would welcome any suggestions you have in writing. You know, 5 minutes isn't much time for you to speak because I know every one of you—I mean, of course you get paid so well to come speak, and I know—they don't get paid anything, you all, if you are sitting back there. But I would welcome your written input, beyond your statements, as to what we might be able to do in the way of a national study because that is something only the Federal Government could do and have it universal enough.

So appreciate your input, appreciate your being here, all of you, thank you.

Mr. SCOTT. Thank you, and we are going to try to get our questions in the best we can before we go to vote. But let me ask just a couple of questions.

Mr. Archer, the ABA had an ethical standard for lawyers that did not exclude court-appointed attorneys. How is that ethical standard enforced?

Judge ARCHER. First of all, let me just say that lawyers are programmed to help. Typically, public defenders have a powerful sense of duty. Sometimes it is just not that easy to admit that you can't do it all. But equally important, once an attorney concludes he can't do it all under the necessary standard, there is a reality of fear and a sense of powerlessness.

Many systems today undermine the independence of public defenders. And without independence, a lawyer who challenges the court or a state or county administration over high caseloads might well be fired. That is one reason why the first of the ABA's Ten Principles calls for the establishment of an independent board whose members are appointed by diverse authorities, so that no single official or political party has unchecked power over the public defense function.

Policymakers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf or certain witnesses should be cross-examined are based solely upon the factual merits of the case and not on a public defender's desire to please a judge in order to maintain his or her job. In sum, it is by case-by-case method and most good, hardworking public defenders——

Mr. SCOTT. Should this be enforced as ethical violations are enforced through the state bar complaints?

Judge ARCHER. I don't think it is being raised, and I think it is not being——

Mr. SCOTT. Should it be?

Judge ARCHER. Yes, it should, but I think public defenders are reluctant to do it because they know that if they don't serve, then

a real estate lawyer might be obligated, imposed upon the court, to fill a needed void because there is no one there with experience. So that lawyer stretches him or herself to do everything that they can to take it on.

What you will see are, as you have seen in the testimony or perhaps have read in the testimony, where examples of where public defenders have sued to back up—to suggest why they shouldn't take a large caseload and why something else should be done by the state itself. So that has been more of a litigation rather than using the ethical barrier. I would defer to anyone else who has more information than that.

Mr. CARROLL. I would just add that the ethics opinion is out there saying that it is unethical for public defenders, as with any lawyer, to take the number of cases that they are doing. They don't refuse the cases because they are generally in most cases contracted directly to a judge or else do not have independence set up for them to feel comfortable to do that. They think if they act and follow the ABA opinions it is going to lead to a termination of their employment, and so it just perpetuates and perpetuates, and you get these caseloads in the 500, 600 level.

Mr. SCOTT. Is an hourly rate the only way to pay lawyers in criminal cases? It is my understanding that most private attorneys take criminal cases on a flat fee. Is that not right?

Mr. CARROLL. In this country, the majority of defense work is provided by private attorneys either through hourly systems or directly under contract. But——

Mr. SCOTT. Well, no, I mean private, not court-appointed, just privately retained counsel.

Mr. CARROLL. Oh, oh, about 85 percent of all criminal defense work is handled by the indigent defense system.

Mr. SCOTT. Okay, the 15 percent that are handled by private lawyers, how are they compensated?

Mr. Archer, how are they compensated?

Judge ARCHER. They would be compensated by retainer. They would assess on the basis of the factual——

Mr. SCOTT. Basically a flat fee.

Judge ARCHER. A retainer, where they would say, "This is what you are charged with. If you want me to represent you, it is going to cost you $10,000; it is going to cost you $35,000." If they resolve it in 6 hours or if they resolve it in 6 months, they are retained on—they are paid——

Mr. SCOTT. So basically it is a——

Judge ARCHER [continuing.] Retainer.

Mr. SCOTT [continuing.] Flat fee. It is not an hourly rate.

Judge ARCHER. That is correct.

Mr. SCOTT. Okay.

Mr. Nadler?

Mr. NADLER. Thank you very much, Mr. Chairman.

Mr. Luna, or Professor Luna, I suppose, I am sorry. Professor Luna, you base much of your argument on the assumption that the practice of civil rights litigation will provide a sufficient incentive for states to meet their sixth amendment obligations. It obviously hasn't worked. So what would you comment on how we should get

states to meet their sixth amendment obligations if the Federal Government won't—shouldn't do it?

Mr. LUNA. I actually would say that it is working, slowly but surely. There is litigation currently pending in Michigan right now before the State Supreme Court. And in fact, you will see——

Mr. NADLER. Wait a minute, slowly but surely.

Mr. LUNA. Sure.

Mr. NADLER. Slowly doesn't work. I mean, slowly but surely means that tens of thousands of people do not get their constitutional rights protected, do not get adequate legal representation and hundreds maybe thousands go to jail who are innocent people.

Mr. LUNA. I could—a couple of responses to that. First thing, I don't see, if the Federal Government were to go down this line—I think Ranking Member Gohmert would agree with this—for you to come up with a system that is going to adequately meet all of the variables involved, whether it is going to be—you are going to have a system of retained counsel, whether you are going to have a system of appointed counsel, whether you are going to have a system of a public defender system nationally—how are you going to do it? That is going to be just as timely and time consuming as anything that might be done by civil rights litigation.

And I don't deny the fact that there is a problem. I have said that——

Mr. NADLER. No, obviously you don't. But obviously, I mean, we are now, what, 40 years after *Gideon*—46 years after *Gideon v. Wainwright* and we have got an intolerable situation. There has been, as long as I can remember, there has been civil rights litigation of one sort or another in one state or another or many states, and yet the situation hasn't improved. So what makes you so certain that this solves the problem?

Mr. LUNA. Yes, I would—I mean, I could throw it back to you. What makes you so certain that the Federal Government is going to be able to resolve this?

Mr. NADLER. Well, I can't be certain but I know we can try.

Mr. LUNA. My response is I don't believe that the Federal Government can resolve this.

Mr. NADLER. Well, let me ask——

Mr. LUNA. I don't believe that the Constitution allows the Federal Government to resolve this. And——

Mr. NADLER. Excuse me, the Federal Government doesn't have the right to insist on states meeting constitutional rights? We can't enforce constitutional rights?

Mr. LUNA. No, that is—the way I understand it is that you would—I am trying to find the clause on which you would hang this. I guess you could make a disingenuous argument that the Commerce Clause would be the basis. You could do it by Tax and Spend, and I have no doubt that the jurisprudence would support that.

You might conceivably, although it would be very difficult under the Supreme Court jurisprudence, try to make a 14th Amendment Section 5 argument as to why you could do that. Or it seems plausible and you certainly have a Department of Justice——

Mr. NADLER. That would be a good, I think, a good peg to hang your hat on.

Mr. LUNA. It might well be, it might well be. Or you could have the Department of Justice do what it does in many circumstances when you have deficient situations in jails, in prisons, is to file a civil rights lawsuit.

Mr. NADLER. Okay, thank you. Civil rights, well, yes, I mean, a 1983 lawsuit it would seem to—would be indicated.

Ms. Dahlberg, let me ask you, the NLADA is recommending that we give the states a choice between continue to raise the money yourselves or conditioning Federal funds on the condition to make a number of changes that would solve the problem. You support that I assume.

Ms. DAHLBERG. Yes.

Mr. NADLER. This document I have before me, which was suggested questions for the witnesses, says although no one is proposing any Federal mandates on states, why shouldn't we mandate states? Why shouldn't the Federal Government, for example, mandate based on Section 5, which is the general Enforcement Clause of the 14th Amendment, which guarantees due process of law and equal protection—why shouldn't we mandate that states spend at least an equal amount on criminal defense as on prosecution in every county or even per case?

Ms. DAHLBERG. Well, a per-case measurement would probably be better because prosecutors' offices oftentimes handle cases that defense programs do not. So——

Mr. NADLER. Okay.

Ms. DAHLBERG [continuing.] Strict dollar-to-dollar parity would in some——

Mr. NADLER. I don't want to write the legislation, but why not mandate that there be some sort of parity of resources along the lines I just said?

Ms. DAHLBERG. That would be a great idea. I just wanted to address the idea of litigation, though, as well.

Mr. NADLER. Please.

Ms. DAHLBERG. The ACLU is one of the very few civil rights programs that does that kind of litigation. In the last 10 years, we have brought four cases. They are huge; they are expensive; they are difficult to litigate. The law is not well-resolved in this area. The cases cannot go into Federal court because of the Younger abstention doctrine. They have to be litigated in state court.

Litigation is really in this area a tool of last resort. And using litigation, I think, what we have discovered, it threatens to tear apart the entire criminal justice system by exposing the underbelly, the dirty laundry, so to speak. It really is—can be very destructive to the criminal justice system within the particular jurisdiction.

And that is why most of our cases, in fact, have settled, is because states don't want to take that risk. So to, you know, on the one hand, spend, I mean, literally millions of dollars defending and prosecuting those kinds of states——

Mr. SCOTT. Ms. Dahlberg, we are going to——

Ms. DAHLBERG [continuing.] Allocate that money to——

Mr. SCOTT. We are going to have to move on to the next witness because——

Mr. NADLER. Thank you.

Mr. SCOTT [continuing.] We just have 3 minutes left before the vote.

Ms. Jackson Lee?

Ms. JACKSON LEE. Chair, would you be kind enough to put the vote on the—vote there so I could just watch it on the——

Mr. SCOTT. I don't know if I can. There are 3 minutes left.

Ms. JACKSON LEE. Okay, let me thank the witnesses for their time. And let me acknowledge all of you since I will have only a moment to ask questions, and this is a serious issue for the state of Texas.

Mr. Archer, let me thank you and acknowledge an additional resume success story of being former president of the National Bar Association, the largest organization of African-American lawyers, many of whom are in that 15 percent that practice criminal defense law.

I just want to focus on the language in the ABA that says that this defender program should be at the state level. And I think Professor Luna has made our case in the 14th Amendment. I think the case is being made under the Fifth Amendment of due process.

What is the ask here, in terms of the indigent standards? Would it be that the Federal Government set standards that require all states to establish a state indigent defense program? Would that move us more toward consistency in defending the indigent?

Judge ARCHER. Yes.

Ms. JACKSON LEE. And isn't it true in your readings that you have seen my state be notorious for, one, poor defense—so let me just say it; I will put it on the record—of indigent as it relates to death penalty cases? We have seen individuals be executed in the state of Texas—it has the highest number of executions—because of poor defense work. And over the last couple of years, we have seen an excellent local Dallas County prosecutor return a number of individuals to freedom because of poor DNA evidence or lawyers not asking it or not being able to get it.

My question, then, is isn't the on or the equity on the side of ensuring that indigents get good defense and that that would be a Federal nexus and desire under the Constitution?

Judge ARCHER. Yes, and I think it can be done without necessarily the expenditure, the money or the expanding, as the Ranking Member indicated in his observation—he can do that, and I believe it would also satisfy Professor Luna—in terms of asking for what is being done and setting forth guidelines. The American Bar Association can't impose on each state what should be done.

We come up with guidelines and ask that the states, typically through the chief justice or the respective supreme court or the highest court of the perspective states, implement the recommendations that are there—and I think if this Subcommittee and the general Committee of the House Judiciary Committee—and then if it was implemented across the board federally would be a great help to cause the states to take a look at themselves how best to do it.

Ms. JACKSON LEE. Well, I am going to conclude by thanking you and saying that I would like to add to the record a statement, Mr. Chairman, from Senator Rodney Ellis in Houston, Texas, that has legislation on indigent counsel, but more importantly chairs the Innocence Committee in New York that notes all of the poor defense

victims, if you will, and we know crime has many victims that are innocent and couldn't get out.

Let me also acknowledge the ACLU because I do not think we can handle this through civil rights legislation, and I support the idea of Federal standards for indigent practice—I was getting ready to say indigent care, but indigent practice and defense in criminal justice cases.

Thank you, I yield back.

Mr. SCOTT. Thank you, thank you very much.

Mr. GOHMERT. Mr. Chairman——

Mr. SCOTT. Mr. Gohmert?

Mr. GOHMERT. I actually had more than one article, if I could submit these three articles with unanimous consent.*

Mr. SCOTT. Without objection.

Mr. GOHMERT. And the comment was made that in 46 years the situation has not improved. It obviously hasn't worked. There are some places where it is not working, I think we will agree. But to say it hasn't improved—there were no real estate lawyers doing criminal work in my felony court.

I think it has improved dramatically. We just need to work on the places that haven't, but I didn't want to see the hearing closed without some fantastic criminal defense that is being done in some locations being acknowledged. Thank you.

Mr. SCOTT. And obviously there are some; it does happen in some cases, doesn't happen in others. And there are a lot of other issues that we have to explore—the independence issue, how much of a caseload is too much, how you guarantee—how you describe competence or how you help competence with the training centers and things like that and a lot of issues that we need to address.

But I would like to thank our witnesses for their testimony today. Members may have additional written questions for the witnesses, which we will forward and ask that you answer as soon as you can so the answer can be made part of the record.

Without objection, the hearing record will remain open for 1 week for the submission of additional material.

And without objection, Subcommittee stands adjourned.

[Whereupon, at 11:39 a.m., the Subcommittee was adjourned.]

*Note: See previous submissions by Mr. Gohmert.

APPENDIX

Material Submitted for the Hearing Record

State Appellate Defender
www.sado.org

Written testimony of Dawn Van Hoek
Chief Deputy Director
State Appellate Defender Office
Detroit, Michigan

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott (VA-3), Chairman

March 26, 2009

Penny-Wise and Pound-Foolish: Waste in Michigan Public Defense Spending

Thank you, Chairman Scott and other members of the Subcommittee, for this opportunity to provide written testimony on behalf of Michigan's State Appellate Defender Office. We greatly appreciate your interest in the constitutional crisis that exists in Michigan, and states across the nation.

I am the Chief Deputy Director of the State Appellate Defender Office, an appellate attorney who has devoted her 33-year legal career to securing the rights of indigent criminal defendants who appeal their state criminal convictions.[1] Since 1969,

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[1] The author thanks SADO staff attorney Marla McCowan for her invaluable research, suggestions and data-crunching. Ms. McCowan's compilation of federal habeas cases granting relief on ineffective assistance of counsel grounds form the foundation for much of this article, as well as the content of SADO's Defender Habeas Book, authored by Ms. McCowan. Our work was greatly aided by research help from Marilena David, who is completing her law school education at Wayne State University Law School while working at SADO. Finally, thanks to Anne Yantus, Director of SADO's Special Unit on Pleas & Sentencing, for her very thorough assembly of information about appellate correction of sentencing errors.

SADO has shown that with steady and adequate state funding, as well as performance and workload standards, an appellate defender office is a solid investment. The criminal justice system must rest upon checks and balances, including the testing of the state's evidence and correction of errors that occur at the trial court level. SADO performs that critical function, and saves public money otherwise wasted on incarceration.

No one likes to waste money, least of all when money is scarce. And yet, day after day in Michigan, avoidable mistakes are made in criminal cases. Those mistakes cost money. Taxpayer money.

Michigan's systemic rush to "justice" was well described in the recent report by the National Legal Aid and Defender Association (NLADA), which concluded that a constitutional crisis exists in the state, arising largely from the historical artifact of county-based funding for defense services.[2] As one of a handful of states without a state-funded system for providing counsel to citizens unable to afford it, Michigan fails to ensure the timely, and effective, assistance of defense counsel guaranteed by the state and federal constitutions. Assigned attorneys carry crushing caseloads, lack training, are underpaid, and have little or no access to investigators and expert witnesses. And, the Report Card released by the Michigan Campaign for Justice in February of 2009 gave Michigan failing grades on virtually all of the well-established Principles of a Public Defense Delivery System.[3] Michigan has invested very little toward defense spending at the trial court level, and it shows in the number and serious nature of errors that must be corrected on appeal.

Little documentation exists for the actual cost of the mistakes made when defense lawyers lack time, training, and resources to defend clients. In the same vein, the frequency of mistakes is elusive, and largely unexamined. As policy-makers turn to solutions, including how to pay for a reformed system, the waste created by the current way of doing business must be considered. It is not unreasonable to conclude that fewer mistakes would lead to savings that might significantly underwrite a state-funded system.

And, Michigan's taxpayers should be getting their money's worth.

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[2] "A Race to the Bottom, Speed & Savings Over Due Process: A Constitutional Crisis," NLADA, June, 2008. The report observes that Michigan counties, dependent on diminishing revenues from property taxes, are hard-pressed to adequately fund defense services.

[3] Available at www.michigancampaignforjustice.org.

Oversight

Currently, no agency or individual in Michigan is tasked with ensuring that public funds for defense services are spent in an efficient, and constitutionally adequate, manner. No one reviews or reports to a funder on whether good value is obtained for every dollar spent. No one tracks the cost of mistakes, or considers loss prevention and the avoidance of waste.

The State Appellate Defender Office (SADO) is uniquely positioned to provide at least some insight on systemic waste, though such analysis is not its statutory mandate. Since 1969, SADO has represented approximately one-quarter of the state's indigent felony defendants who seek an appeal from their convictions and/or sentences. SADO is Michigan's only state-funded criminal defense agency, governed by a commission, with policies in place that conform to national standards.[4] Thousands of cases arising from the fractured and underfunded trial-level system have made their way to SADO, which takes cases from all Michigan counties. A unique and large "database" thus exists for examination of mistakes, defined as those deserving appellate correction.

This paper is offered as a window on waste from this appellate perspective.

Correcting sentencing errors

Every day, in hundreds of Michigan cases, assigned criminal defense counsel appear at sentencing proceedings ill-prepared for perhaps the most important phase of the case. Sentencing in Michigan is a complex and highly specialized process based on computation of statutory sentencing guidelines, and recommendations contained in presentence reports that are prepared by local probation departments. In a typical Michigan criminal case, court-assigned attorneys obtain the report just before sentencing, leaving virtually no time to check the accuracy of its important contents. If his or her caseload is large, as is true for public defenders and contract counsel, assigned counsel has even less time to investigate prior records, personal characteristics of the defendant, or circumstances that might mitigate the severity of punishment. Defendants are frequently sentenced on the basis of inaccurate information, and inaccurately scored guidelines.

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[4] SADO's enabling legislation is found at MCL 780.711 et seq.

The most documented examples of waste observed from SADO's appellate perspective involve sentencing errors. The rush to sentencing, lack of training for attorneys, and difficulty of making the guidelines computations, contribute to these error-laden proceedings.

Recognizing the specialized nature of sentencing, SADO created a special unit of attorneys who handle appeals from guilty pleas, where the most likely appellate claims relate to sentencing. For years, these specialists have tracked sentencing relief obtained, the "errors corrected," through the appellate process. Their measure is the number of years reduced from a client's minimum sentence,[5] easily translated into the cost of incarceration.

In over one-third of plea appeals handled in 2007 by SADO's three Special Unit attorneys, some sentencing relief was obtained. The Special Unit attorneys handle heavy caseloads; each is assigned about 80 cases per year, nearly four times the number of cases handled in a trial appeal caseload. Due to each attorney's large caseload, significant economics are possible: two or three clients may be visited at a single facility on a single day, and even court appearances may be combined. These attorneys frequently initiate an appeal in the trial court, which has significant advantages: memories are fresh, trial judges are well-acquainted with the file, prosecutors are more likely to negotiate, and a costly proceeding in the higher appellate courts may be avoided. **Of the 2007 SADO Special Unit cases that proceeded first in the trial court, sentencing relief was granted an average of 85% of the time.**

For the five calendar years of 2003-2007, the Special Unit accomplished a cumulative reduction in minimum prison terms of 122 1/2 years, and a cumulative reduction of maximum prison terms of 309 years. The average reduction per Special Unit attorney per year was 7 1/2 years on the minimum term, and 19 years on the maximum term.

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[5] Defendants in Michigan become parole-eligible once they serve the minimum term. A reduction in the minimum term represents the most conservative measure of time shaved from a prison sentence.

The numbers and averages for **sentence reductions** for each year appear below. The number of special unit attorneys has varied each year, and therefore the number of overall reduced sentences will vary from year to year. There were two unit attorneys from 2004-2005, three unit attorneys in 2007, and four unit attorneys in 2003 and 2006.

	Cumulative Min Term Reduction	Average Per Atty Min Term Reduction	Cumulative Max Term Reduction	Average Per Atty Max Term Reduction
2003	45 ½ Years	11 Years	73 Years	18 Years
2004	18 ½ Years	9 Years	15 Years	7 ½ Years
2005	10 ½ Years	5 Years	21 ½ Years	10 ½ Years
2006	19 ½ Years	4 ½ Years	85 ½ Years	21 Years
2007	28 ½ Years	9 ½ Years	114 Years	38 Years

Assuming an average annual cost of incarceration of $30,000 (clients reside in a variety of correctional settings), sentencing error correction by Special Unit attorneys during 2007 saved the State of Michigan at least $855,000 (28.5 years reduced from sentence minimum x $30,000). **The cumulative total of prison costs saved through error correction by these three SADO attorneys for the five years surveyed is $3,675,000.**

What could this rate of error correction mean for system-wide savings? Statewide appellate assignments for the same five-year period appear below:[6]

Year	Trials	Pleas/PVs/Resentencings	Total
2003	1418	2207	3625
2004	1070	2350	3420
2005	1098	2777	3875
2006	1166	3238	4404
2007	1182	3030	4212

[6] Figures obtained from the Michigan Appellate Assigned Counsel System.

