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INDIGENT REPRESENTATION: A GROWING NATIONAL CRISIS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JUNE 4, 2009

Serial No. 111–29

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

50–068 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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Submission entitled "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," a report of the National Right to Counsel Committee, April 2009. This report is available at the Subcommittee and can also be accessed at:

http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied__%20Right%20to%20Counsel%20Report.pdf

Submission entitled "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," a report of the National Association of Criminal Defense Lawyers, April 2009. This report is available at the Subcommittee and can also be accessed at:

http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf

INDIGENT REPRESENTATION: A GROWING NATIONAL CRISIS

THURSDAY, JUNE 4, 2009

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

The Subcommittee met, pursuant to notice, at 9:33 a.m., in room 2237, Rayburn House Office Building, the Honorable Robert C. "Bobby" (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Pierluisi, Waters, Quigley, Gohmert, and Goodlatte.

Staff present: Bobby Vassar, Majority Subcommittee Chief Counsel; Jesselyn McCurdy, Majority Counsel; Karen Wilkinson, (Fellow) Federal Public Defender Office Detailee; Veronica Eligan, Majority Professional Staff Member; Caroline Lynch, Minority Counsel; and Robert Woldt, Minority Counsel.

Mr. SCOTT. The Subcommittee will now come to order, and I am pleased to welcome you today to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on "Indigent Representation: A Growing National Crisis."

Our criminal justice system has been referred to as a three-legged stool supported by the judges, prosecutors and defense. If you remove one of those three legs, the stool collapses. And we are here today to talk about the third leg of the stool, the defense, and whether or not that leg has in fact collapsed.

Researchers have estimated that between 80 and 90 percent of all state criminal defendants rely on indigent defense systems for counsel. This number will likely only go higher with our increasing rate of unemployment and the economic downturn. In March, we held a hearing on problems of indigent defense systems in the state of Michigan. This hearing focuses on the status of such systems nationally.

Two significant reports have been released since our last hearing, the first report of the National Right to Counsel Committee titled, "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel." The other report was prepared by the National Association of Criminal Defense Lawyers; that is entitled, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts." Both of these reports are the result of multiyear studies. Both reports also confirm what we suspected at

the last hearing, that the indigent defense system is suffering all across the country.

In 1991, the Department of Justice report—a Department of Justice report concluded that indigent defense was 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 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 caseloads. With only a few exceptions, the situations are only getting worse, and the consequences are devastating.

One of our witnesses today, Alan Crotzer, was convicted of a crime he never committed, spent 24½ years in prison before being exonerated by DNA. The first time he met his court-appointed attorney was 3 months after his arraignment. He told his lawyer he had an alibi, and there were witnesses who could testify on his behalf. His lawyer never even bothered to interview those witnesses.

The NACDL's report, "Minor Crimes, Massive Waste," found that many defense attorneys were carrying excessive caseloads in misdemeanor cases. Their caseloads far exceeded the only existing standard of 400 misdemeanor cases per year, and many believe that that standard, developed over 35 years ago, is too high. In Illinois, Florida, Utah, for example, many jurisdictions report average misdemeanor caseloads exceeding 2,000 per year.

An attorney carrying a caseload of 2,000 cases could spend about 1 hour and 10 minutes on each case total. That attorney would have to meet his client, read the police report, conduct relevant discovery and research, prepare for court, write motions and sentencing memoranda and appear in court all within that 1 hour. New Orleans has an average caseload of almost 19,000 misdemeanor cases per year, which leaves about 7 minutes per case.

The report of the National Right to Counsel Committee reveals similar problems in felony cases. In Miami, average public defender caseloads have increased in the past 3 years from 367 to nearly 500 felonies, while the public defender's office's budget has been cut by over 12 percent. These numbers compare to a maximum national standard of 150 felony cases per year.

Everyone agrees that indigent defense as a whole needs more funding, but no one wants to pay. We continue to fund local and state governments with increasing law enforcement and prosecution resources but refuse to give money to defense. In the meanwhile, innocent people, like Alan Crotzer, continue to be convicted and real perpetrators walk free.

The existing disparity and imbalance in the system continues to grow and hits minorities especially hard given their overrepresentation in the criminal justice system. This problem is exacerbated by the trend in the last several decades for mandatory minimum sentences and overcriminalization of conduct.

I have been working in the field of criminal justice for a long time, and I thought I had heard everything. But yesterday, I learned that it is a crime in Nevada to feed the homeless in a city

park. In New York, apparently sleeping in a cardboard box or even sleeping on a subway is a crime. When we don't like certain conduct, all too often our response is to make it a crime. In many such instances, a more effective and less costly response might be to consider education, prevention or treatment.

All of this leads to the question of whether indigent defendants are being deprived of their sixth amendment right to counsel under the United States Constitution. Most everyone seems to agree that the resounding answer is yes. So what can and should Congress do to address this issue?

The National Right to Counsel Committee has two recommendations that we should consider seriously. The first the committee recommends is the Federal Government establish and adequately fund an independent Center for Defense Services. The function of the center would be to assist and strengthen the ability of the states to provide quality representation to both adult and juvenile criminal defendants who cannot afford to pay for legal services.

Almost 35 years ago, the Federal Government created a similar national program called the Legal Services Corporation to help states provide legal services in civil cases to people who could not afford to hire attorneys. The need for a similar national entity to assist states in meeting their requirements under the sixth amendment is even more compelling.

Second, they call for a Federal research and grant parity. Congress currently spends billions of dollars on programs to states and local governments to enhance the local law enforcement and increase prosecution of crimes. We have an adversarial legal system. For justice to prevail under such a system, the playing field needs to be level, and both sides need to be adequately funded.

Congress cannot continue to fund only one side of the system if we are to be assured of an effective and just system of justice in order to conform with the Constitution.

I look forward to hearing from our witnesses about how we can address these problems.

And it is now my pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman, and I do appreciate the interest in this issue. Appreciate the witnesses being here.

And of course anytime the justice system fails one person, it is a very serious failure for the whole system. And I know that everyone has their testimony prepared, and the statements are going to be very helpful. We have got some good insights into future solutions.

We don't have anybody who has come in today—I could have brought dozens if I had known in time, and that is no fault of the majority—people who can come in and point to some excellent indigent defense that is going on across this country. So it concerns me knowing so many indigent defense attorneys across the country who often get a bad rap, who are dedicated to doing a good job, usually don't get paid adequately but take their job so seriously that they do all they can.

And I know there are attorneys like that because, even though I did civil litigation, I was appointed to appeal a capital murder case. I think it was nearly 800 hours I spent on that case. And I

did a good job, not because I was going to be properly compensated, because I knew I wouldn't, but because it was an oath I took to properly represent my client. My client got good representation, and his case was properly reversed after we took it to Texas' highest court.

There is good representation going on out there, far better than I provided. There is good representation in many areas in the country, and hopefully somebody will be willing to acknowledge that as well, even though there are problems.

Then there are differences on how you address a problem. What we hear in Washington, as we become more and more bankrupt as a Nation because we cannot control our spending—and I was hoping that when—even though the Bush administration, the prior majority, had spent too much money, that when we were promised change, we were going to get change and not keep spending ourselves into bankruptcy. But there has been no change, other than accelerating the course we were already on to bankrupt this country even faster.