Assuming the same sentencing error rate for trials and guilty pleas, the total projected savings per year appear below:[7]

Year	Unnecessary Years in Prison	Cost of Unnecessary Years in Prison
2003	340 years from minimum	$10,200,000
2004	321	9,630,000
2005	363	10,890,000
2006	413	12,390,000
2007	395	11,850,000

In just this five-year sample, the projected total savings in prison costs due to appellate correction of sentencing error is conservatively estimated[8] at $54,960,000. Although they are parole-eligible upon reaching their minimum terms, Michigan prisoners actually serve, on average, 127% of their minimum terms.[9] Adjustment of the projected savings to reflect this parole policy brings the five-year savings number to **$69,799,200.**

This nearly $70 million is the projected cost of incarceration which could have been avoided if mistakes did not occur in the first place, at the trial court level. If **those mistakes did not occur in the first place, the system would also save the cost of taking an appeal and litigating to correct the error, a figure that would include the cost of appellate defense counsel and prosecutors, and appellate courts.**

Wrongful convictions: the ultimate waste

For cases in which a criminal defendant was exonerated, quantifying waste takes on greater dimensions: in addition to wasted costs of appeals and years in prison, civil judgments may dramatically increase the cost to taxpayers.

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[7] The formula for computing savings is (80 cases/7.5 average years reduced from minimum sentence = total annual cases/total average years reduced from minimum sentence) x $30,000 prison costs per year.

[8] Note 5, above.

[9] The Justice Center, Council of State Governments, "Analyses of Crime, Community Corrections, and Sentencing Policies," report released January 22, 2009, at page 9.

Consider the case of **Eddie Joe Lloyd**, who served 17 years in prison for a murder and rape he didn't commit before DNA testing proved his innocence and led to his release in 2002. Police interrogated Lloyd about the 1984 killing of a sixteen-year-old girl in Detroit after he wrote to them from the hospital, where he was receiving treatment for his mental illness. Lloyd offered suggestions on how to solve numerous murders. Police interrogators provided him with crime details not otherwise known, suggested that he could help them "smoke out" the real perpetrator, and obtained a signed confession. At trial, Lloyd's confession was played to jurors, who also heard evidence about semen found on clothing used to strangle the victim. Lloyd's jury convicted him of first-degree murder after just one hour of deliberation. Fruitless appeals followed until Lloyd contacted The Innocence Project in 1995, seeking retesting of the biological evidence used at his trial. With help from the Wayne County Prosecutor's Office, independent testing by forensic Science Associates, and confirmation by the Michigan State Police Crime Lab, Lloyd was released in 2002 when he was excluded as the source of the biological evidence.[10]

What went wrong at the trial court level? A fatal combination of poor lawyering and inadequate resources led to the unjust result:

- Lloyd's court-assigned attorney received $150 for pre-trial preparation and investigation, $50 of which went to a person who failed to investigate Lloyd's mental state or confession;[11]

- His attorney withdrew just eight days before trial, and the substituted lawyer failed to meet with the first attorney, or to seek an adjournment;

- Lloyd's trial attorney failed to question the details of the investigation and failed to cross-examine the police officer most directly involved in obtaining the false confession; he also called no defense witnesses, and gave a five-minute closing argument;

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[10] The source of information about the Lloyd case is The Innocence Project, which obtained his exoneration in 2002: www.innocenceproject.org/content/201.php.

[11] In 1984, Wayne County's fee schedule for court-appointed counsel provided an average of $1,400 to attorneys assigned on first-degree murder cases. *In re Recorder's Court Bar Association*, 443 Mich 110, 117 (1993).

- Lloyd maintained his innocence throughout the lower court process, and said at sentencing that he didn't kill the young woman.

- The attorney assigned to his direct appeal did not visit Lloyd, failed to raise a claim of ineffective assistance of trial counsel, and responded to Lloyd's complaint about his conduct by saying that Lloyd should not be taken seriously, and was "guilty and should die."

Detroit Free Press editors recently wondered, "How much would the state have saved if Lloyd had never been imprisoned in the first place?"[12] When we chart the waste in the Lloyd case, based largely on ineffective assistance of counsel, we include not only the cost of his appeals,[13] and the cost of his unwarranted 17 years in prison, but also the civil judgment obtained against the City of Detroit and other defendants. Lloyd's wrongful conviction suit was settled for $4 million ($3.25 million from the City of Detroit, $600,000 from the State of Michigan, and $200,000 from Wayne County).[14] A conservative take on the money wasted on this one, unjust, prosecution is nearly **$5 million.**[15]

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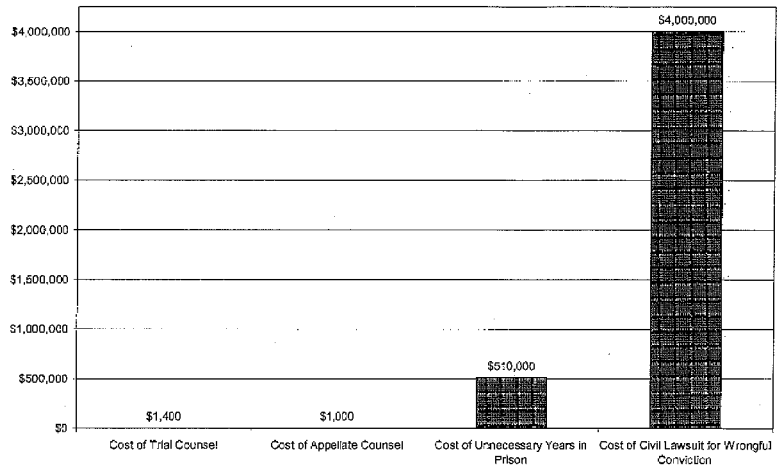
[12] "No justice on the cheap," Detroit Free Press editorial, March 8, 2009.

[13] Lloyd was represented by assigned appellate counsel on his appeal of right to the Michigan Court of Appeals, who would have been paid no more than $2000 under the local fee schedule. He then pursued the following appeals on his own, following denial of relief in the Court of Appeals:
8/31/87 - MI Supreme Court app filed (Dkt 81349)
1/29/88 - MI Supreme Court app denied
2/16/88 - reconsideration denied by MI Supreme Court
3/8/95 - motion for relief from judgment denied by Judge Townsend
4/27/95 - app filed in MI Ct of Appeals (Dkt 185322)
10/5/95 - leave denied by MI Ct of Appeals
10/20/95 - 2nd MRJ denied
12/20/95 - app filed in MI Ct of Appeals (Dkt 191532)
5/21/96 - leave denied by MI Ct of Appeals
6/26/96 - Mi Sup Ct app filed
2/28/97 - MI sup Ct app denied

[14] "State, county to pay in murder conviction," Michigan Lawyers Weekly, May 15, 2006.

[15] The chart and total exclude the nearly impossible to determine costs of trial and appellate court time, and trial and appellate prosecutor time. Costs of trial and appellate assigned counsel are estimates, based on then-existent fee schedules.



The Lloyd case, unfortunately, is not unique to Michigan's jurisprudence. **Kenneth Wyniemko** was exonerated by DNA retesting of evidence used to convict him of criminal sexual conduct at a 1994 trial in Macomb County. He served 8 and one-half years of his 40-60-year sentence before efforts of the Cooley Law School Innocence Project led to his release in 2003. Wyniemko obtained a civil judgment of $3.3 million in his wrongful conviction lawsuit against Clinton Township.[16] **Walter Swift** was convicted of a Detroit rape in 1982, on the basis of an identification by the victim that was both uncertain and unreliable. His court-assigned trial attorney, who was later suspended from practice due to conduct in other cases, failed to investigate or present either Swift's alibi or the forensic test result which excluded him as a donor of semen recovered at the scene. Swift served 26 years in prison, pursuing numerous appeals,

[16] "Man wrongfully imprisoned for rape gets $1.8 million," Michigan Lawyers Weekly, December 5, 2005. The settlement included a $1.8 million lump sum payout, with a structured monthly payout valued at $1.5 million.

before his exoneration and release in 2008.[17] The civil exposure to cash-strapped Detroit for its involvement in the case remains to be determined. Wrongful convictions obviously carry high price tags for government, and taxpayers.

Could more cases of wrongful conviction due to systemic failures emerge, or are these isolated examples? There is little doubt in Michigan's criminal defense community that the future will produce miscarriages of justice arising from unreliable testing conducted by the Detroit Police Crime Lab, closed in September, 2008, after an audit conducted by the Michigan State Police. For a period of years not yet limited, police employees of the lab worked in "deplorable conditions," with high work volumes and poor chain of evidence procedures, and uncalibrated and poorly maintained equipment. At least as to ballistics testing, State Police found that 10% of the test results examined had significant errors. The same audit observed that "if the quality system is failing in one forensic discipline [ballistics], it is highly likely to be an indicator of a systemic problem that affects other forensic disciplines as well."[18] Criminal convictions in Michigan's busiest criminal court, whether from trials or guilty pleas, were based on potentially tainted and outcome-determinative test results.

What does this have to do with adequacy of the public defense system? The Crime Lab's questionable results were routinely accepted at face value by assigned attorneys who face insurmountable obstacles to effective representation: an event-based local fee schedule and lack of resources make the filing of a motion or request for an independent forensic test a rarity.[19] Correcting Crime Lab errors will undoubtedly deal additional financial blows to the local and state treasuries, in large part due to the inadequate funding of defense services.

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[17] Efforts of The Innocence Project led to Walter Swift's exoneration: www.innocenceproject.org/Content/1360.php.

[18] Michigan State Police Forensic Science Division, "Detroit Police Department Firearms Unit Preliminary Audit Findings as of September 23, 2008," online at http://www.sado.org/crimelab/MSP%20Audit%20Findings%20of%20September%2023%202008.pdf.

[19] The fee schedule is available at www.sado.org/fees/2007trial.pdf.

Ineffective assistance of counsel as window on waste

Appellate attorneys largely function as "quality control" for the criminal justice system. SADO's staff attorneys review the entire lower court record, and consult with their clients, before determining which appellate claims to raise; Michigan's unified appellate process permits claims based either on the record, or through development of additional facts in narrow circumstances. Trial counsel's performance is closely examined for its projected impact on the lower court outcome, and as a means to preserve a claim for further appellate review. Performance is defined particularly to include not only affirmative acts, but also any omissions in how a case was handled. Among the performance-related conduct identified by a leading scholar are bad advice, failure to seek suppression of evidence, failure to protect a defendant before trial, failure to discover or challenge prosecution evidence, failure to investigate or introduce defense evidence, introduction of evidence harmful to the defendant, failure to object, failure to request instructions, inadequate representation at sentencing, and conflict of interest.[20] If ineffective assistance of counsel is obvious and established on the lower court record, appellate counsel will proceed to the appellate court venue; if not, an evidentiary hearing is sought in the trial court.

A lawyer performs "deficiently" by making errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Relief is warranted when such deficient performance prejudices the defense. *Id.* However, the lack of a precise definition of the phrase "deficient performance" has created uneven application of the test as a means to obtaining relief. Such varying standards allow courts to virtually insulate poorly practicing lawyers from attack on appeal. At particular risk are indigent defendants whose only recourse when charged with a crime is the assistance of court-appointed counsel.

Despite the difficulty of satisfying the *Strickland* standard on appeal, ineffective assistance of trial counsel is found in a significant number of cases. And, the cost to the system is often extravagant.

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[20] Levine, Barbara, "Preventing defense counsel error – an analysis of some ineffective assistance of counsel claims and their implications for professional regulation," 15 U Tol L Rev 1275 (1983-1984).

Frequency of IAC claims

The scholar who previously catalogued the types of ineffective conduct also examined its frequency. Reviewing hundreds of cases assigned to SADO during a thirty-eight-month period in the early 1980s, Levine found ineffective assistance of counsel claims raised in 14.3% of the cases. This was found to be within the nationally-recognized range of 9 to 22% for the time. [21]

Claims of ineffective assistance of counsel (IAC) are still routinely raised on appeal by staff attorneys at the State Appellate Defender Office of Michigan, due in part to the success rate in federal habeas corpus proceedings. A review of the past three years of briefs on appeal in appeals of right filed by SADO's staff attorneys reveals that claims of ineffective assistance of counsel at trial are filed in **48.4%** of cases in which briefs are filed. **IAC claims on appeal are rising in frequency.**

SADO attorneys liberally raise claims of ineffective assistance of counsel in order to protect their clients' rights and preserve underlying issues that are not preserved at trial. When an error is subjected to "plain error" review on appeal, it may be considered "defaulted" for purposes of subsequent habeas corpus actions. *See e.g., Thompkins v. Berghuis*, 547 F.3d 572, 588-589 (6th Cir. 2008). A claim of ineffective assistance of counsel may constitute "cause" to overcome such a procedural default, but the United States Supreme Court has made it clear that a claim of ineffective assistance of counsel must be presented as a separate claim in the state courts in order to be considered such "cause" in federal habeas corpus review. *Murray v. Carrier*, 477 U.S. 478 (1994). It is therefore out of an abundance of caution that these claims are on the rise by SADO's assistant appellate defenders.

Because state appellate courts have not been particularly hospitable to the claims, which are based on the federal constitution as well as state constitution, IAC cases frequently end in federal court. The results in recent years offer an eye-opening indictment of Michigan's public defense system.

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[21] Levine, note 1, at 1306-1311.

Approximately 50 claims of ineffective assistance of counsel involving state court proceedings have resulted in successful federal habeas corpus actions since 1996.[22] Clearly, IAC claims are costing Michigan not only what it takes to litigate and potentially retry these cases, but also credibility and prestige among the states. At least some commentators have identified Michigan's Supreme Court as among the nation's worst in reaching one-sided verdicts.[23] The inability to obtain appellate relief in Michigan's state courts, in recent years, has created a pathway to federal court.

The list appearing as Attachment A represents failures to both avoid mistakes in the trial court, and to correct them on appeal in the state appellate system.

Spotlight on IAC examples

The cost of IAC is, of course, primarily human, as defendants may spend many unnecessary years in prison. A poor Michigan citizen facing criminal charges almost always receives an appointed attorney who has little training, motivation or opportunity to provide the defense representation that would be provided by retained counsel to a paying client. Errors are frequent, and correcting them through the appellate process often takes many years.

Mistakes due to **poor advice by trial counsel** pose one such problem. In the case of Defendant Kermit Eldridge Haynes, the trial attorney failed to advise his juvenile client that the prosecutor could appeal the juvenile sentence in connection with the guilty plea to first-degree murder. When the prosecutor did appeal the juvenile term, a lengthy appellate process began in the early 1990s, during which every state appellate court decision denied relief to the juvenile defendant. *See Haynes v. Burke*, 115 F. Supp. 2d 813, 814-816 (E. D. Mich. 2000). Ultimately, Mr. Haynes successfully petitioned for federal habeas corpus relief on the ground that he did not plead guilty knowingly, intelligently or voluntarily due to the ineffective assistance of counsel at the plea hearing. *Id.* That decision was affirmed on appeal by the United States Court of

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[22] The Antiterrorism and Effective Death Penalty Act took effect on April 24, 1996, significantly changing and increasing state preservation requirements for habeas review.

[23] Choi, Stephen J., Gulati, G. Mitu and Posner, Eric A.,Which States Have the Best (and Worst) High Courts?(May 1, 2008). U of Chicago Law & Economics, Olin Working Paper No. 405; U of Chicago, Public Law Working Paper No. 217. Available at SSRN: http://ssrn.com/abstract=1130358.

Appeals for the Sixth Circuit at 299 F.3d 57 (6th Cir. 2002) and the United States Supreme Court denied the prosecution's petition for certiorari (at 537 U.S. 1179) on January 27, 2003. All together, the State Appellate Defender Office spent nearly $18,000.00[24] in staff salary alone to obtain relief for Mr. Haynes. As a result of the lengthy appellate process, Mr. Haynes was able to obtain equitable sentencing relief in a plea hearing in 2003 and was paroled from prison on February 24, 2009. Instead of spending the rest of his life in prison without the possibility of parole, Mr. Haynes was released at a savings to Michigan taxpayers of approximately $840,000[25] in incarceration costs. The trial attorney was likely paid $1,400[26] to represent Mr. Haynes during the guilty plea proceedings. The inadequate representation was very **nearly a million dollar error**, when considering not only the incarceration cost, but also attorney salaries and court costs at every state and federal level over the course of a 13-year appeal.

Mistakes due to **inadequate investigation by trial counsel** also result in appellate relief. SADO client Patrico Ramonez was granted habeas corpus relief by the United States Court of Appeals for the Sixth Circuit, which found that his trial attorney failed to investigate witnesses. *Ramonez v. Berghuis*, 490 F.3d 482 (6th Cir. 2007). In that case, Mr. Ramonez was charged with multiple crimes including home invasion; however, witnesses could have substantiated the claim that Mr. Ramonez did not force his way into the complaining witness's home. The trial attorney's strategy focused solely on the events inside of the home, and he declined to interview or investigate these witnesses, believing it not relevant to do so. As the Sixth Circuit observed in granting relief, had trial counsel "engaged in the minimal--and essential--step of

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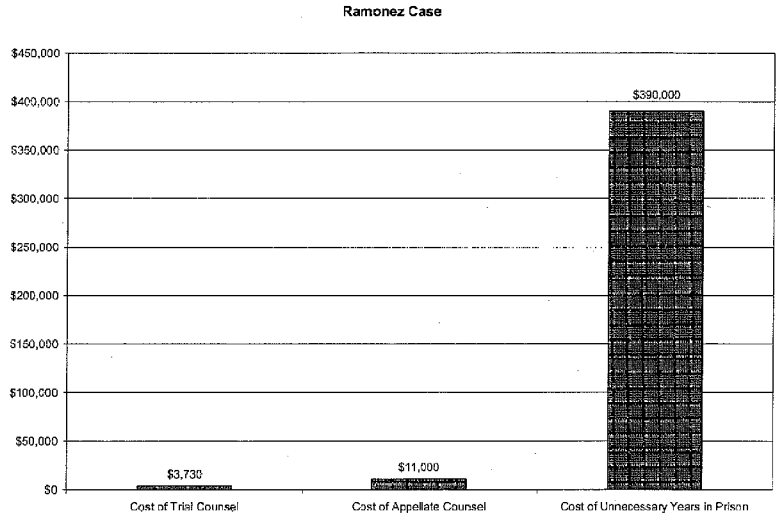
[24] This is an estimate only. A mid-range (pay scale) Defender II at the State Appellate Defender Office earns $45.89 per hour in salary and benefits. Each defender is assigned an average of 28 weighted cases per year and in a calendar year is paid for 2088 hours, spending approximately $3,421.00 per case (appeal of right only) per year. In this particular case, the State Appellate Defender Office was appointed to represent Mr. Haynes in connection with at least three appeals (an average salary of $10,262.00). Hours spent on subsequent state court pleadings, motions and other filings in the state court, federal court filings including initiating pleadings and answers, resulted in at least 168 hours of *additional* time spent by counsel in this particular case ($7,709.52).

[25] Mr. Haynes was 36 ½ years old when he was released in February, 2009. The savings to the Department of Corrections assumes an average life expectancy of 65 years old (an additional 28 years in prison if he was not granted relief) at a rate of $30,000.00 per year to incarcerate an inmate in Michigan.

[26] This assumes the fixed fee for first-degree murder charges in Wayne County effective at the time of the plea in 1990. *See* Joint Administrative Order of the Third Judicial Circuit and Recorder's Court for the City of Detroit 1988-2 and Schedule G, effective for vouchers submitted after July 1, 1988 (which has since been amended); see www.sado.org/fees.

interviewing the witnesses, he would have learned that they *could* testify as to what took place in the house, and that their testimony would have supported Ramonez's version of events." *Id.* at 488. The time it took to litigate that appeal to the conclusion of relief for Mr. Ramonez cost over $11,000.00[27] in appellate staff attorney salary alone, compared with at most a few thousand dollars[28] in payment to the appointed counsel at trial.[29] Mr. Ramonez spent seven years in prison while his case was appealed; a competent defense at trial may well have resulted in outright acquittal.

In just this case alone, waste due to IAC can be visualized by the costs of appellate counsel and unnecessary years in prison:



[27] As set forth in n.2, supra, this considers the initial $3,421.00 in salary and benefits for the appeal, plus hours spent on subsequent state court pleadings, motions and other filings in the state court, federal court filings including initiating pleadings and answers, which resulted in at least 168 hours of *additional* time spent by counsel in this particular case ($7,709.52).

[28] $3,730, assuming the fee scale for an average trial in the 3rd Judicial Circuit as of 2001.

[29] The adequacy of the Wayne County fee schedule for assigned counsel has been the subject of two major lawsuits; see www.sado.org/fees.

Defendant Chamar Avery's case illustrates a typical problem created by an **overworked public defender.** Mr. Avery was charged with first-degree felony murder for the shooting death of a pizza delivery man on Dayton Street in the City of Detroit on January 15, 2000, between 7:30 and 8:00 p.m. Mr. Avery told his attorney that he could not have committed the crime because at the time of the shooting he was with a friend at an automobile repair shop. Mr. Avery's trial attorney did not present any alibi witnesses at trial. Mr. Avery was convicted of second-degree murder and sentenced to 20 to 50 years in prison. On appeal it was alleged that trial counsel was ineffective for failing to present an alibi defense at trial. Testimony at the state court evidentiary hearing established that trial counsel did send an investigator to look into the potential alibi witnesses. However, the federal district court found counsel's failure to follow up on those witnesses to be deficient and warranted habeas corpus relief. *Avery v. Prelesnik*, 524 F. Supp. 2d 903 (W.D. Mich. 2007). The United States Court of Appeals agreed.

In *Avery*, trial counsel is a senior attorney with the Legal Aid and Defender Association of Detroit who alone handles approximately 300 cases per year of varying degree of difficulty, and whose pay in this case, prorated by annual salary, was approximately $170.[30] His inattention in *Avery* cost over $11,000.00[31] in appellate attorney salary alone, plus costs to the system for litigating his deficient performance all the way to the second highest court in the nation in an appeal that spanned over eight years and counting.[32]

Quantifying Waste from IAC

Without a significant investigative effort, it is almost impossible to quantify the full extent of waste attributable to ineffective assistance of trial counsel. SADO can estimate the cost of appellate counsel in its own cases litigated through to successful habeas resolution, but does not have access to other key costs, such as appellate prosecution and appellate courts. And, SADO can also quantify the number of years in prison that were shaved from a sentence that was corrected on appeal; from that

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[30] The attorney assigned to the case had a salary of approximately $50,000, and a caseload of approximately 300 cases per year.

[31] *See* n.5, above.

[32] The Attorney General sought *en banc* reconsideration of the Sixth Circuit decision, which was denied on 2-9-09; further appeal may yet be taken.

number, one can project prison cost savings.[33] What emerges is at least a partial picture of what might have been saved had a case been properly handled in the first place. At the very least, it is possible from the chart appearing as Attachment B to appreciate the extent of appellate work done to achieve the result. For any one of the cases appearing in this chart, waste may be graphed as it was in the Ramonez case, above.

Avoiding waste

Michigan is getting a poor return on investment from its spending on defense of indigent defendants. In a significant number of cases, spending the minimal possible amount on assigned trial counsel does little but produce larger costs downstream. Michigan's 83 counties, which currently bear the entire burden of funding defense services, have reduced that spending in response to lower revenues locally. The resulting dependence on low bid contracts, to cap costs, is only accelerating the error rate.

The connection between a constitutionally sound system and long-term savings was recently, and eloquently, recognized in a Detroit Free Press editorial:

> *How much less would Michigan spend on prisons if it more faithfully provided adequate defense for the poor? If you diverted even a fraction of the money being swallowed by corrections to bolster the state's indigent defense efforts, how much would that contribute to the reduction of the state's structural budget imbalance?*
>
> *Those are questions that no one in Lansing can afford to avoid anymore.*
>
> *Because fixing the state's indigent defense system is not just the right thing to do. It could also be one of the key ways to restrain public spending on corrections.*[34]

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[33] Prison cost savings for cases in which an error was corrected and retrial did not occur are calculated as: maximum sentence – time spent in prison x $30K per year. The presumption applied in cases not retried is that the prosecution could have obtained some conviction on retrial, but was satisfied with the time already spent in prison. The savings therefore are the time left on the original sentence, up to the maximum, not served due to error correction.

[34] Note 10, above.

Investment in defense infrastructure, and state funding, are needed to avoid the waste generated by errors. Assigned attorneys who are qualified, properly trained, and operating within reasonable workloads will have the knowledge and ability to make objections, and calculate sentencing guidelines. Assigned attorneys who have access to investigators and experts will present defenses which avoid wrongful convictions and allow law enforcement to focus on apprehending the real perpetrators. From an appellate perspective, it is time to stop correcting thousands of errors caused by inadequate defense resources, and focus on preventing them in the first place.

Contact:
Dawn Van Hoek, dawn@sado.org, (313) 256-9833

Attachment A

These are the *Strickland*-type of ineffective assistance of counsel cases where deficient performance and prejudice were shown, and habeas relief was granted, from the effective date of AEDPA 4/24/1996 to 02/20/2009:

Plea bargains, including failure to adequately relay plea bargain:

Leatherman v. Palmer, 2008 U.S. Dist. LEXIS 82561 (W.D. Mich. Docket No. 06-121, October 16, 2008) (failure to properly advise petitioner of a plea offer).

McBroom v. Warren, 542 F. Supp. 2d 730 (E. D. Mich. 2008) (original counsel rendered deficient performance by failing to communicate the plea offer prior to trial; successor counsel rendered deficient performance by misinforming petitioner of ability to have plea bargain reinstated as a result of original counsel's deficient performance).

Satterlee v. Wolfenbarger, 453 F.3d 362 (6th Cir. 2006) *cert. denied* 127 S. Ct. 1832 (2007) (failure to advise petitioner of plea offer made on the morning of trial).

Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006) (deficient performance for advising petitioner to plead guilty without investigating potential defense of battered spouse syndrome/duress).

Maples v. Stegall, 340 F.3d 433 (6th Cir. 2003) (failure to advise petitioner that guilty plea waived speedy trial claim on appeal).

Lyons v. Jackson, 299 F.3d 588 (6th Cir. 2002) (failure to advise juvenile defendant that the state could appeal juvenile sentence constituted deficient performance where petitioner established that he would not have pled guilty to first degree murder had he known of possibility of appeal). *See also Miller v. Straub*, 299 F.3d 570 (6th Cir. 2002) (same, affirming *Haynes v. Burke*, 115 F. Supp. 2d 813 (E. D. Mich. 2000).

Dedvukovic v. Martin, 36 Fed. Appx. 795 (6th Cir. Docket No. 00-2306, March 22, 2002) (failure to advise of consequences of not accepting guilty plea to reduced charges and correlating risks of proceeding to trial as charged).

Magana v. Hofbauer, 263 F.3d 542 (6th Cir. 2001) (counsel's advice to reject plea offer based on counsel's misunderstanding of the terms of the sentence

constituted deficient performance where there was a reasonable probability that petitioner would have accepted the plea had it been accurately explained).

Failure to investigate witnesses/prepare for trial:

Davis v. Booker, Eastern District of Michigan Docket No. 02-75063 (January 22, 2009) (failure to meet privately with defendant prior to trial, and failure to investigate and call witnesses at trial and failure to impeach prosecution witnesses).

Brown v. Smith, 551 F.3d 424 (6th Cir. 2008) (failure to obtain complaining witness' counseling records to support defense that the witness was not credible at trial).

English v. Romanowski, Eastern District of Michigan Docket No. 06-11552 (December 9, 2008) (failure to investigate witness and call witness at trial to support claim of self defense despite making claim in opening statements that the witness would testify at trial).

Guilmette v. Howes, 2008 U.S. Dist. LEXIS 68718 (E.D. Mich. Docket No. 05-72646, September 10, 2008) (failure to adequately investigate physical evidence at the crime scene and failure to contest the prosecutor's proofs on an element of the offense).

Ramonez v. Berghuis, 490 F.3d 482 (6th Cir. 2007) (failure to investigate witnesses identified by the petitioner to corroborate, amongst other points, the fact that petitioner charged with crimes including home invasion did not force his way into the complaining witnesses home).

Avery v. Prelesnik, 524 F. Supp. 2d 903 (W.D. Mich. 2007), aff'd 548 F.3d 434; (6th Cir. Docket No. 07-2522, November 25, 2008) (failure to investigate, contact or interview potential alibi witnesses in a murder trial).

Poindexter v. Booker, 2007 WL 1556671; 2007 US Dist LEXIS 38928 (E. D. Mich. Docket No. 05-71607, May 30, 2007) aff'd; (6th Cir. Docket No. 07-1795, November 25, 2008) (failure to interview or produce alibi witnesses at trial).

Tucker v. Cason, 2007 WL 3121589; 2007 US Dist LEXIS 78329 (E. D. Mich. Docket No. 03-10254, October 23, 2007) (failure to investigate automobile accident as alternate source of pelvic injury to complaining witness in a criminal sexual conduct case).

Stewart v. Wolfenbarger, 468 F.3d 338 (6th Cir. 2006) (failure to provide proper alibi notice and failure to investigate potential witnesses for trial).

Smith v. Lafler, 175 Fed. Appx. 1 (6th Cir. Docket No. 04-1353, March 15, 2006) (failure to investigate complaining witness' stay at a psychiatric facility).

Towns v. Smith, 395 F.3d 251 (6th Cir. 2005) (failure to make contact with or investigate potentially important witnesses made known to counsel prior to trial).

Higgins v. Renico, 362 F. Supp. 2d 904 (E. D. Mich. 2005) aff'd 470 F.3d 624 (6th Cir. 2006) (failure to cross examine state's key witness at trial due to lack of preparation).

Tucker v. Prelesnik, 181 F.3d 747 (6th Cir. 1999) (failure to obtain medical records of the complaining witness to impeach his credibility at trial and failure to request a continuance to prepare for trial).

Failure to object to prosecutorial misconduct:

Hall v. Vasbinder, 551 F. Supp. 2d 652 (E.D. Mich. 2008), adopting magistrate's report and recommendation) (failure to object to testimony and prosecutor's repeated references to petitioner's silence).

Smith v. Jones, 2007 WL 2873931; 2007 US Dist LEXIS 70721 (E. D. Mich. Docket No. 05-72971, September 25, 2007) (failure to object to ongoing misconduct throughout trial and failure to request curative instruction).

Hanna v. Price, 245 Fed. Appx. 538 (6th Cir. Docket No. 06-1019, August 27, 2007) (failure to object to prosecutorial misconduct in the form of disparagement of insanity defense during closing argument).

Washington v. Hofbauer, 228 F.3d 689 (6th Cir. 2000) (failure to object to prosecutorial misconduct where the prosecutor improperly emphasized the bad character of the petitioner and argued facts not in evidence during closing argument).

Trial errors:

Thompkins v. Berghuis, --- F.3d --- ; (6th Cir. Docket No. 06-2435, November 19, 2008) (failure to request that the trial court instruct the jury that it could consider

the evidence relating to the jury verdict and guilty plea conviction of the accomplice witness for an evaluation of credibility only and not as substantive evidence of Petitioner's guilt).

Byrd v. Trombley, 2008 U.S. Dist. LEXIS 70798 (E.D. Mich. Docket No. 05-74850, September 18, 2008) (failure to object to evidence of the prior conviction of petitioner, failure to object to "bad man" evidence, and failure to investigate and present an expert to challenge the prosecution's witnesses).

Goldy v. Tierney, 2008 US Dist LEXIS 32000 (E. D. Mich. Docket No. 06-10546, April 18, 2008) (failure to adequately object to damaging impeachment evidence and failure to object to an insufficient jury instruction regarding the element of intent).

Ege v. Yukins, 485 F.3d 364 (6th Cir. 2007) (failure to object to the state expert's statistical opinion on bite mark evidence in the absence of a proper foundation for the admissibility of the evidence).

Carter v. Wolfenbarger, 2006 WL 3446205 (no LEXIS cite available) (E. D. Mich. Docket No. 04-74564, November 27, 2006) (failure to object to court's instruction to jury that they could not obtain transcripts of critical witnesses testimony during deliberation).

Ferensic v. Birkett, 451 F. Supp. 2d 874 (E. D. Mich. 2006) (failure to secure the presence of expert witnesses at trial) *affirmed on other grounds*, 501 F.3d 469 (6th Cir. 2007).

Wade v. White, 368 F. Supp. 2d 695 (E. D. Mich. 2005) (failure to object to irrelevant and highly prejudicial testimony of unrelated shooting of key witness for the state, and failure to object during state's closing argument regarding that evidence).

Tucker v. Renico, 317 F. Supp. 2d 766 (E. D. Mich. 2004) (failure to introduce evidence including long term relationship with complaining witness in criminal sexual conduct and breaking and entering case which would have supported defense of consent and/or negated elements of crimes).

Matthews v. Abramajtys, 319 F.3d 780 (6th Cir. 2003) (failure to present favorable evidence or arguments known to the defense including alibi witnesses during a bench trial).

Northrop v. Trippett, 265 F.3d 372 (6th Cir. 2001) (failure to move to suppress evidence obtained during an illegal search).

Gonzalez v. Phillips, 195 F. Supp. 2d 893 (E. D. Mich. 2001) (failure to obtain Spanish-speaking interpreter to communicate and translate for petitioner at trial constituted deficient performance where petitioner advised counsel that he did not understand the proceedings, was unable to confront the witnesses against him, and where he would have testified at trial with the assistance of an interpreter).

Appellate errors:
Davis v. Booker, Eastern District of Michigan Docket No. 02-75063 (January 22, 2009) (failure to present missing trial witnesses at a *Ginther* hearing).

Guilmette v. Howes, 2008 U.S. Dist. LEXIS 68718 (E.D. Mich. Docket No. 05-72646, September 10, 2008) (appellate counsel was ineffective for failing to raise in direct appeal trial counsel's failure to adequately investigate physical evidence at the crime scene and failure to contest the prosecutor's proofs on an element of the offense).

Tucker v. Renico, 317 F. Supp. 2d 766 (E. D. Mich. 2004) (appellate counsel's failure to raise in direct appeal a claim of ineffective assistance of trial counsel for failing to introduce evidence at trial in support of defense constituted cause for procedural default of underlying claim of ineffective assistance of trial counsel).

McFarland v. Yukins, 356 F. 3d 688 (6th Cir. 2004) (appellate counsel erred in failing to raise conflict of interest issue on direct appeal for trial counsel's dual representation with co-defendant/petitioner's daughter).

Caver v. Straub, 349 F.3d 340 (6th Cir. 2003) (appellate counsel's failure to raise in direct appeal that petitioner was deprived of counsel during critical stage of proceedings/jury reinstruction constituted deficient performance on appeal, given strength of underlying issue).

These are the cases where a presumption of prejudice was found using a *Cronic* analysis:

Absence of counsel:

Harris v. Booker, 2008 U.S. Dist. LEXIS 58478 (E.D. Mich. Docket No. 07-13250, August 1, 2008) (appointed appellate counsels' failure to file an appellate brief, which ultimately deprived petitioner of an appeal, was a *per se* violation of the Sixth Amendment right to counsel on appeal),

Hann v. Harry, 2008 US Dist LEXIS 41483 (E. D. Mich. Docket No. 06-13478, May 27, 2008) (petitioner was deprived of counsel in his first-tier appeal from his plea-based conviction where the originally-appointed appellate attorney improperly withdrew from the representation by not filing an *Anders* brief and where the state appellate courts failed to appoint substitute counsel contrary to *Halbert v. Michigan*, 545 U.S. 605 (2005).

Cottenham v. Jamrog, 2007 WL 2382359; 2007 FED App 0605N (6th Cir. Docket No. 04-1614, August 21, 2007) (petitioner was denied right to counsel of his choice on appeal from his convictions where petitioner desired his appointed counsel to stay on his case despite the fact that his family retained counsel for purposes of appeal. Appointed counsel improperly withdrew from case without consultation with or approval of petitioner prior to filing the motion to withdraw as counsel so that retained counsel could proceed with appeal).

Cooper v. Luoma, 2006 WL 3454793; 2006 US Dist LEXIS 89357 (E. D. Mich. Docket No. 04-74790, November 29, 2006) (retained appellate counsel's failure to file a timely appeal deprived petitioner of counsel in his appeal of right).

David v. Birkett, 2006 WL 2660763; 2006 US Dist LEXIS 66058 (E. D. Mich. Docket No. 05-71519, September 15, 2006) (appellate counsel's failure to properly move to withdraw from case without filing an *Anders* brief and without response by petitioner prior to filing motion to withdraw deprived him of right to counsel on appeal from plea based conviction)

Hatchett v. Kapture, 109 Fed. Appx. 34 (6th Cir. Docket Nos. 03-1421 and 03-1501, August 19, 2004) (counsel's failure to file a notice of appeal was deficient performance without a need for demonstrating prejudice in the form of meritorious issues on appeal).

Ward v. Wolfenbarger, 323 F. Supp. 2d 818 (E. D. Mich. 2004) (trial court's failure to advise petitioner of his appellate rights including right to counsel on appeal deprived petitioner of his right to appellate counsel).

Caver v. Straub, 349 F.3d 340 (6th Cir. 2003) (absence of counsel during jury reinstruction with new/supplemental information to jury deprived petitioner of counsel during a critical stage of the proceedings).

French v. Jones, 332 F.3d 430 (6th Cir. 2003) (absence of counsel during jury reinstruction containing supplemental instruction for a deadlocked jury).

Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003) (absence of counsel during critical pre-trial period of proceedings due to counsel's suspension from the practice of law until the day that trial began deprived petitioner of consultation with counsel and deprived counsel of ability to investigate case).

Frazier v. Berghuis, 2003 WL 25195212 (no LEXIS cite available) (E. D. Mich. Docket No. 02-71741, August 6, 2003) (counsel's abandonment of petitioner during police interrogation, which produced incriminating statements, tainted entire trial).

Not functioning as counsel:
Benoit v. Bock, 237 F. Supp. 2d 804 (E. D. Mich. 2003) (failure to diligently pursue appeal of right due to payment dispute causing dismissal of appeal).

Gonzalez v. Phillips, 195 F. Supp. 2d 893 (E. D. Mich. 2001) (failure to obtain Spanish-speaking interpreter to communicate with client at trial deprived petitioner of his right to communication and/or a meaningful attorney-client relationship during the proceedings).

Conflict of Interest:
Stradwick v. Howe, 2007 WL 1267529; 2007 US Dist LEXIS 31414 (E. D. Mich. Docket No. 06-10020, April 30, 2007) (conflict of interest where counsel represented both petitioner and co-defendant at preliminary examination, which adversely affected the defense even though separate counsel was appointed at trial where key state's witness was unavailable to testify at trial and preliminary examination testimony was used instead, depriving successor counsel the opportunity to effectively cross-examine the witness).

McFarland v. Yukins, 356 F. 3d 688 (6th Cir. 2004) (trial court did not adequately address concerns expressed by petitioner as to joint representation with co-defendant/petitioner's daughter).

Robinson v. Stegall, 343 F. Supp. 2d 626 (E. D. Mich. 2004) (representation of petitioner and his co-defendant by same attorney and attorneys from the same firm created a conflict of interest that adversely affected counsel's performance on the facts of the case and which effectively deprived petitioner of his right to counsel and caused petitioner to decline to testify in his own defense in the absence of conflict-free counsel).

Attachment B

Cost of Unnecessary Years in Prison due to Ineffective Assistance of Counsel

The following ten cases in which federal habeas relief was granted dramatically demonstrate the downstream costs of ineffective assistance of counsel. Correction of the IAC error in these cases led to a reduction in prison terms; defendants may have served up to their maximum terms, but for the granting of habeas relief. "Money saved in terms of prison costs" is thus represented by the amount of time already served, subtracted from the maximum that could potentially be served. For just these ten cases, **that cumulative total cost is over $5 million**.[1]

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act which, amongst other things, amended the standard of review for federal habeas corpus cases. Though the standard for reviewing habeas claims is highly deferential under 28 U.S.C §2254(d) there have been approximately 50 Michigan cases where habeas relief has been granted using the amended standard of review to find that counsel performed deficiently and that prejudice resulted from counsel's deficient performance. Those cases are listed in Attachment A. Of those, the following cases were not retried after obtaining federal habeas corpus relief, resulting in substantial savings to the Department of Corrections:

	DETAILED APPELLATE HISTORY And BASIS OF RELIEF	ULTIMATE RESULT	MONEY SAVED in terms of Prison Costs[2]	TIME WASTED
Satterlee, Wynn	1999—convicted and appealed. 3/00–CA Affirmed 5/00– SCt Denied Lv 05–ED MI Habeas Granted 07–CA6 affirmed Habeas Grant. Remanded for clarification of whether reprosecution was barred. (453 F3d 362) 07—ED MI found reprosecution was barred. 07–US Supreme Court denied certiorari **IAC for failure to advise petitioner of plea offer made on the morning of trial.**	Retrial barred by Fed. Ct. because state failed to reprosecute by deadline in conditional writ.	Sentence: 20-30 yrs. $660,000	8 yrs of appeals

[1] These cases are treated differently than "wrongful conviction" cases, where no conviction or prison sentence should have resulted, and where the total saved is represented by the entire cost of trial and appellate proceedings, and entire prison term.

[2] Prison cost savings for cases in which an error was corrected and retrial did not occur are calculated as: maximum sentence - time spent in prison x $30K per year. The presumption applied in cases not retried is that the prosecution could have obtained some conviction on retrial, but was satisfied with the time already spent in prison. The savings therefore are the time left on the original sentence, up to the maximum, not served due to error correction.

	DETAILED APPELLATE HISTORY And BASIS OF RELIEF	ULTIMATE RESULT	MONEY SAVED in terms of Prison Costs[2]	TIME WASTED
Robinson, Reginald	92—convicted and appealed. 94—CA affirmed. 96—SCT denied 00—6.500 Motion denied in trial court 00—SCT denied 04—Habeas granted.[3] **Representation of def and co-def created conflict of interest; deprived of effective representation.**	Not retried.	Sentence: 10-20 yrs. $240,000	12 yrs of appeals
Maples, David Andrew	96—PG. 97—CA affirmed 98—MI SCT Denied Lv 99 US SCT denied writ of certiorari 01—ED MI denied habeas. 03—CA6 vacated ED decision and remanded to review speedy trial claim. 05—granted habeas. **IAC for failure to advise petitioner that guilty plea waived speedy trial claim.**	Not retried.	Sentence: 10-20 yrs. $330,000	9 yrs of appeals

[3] Mr. Robinson is currently on probation for what appears to be an unrelated offense.