So when we look at where should the Federal Government be spending its money, then we should look carefully at what are the constitutional requirements. Constitutional requirements are clear, and, as some of you have discussed, Gideon points that out. There is to be proper representation of everyone in a court—state, Federal or otherwise.

And one of the witnesses will properly point out and make the good point that, even though it is also required that every prison, every jail, properly feed inmates, it is not a Federal duty to come in and pay for the food if the state or local facilities don't adequately feed their inmates. You make sure they comply with their state duties.

So I know there are disagreements on the solutions. And the easiest thing is just let the Federal Government pay for it, but states and local government have an obligation to make sure the system works by having people get adequate representation.

And I think it is excellent when the national government, the Federal Government, can and should show the way, just like saying, "This is what proper nutrition is." And then it is up to the state and local government to make sure it is adequately funded, so that we do not have cases like Mr. Crotzer's unfortunate situation arise, that we address that adequately. It just seems to be a question of making sure that that is applied across the country.

I do appreciate the witnesses being here, and again I hope everybody is not going to beat up on the defense attorneys, so many of whom actually do a good job. When I found somebody I didn't think was doing a proper job, they did not handle another case in my court. And we handled all felonies, including death penalty cases.

But thank you, Mr. Chairman, for the time. And at this point, I yield back.

Mr. SCOTT. Thank you, and I will point out, I don't think my comments should be interpreted as being critical of the attorneys. It is just when attorneys, no matter how good they are, have a caseload way over what a caseload ought to be, they are put in an impossible situation. So your point that attorneys are doing a good job, I think, is well taken.

Gentleman from Michigan—we are joined by the Chair of the full Committee and, as he is recognized, if the witnesses will come forward and take your seats.

Gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. Top of the morning, Mr. Chairman. I am so happy to be here.

We had the beginning of this hearing on March 26. This is June the 4th, and here we are back looking at it again. We had former mayor, Dennis Archer; David Carroll; Nancy Diehl; Erik Luna; Regina Thomas; Robin Dahlberg. So there has been a predicate for this.

And I am so glad, though, that Judge Gohmert, our Ranking Member, is back again with us, working on how we can work this thing out. And I see the senior Member of the Committee, the Ranking Member, Bob Goodlatte, is here. And we are joined by one of the newest Members, Mr. Pierluisi, but he was an attorney general from his state. And we are glad that he is here too.

Now, what are we here for? To make the adversarial system the basis of our judicial process a better one. Now this is constitutional. What part of the Constitution does this appear in?

VOICE. What did you say?

Mr. CONYERS. I said what part of the Constitution does this appear in?

VOICE. Sixth amendment.

Mr. CONYERS. All right, sixth amendment. Thanks for your attention.

I want to yield time to the newest Member of this Committee that I can think of is Mike Quigley.

I want to give him some of my time, Mr. Chairman, if I may.

Mr. SCOTT. The gentleman is recognized.

Mr. QUIGLEY. Thank you for yielding.

Thank you, Mr. Chairman. I would like to add something I think is a little timely in notice that affects this issue. The Chairman is correct; I am the newest Member of this Committee, second newest Member of Congress, but I spent 10 years in Cook County with a ringside seat in the criminal justice system defending people and watched the extraordinary overload of cases that the public defender's office had there.

Yesterday, I think much of that came to a head. A very good friend of mine became the public defender of Cook County the last week I was there—A.C. Cunningham, a former judge. Yesterday, he asked that the public defender's office be allowed to withdraw from all of their capital cases because they have zero money to defend capital cases for expert witnesses, for all the other costs associated with the extraordinary defense that comes with a capital case.

To me, that is as good an example of what is wrong with our system right now in providing a fair and just criminal justice system as you are going to find. The third largest county in this country cannot fund capital cases and is asking to withdraw.

My first act as a county commissioner was to agree to pay a $36 million settlement to a group called the Ford Heights Four, who were wrongly convicted of a murder case and were in some cases minutes from the death penalty. One of them was raped in prison.

They were later exonerated using DNA evidence. And what was pointed to was the extraordinary inept counsel that they had.

Where we are going from here can only be downhill unless we do something, because the public defenders are overburdened and, at this point, they have no resources to handle our most important cases, those cases which, I think, in some respects the public cares about least—they are not an always sympathetic people—are the ones that we should hold most important to us if we care about justice.

So on behalf of my friend, the chief judge of Cook County, our best wishes and hopes during this struggling time. And I just want to thank both Chairmen for their indulgence.

Mr. CONYERS. I will put the rest of my statement in the record.

[The prepared statement of Mr. Conyers follows:]

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

Our justice system is an adversarial one, and while it's not perfect, it's still the best system that I have seen.

For this adversarial system to work, however, there has to be a fair fight. To that end, the Sixth Amendment provides that the accused in "all criminal prosecutions" is entitled to have the assistance of counsel for his defense.

Unfortunately, most of our States, including my home State of Michigan, fail to comply with this constitutional mandate.

And this longstanding problem will only worsen in our current fiscal difficulties.

So, what can Congress do to help correct this problem? I see three possible roles for Congress.

The first involves funding. Congress appropriates vast sums for State and local governments to train prosecutors and facilitate prosecutions, but we provide little or no funding to the defense side.

Congress should no longer continue to foster this unbalanced system. If State and local prosecution resources are funded, we also should provide meaningful funding to the defense.

Second, both the Constitution Project and the American Bar Association have recommended that a National Center for Defense Services should be established to help States improve their indigent defense systems.

In light of the fact that many States share similar indigent defense problems, there is no reason to re-invent the wheel 50 different times. A centralized center makes sense from both organizational and fiscal perspectives.

Third, Congress should require federal agencies—such as the Office of Justice Programs, the Bureau of Justice Assistance, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Program—that provide assistance to State and local law enforcement entities to also provide assistance to programs that provide indigent defense representation services.

All of these agencies are well-equipped to perform this work.

I think most of us would agree that the Sixth Amendment's guarantee of legal representation in a criminal prosecution is a fundamental right, but one that is unfortunately denied to many in our criminal system.

We need to address this problem, and today's hearing is another step in the right direction. I hope today's witnesses will help guide us on how we can best move forward.

Mr. SCOTT. Thank you. The gentleman——

Are there others that want to make statements?

Gentleman from Texas?

Mr. GOHMERT. Yes, and I did want to also apologize to the witnesses. We have hearings set at the same time. I reviewed everyone's statement, and I will be reviewing all the information we glean both during the hearing and that you may care to submit

after the hearing, but I will end up needing to leave before the hearing is over. Thank you.

Mr. SCOTT. The gentlelady from California?

Ms. WATERS. Thank you very much, Mr. Chairman. I was just considering whether or not I wanted to go into the statement. Why don't I submit the statement for the record and yield back? Thank you.

[The prepared statement of Ms. Waters follows:]

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Mr. Chairman, I want to thank you for organizing this hearing today. I want to also acknowledge our panel of witnesses for participating in today's hearing. We can all agree that there is a problem in meeting the needs of indigent defendants' right to effective representation. The Supreme Court has clearly enunciated that the Sixth Amendment guarantees criminal defendants the right to counsel. This is particularly imperative in the criminal trial context, as we must safeguard our legal system from the tyranny that would ensue were we to pit the powerful government and its resources against vulnerable indigent defendants. Yet, due to administrative inefficiencies, scarce resources, and a huge backlog of cases in public defenders' offices across the country, many defendants have been denied effective counsel. In the most egregious of cases, they have been denied representation entirely. After today's hearing, I hope that we can begin to reach a consensus on the most effective congressional response.

The right of a defendant to legal counsel is granted by the Sixth Amendment of the Constitution, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In 1963, a unanimous Supreme Court, in *Gideon v. Wainright,* held that this right to counsel applied to the States by virtue of the Fourteenth Amendment's due process of law clause.

More recently, a 1999 Department of Justice report found that despite progress since *Gideon,* indigent defense remained "in a chronic state of crisis." The report pointed to a series of problems facing public defenders and their clients, including lack of funding, high workloads, and the low quality of appointed attorneys. In the years since the report, numerous other organizations have released other examinations of indigent defense in America, echoing many of the conclusions reached by the Department of Justice.

Among the most problematic issues raised is the lack of independence between the judiciary and attorneys representing indigent defendants. When the court system is responsible for choosing and paying attorneys for indigent representation, judges may favor attorneys who facilitate quick processing of cases. Attorneys may be forced to choose between trying to please the judge (and remain employed) or representing their clients as required under their ethical rules. And the Supreme Court has provided little guidance. Although the Court has determined that the Constitution guarantees defendants the right to counsel, its holding does not propose how states are to fund the significant costs attached to providing all indigent defendants with effective counsel.

The National Right to Counsel Committee's report concluded that funding remains one of the biggest obstacles to meeting Sixth Amendment requirements. States are having trouble allocating resources in such a way that public defenders are equipped with all they need to adequately represent their clients. Moreover, public defenders are inundated with heavy caseloads, and they simply do not have the personnel, experts, investigators and interpreters to handle the casework so that each defendant's case can be properly tried. According to a 2004 American Bar Association study, caseloads for public defenders far exceed national standards in many states, "making it impossible for event the most industrious of attorneys to deliver effective representation in all cases."

The problem of wrongful convictions also is of concern. Unfortunately, Alan Jerome Crotzer's experience occurs far too often in courts across the nation. Researchers at the University of Michigan surveyed 340 exonerations of innocent defendants, each of whom served an average of ten years in prison before being exonerated. The most frequent causes of the wrongful convictions were mistaken eyewitness identification (64%) and perjury (43%). False confessions occurred in 15% of the cases.

This level of error is unacceptable. It undermines our constituents' confidence in our criminal justice system and it must be corrected.

And then there's the issue of mistakes—mistaken identity or lack of adequate legal defense. Since 1973, over 120 people have been released from death row with evidence of their innocence. From 1973–1999, there was an average of 3.1 exonerations per year. From 2007–2008, there have been an average of 5 exonerations per year.

Once again, I want to thank all of our witnesses today for preparing such detailed testimony. Your professional knowledge and personal experience is invaluable. And I am hopeful that your presentations and answers to our questions will give us a good update on previous research and the current situation.

Mr. SCOTT. Thank you. Other comments? Thank you.

We have a distinguished panel of witnesses here today to help us consider the important issues that are currently before us, and I ask each witness, if possible, to complete your statement within 5 minutes or less. There is a timing device on the table that will start off green, turn yellow when there is 1 minute left, and the light will turn red when your time is up. All of the witnesses' written statements will be made part of the record in their entirety.

Our first witness will be Robert Johnson, who has been a prosecutor for over 40 years. He has been the elected county attorney in Minnesota since 1983. He is past president of the National District Attorneys Association, Minnesota County Attorneys Association and the Anoka County Bar Association. He is a past chair of the American Bar Association Criminal Justice Section and a member of the Minnesota National Guard. He graduated from the University of Minnesota with a bachelor's degree and a Juris Doctorate. He is also co-chair of the National Right to Counsel Committee.

Our next panelist will be Alan Crotzer. How do you pronounce your last name?

Mr. CROTZER. Crotzer.

Mr. SCOTT. Crotzer?

Mr. CROTZER. Crotzer, yes.

Mr. SCOTT. Crotzer—was 20 years old when he was arrested for a crime he did not commit. And he met with his court-appointed attorney for the first time 90 days after his arraignment. And we will hear that story when he testifies. He now works as a intervention specialist at the Florida Department of Juvenile Justice, encouraging at-risk kids to follow a positive path.

Our next witness will be introduced by my colleague from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. It is again my pleasure to welcome back to the Committee Erik Luna, professor of law at Washington and Lee University School of Law. He graduated summa cum laude from the University of Southern California and 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 of the University of Utah College of Law, where he was named the Hugh B. Brown chair in law and was appointed codirector of the Utah Criminal Justice Center.

He has served as a senior Fulbright scholar to New Zealand. He 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, from whence I am a proud alumnus.

So thank you very much, Mr. Chairman, and welcome, Professor Luna.

Mr. SCOTT. Thank you. Our next panelist will be Mr. Malcolm R. "Tye" Hunter. He has spent more than 30 years working on behalf of indigent defendants in North Carolina. He was the executive director of the North Carolina Office of Indigent Defense Services from 2001 to 2008.

Before that, he served as the state's appellate defender from 1985 until his appointment to the Indigent Defense Services. He is currently the executive director of the Center for Death Penalty Litigation, a nonprofit law firm representing capital defendants at trial, appeal and post-conviction. He graduated from the University of North Carolina Chapel Hill School of Law and served as an adjunct professor at the law school since 1998.

Next panelist will be John Wesley Hall, currently the president of the National Association of Criminal Defense Lawyers. He served as deputy prosecuting attorney from 1973 to 1979 and has since then been in private criminal defense practice.

He is the author of several books and law review articles on trial practice, criminal law and professional responsibility for criminal defense lawyers. He is a frequent lecturer and expert witness on legal ethics and relative matters and serves as a consultant in Arkansas' Supreme Court Committee on Professional Conduct and on the Disciplinary Appeals Board for the International Criminal Court. He graduated from Hendrix College with a B.A. and the University of Arkansas with a Juris Doctorate.

Final witness will be Justice Rhoda Billings, who received her B.A. from—is it Berea?

Judge BILLINGS. Berea.

Mr. SCOTT. Berea College in Kentucky and her Juris Doctorate from Wake Forest University School of Law. She has been a private practitioner, a law professor and a judge. She was an associate justice and chief justice for the North Carolina Supreme Court. She has been a professor of law for many years in Wake Forest University School of Law, where she teaches criminal procedure and constitutional law. She has been a commissioner with the North Carolina Indigent Services Commission since 2001 and is co-chair of the National Right to Counsel Committee.

So we will begin with Mr. Johnson.

TESTIMONY OF ROBERT M.A. JOHNSON, CO-CHAIR, NATIONAL RIGHT TO COUNSEL COMMITTEE AND DISTRICT ATTORNEY, ANOKA COUNTY, MN

Mr. JOHNSON. Mr. Chairman, thank you.

As a prosecutor under all the case law and standards relating to criminal justice, I know that my duty is to do justice. It is not merely to convict. And in an effort to find justice, I need a com-

petent defender in the courtroom on the case in order to find that. I need that first to protect against convicting innocent people.

As you may know, prosecutors don't charge all the cases that come in from the police. Twenty percent of the cases that come in my office we decline; that is probably a low number compared to other prosecutor offices. And even those that I charge, the 80 percent of the cases, there are questions that we still have from the police documents that we get.

There have been any number of times when defenders have gone out, done their investigation, analyzed the case and convinced us that there is not a crime that has been committed and certainly not a crime that we could prove was committed.