	DETAILED APPELLATE HISTORY And BASIS OF RELIEF	ULTIMATE RESULT	MONEY SAVED in terms of Prison Costs[2]	TIME WASTED
Smith, Robert Lee	98—Convicted and appealed. 02—CA Affirmed. 02—SCT denied lv. 04—ED MI granted habeas. 06—CA6 affirmed grant of habeas **IAC for failure to investigate complaining witness's stay at a psych facility.**	Not retried.	Sentence: 20-50 yrs. $1.26 million	8 yrs of appeals
Wade, Martinez	98—Convicted. 01—CA Affirmed. 01—Sct denied. 04—ED MI granted conditional habeas (based on pros misconduct). 04—CA6 reversed and remanded for ED to consider other claims. 05—ED MI granted habeas. **IAC for failure to object to irrelevant and highly prejudicial testimony of unrelated shooting of key witness for the state, and failure to object during state's closing argument regarding that evidence.**	Not retried.	Sentence: 10-15 yrs. $240,000[4]	7 yrs of appeals
Northrop, Charles	90—conviction. 95—CA affirmed. 96—SCT denied. 98—ED MI grant of conditional habeas. 01—CA6 affirmed. **IAC for failure to move to suppress evidence obtained during an illegal search.**	Not retried.	Sentence: 8-20 yrs. $300,000	10 yrs of appeals

[4] Mr. Wade is currently in prison for new offenses of felony firearm and felon in possession committed in 2008. He's currently serving 10 months and 2-2 years consecutive.

	DETAILED APPELLATE HISTORY And BASIS OF RELIEF	ULTIMATE RESULT	MONEY SAVED in terms of Prison Costs?	TIME WASTED
Tucker, Anthony	94—convicted 96—CA Affirmed 97—Sct denied 6500 04—ED MI granted habeas. **IAC for failure to introduce evidence including long term relationship w/ complaining witness in criminal sexual conduct and breaking and entering case which would have supported defense of consent and/or negated elements of crimes, and for appellate counsel's failure to raise in direct appeal a claim of IAC for above.**	Not retried.	Sentence: 10-15 yrs. $150,000	10 yrs of appeals
Caver, Robert Lee	92—convicted. 94—CA affirmed 95—Sct denied lv 99—Sct denied lv for 6500 motion 01—ED MI granted habeas 03—CA6 affirmed **IA of appellate counsel for failure to raise in direct appeal that petitioner was deprived of counsel during critical stage of proceedings/jury reinstruction.**	Not retried.	Sentence: 20-40 yrs. $870,000	11 yrs of appeals
McFarland, Paula	88—convicted. 90—CA Affirmed and remanded for resentencing. 91—Sct denied. 97—Sct denied 6.500 motion 00—ED MI granted habeas. 04—CA6 affirmed. **IA of Appellate Counsel for failing to raise conflict of interest issue on direct appeal for trial counsel's dual**	Not retried.	Sentence: 20-30 yrs. Resentenced to 10-30 yrs. $540,000	16 yrs of appeals[5]

[5] Ms. McFarland appears to have been released on bond by the federal district court after successfully petitioning for habeas corpus relief in 1999.

	DETAILED APPELLATE HISTORY And BASIS OF RELIEF	ULTIMATE RESULT	MONEY SAVED in terms of Prison Costs[6]	TIME WASTED
	representation w/ co-def/petitioner's daughter.			
Gonzalez, Alejo	92—convicted. 96—CA affirmed. 97—Scr denied. 01—ED MI Granted habeas. **IAC for failure to obtain Spanish-speaking interpreter to communicate and translate for petitioner at trial where petitioner advised counsel that he did not understand the proceedings, was unable to confront the witnesses against him, and where he would have testified at trial with the assistance of an interpreter.**	Not retried.	Orig St: Life. $780,000[6]	9 yrs of appeals
TOTALS			**$5,370,000 prison costs**	**114 yrs** in the courts.

Key for abbreviations:

- CA: Michigan Court of Appeals
- SCT: Michigan Supreme Court
- ED MI: United States District Court Eastern District of Michigan
- WD MI: United States District Court Western District of Michigan
- CA6: United States Court of Appeals 6th Circuit
- US SCT: United States Supreme Court
- PG: guilty plea
- NC: no contest

- Lv: leave
- IAC: ineffective assistance of counsel
- Def: defendant
- DC: defense counsel
- Orig St: Original sentence

[6] This savings assumes a life expectancy of 65 years old, less Mr. Gonzalez' approximate age at the time of release (39 yrs old) for a total of 26 years saved to the Department of Corrections.

SBM STATE BAR OF MICHIGAN

p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

WRITTEN TESTIMONY OF EDWARD H. PAPPAS
PRESIDENT, STATE BAR OF MICHIGAN

U.S.HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

MARCH 26, 2009

On behalf of the State Bar of Michigan, I express my gratitude to the Chairman of the House Judiciary Committee, Representative John Conyers, Jr.; the Subcommittee Chair, Representative Robert C. Scott; the Ranking Member, Representative Louie Gohmert and the Members of the Subcommittee for calling the congressional hearing on the representation of indigent defendants in criminal cases. While the testimony today presents a bleak picture about the constitutional crisis that Michigan, like many other states, is facing, we are encouraged that through the attention of this distinguished Committee and the policymakers in our state the crisis will at last be meaningfully addressed.

Michigan's public defense system is really not a system at all. It is a patchwork of county funding arrangements, none of which meet all the requirements of adequate criminal representation and some of which fail in all regards.

Michigan is blessed with countless dedicated and tireless lawyers devoted to upholding the Constitution and defending the rights of all who come before the courts. The dedication and commitment of our bar to improvements in Michigan's public defense system, simply, have not been enough to convince our lawmakers to make the difficult substantial systemic and funding change needed. In fact in some ways, the very heroic efforts and sacrifices of defense counsel over the years and throughout the state have disguised the ways in which Michigan's system is fundamentally broken.

We are turning to you because we see concrete and limited ways in which the federal government can provide crucial help so that we can finally achieve a system that meets constitutional standards. The actions we urge you to consider are outlined in the testimony of our distinguished Past President, Dennis Archer.

The State Bar of Michigan is required under Michigan Supreme Court Rules to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interest of the legal profession in this State." From these words we take a clear directive to work to assure the Constitutional right to effective assistance of counsel in all criminal proceedings throughout our state.

Our commitment to this mission has been long and steadfast. In 1975, a blue ribbon Defense Services Committee appointed by the Michigan Supreme Court and consisting of state bar leaders, judges, prosecutors, defense attorneys and court officials, made ten recommendations for improvement in our criminal defense system. Those recommendations have yet to be fully acted upon.

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p 517-346-6300
p 800-968-1442
f 517-482-6248
www.michbar.org

306 Townsend Street
Michael Franck Building
Lansing, MI
48933-2012

In 2002 the American Bar Association (ABA) adopted ten principles of a public defense delivery system. The State Bar of Michigan quickly embraced the ten principles and adopted an eleventh principle recommended by the Michigan Public Defense Task Force. It reads, "When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism."

In response to a bipartisan request from the Michigan Legislature in 2006, the State Bar of Michigan has been proud to partner with the National Legal Aid and Defender Association in a thorough investigation of the state of public defense in Michigan today. The details of that report are being offered to you today by David Carroll of the National Legal Aid and Defender Association. The report is a detailed and expert appraisal of the many ways in which Michigan is failing in its 6th amendment obligations. Since the release of the Report, the State Bar of Michigan has worked in partnership with all stakeholders to ensure Michigan has a justice system that works for all.

Over the last thirty plus years, the voices of State Bar Presidents have joined with members of the Michigan Judiciary and other Michigan leaders in the call for reform of indigent defense services in our state. I am proud to add my voice to that distinguished chorus. With the knowledge and tools now available to us, now is the time for immediate and significant action. We can finally accomplish an effective and efficient solution to remedy the problems that have been so fully documented in the state of Michigan. With the leadership of this distinguished Committee, and leadership in our great state of Michigan, I am confident our efforts will finally deliver the victory for the people of Michigan, and for all others in failing states, that the Constitution demands.

Written testimony of Laura Sager
Director of the Campaign for Justice
Lansing, Michigan

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott (VA-3), Chairman

March 26, 2009

Thank you, Chairman Scott, for holding this hearing today and for allowing me to present to the committee on behalf of Michigan's Campaign for Justice. I commend you and your colleagues for taking such a strong leadership role on this issue and for using the situation in Michigan as an example of the public defense crisis across America. While on many issues I would feel pride if my state received the national attention of a congressional hearing, on the issue of Michigan's failing public defense system, I am indeed honored to be a part of the coalition working to fix the problems that have brought us all here today.

My name is Laura Sager, and I am the director of the Campaign for Justice, a Michigan nonprofit, nonpartisan organization seeking state reform of our failing public defense delivery system. Just over one month ago, we introduced a large and growing coalition of groups and individuals committed to addressing the problems in Michigan's public defense system. Together, we are seeking reform on behalf of Michigan taxpayers, on behalf of those seeking safer communities and — most importantly— on behalf of the adults and children who have a constitutional right to effective defense representation when they are accused of a crime or face delinquency proceedings, even if they cannot afford to hire a lawyer.

Over the last year, the Campaign for Justice has been working to educate the public and key stakeholders about the failures of Michigan's public defense system. We have built on the work of many individuals – some of whom are speaking or presenting written testimony to the committee today – who have spent decades trying to fix a system that has been repeatedly found to be one of the worst in the nation. As a result of our efforts and those of our supporters, our coalition is growing. Those who present with us today

represent some of the very diverse organizations that have joined this critically important effort in Michigan, and on their behalf, I want to thank you for your attention to this issue.

Today, both through spoken and written testimony, you will hear very different perspectives from very different groups on the urgent need for change in our state. As the director of the Campaign for Justice, however, it is my role to tell you more about the constitutional crisis in Michigan's wasteful and inefficient public defense system, and how the Campaign is working with the state legislature to fix this problem.

Last June, at the request of the Michigan Legislature, and working with the State Bar of Michigan, the National Legal Aid and Defender Association completed an intensive year - long report on the public defense system in ten representative Michigan counties. The devastating findings from that report were recently summarized in a Michigan Public Defense Report Card (attached).

The report card paints a bleak picture of Michigan's performance in meeting its constitutional responsibilities as outlined in the Sixth Amendment of the Constitution.

Of the Eleven Principles of a Public Defense Delivery System, established by the State Bar of Michigan, Michigan received a grade of "F" in five areas, a "D" in five other areas and a "C" in the one remaining area.

There is a copy of the full report card in the written materials we are presenting today.

This Report Card, like the NLADA report itself, reveals a system in such crisis that it cannot meet widely recognized national standards for an effective public defense delivery system.

As a result, our public defense system in Michigan is:

- Failing taxpayers through inefficiencies, duplicative bureaucracies, costly lawsuits and higher corrections costs due to errors and mistakes. With staggering caseloads, little training and few resources, defense attorneys too often fail to identify underlying problems such as addictions, mental health or learning disabilities in adults and children and advocate for more appropriate and cost-effective sanctions, such as substance abuse treatment, drug courts, mental health or other appropriate programs;
- Failing the accused- the adults and children of limited means who have the right under the 6th amendment of the Constitution to effective assistance of competent defense representation; and
- Failing to protect public safety by not catching mistakes that put innocent people behind bars and allow guilty people to go free.

In the coming months, the Campaign coalition will be taking action to address these failures and hope that our actions will not only bring change to Michigan, but also serve in helping your efforts as you look at this issue in Congress.

As a coalition, we will be:

- Continuing to build a broad-based network of organizations that share the vision of a justice system that works for all;
- Educating policymakers and the public about the need for reform; and
- Advocating for legislation that fixes Michigan's failing public defense system.

As I conclude, please let me focus on this last item.

When the Campaign for Justice formally launched our effort, we did so at the State Capitol in Lansing to signal our readiness to work with lawmakers in both parties to enact legislation that meets two vitally important goals: adequate state funding and a system that implements and enforces minimum national standards – the Eleven Principles for a Public Defense Delivery System. Already, important progress has been made with the naming of a State House Judiciary Subcommittee on Indigent Defense. The Campaign for Justice is eager to continue to work with our state lawmakers and we welcome your assistance.

It is our belief, backed up not only by studies and testimonials, but also by the U.S. Supreme Court ruling, *Gideon v. Wainwright*, that Michigan's public defense system must be adequately funded by the state, not our 83 counties and their individual courts.

County governments, even in the best of times, are ill equipped to shoulder the State's constitutional burden. The current crisis is contributing to a rapid deterioration in a system that has been repeatedly tagged as one of the worst in the nation. In fact, Michigan is just one of seven states that forces counties to fund public defense services. Just as the quality of justice you receive should not be determined by the size of your bank account, it should also not be determined by which side of a county line you are charged in.

We also must have a statewide system that implements and enforces standards such as workload controls, training, accountability and other quality assurance standards. The Eleven Principles, taken together, create the conditions for putting each criminal case and delinquency proceeding to the adversarial test that is the foundation of our traditional American criminal justice system. Even the most outstanding defense attorney cannot possibly deliver effective defense representation with staggering caseloads or without access to resources like expert witnesses and investigators.

We know this is a difficult challenge. There are many competing priorities in these difficult economic times. However, our constitutional right to counsel is not a nicety that can be dispensed with when times are tough.

Public defense reform is also, as Mr. James Muffett of Citizens for Traditional Values emphasizes in his written testimony, a moral priority.

In the previously mentioned landmark case of *Gideon v. Wainwright*, the United States Supreme Court concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that States must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty, including misdemeanors and juvenile delinquency proceedings.

Forty-five years later, the NLADA report found that Michigan's public defense system is so chaotic, inefficient and structurally deficient that it is reneging on this constitutional promise.

Just as we must invest in our economic infrastructure to avoid collapse and ruin, we must invest in the constitutional infrastructure of our unique American Democracy — to prevent the collapse of the integrity of our criminal justice system and the needless, costly and unnecessary ruin of Michigan citizens' lives.

This is our mission as a broad based coalition working for reform.

Of the more than forty organizations that are part of the Campaign for Justice coalition, fifteen have added their voice to this issue by also submitting written testimony. Please see the attached testimony.

Thank you once again for the opportunity to testify before your committee, and I would welcome any questions you might have.

MICHIGAN'S PUBLIC DEFENSE SYSTEM – WINTER 2009 REPORT CARD

MICHIGAN'S PUBLIC DEFENSE SYSTEM

REPORT CARD

WINTER 2009

"In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense."

U.S. Constitution, Amendment VI

The Michigan Public Defense System Report Card is based on the Eleven Principles of a Public Defense Delivery System, adopted by the State Bar of Michigan's Representative Assembly in 2002, and the findings of a comprehensive study of Michigan's public defense system completed by the National Legal Aid and Defender Association, released in June 2008.

MICHIGAN'S PUBLIC DEFENSE REPORT CARD

The American Bar Association and the State Bar of Michigan adopted the Ten and Eleven Principles of a Public Defense Delivery System in 2002. In a comprehensive Michigan study commissioned by the State Legislature, a team of national experts found that our state fails to meet nationally recognized standards.

1. INDEPENDENCE

The public defense function, including the selection, funding, and payment of defense counsel, is independent.

F

Comments: In many Michigan counties, judges have the complete discretion to award contracts or appoint defense attorneys to cases. This practice leads to a compromised justice system in which attorneys may be forced to make critical decisions based not on the best interest of their clients but on pleasing the judge. Attorneys in some counties "must do something to garner sufficient favor or grace with a judge to get an appointment."[1]

2. STATE FUNDING AND STRUCTURAL INTEGRITY

Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

F

Comments: An efficient and effective public defense system requires adequate state funding and state oversight to meet even minimum national standards. Michigan is one of only seven states that provides no state funding for trial-level public defense services. Michigan's 83 counties and municipalities are ill-equipped to fund and manage statewide public defense services. In addition, a 'mixed system' of a defender office and an appointed counsel system provides the most effective and stable system over time.

3. ELIGIBILITY/EARLY APPOINTMENT

Clients are screened for eligibility and defense counsel is assigned and notified of appointment as soon as feasible after clients' arrest, detention, or request for counsel.

D

Comments: Michigan has no uniform screening method to determine eligibility for public defense services, nor does it have eligibility standards that are uniformly applied statewide.

Many Michigan counties have no eligibility screening mechanism. Other jurisdictions require individuals to fill out forms to be reviewed by judges, court administrators, or other court personnel, based on local standards. In some courts, defendants routinely waive their right to an attorney because they are told by the courts that they will be responsible for the cost, without regard for eligibility.

There is no statewide requirement for or enforcement of prompt appointment of counsel. In some jurisdictions, defendants are are not represented at initial arraignment or told to speak with the prosecuting attorney before the court appoints an attorney.

4. CONFIDENTIALITY

Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

D

Comments: The majority of the ten counties studied by the NLADA fail to uphold this principle. Many attorneys interview their clients in crowded "bullpens" that are located behind courtrooms or in public hallways. In one county's district court, attorneys wait in line to have an opportunity to meet with their clients in a unisex bathroom. A few counties do have private meeting spaces in which defense attorneys can meet with their clients.

1. National Legal Aid and Defender Association, "A Race to the Bottom: Speed & Savings over Due Process – A Constitutional Crisis" (June 2008), Page 27.

5. AVAILABILITY

Defense counsel's workload is controlled to permit the rendering of quality representation.

F

Comments: There is no court in Michigan that has a total caseload or workload cap for public defense attorneys. Across the state, attorneys have caseloads well above the national standards. In one county, a misdemeanor contract firm handles so many cases that the attorneys spend an average of 32 minutes per case. Many private attorneys maintain private law practices and courts have no way of tracking the number of cases they are handling, let alone the number of court appointments attorneys may be taking in other counties or the number of privately retained clients.

6. COMPETENCY

Defense counsel's ability, training, and experience match the complexity of the case.

D

Comments: There are no consistent statewide qualification standards for public defense attorneys. Some counties have boards that review applications submitted by attorneys who wish to take court appointments, but others have no minimum qualifications for some types of cases. Although some courts do have standards, they are very limited and are not appropriate measures of experience or ability.

7. CONSISTENCY

The same attorney continuously represents the client until completion of the case.

C

Comments: This type of consistency, called "vertical representation," is easier to maintain with smaller pools of attorneys and some jurisdictions do uphold this principle. However, attorneys in some urban counties are overburdened with cases and forced by the system to ask "stand-in" attorneys to cover for them for hearings. Some courts appoint one attorney to handle all the arraignments in a day and then appoint a different attorney to handle the case through disposition.

8. RESOURCES

There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

F

Comments: The public defense system is underfunded and attorneys have extremely limited access to experts and investigators. Public defenders often must ask the presiding judge for funds to hire expert witnesses or investigators. If funds are authorized but insufficient, the defense may proceed without crucial testimony. In one county, public defense attorneys are required to provide certain district court services (arraignment attorney, staffing the drug court, and appearing at lineups) without compensation.

9. TRAINING

Defense counsel is provided with and required to attend continuing legal education.

D

Comments: Although some courts require attorneys to attend some training, there are no minimum statewide training requirements for attorneys. The majority of courts have no training requirements, and specialized training for representation of juveniles in delinquency proceedings is extremely rare.

10. QUALITY

Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

D

Comments: There are no statewide performance standards or oversight mechanisms, leading to wide variations in the quality of justice. In some courts, judges evaluate attorney performance in a non-systematic way, while others have a more formalized review process that may include a committee. Most courts in Michigan have no real review process at all. Some small public defender offices have no real supervision or file review.

11. ADVOCACY

When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism.

F

Comments: Because Michigan lacks the structure to uphold the first ten principles, it does not have the ability to implement the 11th Principle. Defense attorneys in an ineffective system do not have the time or resources to identify more cost-effective approaches to substance abuse, mental illness, and developmental delays, in appropriate cases.

The Campaign for Justice is a broad-based group of organizations and individuals from across the political spectrum fighting for a fair and effective public defense system in Michigan. We believe that legislative reform is needed to improve cost effectiveness, protect the public's safety and restore the Constitutional right to an effective defense representation. The Campaign for Justice also works in close partnership with the State Bar of Michigan.

THE COALITION:

CRIMINAL JUSTICE SYSTEM/ATTORNEYS

- Michigan Judges Association
- Legal Services in Michigan – State Planning Body
- Criminal Defense Attorneys of Michigan
- National Association of Criminal Defense Lawyers
- Criminal Defense Lawyers of Washtenaw County
- Hispanic Bar Association of Michigan
- Grand Rapids Bar Association
- Kalamazoo County Bar Association
- Macomb County Bar Association
- Shiawassee County Bar Association
- National Lawyers Guild – Detroit & Michigan Chapter

PROFESSIONAL/SOCIAL SERVICE PROVIDERS

- Michigan Council of Private Investigators
- National Association of Social Workers – Michigan
- Michigan County Social Services Association
- Michigan Juvenile Detention Association
- Association for Children's Mental Health
- Michigan Association for Children with Emotional Disorders
- The Provider Alliance
- Detroit Life Challenge
- Detroit Hispanic Development Corporation

PUBLIC POLICY

- Michigan Prospect
- Former Michigan Gov. William Milliken

CRIMINAL JUSTICE ADVOCATES

- Innocence Project – Cooley Law School
- Michigan Council on Crime and Delinquency
- Michigan Juvenile Justice Collaborative
- Michigan Public Defense Task Force
- American Friends Service Committee Criminal Justice Program
- Citizens Alliance on Prisons and Public Spending - Michigan
- Humanity for Prisoners

CIVIL RIGHTS/SOCIAL JUSTICE

- American Civil Liberties Union
- ACLU of Michigan
- NAACP - Michigan State Conference
- Brennan Center for Justice at New York University School of Law
- American-Arab Anti-Discrimination Committee of Michigan
- Race Relations Council of Southwest Michigan

FAITH

- Michigan Catholic Conference
- Citizens for Traditional Values
- Michigan Jewish Conference
- Jewish Community Relations Council of Metropolitan Detroit
- Prison Fellowship
- Council of Islamic Organizations of Michigan
- Metropolitan Organizing Strategy Enabling Strength (MOSES)
- Michigan Unitarian Universalist Social Justice Network
- National Council of Jewish Women, Greater Detroit Section
- Brad Snavely, executive director, Michigan Family Forum

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www.michigancampaignforjustice.org

info@michigancampaignforjustice.org

Facebook: Search "Campaign for Justice"

Twitter: Search "Working4Justice"

Phone: 517.372.3050 Laura Sager, Director

March 26, 2009

The Campaign for Justice is a broad-based group of organizations and individuals from across the political spectrum fighting for a fair and effective public defense system in Michigan.