I need them to protect against convicting innocent people. I also need them to find the proper sentence. Make no mistake about it; prosecutors sentence. When I charge a mandatory minimum—and in my state, when I charge a crime or plea bargain to a crime, it puts it on our sentencing guidelines box.

So as a Federal judge once said at a Kennedy Commission hearing in the ABA, if AUSAs are going to sentence, they should get a PSI before they indict, as I need more information about the offender if I am going to be able to find the right disposition of the case.

Now, most of the people that we deal with are ordinary people who have just done something bad. The truly evil people, the predators, are easy. We just max them; we put them away for as long as possible. But most of the people that we deal with are not, and our challenge is to try to find the right sentence.

So I need to have the defender tell us about the characteristics of the offender that enables us to find the right sentence—find the right disposition. And I need defenders to move cases.

Now, I will certainly acknowledge that we have some excellent public defenders in my jurisdiction. I have a tremendous public defender who just went to—headed up our district public defense, went to another district. There just aren't enough of them. There aren't enough of the defenders to be able to deal with it, so that when we don't have enough defenders, as was pointed out in Chicago on capital cases, it paralyzes the system. The system does not go forward.

Defenders have to triage the cases that they are going to handle and decline to handle the others, as was pointed out too. Defenders are starting to realize more and more their ethical responsibilities not to take on cases that they can't adequately represent.

So you see in Florida, you have seen in Massachusetts, you are seeing now in Illinois, where the defenders are saying, "We are not going to represent these people because we can't do an adequate job." That paralyzes the system.

We have to have good defenders in the courtroom for the reasons that I have stated. As the report amply discusses, the state of criminal defense in this country is not good. It is bad. There is an enormous amount of work that can be done in the states. And we recommend in the report that the Federal Government contribute to the solution.

And I will say that the Federal Government does fund various parts of the system. The Federal Government has just put a billion

dollars on the street for cops. I haven't received any of that money to prosecute it. The defenders haven't received any of that money to defend it. So we are going to have an influx of cases that we are going to have to deal with. We need balance in the system. We aren't providing enough balance.

I pick up a bit from time to time—drug prosecutions, I get Federal money up through the Byrne Grant, through the state to my office. I have picked up over half a million dollars over the years. In all candor, a piece of that should have gone to the defense system. And I understand that is a state responsibility to allocate some of that Byrne money or at least it is in my state. But we have to recognize that this is a balance system, and if we are going to do justice, it is important that we do balance it.

Now, at some point, the states have to come to terms with the overcriminalization of behavior. The criminal court in my state, Minnesota, has gone, from the time I have been a prosecutor, from 35 pages to over 200 pages. When I started this work 40 or so years ago, I had less than 100 cases. In 2006, I had 1,800 cases. So we have to come to terms with this. And I think the recommendations in the report are well taken: funding defense and a national center for public defense.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF ROBERT M.A. JOHNSON

Having been a prosecutor for nearly forty years, president of the National District Attorneys Association, chair of the Criminal Justice Council, worked for over a dozen years with national and international criminal justice organizations, and co-chair of the Constitution Project's National Right to Counsel Committee, I have some knowledge of the structure of our criminal justice system and the importance of capable defense lawyers representing a person accused of a crime. This importance goes far beyond the constitutionally generated right of an accused to have the assistance of counsel; the right to counsel is essential for the integrity and proper functioning of our criminal justice system.

The essential nature of an accused's right to counsel was reflective of the experience and wisdom of the drafters of our Constitution. They understood from their history and experience under the English criminal justice system that citizens must be guaranteed certain rights if we were to live in a free society. In the sixth amendment, they guaranteed "in all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In applying this right to the accused in state prosecutions, our Supreme Court in a unanimous opinion stated in *Gideon v. Wainwright,* "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." There have not been any credible challenges or even serious discussion challenging this constitutional right which the court affirmatively put in the same category as the taking of property for public use without compensation, and the prohibition of unreasonable searches. The only challenge has been and is the implementation of this right in the states.

Speaking as a prosecutor, I know of the importance of the right to counsel for an accused. I see an accused (and family) try to understand and struggle with an unknown system as I bring the weight of the state to bear. The family is often devastated by what the accused may have done and often unable to understand how the accused violated the law and how to proceed. They often are unable to afford an attorney to advise them and the accused.

There are a number of reasons a capable defense attorney is necessary for the proper functioning of our system of justice. First and perhaps most important is to protect an innocent person. As the Innocence Project has ably demonstrated, innocent persons are convicted of committing crimes. Such an injustice is abhorrent to a professional prosecutor. Not only is the guilty party free to commit more crimes, an innocent person is unjustly punished. Prosecutors must have capable defense at-

torneys challenging the state's proof to reduce the chance that an innocent person is unjustly convicted.

Secondly, prosecutors do a lot of sentencing in our current system of justice. Mandatory sentencing laws and sentencing guidelines permit a prosecutor to sentence by what crime is charged or plea bargained to a conviction. In these discretionary acts, the prosecutor does not have a pre-sentence report as is typically provided a judge before sentencing. Prosecutors see the victims and law enforcement and their view, but do not see the circumstances of the offender. From my experience as a prosecutor and an Army National Guard military judge, I tell you the characteristics of an offender are necessary to a reasoned decision as to sentence. A defense attorney adequately representing an offender and presenting mitigating reasons to a prosecutor is the only chance the prosecutor will make a reasoned decision about a sentence.

A third reason for the full implementation of the constitutional right to counsel is simply for the criminal justice system to efficiently function. Unless a defense attorney is in the courtroom with the prosecutor, the case may not go forward. Judges do and should refuse to move forward with a case unless the accused has a defense attorney present in court.

I say again full implementation of this sixth amendment right to counsel is critical as both a constitutional and practical matter if we are to have the system of criminal justice that our Constitution promises. But this promise is not being kept. As set forth in the Constitution Project's comprehensive Report of the National Right to Counsel Committee entitled *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel,* the states have taken a number of approaches to complying with the constitutional mandate. Often these approaches are shockingly inadequate.

A common problem in the states meeting their obligations is insufficient funding. Whether state funded, county funded, or a mixture of both, the funding is inadequate. The budget issues in states and local governments are well known. As government struggles to meet its often self-imposed needs, it regularly does not adequately fund a constitutional right of the people it accuses of a crime. This shameful conduct often comes from a lack of understanding of the very practical reasons for funding an entire criminal justice system. Particularly troubling are the inequities between the adequate funding of law enforcement and prosecutors and the lack of funding for defense services. While the sentiment to make offenders accountable is understandable, there is a lack of understanding of the issues earlier discussed. There seems to be a mentality that, if the police arrest and the prosecutor brings charges, the accused must be guilty and we should just lock them up. Sadly, this type of thinking is part of why the state of criminal justice is not good and public safety is less than it might be if our criminal justice system was balanced.

Of course, the lack of funding makes for excessive caseloads for the public defenders who are employed. Again, reference to the Report provides detail not repeated here. Efforts are underway to deal with this issue as public defenders are confronted with failing to fulfill their ethical duty to competently represent their clients. Public defenders are refusing to take on more clients when overburdened, judges are beginning to accept their refusals, and the criminal justice system is faltering.

There are other problems with how defense services are being provided. The Report details many of these problems: lack of independence, lack of training, inability to hire experts, lack of technology, inadequate client contact, and significant lack of investigation capability. Prosecutors have enormous investigative capability through police departments. Important for the defense is the ability to pursue alternative theories as to how the crime occurred or even whether a crime occurred. It is not unusual for law enforcement to end their investigation when the defense team has a plausible theory.

With a constitutional guarantee, practical reasons for implementing the guarantees, and strong evidence that effective counsel for the accused is not being provided, what is the responsibility of the federal government? The Report provides two recommendations which are reproduced here:

A NATIONAL CENTER FOR DEFENSE SERVICES

Recommendation 12—The federal government should establish an independent, adequately funded National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation for persons unable to afford counsel in criminal cases and juvenile delinquency proceedings.

Commentary—As discussed earlier in this report, the duty of providing defense representation in criminal and juvenile cases derives from decisions of the U.S. Supreme Court and is based upon interpretations of the *federal* Constitution's Sixth

Amendment. Taken together, the Court's decisions are an expensive unfunded mandate with which state and/or local governments have been struggling for more than 45 years. Although the federal government established the Legal Services Corporation in 1974 to assist states in providing legal services in civil cases, in which there is not a constitutional right to counsel, the federal government has not enacted comparable legislation to assist states in cases where there is a constitutional right to counsel or where states require that counsel be appointed, even though it is not constitutionally mandated. The Committee applauds the establishment of the Legal Services Corporation but believes there should also be a federal program to help the states defray the costs of defense services in criminal and juvenile cases.

Thirty years ago, the ABA endorsed the establishment of a federally funded "Center for Defense Services," and the Association reiterated its support for such a program in 2005. The Center's mission would be to strengthen the services of publicly funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data. The original report submitted to the Association's House of Delegates in 1979 explained the proposal's importance: "If adequately funded by the Congress, the Center could have far-reaching impact in eliminating excessive caseloads . . ., providing adequate training and support services . . . and in facilitating representation as well as ensuring that quality defense services are available in all cases where counsel is constitutionally required."

FEDERAL RESEARCH AND GRANT PARITY

Recommendation 13—Until a National Center for Defense Services is established, as called for in Recommendation 12, the United States Department of Justice should use its grant and research capabilities to collect, analyze, and publish financial data and other information pertaining to indigent defense. Federal financial assistance through grants or other programs as provided in support of state and local prosecutors should also be provided in support of indigent defense, and the level of federal funding for prosecution and defense should be substantially equal.

Commentary—As noted in the Commentary to Recommendation 12, the call for a National Center for Defense Services is not new. Although Congress has not been persuaded to enact such a program, the Committee is convinced that the proposal still makes excellent sense. However, in the absence of such a program, there are valuable steps that the federal government can take through existing agencies of the U.S. Department of Justice (DOJ) to enhance indigent defense.

The Office of Justice Programs (OJP) of the DOJ, for example, develops and disseminates data about crime, administers federal grants, provides training and technical assistance, and supports technology development and research. The OJP's bureaus include, among others, the Bureau of Justice Assistance (BJA), which gives assistance to local communities to improve their criminal justice systems, and the Bureau of Justice Statistics (BJS), which provides timely and objective data about crime and the administration of justice at all levels of government. Also, the National Institute of Justice (NIJ), the research and evaluation agency of DOJ, offers independent, evidence-based knowledge and tools designed to meet the challenges of criminal justice, particularly at state and local levels.

Although the overwhelming majority of expenditures by these agencies have been devoted to enhance law enforcement, crime control, prosecution, and corrections, a few successful defense-oriented projects have been funded, which suggest that increased federal attention to indigent defense could have significant positive impact. For instance, in both 1999 and 2000, BJA hosted two symposia that brought together from all 50 states criminal justice professionals, including judges and leaders in indigent defense, to explore strategies to improve the delivery of defense services. The National Defender Leadership Project, supported by a grant from BJA, offered training and produced a series of publications to assist defender managers in becoming more effective leaders. Grant awards by the Office of Juvenile Justice and Delinquency Prevention, another bureau of OJP, have supported a national assessment of indigent defense services in delinquency proceedings as well as numerous individual state assessments of access to counsel and of the quality of representation in such proceedings.

While the foregoing projects and programs are commendable, the financial support of DOJ devoted to indigent defense is substantially less than the sum spent on the improvement of prosecution services at the state and local level. For this reason, the Committee calls for the financial support of "prosecution and defense . . . [to] be substantially equal."

You may say: How can we provide assistance with all the other demands we face? I ask: How can you not? You provide massive amounts of funds to police, prosecu-

tion, and prison. It is past time that you invest in an entire system and not simply a punitive piece of the system.

Mr. SCOTT. Mr. Crotzer?

TESTIMONY OF ALAN CROTZER, PROBATION AND COMMUNITY INTERVENTION OFFICER, FLORIDA DEPARTMENT OF JUVENILE JUSTICE, WRONGFULLY CONVICTED AND SENTENCED TO 130 YEARS IN PRISON, TALLAHASSEE, FL

Mr. CROTZER. Good morning, Chairman. Good morning, Committee Members. And I just want to thank God for being here this morning. I didn't think I was going to make it. I only got in around 2 o'clock this morning; my flight was delayed so much. So if my eyes are red, it is because I didn't have much sleep.

I did submit a written report, and I know everybody should have one. But I want to tell you real quick what really happened to me in my own words out of this mouth.

In 1981, I was convicted of three counts of armed robbery, one count of attempt robbery, two counts of sexual battery, two counts of kidnap, one count of armed burglary and one count of assault with a deadly weapon. I was tentatively identified by one of two rape victims—or one of two rape victims, as an assailant. I was said to be six feet tall, light complected, weighing 200 pounds. I was five foot five, weighed 135 pounds; as you look at me, you can see I have never been light skinned. [Laughter.]

You know, but all this points to the fact that I was convicted 10 months later, sentenced to 130 years. I spent 24 years, 6 months, 13 days and 4 hours wrongly convicted. And if it wasn't for the grace of God and DNA testing, I would still be in there rotting away in a South Florida prison for crimes I didn't commit.

It took me 20 years writing letters to everyone, even the person that prosecuted me, and the lawyer that became a judge that handled my case can't remember me. Twenty years of writing the people everywhere across the Nation to finally find someone to take my case, 1,200 miles away in the city of New York City, David Menschel and Sam Roberts came to my rescue. Two young men that were—one was just an intern, and one was just an attorney for a couple of weeks. They saved my life. It took them 3½ years to get me out. That is what you call competent representation.

Why did I not get that before then? No one looked at my alibi witnesses; no one looked at the fact that I didn't fit the description, at least my attorney didn't. The serology report was botched too. The serology report proved I couldn't have been the perpetrator of the crime, and yet I spent more than half of my life in prison. My whole world was turned upside down.

And I am not the only one. I was number five in the state of Florida, 173 in the country. I haven't been out for 3 years and 4 months; they have 10 in the state of Florida, DNA exonerees, and 234 in the whole country. That is one per year for the existence of this country. One is too many.

The system is broken. It failed me from the beginning. Why? Because I was indigent and convenient. This has to stop, and the only people that can change that is basically people in power, people on this Committee—and no matter what your political party is.

People are dying in there. I represent right now—in my heart, I represent Frank Lee Smith, who died on death row, the first DNA exoneree in the state of Florida. He died on death row before he was DNA exonerated. He was exonerated after his death. I represent him today in my heart, and there are others.

And all I am asking is that you read the report and try to help us. One is too many. That is all I have to say.