Attached please find the written testimony or statements from the following:

CRIMINAL JUSTICE SYSTEM/ATTORNEY ORGANIZATIONS

- Hon. Fred Borchard, Michigan Judges Association
- Margaret Sind Raben, Criminal Defense Attorneys of Michigan
- Dick Hillary, Kent County Office of the Defender

PROFESSIONAL/SOCIAL SERVICE PROVIDERS

- Peter Psarouthakis, Michigan Council of Private Investigators
- Maxine Thome, National Association of Social Workers - Michigan Chapter
- Theresa Spencer, Michigan County Social Services Association
- Amy J. Winans, Association for Children's Mental Health
- Susan McParland, Michigan Association for Children with Emotional Disorders

CRIMINAL JUSTICE ADVOCATES

- David A. Moran, Michigan Innocence Clinic
- Elizabeth Arnovits, Michigan Council on Crime and Delinquency

CIVIL RIGHTS/SOCIAL JUSTICE

- Heaster Wheeler, Detroit Branch NAACP
- Melanca D. Clark, Brennan Center for Justice at New York University School of Law

FAITH

- James Muffett, Citizens for Traditional Values
- Susan Herman, Michigan Jewish Conference
- Mary Engle, Prison Fellowship

WRITTEN TESTIMONY OF HONORABLE FRED BORCHARD
PRESIDENT OF THE MICHIGAN JUDGES ASSOCIATION

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
HOUSE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
CONGRESSMAN ROBERT SCOTT, CHAIRMAN

March 26, 2009

Congressman Scott, thank you for the opportunity to present testimony on such an important issue. The constitutional right to counsel is simply fundamental to American justice, and the Michigan Judges Association applauds the subcommittee for holding a hearing on this issue.

I have the honor of serving as the president of the Michigan Judges Association, an organization that was founded in 1927 with part of its mission statement centering around the improvement of justice. The Michigan Judges Association is comprised of all of Michigan's trial court and appellate judges.

We, as citizens, often take many of our constitutional rights for granted; for instance, the right to worship as we see fit and the right to speak without worry that the government will prevent us from openly discussing our opinions or from gathering as a group. Yet one of our rights, the right to an effective defense representation guaranteed to us by the 6th Amendment, is easily taken for granted. The right to counsel for both adults and children is a mandatory and fundamental right in our American system of justice.

As judges across Michigan's counties and cities, many members of the Michigan Judges Association see firsthand in their courtrooms why statewide training and standards for public defense services are truly needed.

Every day in Michigan, someone's friend, neighbor, or family member faces the prospect of criminal proceedings without the resources to pay for an attorney. In courtrooms across the state, hardworking public defense attorneys are struggling to fulfill their constitutional obligations; but due to weaknesses in Michigan's public defense system, most are forced to handle overwhelming caseloads with few resources.

Michigan currently has no statewide standards or monitoring for public defense services. As a result of the fact that no court has a total caseload or workload cap for public defense attorneys, many attorneys end up with caseloads well above national standards. Many judges observe

defense attorneys that "are overworked, spread too thin and frequently not available on the date of a preliminary examination" [1] or other court proceedings.

In regards to training, the National Legal Aid and Defender Association's observation that "[i]t is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers."[2]

Our state is but one of only seven states that does not provide a single dollar in funding this constitutional mandate for legal defense at the trial level. Instead, each of Michigan's counties and their multiple courts are left to handle the task on their own, creating countless different standards and methods of delivering public defense while placing the financial burden on cash-strapped local governments.

A patchwork system of justice with such wide variations across the state – both in structure and in funding – mean that the kind of representation one might receive depends on the side of the county line you are charged in. This is not the justice that the writers of the Constitution envisioned.

The result is a system that does not provide the most cost efficient and effective delivery system for public defense. The burden of paying for public defense and incarceration falls on each of us as taxpayers while individual defendants and their families may pay a much larger emotional toll.

The opportunity to examine Michigan's public defense system represents a chance to protect the rights of our citizens while spending tax dollars more efficiently. Providing training and adequate resources for our hardworking public defense attorneys would help ensure quality service across Michigan. An adequately state-funded system would ease the financial burden placed on local governments.

Thank you again for the opportunity to present this testimony and for your kind attention and consideration on this very important matter.

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[1] National Legal Aid and Defender Association, "A Race to the Bottom: Speed & Savings over Due Process – A Constitutional Crisis" (June 2008). Page iv.

[2] National Legal Aid and Defender Association, "A Race to the Bottom: Speed & Savings over Due Process – A Constitutional Crisis" (June 2008). Page iv.

WRITTEN TESTIMONY OF MARGARET SIND RABEN
PRESIDENT OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
HOUSE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
CONGRESSMAN ROBERT SCOTT, CHAIRMAN

March 26, 2009

Chairman Scott, members of Congress, thank you for the opportunity to provide testimony to this subcommittee on an issue so vital to Michigan and to the country. The public defense crisis is one that needs to be addressed and I am very encouraged by the important steps this subcommittee is taking.

My name is Margaret Sind Raben, and I am the president of the Criminal Defense Attorneys of Michigan (CDAM). CDAM was formed in 1976 by defense attorneys across the state of Michigan. We are trial lawyers and appellate advocates in Michigan and federal courts. Our mission is to promote quality defense services; to educate the public on the need for quality and integrity in defense services; and to guard against the erosion of the constitutional rights guaranteed by the State of Michigan and the United States. CDAM presents training conferences and a Trial College for defense attorneys to continue their legal education and improve their defense practices. CDAM is a coalition member of the Campaign for Justice and supports a reform of Michigan's public defense system that will meet the Eleven Principles of a Public Defense Delivery System[1] and has adequate state funding.

A Failing Public Defense System

Michigan's current public defense system is not working at the trial level. It is unfair and inefficient. A working justice system requires an adequately funded and resourced defense attorney. It is not an exaggeration to say that a working justice system IS a working defense system. In Michigan, public defenders, contract counsel, and assigned counsel from the private sector are overworked and under-resourced in providing competent and effective representation to individuals who cannot afford to hire attorneys for their trial-level proceedings. In each of Michigan's 83 counties, the working poor make up a disproportionate percentage of indigent criminal defendants. In Michigan, the counties fund the cost of attorneys for these indigent defendants even though the state has the constitutional mandate to provide counsel. The counties have rarely provided more than minimal funding for defender services. In these lean times, the counties are solving their budget shortfalls by cutting defender services. The result is a second-

[1] Adopted by the State Bar of Michigan Representative Assembly, April 2002.

class system of justice for the poor and a more expensive and ultimately less reliable system for society as a whole.

As a result of this lack of resources, the dedicated attorneys who represent indigent persons in trial-level proceedings are forced into ethical and professional dilemmas. There is a direct correlation between lack of funding and inadequate defense services. Public defenders and contract counsel are assigned more cases than they can effectively serve and are forced to spend less time on each of the cases they receive. Many counties in Michigan assign trial-level caseloads which exceed national recommendations. There are no statewide trial-level standards in Michigan and many of the counties have no standards for representation at all.

The lack of resources leads to routine violations of a defender's legal responsibilities to his or her client. A trial-level criminal matter is designed to be an adversarial proceeding. Defense attorneys are expected to investigate and challenge the state's case. Prosecutors have investigators, forensic testing, and expert witnesses. Defenders of the indigent rarely have any of this assistance and rarely find persons with expertise willing to work for the price the county will approve. The result: wrongful convictions and excessive convictions. This is unfair and ineffective. It is third world justice.

Cost efficiencies and the role of the defense at sentencing

With corrections costs soaring and government budgets tightening, a public justice system that results in appropriate sentences is important. The systemic problems in an under funded defense system often result in a greater quantum of punishment than the law requires and unnecessary appeals. A public defense system with effective defense representation leads to appropriate sentences which seek cost efficient sentencing options such as drug treatment, mental health care, and rehabilitative support for appropriate defendants, and reserves expensive prison beds for those who require them. A working defense system reduces the impact on the corrections system.

In a working defense system, defense counsel will have investigated the aspects of an individual's life that could mitigate punishment and provided the court with a chance to address the problems which so often underlay criminal activity: mental illness, lack of education or training, drug and alcohol addiction. However, it requires time and adequate resources for defense counsel to investigate a client's background in order to effectively present that balancing view and to research and suggest sentencing alternatives. Under-resourced assigned counsel many times cannot provide these assessments and lack the services to get them. The micro result is that an individual person is not given the "second chance" or support they need to make it. The macro result is that society pays more in corrections costs. A working public defense system

grounded in adequate state funding and meeting national standards would be much more cost effective.

Conclusion

Last November, CDAM approved a resolution in support of public defense reform in Michigan. The resolution says "the State of Michigan has abdicated this responsibility [to provide competent and effective counsel] by placing the burden of providing counsel and funding defense services for indigent persons on its counties and providing virtually no state funding or fiscal or administrative oversight.... [this] results in an uneven quality of justice statewide."

Contact:
Margaret Sind Raben, *President*
Criminal Defense Attorneys of Michigan
(313) 628-4708
msraben@aol.com
Yvonne Fleener, Executive Director
http://www.cdamonline.org

Written statement of Dick Hillary
Kent County Office of the Defender
Grand Rapids, Michigan

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott, Chairman

March 26, 2009

Mr. Chairman, I appreciate the opportunity to present a brief statement for your hearing on Michigan's failing system of public defense. I also appreciate your attention to this important issue.

It is unacceptable that a number of counties in Michigan are not funding their defense systems properly. This inevitably results in defendants not being represented adequately, thus resulting in wrongful convictions and jail and prison sentences that could be avoided.

State funding for these counties is necessary so that the promise of Gideon can at least have a chance of being fulfilled. I believe it's a tragedy that judges in these underfunded counties aren't the first ones to be demanding changes in their systems. When defense attorneys are not adequately compensated, not properly trained, and have caseloads that are not monitored, the system of justice fails.

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Written testimony of Peter Psarouthakis
Legislative Chairman, Immediate Past President of the
Michigan Council of Private Investigators

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott, Chairman

March 26, 2009

Chairman Scott, members of Congress, thank you for the opportunity to offer testimony on public defense reform in Michigan, a critical issue that affects every family and every taxpayer in the state of Michigan.

My name is Peter Psarouthakis and I am the Legislative Chairman and the Immediate Past President of the Michigan Council of Private Investigators. Our organization represents the interests of every licensed professional investigator in the state of Michigan, many of whom perform criminal defense investigation for attorneys. I offer this testimony in that capacity, but more than that, I offer it as a professional investigator with years of personal experience, and as someone who has seen, first hand, the way Michigan's broken system has often failed to provide the adequate criminal defense guaranteed by our Constitution.

Our state currently has no uniform system to ensure that defendants receive the rights promised under the Sixth Amendment. Instead, each of our state's 83 counties are left to devise their own methods for protecting this right. According to a recent report by the National Legal Aid and Defender Association, too often efforts are falling short of Michigan's constitutional obligations.

The sad truth is that for professional investigators across Michigan, this isn't news. We see the inadequate public defense and its consequences as a part of a normal day on the job.

Every defendant is guaranteed due process under the law. Public defenders often do laudable work, but this is more than a question of effort and intentions, this is a question about finding the right tool for the right job. Defense attorneys are not investigators and due process requires proper investigation.

Many investigators perform critical pro bono work but, simply put, that is not a sustainable model. State government hires prosecutors and police officers to do investigations. Meanwhile, defendants, especially those without means, are left to fend for themselves.

We are not naïve. We understand that the prisons are not filled with innocent men and women. Conversely, even one false conviction is too many and the costs associated with appeals, lawsuits and the incarceration of individuals on charges perhaps more severe than additional investigation would reveal necessary cost Michigan taxpayers millions of dollars every year.

It is not uncommon that additional time and money spent to provide an adequate defense could make the difference between false conviction and acquittal and, perhaps more often, mitigate the severity and number of charges a defendant faces.

The State of Michigan estimates that hundreds of millions of dollars are wasted every year housing inmates who would otherwise have the potential to be contributing members of society outside of prison walls, if only our public defense system were adequate.

Reforming Michigan's public defense system will enable both defense attorneys and professional investigators to do the critical and fundamental work they are trained to do. Doing so, we would not only realize the potential for taxpayer savings but justice would be better served. That is a goal that individuals on both sides of our adversarial system readily embrace.

Thank you again for the opportunity to discuss these issues with the committee and for your willingness to discuss this important constitutional issue.

WRITTEN TESTIMONY OF MAXINE THOME, PhD, LMSW, ACSW, MPH
EXECUTIVE DIRECTOR OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS
– MICHIGAN CHAPTER

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
HOUSE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
CONGRESSMAN ROBERT SCOTT, CHAIRMAN

March 26, 2009

Thank you to the members of this subcommittee and to Congressman Scott for your leadership. I and the National Association of Social Workers – Michigan are grateful for the opportunity to present this testimony on an issue many social workers in Michigan care about passionately.

My name is Maxine Thome, and I am the executive director for the National Association of Social Workers – Michigan (NASW-MI). The mission of our organization is to support, promote and advocate for professional social work practice, practitioners and the social work profession, to improve the quality of life for the people of Michigan.

The National Association of Social Workers (NASW) is the oldest and largest organization of professional social workers with 153,000 members; more than 7,500 are in Michigan. It serves members, and it advocates for sound social policy.

Michigan's professional social workers practice in many settings including family service agencies, community mental health centers, schools, hospitals, employee assistance programs, and public and private agencies. Professional social workers provide more than half of the nation's mental health services and offer other vital services to individuals, families and communities.

People in Michigan are becoming more and more concerned every day about the ballooning costs of the State's corrections system. Taking a careful look at Michigan's public defense system is one important way we can begin to work to improve cost efficiencies in our state budget. The kind of defense that an individual receives at the front end can have a drastic effect on back end costs that Michigan taxpayers are now paying. Our current system is fraught with unnecessarily long sentences, costly appeals, wrongful conviction lawsuits, and other mistakes that add up to higher corrections costs.

Social Work and Pnblic Defense

In an effective public defense system, public defense attorneys, working in tandem with licensed social workers, would play a crucial role in ensuring that individuals can be restored to meaningful crime-free lives in society, thus reducing recidivism. Individuals with mental health or substance abuse problems would be diverted to treatment programs that work instead of years in prison.

NASW-MI hopes for an effective public defense system. Social workers and defense attorneys together can work to provide necessary and important services that will, in the long run, ensure a system that is much more effective and cost efficient. Our current public defense delivery system, however, does not even equip attorneys with the necessary tools. For example, because of unmanageable caseloads, attorneys sometimes meet their clients for just a few minutes before court hearings. Because of a lack of funding for experts or investigators and a lack of training requirements, attorneys often do not have the resources to properly handle a case.

Placing more social workers in public defender offices throughout the state would lead to a speedier and more efficient integration of services for individuals needing public defense assistance. Social workers are uniquely trained and educated in social justice issues and can advise public defense attorneys on client-specific treatment plans, diversion programs, and other recommendations for alternatives to incarceration.

Forty-six years ago this week, the Supreme Court affirmed that the constitutional right to counsel is a fundamental right. In deciding *Gideon v. Wainwright*, the Court called it an "obvious truth" that in order to ensure a fair trial, everyone must have an attorney if accused of a crime, even if she or he cannot afford one.

The National Association of Social Workers – Michigan Chapter embraces a code of ethics that social workers will promote institutions that are "compatible with the realization of social justice." What is more just than ensuring that the rights of all our residents, regardless of financial standing, are upheld?

Gideon's promise still goes unfulfilled today, even after decades of calls for reform. NASW-MI is committed to working towards a public defense system that works.

Thank you sincerely for the opportunity to provide this testimony.

Written testimony of Theresa Spencer, President
of the Michigan County Social Services Association
Lansing, Michigan

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott, Chairman

March 26, 2009

Congressman Scott, thank you for taking an important leadership role in discussing the problems with Michigan's public defense system. Thank you also for the opportunity to present testimony on behalf of the social service agencies working in Michigan counties.

The Michigan County Social Services Association is a statewide organization whose members are county Department of Human Services board members, directors, district managers, and supervisors from all 83 counties. MCSSA represents community social and economic concerns, advocates on social services issues, represents the front-line DHS services delivery perspective, and advocates for DHS client populations.

MCSSA believes that the development and implementation of Michigan's human services system requires active participation of local citizen boards and members of the human services delivery systems in order to ensure efficient management of resources. It is our role to advocate at the local, state and national level by promoting social policies as defined by the membership.

The mission of MCSSA is to serve Michigan residents by 1) advocating for humane and effective human services systems and 2) facilitating education and training opportunities for members, elected officials and communities.

In regard to the problems in Michigan's public defense delivery system, the MCSSA and our members bring a unique perspective to the issue. Currently, public defense services for those of limited means are the sole responsibility of county governments. Each county must fund and administer the public defense system within its borders. Because the MCSSA and our members work within each of Michigan 83 counties, we see first hand the differences and disparities of justice that result from Michigan's county-based system.

Michigan is a very diverse state – geographically and demographically. Some of our counties are very rural; some are completely urban. Some have low levels of poverty and some have very high levels of poverty. As our members witness each day, public defense services for the poor also vary widely from one county to the next.

For some issues, local control and unique local approaches to the delivery of services is very appropriate and even preferred. When it comes to protecting the constitutional right

to counsel for Michigan citizens, however, inconsistency and disparity are not acceptable.

For the poor, the quality of their defense in court should not depend on the amount of money they have in their checkbook or the address they have listed in the phonebook. If, of course, they even have an address to list.

The facts are that because Michigan does not offer a statewide system of funding, paired with the implementation of statewide standards for public defense, too often, Michigan residents of limited means simply do not receive the same defense services as those who are better off.

As you examine this issue within the halls of Congress, please know that as the organization working on the front-lines of delivering social services to the poor in counties across Michigan, we are joining with those who are calling for significant reform to our failing system. County governments need to be relieved of the funding obligations required in providing public defense services and the state must assume that constitutionally mandated responsibility. In addition, statewide standards for providing an effective defense, based on nationally recognized principles of justice, need to be put in place in Michigan.

It is our hope at the MCSSA that your hearing today, combined with the efforts of many people in Michigan, will continue to build the momentum needed to bring about the reform that is so long overdue.

Thank you again for the opportunity to present testimony to the committee.

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Written testimony of Amy J. Winans,
Executive Director of the Association for Children's Mental Health

U.S. House of Representatives Committee on the Judiciary
House Subcommittee on Crime, Terrorism, and Homeland Security
Congressman Robert Scott, Chairman

March 26, 2009

Congressman Scott, thank you very much for the opportunity to present testimony on the issue of public defense in the state of Michigan. The week after the anniversary of the historic *Gideon v. Wainwright* decision, which affirmed the right to counsel as fundamental to a fair trial, we are so glad that lawmakers are taking a close look at the status of the public defense system in Michigan.

About the Association:

The Association for Children's Mental Health (ACMH) was founded in 1989 by two parents of children with emotional disorders to support families who were shamed and blamed for their children's problems. ACMH is a family organization with statewide staff and membership who support activities to enhance the system of services which address the needs of children with serious emotional disorders and their families. ACMH is a statewide chapter of the national Federation of Families for Children's Mental Health and our membership of over 1200 individuals is comprised of family members, professionals and concerned community members.

We provide advocacy to individual children and their families across Michigan, to help them secure the most appropriate and effective services possible. We work in partnership with the Department of Community Health, Family Independence Agency, Community Mental Health Authorities, Family Court, the Department of Education and local school districts and have many accomplishments to celebrate. Our local staff (who are predominately parents of children with serious emotional disorders) are active in system reform efforts and are often the catalyst for important innovations in local service systems. At the state level, ACMH staff and volunteers advocate for policy and legislative development to improve services to families.

Children in the System:

"Under our Constitution, the condition of being a boy does not justify a kangaroo court."

- In re Gault, 387 U.S. 1 (1967)

National studies reveal that between 50 and 75 percent of incarcerated children have mental health disorders. Almost 50 percent are dealing with substance abuse problems.

Michigan has a public defense system in which children accused of delinquent acts are not guaranteed the effective defense representation that the Constitution promises all of us. The Association for Children's Mental Health works regularly with children and their families all

across Michigan. We have seen the increase in children being placed into the corrections system while they could have been instead been given alternative programs that are more effective and cost efficient, such as drug treatment, counseling or other kinds of wrap-around support services.

However, juvenile defense attorneys in Michigan face almost insurmountable challenges. In a system with no state funding and no statewide standards for defense representation, attorneys are left with scarce funding or access to investigators, experts or mental health or adolescent development specialists. Because of a tremendous caseload burden, children often meet their attorneys in hallways outside of courtrooms, only minutes before court hearings. In addition, there are barely any training resources available for juvenile defense representation and zero statewide training requirements.