[The prepared statement of Mr. Crotzer follows:]

PREPARED STATEMENT OF ALAN CROTZER

Good morning and thank you to this esteemed Committee for inviting me to speak about an extremely important issue that has profoundly affected my life in unimaginable ways. My name is Alan Jerome Crotzer and on July 10, 1981, at the young age of twenty, my life changed forever. At around 5:30 A.M., law enforcement officers in St. Petersburg, Florida, came to my girlfriend's mother's house where I had spent the night. They came to arrest me and accuse me of a horrifying crime. They were looking for three black men who invaded a home, kidnapped a thirty-year-old white female and twelve-year-old white female, placed them in a trunk of a car, drove them to a secluded area in the Florida summer heat, and then raped them. They were looking for me because the adult female victim made a tentative photo identification of me as the ring leader.

I was taken to the county jail and charged with three counts of armed robbery, 1 count of attempted robbery, 2 counts of kidnapping, 2 counts of sexual battery, 1 count of armed burglary, and 1 count of aggravated battery with a deadly weapon. Ten months later, I was convicted by an all white jury and sentenced to 130 years in prison. When they announced the sentence in court, my mother crawled out of the court room on her hands and knees as she wailed, lamenting that her son would likely die in prison as a rapist.

But my faith in God and in my innocence brought a different outcome. On January 23, 2006, at 9:30 A.M. and after 24 years, 6 months, 13 days, and 4 hours of wrongful incarceration, I was released from custody an innocent man, as new DNA results proved once and for all that I did not commit this crime. I was not the monster they made me into.

I would still be in a deep south Florida prison today for crimes I didn't commit but for the legal help I received from 1,200 miles away in New York from David Menschel and Sam Roberts. For three years, they put their lives on hold, making numerous trips to Florida and spending thousands of dollars to free one innocent person.

These efforts, particularly the time, energy, and money spent to free me, are in stark contrast to the efforts made by my court-appointed attorney to keep me from being convicted in the first place. I was just a kid; a minority, poor, uneducated in the law, and very convenient. I needed professional legal help and expected to get it when the judge appointed me an attorney. It is generous, however, to say that my public defender at trial was ineffective. Frankly he hardly showed up. The first time I even saw him was 90 days after I was arraigned. In one of our very few meetings I had with him, he ignored my claim of innocence and instead tried to force me to plead guilty and accept 25 years imprisonment. He reasoned that I would probably only do 12.5 years.

His cavalier attitude towards my innocence carried over to how he handled trial preparation and the actual trial. I alerted him that I had an alibi—I was watching TV at my girlfriend's mother's house in a different county at the time of the crime—and that witnesses could truthfully explain to the jury that I was more than twenty miles away from the crime when it happened. My lawyer never even interviewed these witnesses. My lawyer failed to subpoena these witnesses for depositions or trial, so I had to do these subpoenas myself. The State even came to my jail cell to collect physical evidence from me. I asked the prosecutor where my attorney was and he replied that my public defender was literally on vacation.

But his unwillingness to put on even a minimal defense at trial made my wrongful conviction not just possible, but probable. He did not vigorously demonstrate my solid alibi defense. He didn't challenge the obviously suggestive photo identification used to mistakenly connect me to this crime. And, most importantly, he failed to sever my trial from that of one of the actual perpetrators of this horrendous crime. Instead, the jury got to blame me as I sat there listening to the actual rapist, representing himself and cross-examining his own victim, even arguing that because she didn't fight back it must have been consensual.

When the jury read its verdict, I came to the realization that I would probably die an innocence man in prison, at least in part because my lawyer was too lazy, too busy, or just didn't care enough to provide me with the effective representation I was constitutionally guaranteed. Despite his gross ineffectiveness, my attorney was rewarded with a circuit court judgeship, where he still sits today.

I lost so much during my wrongful incarceration. The crack-cocaine epidemic ravaged my working-class St. Petersburg, Florida neighborhood and many of my family and friends became woefully addicted. I never fulfilled my dream of serving my country in the coast guard and getting an education in the process. I lost the prime years of my life to start a family, build a career, and gain the life skills and experience that most people take for granted. Most of all, my mother never experienced my vindication in her lifetime, as she died of cancer less than five years before I was exonerated.

Many in my position would be bitter and burdened by all that was taken during the wrongful incarceration. But I don't have time for that. I spend my days working as Intervention Specialist at the Florida Department of Juvenile Justice, encouraging at-risk kids to get their lives on a positive path. I am a member of the Board of Directors of the Innocence Project of Florida where I speak out and raise awareness about my wrongful conviction and incarceration, alerting the public of ways we can prevent such injustice in the future. I also try every day to be a good husband to my new wife and positive role model to her two kids.

I am here today, however, as a member of the National Right to Counsel Committee to tell you about my experience as an indigent defendant who was left behind by a broken criminal justice system. I hope that my story of ineffective assistance of counsel can be a lesson that if we are going to continually incarcerate more and more people every year in this country, then we have to do better to make good on our constitutional promise of adequate representation. It is my wish that my words here today are the beginning of real interest by this Committee and this Congress in reforming our indigent defense system so what happened to me will be infrequent rather than a constant refrain.

I thank you for your invitation to come here to tell my story and I look forward to answering any questions you may have.

Mr. SCOTT. Thank you. Professor Luna?

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

Mr. LUNA. Thank you.

Thank you, Congressman Goodlatte, for the—introduction.

Chairman Scott, Ranking Member Gohmert and Members of the Committee and Subcommittee, thank you for the opportunity to speak today on the subject of indigent representation of counsel.

Let me begin by reiterating my firm belief in the sixth amendment and the constitutional duty of the states to provide competent legal representation to indigent defendants whose liberty the prosecuting jurisdiction seeks to deprive. It is as true today as it was when Gideon was announced that defense attorneys are necessities, not luxuries, in the criminal process.

One of the documents that inspired today's hearing, the report of the National Right to Counsel Committee, provides a comprehensive review of indigent defense in jurisdictions across the Nation. I will not reiterate the troubling narratives it provides, as my fellow witnesses and the report itself can do this with far greater eloquence.

I simply pause to note that the problems detailed in the report are deeply disturbing to me, and I suspect the sentiment is shared by most in the room regardless of political party. The real issue is not whether a so-called constitutional crisis exists, but what entity created the dilemma and what should be done to resolve it—in other words, questions of responsibility and remedy.

Like previous works, the report sets out a series of recommendations to deal with the problems of indigent defense. Almost all the recommendations are unobjectionable, if not laudable, particularly those that call upon the states to fulfill their constitutional obligations by providing adequate funding.

Not only is it constitutionally required that the states pay for these expenses, it is altogether fitting. After all, the states and their agents are the ones who set the entire process in motion and have made all the choices that have resulted in today's situation.

As a matter of Federal constitutional law, the states have no obligation to criminalize and punish any particular behavior, nor are they required to arrest and prosecute any given individual. But when jurisdictions choose to employ their awesome power to deprive individual liberty, they have the absolute duty to comply with the U.S. Constitution, including the sixth amendment. In a very real sense, the states have brought any crisis upon themselves through overcriminalization.

And to be sure, they have the power to remedy the situation by parsing back their bloated penal codes and reducing lengthy sentences and by being more prudent in the enforcement of criminal laws on the streets and in courthouses.