Children, especially those with mental health problems, need to have a consistent, trusted attorney with them through the court process. The reality is that in some counties in Michigan, different attorneys represent a child at varying stages of the proceedings. In a situation like this, a real relationship between the child and his or her attorney can be built, and the child's future is at stake.

The lack of standards and state funding of public defense leads to a situation in which taxpayer dollars are being wasted. When adults and children, especially those with mental health problems, should be in effective treatment and counseling programs that are much less costly, it is much more expensive and cost inefficient to have the kind of public defense system that Michigan has. For example, appeals, wrongful conviction lawsuits, inappropriately long sentences, and other items drive up the cost in the courts and in the corrections system.

Everyone has the right to counsel – to ensure a fair and effective justice system – yet children and adults in Michigan are being denied this every day in our courts. The Association for Children's Mental Health is a member of the Campaign for Justice coalition, and we believe that an adequately state funded system that meets the Eleven Principles of a Public Defense Delivery System, adopted by the State Bar of Michigan in 2002, is necessary and vital to Michigan's future.

Contact information:

Amy J. Winans, *Executive Director*
Association for Children's Mental Health
(517) 372-4016
ajwinans@aol.com
http://www.acmh-mi.org

TESTIMONY OF THE MICHIGAN ASSOCIATION FOR CHILDREN WITH EMOTIONAL DISORDERS

FOR THE HEARING ON INDIGENT DEFENSE, BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

U.S. HOUSE OF REPRESENTATIVES

March 26, 2009

Congressman Scott, thank you for the opportunity to submit this testimony.

The Michigan Association for Children with Emotional Disorders (MACED) is of the strong belief that Michigan is in a right to counsel crisis. The Sixth Amendment right of all individuals – including children – to effective defense representation is not being upheld. To bring about an efficient and ethical public defense system in Michigan that ensures a future for all of Michigan's children, adequate state funding and the establishment of and adherence to the Eleven Principles of a Public Defense Delivery System[1] is necessary.

Background:

Since the group's formation in 1957, the Michigan Association for Children with Emotional Disorders has helped families statewide dealing with the difficulties they face each day when there is a child in the family with an emotional disorder. The mission of MACED is as critical today as ever: To help families find educational, mental health, and other services for children with emotional disorders as well as to encourage and enhance the public's understanding and support of these children, their families and the services they desperately need.

Mental health and juveniles:

For the past several years, MACED staff has assisted with cases of children with emotional disorders who are charged with offenses in the juvenile justice system. The number of children in this predicament has increased dramatically over the past several years. More and more children with untreated serious emotional disorders whose symptoms are mistaken for delinquent behavior are relegated to the juvenile justice system and often committed to the custody of the Department of Human Services.

Reliable data show that 65% of children committed to these facilities through the juvenile justice system suffer from a diagnosable mental illness and that 40% of these children have a serious emotional disorder or mental illness. These children are extremely vulnerable to physical and sexual assault, self-mutilation and suicide. All juvenile justice placements practice "positive peer culture" that is often injurious to children with disabilities, unable to conform to rigorous point systems. Mental health treatment is often not provided in these facilities. In addition to the stunning number of children with serious emotional disorders ("SED") in juvenile justice facilities, there are currently many children with SED in state prisons. State prisons are bereft of appropriate mental health treatment for children and lack adequate

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[1] Adopted by the State Bar of Michigan Representative Assembly, April 2002

physical facilities for minors. As a result, these children are subject to lengthy periods of administrative segregation or placement in cells for 23 out of every 24 hours.

This epidemic of children with severe illness committed to correctional facilities is due in large part to the failing public defense system in Michigan.

Juvenile defense:

"Juvenile justice representation is considered in many ways as an afterthought all across the state of Michigan. As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse."

-David Carroll, National Legal Aid & Defender Association, "A Race to the Bottom: Speed & Savings over Due Process A Constitutional Crisis"

All children accused of delinquent acts have a right to be represented by an attorney in their proceedings. However, the majority of children accused in Michigan are either denied counsel, waive counsel without full understanding, or are represented by counsel working in a system that fails to provide the resources and training necessary to provide an effective representation. Many juvenile defense attorneys have caseloads above the national standards. Most are forced to meet their clients only minutes before court hearings because of this caseload problem.

One of MACED's core justice projects focuses on the legal representation provided to juveniles with emotional disorders or mental illness. A core recurring problem is the lack of training in the development of mental health defenses and in adolescent development. There are no statewide training requirements for public defense attorneys, and there is little training regarding juvenile delinquency proceedings available.

Many children in the juvenile justice system could have avoided the system if only their attorneys had the time and resources to explore treatment or counseling options that are most cost effective and work to reduce recidivism.

Conclusion:

An improved public defense system in Michigan is needed to equip and train defense attorneys to more effectively address the needs of Michigan's most vulnerable children, particularly children with emotional disorders. The Michigan Association for Children with Emotional Disorders supports a system with state funding and that meets the Eleven Principles of a Public Defense Delivery System. Thank you for your time and for considering this important issue.

Contact information:

Susan McParland, *Executive Director*
Michigan Association for Children with Emotional Disorders
(248) 433-2200x203
susan@michkids.org
http://www.michkids.org

MICHIGAN INNOCENCE CLINIC

BRIDGET MCCORMACK
DAVID MORAN

1029 Legal Research Bldg.
625 South State Street
Ann Arbor, Michigan 48109-1215
734.763.9353
Fax 734.764.8212

March 18, 2009

Hon. Robert C. Scott, Chair
Subcommittee on Crime, Terrorism, and Homeland Security
U.S. House of Representatives
Washington D.C.20515

Dear Chairman Scott:

I am writing to submit testimony before the Committee about the state of indigent criminal defense in Michigan. Please accept this letter as my sworn testimony.

I am a Clinical Professor of Law at the University of Michigan Law School and the Co-Director of the Michigan Innocence Clinic, a position I have held since July 2008. From 2000 to 2008, I was a professor at Wayne State University Law School, where I rose to the rank of associate professor and served as associate dean from 2006 to 2008. I have published numerous law review articles about various aspects of criminal law and criminal procedure, and I have argued four cases before the United States Supreme Court including *Halbert v. Michigan*, 545 U.S. 605 (2005), in which the Court held that Michigan indigent defendants who plead guilty or nolo contendere enjoy the right to appointed appellate counsel on appeal. From 1992 to 2000, I served as an assistant defender at the Michigan State Appellate Defender Office (SADO) in Detroit, where I was involved in the exoneration of five innocent defendants who had been convicted of felonies at trial. I have attached my full curriculum vitae to this letter for your reference.

As the 2008 report from the National Legal Aid and Defender Association confirms, the state of indigent trial-level criminal defense in Michigan falls far short of Sixth Amendment standards. From my experience at SADO and my current position with the Michigan Innocence Clinic, I can state categorically that Michigan's woeful system of appointing trial counsel for indigents is the leading cause in Michigan of wrongful convictions, that is, convictions of people who are completely innocent of the crimes for which they have been convicted. For the balance of my testimony, I would like to give just two examples from my own direct experience of how the failure to provide adequate defense lawyers leads to wrongful convictions.

Harold Wells. When I was at SADO in the mid-1990s, I represented a man named Harold Wells, who had been convicted in Wayne County of, essentially, car theft after a bench trial lasting less than 30 minutes. At the trial, Mr. Wells' appointed counsel gave no opening

statement, called no witnesses, and asked almost no questions of the two witnesses the prosecution called. The first prosecution witness, a police officer, testified that after watching a car commit a traffic violation at night in Detroit, he followed it, ran the plates, and determined that the car was stolen. He then chased the car and watched as three people leaped from the car and ran. The officer apprehended the two passengers, a boy and a girl, but the driver, a black male wearing brown pants, disappeared into the night. The prosecution's second witness, another officer, testified that approximately 30 minutes after hearing the first officer's dispatch, he spotted Mr. Wells, a black man wearing brown pants, walking down the street approximately a quarter-mile away from where the car was abandoned.

And that was the prosecution's entire case. The first officer could not identify Mr. Wells as the driver, and there was no fingerprint or any other kind of evidence linking him to the crime other than that he was wearing brown pants and was near in time and space to where the car had been abandoned.

When I got the case on appeal, the first thing I did was something that Mr. Wells' trial lawyer never bothered to do: read the police report. I immediately noticed that when Mr. Wells was brought into the police station, the two juvenile passengers told the officers, "That's not him." We then located one of the juveniles, who confirmed to me that Mr. Wells was not the driver. In fact, she revealed that she had given the police the name and address of the man who was driving the car that night.

Faced with this new evidence, the trial judge ordered a new trial, and the prosecution then dismissed the case. Harold Wells spent 18 months incarcerated for a crime that he did not commit. If Mr. Wells had competent trial counsel who bothered to read the police report, his case would have been dismissed before trial.

Karl Vinson. The Michigan Innocence Clinic, which began operations in January 2009, has taken the case of Karl Vinson as one of the first set of actual innocence cases to be litigated by the clinic. Mr. Vinson was convicted in 1986 of the brutal rape of a young girl.

On January 3, 1986, a man broke into a home in Detroit by cutting the screen of the girl's bedroom window. He proceeded to viciously sexually assault the ten-year-old girl in her bed. Immediately after the perpetrator fled, the girl spoke to her mother, who quickly suggested that the rapist must have been Karl Vinson. Mr. Vinson was the ex-husband of a babysitter who had sat for the girl years earlier when she was five or six years old. The girl eventually agreed that Mr. Vinson was the perpetrator, and he was convicted entirely on the basis of the girl's testimony despite alibi evidence placing him elsewhere at the time of the rape.

Appointed trial counsel for Mr. Vinson was completely ineffective in dealing with the forensic evidence in this case. At the trial, a lab technician from the Detroit Police Crime Lab (which has since been shut down because of malfeasance) testified that she found a semen stain on the girl's bedsheet and that she found only O blood antigens in the sheet. This finding was significant because Mr. Vinson blood type is AB negative, and no AB negative was found in the

semen stain. The lab technician explained this finding away by stating that the victim had O blood type and that Mr. Vinson is a "non-secretor," that is, he belongs to the 20% of the population that does not secrete blood antigens into bodily fluids such as semen. This testimony was not challenged or investigated at all by appointed defense counsel.

Even worse, another Detroit Police Crime Lab technician testified that he found no fingerprints matching Mr. Vinson at the scene (even though the perpetrator did not wear gloves) but that this result was not surprising because non-secretors often do not leave behind fingerprints. This "scientific" testimony is completely fraudulent; whether a person is a secretor or non-secretor has absolutely nothing to do with whether they leave behind fingerprints, but appointed defense counsel did nothing to expose this fraud.

In closing argument, the prosecutor pointed to Mr. Vinson's non-secretor status as powerful evidence of his guilt; the fact that no blood antigens other than those matching the victim were found was evidence, the prosecutor argued, that the rapist was a non-secretor, and the absence of fingerprints was further evidence that the rapist was a non-secretor, just like Mr. Vinson. Again, appointed defense counsel did nothing to challenge this evidence.

Unfortunately, the Detroit Police have destroyed the bed sheet so that it cannot be tested for DNA, but we have retested Mr. Vinson in 2009 and have determined that he is a secretor. In other words, there is no way to explain why his AB- blood type did not show up in the semen-stained sheet other than that he is innocent and has served 23 years for a crime he did not commit.

If appointed defense counsel had done her job at trial, not only would Mr. Vinson have not served 23 years on a wrongful conviction, but, perhaps, the police would have renewed their hunt for the real rapist who presumably has been free to rape other children all of these years. Mr. Vinson's case illustrates the tremendous cost to society when the adversary breaks down because of inadequate defense lawyering.

In short, inadequate indigent defense leads inexorably to wrongful convictions. I thank for you for your consideration of my testimony.

Sincerely,

David A. Moran, Co-Director
Michigan Innocence Clinic

MICHIGAN COUNCIL ON CRIME AND DELINQUENCY
1115 S. Pennsylvania Avenue · Suite 201 · Lansing, Michigan 48912
Telephone: (517) 482-4161 · Fax: (517) 482-0020 · Email: mail@miccd.org

WRITTEN TESTIMONY OF ELIZABETH ARNOVITS
EXECUTIVE DIRECTOR, MICHIGAN COUNCIL ON CRIME AND DELINQUENCY
CHAIR, MICHIGAN PUBLIC DEFENSE TASK FORCE

U.S. HOUSE OF REPRESENTATIVE COMMITTEE ON THE JUDICIARY
HOUSE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
CONGRESSMAN ROBERT SCOTT, CHAIRMAN

March 26, 2009

Chairman Scott, thank you for your leadership in beginning to address the national public defense crisis by holding this hearing. Thank you, members of the subcommittee, for the opportunity to submit testimony on the status of Michigan's public defense system.

As manifested in the Pledge of Allegiance, a commitment to justice for all is the cornerstone of the American social contract and our democratic system. We entrust our government with the administration of a judicial system that guarantees equal justice before the law – assuring victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty.[1] The right to counsel was affirmed for juveniles in *In re* Gault, 387 U.S. 1 (1967): "Under our Constitution, the condition of being a boy does not justify a kangaroo court."

[1] *Gideon* established the right to counsel for felony trials. Subsequent cases extend that right to: direct appeals - *Douglas v. California*, 372 U.S. 353 (1963); custodial interrogation - *Miranda v. Arizona*, 384 U.S. 436 (1966); juvenile proceedings resulting in confinement - *In Re Gault*, 387 U.S. 1 (1967); critical stages of preliminary hearings - *Coleman v. Alabama*, 399 U.S. 1 (1970); misdemeanors involving possible imprisonment - *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and misdemeanors involving a suspended sentence – *Shelton v. Alabama*, 535 U.S. 654 (2002).

Yet Gideon's promise remains unfulfilled in Michigan. Today, the State of Michigan has operates one of the worst systems in the country, failing to provide adequate representation to either adults or juveniles.

What emerges from even the most casual examination of the historical record in Michigan these past 30 years is that the juvenile public defense system is failing. The Michigan Public Defense Task Force was formed in 2001 by the Michigan Council on Crime and Delinquency to address the crisis in how public defense services are provided to the state's poorest citizens. Composed of criminal justice and juvenile justice professionals, as well as concerned citizens from all walks of life, the Task Force has actively worked with stakeholders at the local and state levels to identify and advocate for standards and practices integral to effective public defense delivery. In 2008, the Michigan Public Defense Task Force became a founding member of the Campaign for Justice, a non-partisan, non-profit organization dedicated to reforming Michigan's failing public defense system through legislation.

In 2002, the Task Force published *The Eleven Principles of a Public Defense Delivery System* ("Eleven Principles"), patterned on the American Bar Association's (ABA's) *Ten Principles of Indigent Defense*. The Eleven Principles were subsequently adopted by the State Bar of Michigan's Representative Assembly in 2002 and it's Board of Commissioners in 2005. These Principles serve as the fundamental elements of a public defense delivery system that can provide effective, efficient, quality, and ethical representation to those charged in criminal or delinquency proceedings who cannot afford to hire an attorney. Unique to the state of Michigan, the Eleventh Principle strives to engage public defenders in the process of exploring and advocating for programs that improve the system and reduce recidivism. The Eleventh Principle states:

> *"When there is a defender office, one function of the office will be to explore and advocate for programs that improve the system and reduce recidivism."*

The defense attorney is in a unique place to assist clients, communities and the system by becoming involved in the design, implementation and review of local programs suited to both repairing the harm and restoring the defendant to a productive, crime free life in society. Especially in juvenile delinquency matters, defense attorneys can play a crucial role in diverting children from the cycle of crime. When up to three quarters of incarcerated children have diagnosable mental health disorders and almost fifty percent have drug problems, the time and resources an attorney has really makes a difference in whether these important aspects of a child's life will be spotted and whether she or he may be diverted to treatment or counseling rather than the corrections system.

MICHIGAN COUNCIL ON CRIME AND DELINQUENCY
1115 S. Pennsylvania Avenue · Suite 201 · Lansing, Michigan 48912
Telephone: (517) 482-4161 · Fax: (517) 482-0020 · Email: mail@miccd.org

As Michigan does not have the system to uphold the first ten principles, we certainly are nowhere near implementing the Eleventh Principle. "The ability of defense advocates to currently speak with a single, unified voice on justice matters and effectively advocate in such a manner is seriously diluted in Michigan by the Balkanization of service providers" (*A Race to the Bottom*, NLADA, 2008, page 91).

The lack of standards for public defense services in juvenile proceedings result in a significant risk that the Constitutional rights of youth are violated.

- Many attorneys lack training or experience specific to handling juvenile delinquency cases. There is no statewide training requirement to take court appointed juvenile work. While areas such as child protection have government funded trainings financed by such programs as The Governor's Task Force on Children's Justice (Children's Justice Act funding) and Court Improvement Program funding, there is no such program in the delinquency realm. There is rarely, if ever, a training program dedicated to representing juveniles in delinquency proceedings.

- Public defense attorneys in Michigan have such unmanageable caseloads that they cannot provide an effective defense. This is true of both public defenders and of private lawyers who take large numbers of appointments in order to make this practice financially worthwhile.

- Youth are advised to waive counsel, without an adequate explanation of the potentially severe consequences.

- Youth often meet their attorneys for just a few minutes before trials.

- It is common practice for public defense attorneys to advise their juvenile clients to plead guilty before the lawyer has conducted any factual investigation of the case.

- There is little to no funding for investigators, experts or specialists.

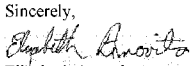
Many children charged in Michigan often proceed without the guidance of counsel at their side. Parents sometimes tell their children to waive their right to counsel – for some, because of the cost they are told they will have to pay afterward, for others, because there is a clear conflict of interest (domestic violence or other problems at home). In other

cases, children are just not informed that they can speak with an attorney to decide whether or not to have an appointed attorney or defender.

The significant failures of the system have since led to the creation of a culture that discourages aggressive representation of youths charged as delinquents. While Michigan's law and juvenile court rules are far from ideal in responding to delinquency, lawyers too often fail to utilize the legal tools currently available to them on behalf of their young clients. This is not necessarily because the lawyers appointed by the courts are professionally incompetent but, rather, is largely the result of forty years of practice in our courts that discourage real advocacy on behalf of allegedly delinquent children. At a basic level, lawyers are sometimes confused about whether the client is the youth, the youth's parents or the court. Rarely does an attorney have the time or resources to remain involved in a case through disposition. The lack of advocacy creates an environment in which the burden of defense falls upon the child rather than the attorney. Finally, Michigan practices encourage a "processing" or "rocket docket" approach that further discourages attorneys from pursuing advocacy that meets the needs of juveniles in the system.

We look forward to working with in efforts to improve the public defense system in the United States. Thank you again for this opportunity to present testimony on such an important issue.

Sincerely,



Elizabeth Arnovits
Executive Director, Michigan Council on Crime and Delinquency

DETROIT BRANCH....NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

REVEREND WENDELL ANTHONY
PRESIDENT

HEASTER L. WHEELER
EXECUTIVE DIRECTOR

TESTIMONY OF THE DETROIT BRANCH NAACP

FOR THE HEARING ON INDIGENT DEFENSE, BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

U.S. HOUSE OF REPRESENTATIVES

March 26, 2009

"And Justice For All"

The Detroit Branch NAACP firmly believes that Michigan's failing public defense system is in need of reform. The constitutional right of all individuals to effective defense representation regardless of race, income or background, is not being upheld. A state-funded public defense system that meets the Eleven Principles of a Public Defense Delivery System[1] would ensure a more effective, efficient and ethical system that upholds the rights that are fundamental.

Background:

Founded February 12, 1909, the National Association for the Advancement of Colored People ("NAACP") is the nation's oldest, largest and most widely recognized grassroots civil rights organization. The NAACP's more than half-million members and supporters throughout the United States and the world are the premier advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors. The mission of the NAACP is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.

The Detroit Branch NAACP received its charter to operate as a local branch in 1912. The Detroit Branch has remained the largest Branch of the NAACP since its inception. Its power in numbers has proved successful in many lawsuits and public demonstrations in Detroit and throughout Michigan. In May 2007, the Detroit Branch launched its "And Justice For All" campaign to address various problems with Michigan's justice system, including but not limited to, indigent and juvenile public defense.

Race and the right to counsel:

The Sixth Amendment of the United States Constitution states that "in all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." Each person has the right to effective defense representation under the constitution, even if one cannot afford to hire an attorney. However, in Michigan, this right is being denied. Every day our most vulnerable citizens are put on a fast-moving assembly line to our prison system.

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[1] Adopted by the State Bar of Michigan Representative Assembly, April 2002

Low-income people of color are disproportionately among those who need access to adequate and qualified public defense. As a result, people of color are disparately impacted by Michigan's failing public defense system. For example, while minorities make up only 18.8 percent of Michigan's population[2], they account for 54.8 percent of Michigan's prison population.[3] Nationally, a U.S. Department of Justice survey showed that 77 percent of African Americans and 73 percent of Latinos in state prisons were presented by public defense attorneys.[4]

In Wayne County, Michigan, home to the Detroit Branch NAACP, the Circuit Court processes approximately 19,000 felony cases per year. Yet, Wayne County only allots $8 million annually for public defense. **This amount has not changed since 1982!** Despite being mandated by law to handle 25% of the county's criminal caseload, the Legal Aid & Defender Association is given only $1.98 million annually to represent its clients. What was a staff of 25 lawyers and 5 investigators in 1986 is now only 16 lawyers and zero investigators due to the lack of adequate funding. Compare this to the Wayne County Prosecutor, who enjoys the investigative resources of the Michigan State Police, Wayne County Sheriff and all of the municipal police departments in the county. Moreover, while the prosecutor has the budget to hire experts, public defense attorneys must petition the Court to hire an expert in a given case, and then try to find an expert willing to provide testimony for a minimal fee. Clearly, the playing field in uneven. And people of color, all NAACP constituents, comprise **more than 85% of the defendants** in the county's cases.

In evaluating Michigan's public defense system, the National Legal Aid and Defender Association (NLADA) found that many individuals are not represented at pre-trials in some jurisdictions, even when an attorney has been requested.[5] In other jurisdictions, requests for counsel are denied in misdemeanor cases for which there is no potential jail sentence, regardless of the collateral consequences that an individual may have to face if convicted. Court observations revealed that many individuals – both adults and children – waive their right to counsel in part because of the fees that may be assessed if counsel is requested, or because they are told to speak to the prosecutor to work out a deal before considering a request for counsel. This is not the justice that our founding fathers intended. The state has no statewide eligibility standards or screening that is uniformly applied. In addition, there is no statewide requirement for or enforcement of prompt appointment of counsel.

Furthermore, for those that are granted a public defense lawyer, their lawyers often are overworked and under-resourced. For example, there is little to no funding for investigative resources or expert witnesses; individuals often meet their lawyers just a few minutes before court hearings because of unmanageable workloads; and there is no statewide standard or requirement for training.

These are just a few examples of a public defense system that clearly is neither effective nor just. The bottom line is that the right of minority Michigan residents to effective public defense is being unconstitutionally violated.

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[2] U.S. Census Bureau, 2006 American Community Survey.

[3] Michigan Department of Corrections, 2006 Annual Report, p. 35.

[4] Gohara, M.S., Hardy, J.S., Hewitt, D.T., "The disparate impact of an under-funded patchwork indigent defense system on Mississippi's African Americans: The civil rights case for establishing a statewide, fully funded public defender system." *Howard Law Journal*, 49 (1) (Fall 2005).

[5] National Legal Aid and Defender Association, "A Race to the Bottom: Speed & Savings over Due Process – A Constitutional Crisis" (June 2008).

Juvenile defense:

"Juvenile justice representation is considered in many ways as an afterthought all across the state of Michigan. As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse."

-David Carroll, National Legal Aid & Defender Association, "A Race to the Bottom: Speed & Savings over Due Process – A Constitutional Crisis"

One of the NAACP's core advocacy issues is juvenile justice. While all children accused of delinquent acts have a right to be represented by an attorney in their proceedings, minorities are more greatly affected by the inadequate access to effective public defense. In Michigan, of the 2,706 youth in residential placement in Michigan in 2003, 44.6 percent were African American and 4.0 percent were Latino.[6]

However, in Michigan, the majority of the children accused are either denied counsel, waive counsel without full understanding, or are represented by counsel working in a system that fails to provide the resources and training necessary to provide an effective representation. Many juvenile defense attorneys have caseloads above the national standards and are forced to meet their clients only minutes before court hearings as a result. Moreover, there are no statewide training requirements for public defense attorneys, and there is little training regarding juvenile delinquency proceedings available. Yet, Michigan spends 3.2 times as much per prisoner as per public school pupil.[7]

Conclusion:

The pursuit of justice is a fundamental principle of American democracy. Michigan's public defense system has been singled out numerous times over the past few decades for its failures in upholding the constitutional right to counsel. The Detroit Branch NAACP believes it is time now for lawmakers to act and ensure that all of Michigan's residents, irrespective of race, have an equal access to the justice system. Thank you for the opportunity to submit this testimony.

Contact information:

Heaster Wheeler, Executive Director
Detroit Branch NAACP
(313) 871-2087
hwheeler@detroitnaacp.org
www.detroitnaacp.org

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[6] Children's Defense Fund, "Cradle to Prison Pipeline – Michigan Fact Sheet" 2007.

[7] Children's Defense Fund, "Cradle to Prison Pipeline – Michigan Fact Sheet" 2007.

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security

Testimony of Melanca D. Clark[1], Counsel
Brennan Center for Justice at NYU School of Law
Thursday, March 26, 2009

Chairman Scott and members of the subcommittee, thank you for your leadership in holding this hearing to address Michigan's public defense system, and for inviting testimony on the need for reform.

Introduction

The Brennan Center for Justice at NYU School of Law was founded in 1995 as a living tribute to Supreme Court Associate Justice William J. Brennan Jr. The Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its effort to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Brennan Center's activities include guiding the Community Oriented Defenders Network – a national coalition of public defender organizations that believe the representation of individuals charged with crimes is made most effective by a deep engagement of defenders with the communities in which their clients live. The Brennan

[1] Melanca D. Clark is counsel in the Justice Program of the Brennan Center for Justice at New York University School of Law, and director of the Center's Community Oriented Defender Project.

Center also conducts a broad range of activities in support of indigent defense reform, helping to lead and to support reform campaigns in specific settings, filing amicus briefs in support of reform litigation and publishing reports illuminating solutions to intractable problems within the criminal justice system.[2] Most notably, the Brennan Center (through its affiliated 501(c)(4)) is one of the founding members of the Michigan Campaign for Justice, and along with other concerned parties from across the political spectrum, is dedicated to securing an effective indigent defense system in Michigan.

We submit this testimony to draw attention to the racial disparities that pervade the criminal justice system in Michigan and other jurisdictions, to make clear that failing to provide adequate representation to those who are poor exacerbates these disparities, and to endorse the Community Oriented Defender model as one that the Congress should evaluate as it considers structures with the potential for improving defender services and reducing racial disparities in the system.

Michigan's Troubled System for Providing Indigent Defense Services

Although the majority of Americans believe in basic fairness and the importance of providing justice to people of all income levels, it is readily apparent that many states fail to deliver on the promise of *Gideon* to provide indigent defense systems that protect individuals' basic rights.[3] The fact that indigent defense services in Michigan rank among the worst in the country is therefore a particularly dubious distinction, as it puts Michigan near last in a race of underperformers. Michigan ranks 44th of the 50 states in public defense funding, and is one of only seven states that does not provide state funding for trial-level public defense services.

The State of Michigan has abandoned responsibility for indigent defense, leaving the matter almost entirely to the counties, which use a combination of low-bid contract attorneys, assigned counsel, and a small number of full and part time defenders, to form a patchwork of under-resourced local defense systems that, among other failings, are not independent from the judiciary, do not utilize uniform screening methods to determine

[2] *See* Appendix at p. 7 for a list of relevant Brennan Center reports.
[3] National Legal Aid and Defender Association, *Developing a National Message for Indigent Defense:* (Oct. 2001) *available at* http://www.nlada.org/DMS/Documents/1211996411.65/Polling%20results%20report.pd.

eligibility for public defense services, and operate without any statewide performance standards or oversight mechanisms. Attorneys representing the poor around the state frequently lack sufficient training and support to mount effective defenses, and have caseloads well above the maximum recommended by national standards. For individuals with misdemeanor cases in the many district courts throughout the state, attorneys are not provided at all.[4]

Disproportionate Minority Contact with the Criminal Justice System

The implications of Michigan's broken public defense system are profound. The State's failure to adequately fund and oversee defense counsel may in fact raise the ultimate cost of criminal justice because it leads to the unnecessary detention of people pre-trial,[5] multiple appeals, re-trials, conviction of the innocent, liberation of actual wrongdoers, settlements with innocent people unfairly convicted and incarcerated, an overarching problem of over-incarceration, and defense of the state against systemic litigation.

Michigan's failure to provide constitutionally mandated services to the accused not only wastes tax payer dollars and decreases public safety, but also undermines the legitimacy of the criminal justice system by creating two systems of justice, one for people with means, and an inferior system for the poor. African American and Latino defendants disproportionately rely on publicly funded counsel. [6] When the service

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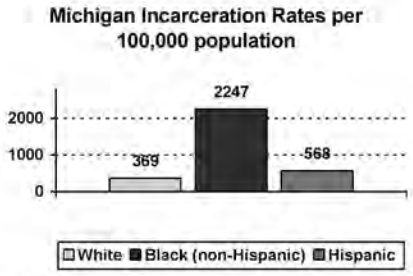
[4] For this section, *see generally*, National Legal Aid and Defender Association, *A Race to the Bottom: Speed and Savings Over Due Process A Constitutional Crisis* (June 2008) *available at* http://www.mynlada.org/michigan/michigan_report.pdf; Michigan Campaign for Justice, *Michigan's Public Defense Report Card* (Feb. 2009) *available at* http://www.michigancampaignforjustice.org/docs/Report%20Card%20small[1].pdf.

[5] Michigan is one of just four states to spend more money on prisons than higher education. The administration of the state's correction systems costs Michigan tax payers over $2 billion a year. The Pew Center on the States, *One in 100, Behind Bars in America 2008* (Feb. 2008) *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

[6] Nationally, 77 percent of African Americans and 73 percent of Latinos in state prisons were represented by public defense attorneys. U.S. Dep't of Justice, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

provided by such counsel is inadequate, racial disparities that persist at every stage of the criminal justice system are exacerbated.[7] Michigan incarcerates Latinos at 1.5 times the rate of whites, and African Americans at 6 times the rate of whites. Disparities are also rampant in Michigan's juvenile system where African-American youth are 88% more likely than white youth to be arrested; 50% more likely to be petitioned to the juvenile court; 2.6 times more likely to be placed in secure detention; and 4.2 times more likely to be placed in a correctional/residential treatment facility.[8]



Source: Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2001.

The over-involvement of minorities in the criminal justice system imposes a massive societal burden, which includes not only the costs of incarceration and parole

[7] These disparities, prevalent throughout the system, are particularly salient in the context of drug offenses where, despite similar rates of drug use, African Americans are three times more likely to be arrested for drug offenses than whites, and nearly ten times as likely to enter prison for drug offenses. *See* The Sentencing Project, *Disparity by Geography: The War on Drugs in American Cities* (May 2008) *available at* http://sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_drugarrestreport.pdf; Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States* (May 2008) *available at* http://www.hrw.org/sites/default/files/reports/us0508_1.pdf.

[8] Michigan State University, DMC Assessment Project, *Measuring Disproportionate Minority Contact in the Juvenile Justice System: An Examination of the Michigan Relative Rate Index* (Mar. 2005), *available at* http://www.michigan.gov/documents/DHS-dmc-mich-06_142983_7.pdf

supervision, but also the destruction of the social fabric and economic health of minority communities, with, in turn, still larger societal impacts.

The collective failure to provide sufficient resources and sufficient oversight to Michigan's indigent defense system thus reflects an affirmative choice to allow racial inequality to endure.

A Better Path Forward - The Case for Community Oriented Defender Services

Over the past five years, through its coordination of the national Community Oriented Defender Network, the Brennan Center has had the privilege of working with a coalition of public defender organizations that believe the representation of individuals charged with crimes is made most effective by a deep engagement of defenders with the communities in which their clients live. These model "community oriented defender" programs, when supported by adequate funding, training, and other assistance, are able to help clients avoid negative police interaction, make contact with social service providers who can identify alternatives to prison, facilitate client reentry at the front and back ends of the criminal justice process, and combat the structural problems that turn courthouse entrances into revolving doors for increasing numbers of minorities and the poor. They are making a difference not only in individuals' lives, but for families and communities.

For example:

- In Connecticut, the Division of Public Defender Services has a permanent seat on the state's Commission on Racial and Ethnic Disparity, which provides a forum for stakeholders to focus on fixing policies, traditions, and cultures which promote racial disparities.
- In Massachusetts, the Committee for Public Counsel Services, the statewide public defender, is partnering with the Brennan Center to develop legislation to improve the collection, review, and monitoring of data on race as a factor in law enforcement traffic stops with the goal of eliminating racial profiling.
- In San Diego, the chief defender spearheaded the creation of a problem-solving court for homeless defendants. The court resolves outstanding warrants and misdemeanor offenses by sentencing defendants to activities in shelter programs, including drug treatment, as an alternative to incarceration.

By moving from an exclusive concentration on the individual circumstances affecting each client to a fuller consideration of the institutional forces impacting multiple clients, these problem solving defender organizations (and other participants in the Community Oriented Defender Network) are partnering with government to reduce racial bias in the system, and to correct a variety of systemic problems. Such advocacy leads to more effective representation of clients, the advancement of practical solutions, and promotion of a fairer criminal justice system.[9]

Conclusion

Our nation's current economic crisis adds a new urgency to the work of addressing the public defense crisis in Michigan and across the nation. It is critical that the resources of the public fisc be efficiently deployed and that the pressures of fiscal austerity not be permitted to undercut further the fundamental integrity of the system. The underlying problem of racial injustice must not be ignored, and the transformational potential of models such as the Community Oriented Defender Network should be explored. Reform of the indigent defense system in Michigan is long overdue. The people of Michigan simply can not afford the price of the status quo.

The Brennan Center applauds the committee for holding this important hearing.

[9] Notably, exploration of and advocacy for "programs that improve the system and reduce recidivism" has been recognized as one of eleven fundamental principles for a public defense delivery system once a defender office is in place. *The Eleven Principles of a Public Defense Delivery System*, Michigan Public Defense Task Force (adopted by the State Bar of Michigan's Representative Assembly and Board of Commissioners).

Appendix

Brennan Center Reports Related to Indigent Defense:

- Access to Justice: Opening the Courthouse Door *available at* http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf
- Eligible for Justice: Guidelines For Appointing Defense Counsel *available at* http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf
- Maryland's Parole Supervision Fee: A Barrier to Reentry (forthcoming)
- Prosecutorial Discretion and Racial Disparities in Federal Sentencing *available at* http://www.brennancenter.org/content/resource/prosecutorial_discretion_and_racial_disparities_in_federal_sentencing/
- Taking Public Defense to the Streets *available at* http://brennan.3cdn.net/3e336561b5c87c36e4_a3m6bo95w.pdf
- The Case for Community Defense in New Orleans *available at* https://www.policyarchive.org/bitstream/handle/10207/8686/communitydefenseNOLA.pdf?sequence=1

Written testimony of James Muffett
President, Citizens for Traditional Values
Lansing, Michigan

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott, Chairman

March 26, 2009

Thank you, Mr. Chairman, for holding this hearing today and for allowing me the opportunity to submit testimony on behalf of Citizens for Traditional Values regarding the issue of Michigan's troubled public defense system. I commend you and your colleagues for examining this important issue.

My name is James Muffett. I am the president of Citizens for Traditional Values (CTV), a nonprofit civic league working on the grassroots level to encourage an active and informed citizenry in the State of Michigan. CTV seeks to broaden public understanding of the importance of personal freedom and traditional family values; and to work for the adoption of laws and public policies that reflect those values.

An important part of our efforts at CTV is monitoring proposed legislation and interacting with state legislators and other government leaders. So, as I learned more about the problems within Michigan's public defense system and the impact those problems have on people with limited means, it became clear that this was an issue that deserved our attention and needed to be addressed.

The Sixth Amendment to the Constitution protects every citizen's right to an adequate legal defense at trial. I am not a lawyer and do not have nearly the expertise in these matters as many of the people who will testify before your committee, but it is clear to me that real justice demands equal treatment under the law for everyone, rich and poor. Unfortunately, it is becoming increasingly obvious that, in Michigan, the mechanism for delivering justice is in need of serious repair.

Michigan's public defense system is funded at the county level. At the same time, no uniform standards for an effective defense exist, let alone are being enforced. This leads to a reality where a person of limited means receives a defense that is inconsistent at best, inadequate at worst. The lack of adequate representation at trial leads to many problems, including false convictions and the incarceration of innocent men and women. That means that the real criminal remains free, and as a result, our streets are less safe.

We, as a society must work to ensure that everyone's rights are protected, regardless of their financial position. In addition to being a fundamental aspect of our justice system, standing up for every citizen's rights, is fundamentally, a moral issue. In my view, since we are all created equal, the law must not treat one person differently than another.

In Exodus 23:6, we are told, *"Do not deny justice to your poor people in their lawsuits."* Michigan fails to live up to this standard each and every day. The current system must be reformed in order to provide adequate representation for all people and in all communities.

It is my hope that we will address the problems we face in Michigan and ensure that we as a society truly treat others as we would hope to be treated ourselves.

Thank you again for the opportunity to share the position of Citizens for Traditional Values with the committee.

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WRITTEN TESTIMONY OF SUSAN HERMAN, DIRECTOR OF THE MICHIGAN JEWISH CONFERENCE

FOR THE HEARING ON INDIGENT DEFENSE, BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

U.S. HOUSE OF REPRESENTATIVES

March 26, 2009

Congressman Scott and members of the subcommittee, thank you for your time and for addressing the critical issue of public defense. Thank you for the opportunity to provide this testimony.

My name is Susan Herman and I serve as the director of the Michigan Jewish Conference, which was established in 1992 to serve the political and community relations needs of the statewide Jewish community through legislative advocacy and coalition building with other statewide religious and social justice organizations.

The Michigan Jewish Conference believes that Michigan's public defense system is failing and in need of reform. Every individual regardless of income or background, has a constitutional right to an effective defense. A state-funded public defense system that meets the Eleven Principles of a Public Defense Delivery System[1] would ensure a more effective, efficient and ethical system that upholds this fundamental constitutional right.

"Justice, justice you shall pursue." – Deuteronomy 16:20

The right to counsel:

The Sixth Amendment of the United States Constitution states that "in all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defense." The constitution does not make a distinction between those who can and those who cannot afford an attorney. In Michigan however those who cannot afford an attorney are often denied this right..

The National Legal Aid and Defender Association (NLADA) found, in a year-long study of ten representative Michigan counties,[2] that many individuals are not represented at pre-trials in some jurisdictions, even when an attorney has been requested. In other jurisdictions, requests for counsel are denied in misdemeanor cases for which there is no potential jail sentence, regardless of the collateral consequences that an individual may have to face if convicted. Court observations revealed that many individuals – both adults and children – waive their right to counsel in part because of the

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[1] Adopted by the State Bar of Michigan Representative Assembly, April 2002

[2] National Legal Aid and Defender Association, "A Race to the Bottom: Speed & Savings over Due Process – A Constitutional Crisis" (June 2008).

fees that may be assessed if counsel is requested, or because they are told to speak to the prosecutor to work out a deal before considering a request for counsel. This is not the justice that our founding fathers intended. The state does not have any statewide eligibility standards or screening that is uniformly applied for providing representation. In addition, there are not any statewide requirements for or enforcement of prompt appointment of counsel.

Furthermore, for those that are granted a public defense lawyer, their lawyers often are overworked and under-resourced. For example, there is little to no funding for investigative resources or expert witnesses and individuals often meet their lawyers for the first time just a few minutes before court hearings because of unmanageable workloads. Additionally there is no statewide standard or requirement for training for public defense lawyers.

Wrongful convictions and public safety:

In Michigan recent exonerations of wrongfully incarcerated individuals such as Walter Swift and Ken Wyniemko has clearly demonstrated that change must be made in order to ensure a justice system that promotes public safety.

The failures of our state's public defense system are evident in these cases. Swift spent twenty-six years in prison for a crime he did not commit; his attorney lost his license to practice law three times after Swift was convicted. The public defense attorney in Swift's case did not present crucial forensic evidence that would have helped to prove his innocence, nor did the attorney question a police officer about the identification procedure used or cross examine one of the scientific lab technicians. A working public defense system would include monitoring of attorney performance and ensure that attorneys receive cases which they are trained and experienced to handle.

In Ken Wyniemko's case, his first attorney failed to return a multitude of calls and then quit. The second attorney had only two days to prepare – over a weekend. Crucial biological evidence that would have supported Wyniemko's innocence claim was never even analyzed, let alone presented in court. After more than eight years in prison, DNA testing proved him innocent.

For each person that is locked up for a crime that she or he did not commit, the real perpetrator may still be free on the streets to commit additional crimes.

Conclusion:

The pursuit of justice is a core Jewish value and also a fundamental principle of American democracy. Michigan's public defense system has been singled out numerous times over the past few decades for its failures in upholding the constitutional right to counsel. The Michigan Jewish Conference believes it is time now for lawmakers to act and ensure that Michigan residents have a justice system that works for all. Thank you for the opportunity to submit this testimony.

"On three things does the world endure: justice, truth, and peace..." – Pirkei Avot 1:18a

Contact information:

Susan Herman, *Director*
Michigan Jewish Conference
(517) 449-1562
Herman@JFMD.org

Written testimony of Mary Engle
Executive Director of Prison Fellowship
Grand Rapids, Michigan

U.S. House of Representative Committee on the Judiciary
House Subcommittee on Crime, Terrorism and Homeland Security
Congressman Robert Scott, Chairman

March 26, 2009

Chairman Scott, thank you for convening today's hearing. The failures in Michigan's public defense delivery system are serious. They are negatively impacting our state's budget, families, the rights of those accused of crime and the lives of people who are victims of crime. As Executive Director of Prison Fellowship for Michigan, I applaud you for examining this issue and thank you for the opportunity to present testimony.

The biblically based principles of restorative justice acknowledge that crime is more than law breaking; it's victim harming. Restorative justice aims at every step of the criminal justice process to hold offenders accountable, heal victims, reconcile broken relationships between victims and offenders, and restore community peace. A lasting solution to America's problematic justice system should incorporate the principles of restorative justice.

In the case of Michigan, the failures of the state's public defense system undermine Prison Fellowship's pursuit of restorative justice. This is why we have joined the Campaign for Justice in calling for statewide funding and statewide standards for public defense services, because the deteriorating condition of Michigan's system demands reform.