Indeed, there should be no doubt that the relevant jurisdictions can provide the funds for competent indigent representation, as demonstrated by the disproportionate resources provided to prosecution offices and law enforcement agencies and the vast sums the states spend on legal work and programs that are not constitutionally required.

Now, I won't belabor the two primary arguments regarding Federal involvement, the principle of federalism and the potential for perverse incentive structures, as I testified about these concerns at the last hearing, and they are laid out in some detail in my written testimony today. In a nutshell, federalism, which is in the text and context of the Nation's charter, limits Federal power and cautions against interference with the core internal affairs of the states, including state criminal justice.

As the Supreme Court has said, constitutional concerns are raised whenever Congress affects a significant change in the sensitive relation between Federal and state criminal jurisdiction. Federalism has many values, including protection against the dangers that come from the concentration of too much power in too few hands.

Federal funding of state indigent defense also raises policy issues, especially the specter of moral hazard, an economic phenomenon that was once described as the distortions introduced by the prospect of not having to pay for your own sins. If a given state does not bear the full cost of its criminal justice's decisions and instead is able to externalize a politically disagreeable expense on another entity, 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 that have met their constitutional requirements may be tempted to skimp on their budgeting for indigent representation with an eye toward receiving Federal support.

I should also mention that I have some concerns about the proposed National Center for Defense Services, a bureaucracy that would set policy and control and dispense Federal funds. Although the proposal is extremely well-intentioned, caution is warranted in creating any Federal body with such powers outside of the constitutional framework.

Government bureaucracies tend to be acquisitive, monopolistic, and they seek to maximize their funding and expand their powers. They also have a tendency toward entrenchment, and they create agency cost, serving the self-interests of bureaucrats rather than the principals, the American taxpayers.

Now, although Federal involvement in state indigent representation is problematic on a number of grounds, I will not lose sleep if Congress were to create the National Center for Defense Services. I am, in fact, more troubled by the prospect of becoming an involuntary stockholder of General Motors.

But before acting, I would simply recommend that Congress take into consideration all constitutional values at stake, including federalism and the unintended consequences and equity of absorbing the costs owed by the state that in all good conscience they should pay.

Most of all, I hope Congress will consider measures that do not raise the same type of constitutional and public policy concerns, a few of which I mention at the end of my testimony, my written testimony.

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

Indigent Representation: A Growing National Crisis

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

June 4, 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 indigent representation 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. It is an honor to participate in today's hearing with such a distinguished group of witnesses and before an audience that includes some of the leading researchers and activists in the area of indigent defense.

I come before you as an advocate for the constitutional values that protect both individual liberty and limited government. As for the former, I am a firm believer in the Sixth Amendment right to counsel and the constitutional duty of the state to provide competent legal representation to indigent defendants whose liberty the prosecuting jurisdiction seeks to deprive.[2] Indeed, I might go further than some. Among other things, it is problematic that the impoverished may be convicted without counsel, their names sullied and future opportunities jeopardized, simply because incarceration does not ensue.[3] But fidelity to the U.S. Constitution does not begin and end with the Bill of Rights. Other constitutional values, like federalism, not only ensure limited government but also provide structural protection of liberty by preventing the concentration of power in either state or federal government.[4] It is the interaction between these constitutional values, as well as policy considerations regarding incentive structures and interests, that may be the most difficult issue in this hearing and, in all honesty, the reason we are here today.

1. THE SIXTH AMENDMENT AND INDIGENT DEFENSE REPRESENTATION

At the outset, it is important to express my agreement with much of the critical commentary in this area, including the Report of the National Right to Counsel Committee ("NRCC") and the opinions expressed today by my fellow panelists. As the Supreme Court once said, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[5] And it is just as true today as it was in 1963 that defense attorneys are "necessities, not luxuries," in the criminal process:

> [I]n 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. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities,

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

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

[3] *Contra* Scott v. Illinois, 440 U.S. 367 (1979).

[4] *See, e.g.*, THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.*, No. 51, at 323 (James Madison).

[5] Griffin v. Illinois, 351 U.S. 12, 19 (1956) (requiring state to provide trial transcript to indigent defendant based on constitutional guaranties of due process and equal protection).

> not luxuries.... From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[6]

Nearly a half-century later, however, there are American jurisdictions where the impoverished defendant receives the facade of legal representation, which at best meets the letter of the Sixth Amendment right but certainly not its spirit, and at worst fails to maintain even the pretense of constitutional compliance. Echoing other compelling works,[7] the NRCC Report provides a comprehensive and, in many ways, brilliant review of indigent defense in jurisdictions across the nation.[8] The problems it details should be disconcerting to anyone who cares about criminal justice: inadequate compensation and excessive caseloads for defense lawyers; the lack of resources for investigators, expert witnesses, interpreters, and support staff; the absence of meaningful training programs, oversight, and performance standards; incompetent and unethical lawyering; and undue judicial involvement and interference with the defense function.

Most of these problems stem directly from parsimonious decision-making and grossly insufficient funding by the states. As a result, defense counsel are poorly compensated, to the point that some cannot make ends meet or have to take on caseloads that violate their professional duties to their clients. The ultimate consequences are borne by indigent defendants themselves – who languish in jail before being assigned an attorney and who have little if any meaningful contact with that attorney; whose cases are insufficiently investigated and whose legal claims go unexplored; and who receive representation that is, in the words of the NRCC Report, "perfunctory and so deficient as not to amount to representation at all."[9] All of this constitutes a deprivation of procedural justice, with indigent defendants propelled through a process that lacks many of the hallmarks of a decent legal system. Even more troubling is the potential deprivation of substantive justice. Without competent representation, individuals may be inappropriately charged or excessively punished, and viable legal and factual defenses may never be raised. Most alarming is the possibility of convicting the innocent, the worst of all miscarriages of justice. With two decades of DNA-based exonerations, it is now clear that shoddy defense lawyering is a major contributor to wrongful convictions.[10]

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[6] *Gideon*, 372 U.S. 344. *See also* Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[7] *See* 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); 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) (hereinafter "*GIDEON*'S BROKEN PROMISE"). *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.

[8] REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (April 2009) (hereinafter "JUSTICE DENIED").

[9] *Id.* at xii.

[10] *See, e.g.*, Lewis, A. Kaplan, *Wrongful Convictions and the Right to Counsel*, N.Y. L.J., May 6, 2009; JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE ch. 9 (2000).

2. RECOMMENDATIONS

The NRCC Report offers a somber evaluation of jurisdictions that fail to meet their obligations under the Sixth Amendment. I find the situation deeply disturbing and suspect this sentiment is shared by many in the room, regardless of political party. The real issue, then, is not whether a "constitutional crisis" exists, but what entity created the dilemma and what should be done to resolve it – in other words, questions of responsibility and remedy. Like previous works, the NRCC Report sets out a series of recommendations to deal with the problems of indigent defense. Almost all are unobjectionable, if not laudable, including: the creation of a state board or commission responsible for indigent defense services; the establishment of qualification, performance, and workload standards for defense counsel; the prompt determination of eligibility and assignment of counsel for indigent defendants; the collection of data on cases involving indigent representation; the adoption of open file discovery policies in prosecutorial offices; the obligation of defense counsel to refuse excessive caseloads; and the duty of all criminal justice actors to ensure against ethical violations implicating the rights of indigent defendants.[11]

In the following, I would like to highlight several recommendations that deserve special attention in this hearing.