Currently, a patchwork system of county-based public defense services stretches across Michigan. Each of Michigan's 83 counties is responsible for funding and administering the public defense system within its border. This leads to inadequate funding, uneven oversight and inconsistent justice for both those accused of a crime and those who are victims of crime. As a result, mistakes occur. People are wrongfully or inappropriately imprisoned. Scarce financial resources are wasted. Real offenders are not held accountable and victims of crime become victims again.

A detailed account of the failures in Michigan's system was outlined last year in a comprehensive study requested by the Michigan legislature and completed by the National Legal Aid and Defender Association. It reported:

> The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan's denial of its constitutional obligations has produced myriad public defense systems that vary greatly in

> defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county – giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one's crime is alleged to have been committed instead of the factual merits of the case – NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

This passage confirms Michigan needs to implement a statewide system of funding for public defense services and must apply nationally recognized standards to the defense services provided to those of limited means.

These are the goals of the Michigan Campaign for Justice, and they are goals that we at Prison Fellowship share. Preserving the constitutional right to an effective, state-provided defense is critically important to all people associated with our criminal justice system – the accused, victims and the public.

Again, I appreciate the opportunity to share this information with the subcommittee and thank you again for your attention to this important issue impacting Michigan.

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

HEARING ON THE REPRESENTATION OF INDIGENT DEFENDANTS IN CRIMINAL CASES: A CONSTITUTIONAL CRISIS IN MICHIGAN AND OTHER STATES?

THURSDAY, MARCH 26, 2009

WRITTEN TESTIMONY OF:

TIM YOUNG
OHIO PUBLIC DEFENDER

Office of the Ohio Public Defender
250 East Broad Street - Suite 1400
Columbus, Ohio 43215-2998
www.opd.ohio.gov

TIMOTHY YOUNG
State Public Defender
(614) 466-5394
Fax (614) 644-9972

Chairman Scott and Members of the Subcommittee on Crime, thank you for this opportunity to provide written testimony to be entered into the record of the hearing on the representation of indigent defendants in criminal cases, held on March 26, 2009. I would also like to thank the Subcommittee for recognizing the importance and urgency of this issue and for holding this hearing. As you have already learned from the testimony provided by the witnesses at the hearing, the indigent defense system in Michigan and other states is woefully underfunded and overburdened, and states across the country are on the precipice of a constitutional crisis. Ohio is among those states.

The Ohio Public Defender Commission (OPD) provides, supervises, and coordinates legal representation for indigent persons accused of crime, indigent prisoners appealing their convictions or seeking post-conviction relief, persons charged with post-release control violations, and indigent adults and juveniles in various juvenile court matters. The agency provides funding for county-run systems and sets rules and standards for conduct of Ohio's indigent defense system. The agency's mission is to ensure that quality representation is provided to all persons for whom there is a right to public counsel.

Much of the responsibility and burden of Ohio's indigent defense system falls to the counties. Under Ohio law, counties may choose from among five options to provide indigent defense services: county public defender office, joint-county public defender office, contract with the state public defender to provide services, appointed counsel, and contract with a nonprofit organization to provide services. The counties pay up-front to provide indigent defense services under their chosen system, then submit their expenses to the state, which reimburses the counties for a portion of their expenses. When Ohio's indigent defense system was first created in 1976, the state was obligated by statute to reimburse the counties for 50% of their indigent defense expenses. Less than six years later, the Ohio legislature amended the statute to allow for state reimbursement *up to* 50% of the counties' expenses. Last year, the state reimbursement rate fell to an all-time low of just 25%, saddling Ohio's counties with the responsibility of funding three-quarters of the growing cost of the indigent defense system.

I was appointed State Public Defender on January 1, 2008. Prior to that, I served as a senior attorney and administrator at the Montgomery County Public Defender Office. Since becoming the Director of OPD, I have taken the opportunity to visit every county public defender office, and to meet with other state and county officials regarding the state of indigent defense in Ohio. What I have found is that Ohio's indigent defense system is in need of reform in two fundamental aspects. First and foremost, the system is grossly underfunded and the current method of funding the system is unreliable. Second, there is a need to increase oversight and control and to improve the quality of service delivery.

The first task is to change how the system is funded and to secure new funding. Presently, the funding system for indigent defense in Ohio is broken. Following the latest round of cuts, general revenue funding (GRF) for indigent defense reimbursement is $26.5 million, about the level it was in 1997. At the same time, costs have reached an all-time high. In fiscal year 2009,

county indigent defense system costs are expected to be $119.2 million, more than double that of 1997.

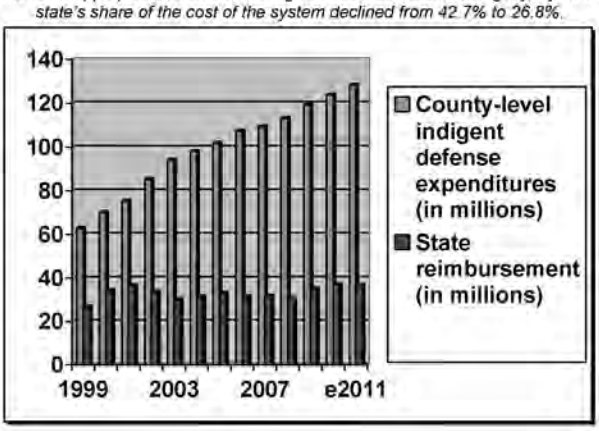
Many counties are now in dire financial situations regarding indigent defense funding, and at least one county, Hamilton (Cincinnati), is in an all-out crisis. Counties, faced with their own budget issues, have not been able to keep pace with the increase in costs and the reduction of state reimbursement.

Likewise, GRF funding for the state office is just above that of 1996, and despite increased demands in workload, the office has reduced in size and function. To cope, the office has had to refuse representation to some who are arguably entitled, placing the state office in a precarious position of failing to meet its constitutional requirements.

The model of funding the system largely with GRF dollars, and passing state budget shortfalls onto county governments, has led the entire system to the brink of disaster.

INCREASING COSTS

Between 1999 and 2008, county expenditures, before state reimbursement, increased 79.8%. While the state appropriation for reimbursing the counties increased slightly, by 12.9%, the state's share of the cost of the system declined from 42.7% to 26.8%.



While increasing funding is an important and necessary first step, a systemic solution is also necessary—one that not only addresses funding, but that also ties funding to rules, standards, and guidelines, such as requiring additional staffing as caseloads increase, maintaining pay parity with the prosecution, increasing fees for appointed counsel, and maintaining and monitoring quality controls.

a. Training, Certification, and Performance Standards Program

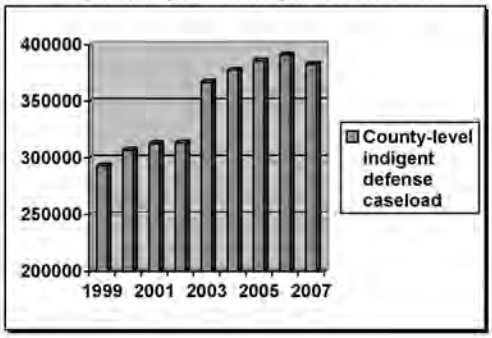
Presently, Ohio has no uniform system for qualifying counsel who provide representation to indigent persons at public expense, and there is no system for evaluating their performance. The Ohio Public Defender Commission has issued rules and standards detailing attorney qualifications, but there is no enforcement mechanism, and it is generally handled differently county-by-county and in some cases court-by-court. I envision creating a system whereby all attorneys who work at a public defender office or contract for or take appointed cases must be qualified based on specific training and experience requirements, and are periodically evaluated against uniform and accepted performance standards. This will involve establishing a training and mentoring program that allows attorneys to meet and maintain such requirements.

b. Caseload Standards

In most counties, caseloads for public defenders far exceed national standards and are in many cases double what would be considered a normal caseload for a practicing attorney. At the current levels, provision of quality representation is in jeopardy. Presently, OPD's objective is to establish a system whereby each public defender office can determine what an optimal caseload should be. Some considerations include the impact of technology, open discovery, and court scheduling. These standards should also be extended to cover attorneys who take appointed cases, and place limits on the number and kind of cases an individual attorney would be permitted to accept per year.

INCREASING CASELOADS

Between 1999 and 2007, the number of indigent criminal and juvenile cases handled by Ohio's county-level indigent defense system increased 31%.



c. Pay Parity

To guarantee fundamental fairness in an adversarial system, one side cannot be substantially better funded than the other. Comparing budgets between public defender offices and

prosecutor offices is akin to comparing apples and oranges. Prosecutors perform many functions that are not performed by public defenders – grand juries and civil divisions are two examples. One area that is indicative of fairness and that can be easily compared is pay parity between public defenders and prosecutors. It is fundamentally unfair to pay one substantially more than the other. To do so guarantees that one side will be able to recruit better candidates, engage in better retention of quality employees, and ultimately have one side of the case presented in court with better lawyers.

d. Appointed Counsel Fees

A common refrain among defense counsel is that they no longer take appointed cases because the cost exceeds their compensation. The average hourly rate paid to private appointed counsel is $45.00 per hour, but because of fee maximums per case, the rate is effectively reduced to single digits if a case is complex, requires significant research or investigation, or even if it goes to trial. When adjusted for inflation, appointed counsel in Ohio have not received a raise in over 20 years. Understandably, many experienced attorneys simply refuse to work for such low wages, reducing the quality of representation.

The conclusion is evident. Ohio's indigent defense system must be reformed, and done so in a way that adjusts funding for caseloads, creates pay parity between prosecutors and public defenders, and pays appointed counsel a wage that does not result in the defense lawyer's subsidizing the prosecution of his own client. Performance standards must be followed and criminal law certification training must be implemented for new lawyers seeking to be appointed to cases. The system cannot absorb any further decreases in either the operational budget of OPD or the reimbursement to counties. Nor can it continue to absorb caseload increases without an increase in funding. To do so ensures that OPD and the counties will be unable to fulfill the government's obligation under the Sixth Amendment and *Gideon*.

Chairman Scott and Members of the Subcommittee, thank you for this opportunity to provide written testimony on this important issue. I will be happy to answer any questions you may have and to provide you with any additional information you may need.

Ohio Indigent Defense Fact Sheet

Overview

	2000	2009	Percentage Change
• Total Caseload:	317,598	417,450	28.4%
• Ohio Public Defender:	$8.6m	$6.9m	-23.8%
• County Reimbursement:	$34.1m	$28.5m	-16.4%

Counties

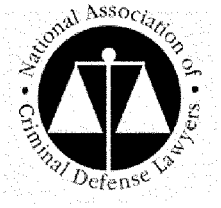
- 22 counties have over 100% caseload growth since 1997
- 8 counties have over 200% caseload growth since 1997
- Hamilton County indigent defense system found unconstitutional by NLADA study
- Stark County had to emergency fund its public defender office or face shutdown
- County reimbursement is at its lowest point ever: 25%
- Caseloads are double and triple national standards in some counties

System

- 88 different systems
- Lacks accountability – patronage, repeating costs for multiple counsel, high reversal rate
- No transparency – cannot tell what why costs are different from system to system
- No quality – no standards or certification

Solutions

- Funding – if targeted to address caseloads, attracting quality counsel, and certification and training
- Unitary system – reform with accountability, transparency, and quality as the standards; eliminate county reimbursement with funding taken over by the State



Written Statement of
John Wesley Hall

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Subcommittee on Crime, Terrorism, and Homeland Security
House Committee on the Judiciary

Re: "Representation of Indigent Defendants in Criminal Cases:
A Constitutional Crisis in Michigan and Other States?"
March 26, 2009

I. Introduction

On behalf of the National Association of Criminal Defense Lawyers (NACDL), I would like to thank you for holding this hearing. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.

NACDL has long worked to improve this country's public defense systems. Through public education, advocacy and litigation, we have sought to ensure that those without financial means are afforded the zealous, competent counsel necessary to guarantee a fair trial in our adversarial system. NACDL has been at the forefront of many indigent defense reform efforts, for example:

- Research and Education. NACDL is constantly trying to raise awareness of the right to counsel and its violation throughout the United States. Our comprehensive report, Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor System, will be released in the next few weeks. This report documents an extensive research effort on misdemeanor indigent defense throughout the nation and sets forth reform recommendations. In this area, some judges actually acknowledge the widespread violation of Sixth Amendment rights. For example, Chief Justice Jean Hoefer Toal of the Supreme Court of South Carolina told a group of attorneys at a state bar meeting, "*Alabama v. Shelton* is one of the more misguided decisions of the United States Supreme Court . . . so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."

- Advocacy. NACDL is actively engaged in encouraging states to fulfill their constitutional obligations to provide competent, well-resourced counsel for all indigent defendants within their state. NACDL provides technical support and expert testimony whenever policymakers are entertaining new laws or rules regarding indigent defense.

- Litigation. When necessary, NACDL supports litigation to achieve indigent defense reform. NACDL has helped challenge certain practices, such as the failure to fund investigators or experts and caseloads that greatly exceed national standards. Additionally, NACDL has helped coordinate class actions on behalf of indigent defendants to challenge, on a larger level, the constitutionality of particularly defective indigent defense systems.

NACDL's written statement will focus on two of the most prevalent and pernicious problems within the arena of indigent defense today: the increased use of low-bid, flat-fee contracts as a means of providing public defense services and the overwhelming caseloads public defenders and assigned counsel face. These problems have the same effect – they hamstring the defense, thus unbalancing the scales of justice.

When the defense cannot do its job fully, money is wasted on appeals, retrials, and unwarranted prison sentences. Alternatives to incarceration are not explored. In the worst case scenario, the wrong people go to jail, while actual guilty parties remain free.

These problems have been greatly exacerbated by the current economic crisis. With states across the country struggling to meet budget shortfalls, indigent defense frequently gets short shrift. Because of stark nationwide defender budget cuts, defender offices hiring freezes, and loss of seasoned staff due to astronomical rates of attrition, the criminal justice systems in many jurisdictions are at the breaking point. But when states fail to provide even the most basic resources for the justice system to work effectively, the result is massive inefficiencies that squander money. The answer to the question posed by this hearing is clear: the representation of indigent defendants in Michigan and other states is part of a worsening constitutional crisis.

II. Low-bid Contracts for Public Defense Work

In a "Low-bid" or "Fixed Rate" or "Flat Fee" contract public defense system, lawyers compete for criminal court appointments by submitting a proposal to represent all or a portion of a jurisdiction's caseload for a fixed price. Many jurisdictions in Michigan, and other states, have used this type of contract. In most cases, there is no numeric limit on the number of cases the attorney will receive and no mechanism for the price of the contract to change if the cases are unduly complex, numerous, or require experts or investigators. Generally, the jurisdiction accepts whichever bid is the lowest. Few contract systems consider the qualifications and experience of bidding attorneys.

Virtually unknown prior to the 1980s, the use of low-bid contracts for public defense services has proliferated in the past two decades. In the past year alone, many states that have switched to low-bid, flat-fee contracts as their means of providing public defense services in criminal cases.

The primary goal of fixed-price contracting is not quality representation but cost limitation. Fixed-price contracts inevitably result in case overload and inadequate representation, as the incentive for the attorney is to process cases quickly. The system thus discourages investigation, consultation of experts, motions practice and trials. Instead, it encourages quick plea bargaining, regardless of whether it is appropriate or right for the client. Accordingly, these systems create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions.

Low-bid, fixed price contracting for public defense services also violates the American Bar Association's Ten Principles of a Public Defense Delivery System, which are "the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict free representation to accused persons who cannot afford to hire an attorney."[1] The eighth principle directs, "Contracts

[1] The ABA Ten Principles are available online at http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services."

In 1984, the National Legal Aid and Defender Association adopted Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,[2] which explicitly forbid the use of low-bid, flat-fee contracts. Instead, these standards require compensation to be determined by work, strictly enforced workload limits for contract attorneys, and separate pools of money to pay third-party service providers, such as investigators and experts, whenever their assistance is required. Despite widespread condemnation of the practice, contracting in this manner for public defense services persists. It is time to take steps to compel counties to consider quality above cost-savings in their criminal justice systems.

Counties are generally forbidden from awarding a construction contract to a bidder – lowest or otherwise – without requiring them to abide by certain standards. A public defense contract should be no different. Failing to require quality, in both instances, puts the citizens of the county in jeopardy and leaves the county open to potentially enormous liability.

III. Addressing Overwhelming Caseloads for Indigent Defense Lawyers

No matter how brilliant and dedicated the attorney, if she is given too large a workload, she will not be able to provide clients with appropriate assistance. Defense counsel will not be providing the "guiding hand of counsel" as required by the Sixth Amendment to the U.S. Constitution.[3] With this in mind, the National Advisory Commission on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, or 400 misdemeanors, or 200 juvenile, or 200 mental health, or 25 appeals. In no event should caseloads surpass the maximum listed in the NAC standards.[4] Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time public defender caseloads should be judged. Tragically, almost no jurisdiction in the country abides by

[2] The NLADA Contracting Guidelines are available online at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threeonezero.

[3] *Powell v. Alabama*, 287 U.S. 45, 49 (1932) (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1964)); *Argersinger v. Hamlin*, 407 U.S. 25, (1972) (quoted in *Alabama v. Shelton*, 535 U.S. 654, 665 (2002)).

[4] There are a variety of reasons, however, that caseloads should, in reality, be lower than the standards propose. For example, the standards assume that the defender is full-time and works exclusively on cases. Accordingly, any administrative responsibilities allocated to the defender should reduce the expected maximum caseload. The caseload standards also assume appropriate support staffing in the office. If the number of assistants or investigators are insufficient, requiring the attorney to take on this work as well, the attorney's caseload should be reduced accordingly.

these caseload standards. Full workload assessments[5] to determine the number of cases that is reasonable in the particular jurisdiction are even less common.

When caseloads become overwhelming, public defense attorneys are forced to cut corners. They cannot take the time to investigate cases, consult experts or investigators, request and review discovery, file pre-trial motions, and they cannot prepare adequately for trial. Additionally, staggering caseloads often prevent the attorney from taking time to explore diversion or treatment alternatives, which can result in reduced recidivism and therefore significant cost savings when appropriately utilized. So what is a public defense attorney to do if her caseload becomes such that she is incapable of providing a full and vigorous defense for her clients?

Arguably, the current ethical rules provide a full answer. However, it is a common view that this rule has limited applicability to those who have no-control over their caseload, *i.e.* public defenders and prosecutors. For this reason, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued an ethics opinion last year that specifically requires public defenders to keep their caseloads under control or seek relief in court. That opinion, ABA Ethical Opinion No. 06-441,[6] states, "If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation."[7] In other words, if the caseloads become too high, individual public defenders are ethically compelled to seek a reduction.

The ethics opinion first requires a line defender to go to his or her supervisor for that reduction, and then up the chain of command to the head of the office. If, however, the office does not address the caseload problem, the opinion requires the defender to seek relief in court. "[T]he lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients." As defender caseloads

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[5] Precise workload targets are best established through an individualized study that allows a locality to take into account its unique geographic issues, the administrative and other responsibilities of the attorney, as well as the format of its judicial system and the make-up of its criminal docket, the baseline national caseload standards allow us to evaluate systems where an individualized workload study has not been done. Colorado is an example of a system that used a case-weighting study to establish appropriate workloads for its public defenders. The study was completed in 1996 and the legislature has accepted the formula from that study for purposes of both budgeting and analyzing the fiscal impact of proposed legislation. A number of other states also have established caseload standards. For a slightly outdated overview, see Bureau of Justice Assistance, Keeping Defender Workloads Manageable, available at http://www.ncjrs.org/pdffiles1/bja/185632.pdf.

[6] The full opinion can be read at http://www.abanet.org/cpr/06_441.pdf.

[7] The American Council of Chief Defenders has similarly published an ethical opinion stating that defenders are "ethically required to refuse to accept additional casework" if that casework would cause them to exceed the capacity of the agency's attorneys. *See* ACCD Ethics Opinion 03-01 (April 2003), available at http://www.nlada.org/Defender/Defender_ACCD/Defender_ACCD_Home.

swell in response to state budget cuts, such requests have become a more frequent occurrence.

IV. Conclusion

There can be no doubt that indigent defense services are at a crisis point. Once again, we want to thank this Committee for shining a light on this complicated but critical issue. The National Association of Criminal Defense Lawyers looks forward to working with you to ensure quality representation for all indigent individuals in the criminal justice system.

Office of the Ohio Public Defender
250 East Broad Street - Suite 1400
Columbus, Ohio 43215-2998
www.opd.ohio.gov
(614) 466-5394
Fax (614) 644-9972

TIMOTHY YOUNG
State Public Defender

April 2, 2009

The Honorable Bobby Scott
Subcommittee on Crime, Terrorism, and Homeland Security
1201 Longworth House Office Building
Washington, D.C. 20515

Delivered via email: karen.wilkinson@mail.house.gov

Dear Chairman Scott:

Attached to the email containing this letter is written testimony concerning Ohio's indigent defense system. I respectfully ask that my written testimony be entered into the record of the Subcommittee on Crime, Terrorism, and Homeland Security's hearing on March 26, 2009, titled, "The Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?"

Like many states, Ohio's indigent defense system is underfunded and overburdened, and on the verge of a constitutional crisis. I greatly appreciate that your Subcommittee held a hearing on this important and urgent issue.

If I can answer questions or provide additional information that will be of assistance to you or other Members of the Subcommittee, please do not hesitate to contact me.

Sincerely,

Tim Young
Ohio Public Defender

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