A. WHAT STATES *MUST* DO

Among its recommendations, the NRCC Report states that "legislators should appropriate adequate funds so that quality indigent defense services can be provided,"[12] which would include fair compensation for counsel and resources for those services necessary for effective legal representation (e.g., independent experts and investigators).[13] My only quibble with the relevant recommendations is the use of the word *should* rather than *must*. By and large, these are not aspirational norms but instead mandatory duties, based on the states' fundamental obligation to provide sufficient funds for competent indigent representation. Under *Gideon v. Wainwright*,[14] *Griffin v. Illinois*,[15] *Ake v. Oklahoma*,[16] and their progeny, an indigent defendant has the constitutional right to appointed counsel, state-provided expert witnesses, and other services that assure "a fair opportunity to present his defense" and "the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[17] From the attorney's perspective, the failure of the state to pay for the necessary expenses associated with indigent representation may amount to an unconstitutional taking of property.[18]

Not only is it constitutionally required that the relevant jurisdiction pay for expenses related to indigent defense, it is altogether fitting. After all, the states and their agents are the ones who set the entire process in motion and have made all of the choices that have resulted in the current

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[11] *See* JUSTICE DENIED, *supra*, at 185-90, 191-94, 197-98, 197-98, 202-07 (Recommendations 2-3, 5-6, 9, 11, 14-16).

[12] *Id.* at 183 (Recommendation 1).

[13] *See id.* at 194-97 (Recommendations 7 and 8).

[14] 372 U.S. 335 (1963).

[15] 351 U.S. 12 (1956).

[16] 470 U.S. 68 (1985).

[17] *Id.* at 76. *But cf.* Caldwell v. Mississippi, 472 U.S. 320 (1985).

[18] *See, e.g.*, Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982).

"constitutional crisis." State lawmakers determine what will be a crime in the first place, as well as the principles of culpability and degrees of punishment. They decide the amount of funding for courts, jails and prisons, and all levels of law enforcement. In turn, state executives choose which individuals will be propelled into the criminal justice system, with police officers using their power to investigate and arrest and state attorneys exercising their authority to charge and prosecute. As a matter of federal constitutional law, the states have no obligation to criminalize and punish any particular behavior, nor are they required to arrest and prosecute any given individual. But when jurisdictions choose to employ the awesome power to deprive individual liberty, they have an absolute duty to comply with the U.S. Constitution, including the Sixth Amendment right to counsel.

In practice, the states have brought any crisis upon themselves through, *inter alia*, overcriminalization[19] – abusing the law's supreme force by enacting dubious criminal provisions and excessive punishments, and overloading the system with arrests and prosecutions of questionable value. State penal codes have become bloated by a continuous stream of legislative additions and amendments, particularly in response to interest-group lobbying and high-profile cases,[20] producing a one-way ratchet toward broader liability and harsher punishment. Lawmakers have a strong incentive to add new offenses and enhanced penalties, as conventional wisdom suggests that appearing tough on crime fills campaign coffers and helps win elections, irrespective of the underlying justification. Law enforcement also has an interest in a more expansive criminal justice system, with the prospects of promotion (or reelection) often correlated to the number of arrests for police and convictions for prosecutors.[21]

As a result, the United States has now become the most punitive nation by virtually every measure and the world's leader in incarcerating its own population,[22] all during a time of decreasing rates of violent and serious crime.[23] The NRCC Report notes that a significant percentage of inmates are locked up not for committing new crimes but for violating the terms of their release, often for rather trifling infringements like missing a scheduled appointment with a parole or probation officer.[24] The Report also discusses the overcriminalization of low-level misconduct, from riding bikes on sidewalks to driving on a suspended license.[25] The NRCC

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[19] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

[20] *See, e.g.*, Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003).

[21] In addition, officials sometimes have a financial incentive to pursue low-level violations with impunity. *See, e.g.*, Howard Witt, *Driving Through Tenaha, Texas, Doesn't Pay for Some*, L.A. TIMES, Mar. 11, 2009; David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561-63 (1997).

[22] *See, e.g.*, Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, April 23, 2008. At the beginning of 2008, the United States had an adult inmate population of 2.3 million people, meaning that one out of every 100 Americans was incarcerated. To put things in perspective, if you placed a prison wall around North Dakota, South Dakota, and Wyoming and counted every single person as an inmate, it would still not equal the nation's total prison and jail population – but the number gets close by adding, say, American Samoa, Guam, and the U.S. Virgin Islands as penal colonies.

[23] *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (online) tbl. 3.106.2007, *available at* http://www.albany.edu/sourcebook/ (hereinafter "SOURCEBOOK").

[24] *See* JUSTICE DENIED, *supra*, at 71.

[25] *Id.* at 73. *See also* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 25-28 (Apr. 2009) (hereinafter "MINOR CRIMES").

Report does not mention, however, the single greatest criminal justice boondoggle of all time: the multi-billion dollar "war on drugs" that overloads court dockets around the nation.[26]

But just as the states have the ability to create and enforce criminal provisions, no matter how picayune, they 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. Despite current economic straits, there should be no doubt that the relevant jurisdictions can provide the funds for competent indigent representation. State lawmakers have always had the means to do so but have chosen not to meet their constitutional obligations. As the NRCC Report notes, "[i]n the competition for state funds, indigent defense is frequently at the back of the line."[27] Prosecutors typically receive far greater state funding than defense counsel, leading to disparities in salaries and number of attorneys;[28] and needless to say, the states pay vast sums for legal work and programs that are *not* constitutionally required.[29] Moreover, the states can decriminalize conduct that poses little or no risk to public safety, which the NRCC Report recommends[30] and some jurisdictions have in fact done.[31]

In the end, the states can and must provide the necessary resources for defense counsel, whether by increasing funding of indigent representation or by reducing the number of criminal cases and thus the need for defense counsel in the first place. If they refuse to do so, a different set of NRCC recommendations should be pursued, specifically, those involving litigation.[32] The recalcitrant state 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.

B. WHAT CONGRESS SHOULD *NOT* DO

The NRCC Report also recommends that the federal government provide substantial financial support for indigent representation in state criminal justice systems,[33] including the creation of "an independent, adequately funded National Center for Defense Services."[34] This reiterates a long-standing proposal by the American Bar Association, as well as a congressional bill sponsored by Sen. Kennedy and Rep. Rodino in 1979-80.[35] On its face, federal funding

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[26] In 2007, 1.8 million American were arrested for drug violations (80% for possession). *See* SOURCEBOOK, *supra*, at tbls. 4.1.2007 & 4.29.2007. In recent years, state drug offenses have accounted for a third of all felony convictions and at least one out of every five inmates. *See, e.g. id.* at tbls. 5.44.2004, 6.20, 6.0001.2005.

[27] JUSTICE DENIED, *supra*, at 57.

[28] *See, e.g., id.* at 61-64.

[29] *See, e.g.*, Stephen Bright, *Georgia Beggars Indigent Defense: As Lawyers for the Poor Get a Pittance, Prosecutors Enjoy a Blank Check, Want to Pick Opponents*, DAILY REP. (Fulton County, Ga.), Jan. 4, 2008 ("It's not that Georgia doesn't have the money. It pays private attorneys rates between $125 and $225 for legal work that is not constitutionally required, more than the $95-per-hour rate paid for appointed lawyers in capital cases. And of course it spends millions of dollars on other things that are not constitutionally required.").

[30] *See* JUSTICE DENIED, *supra*, at 198-99 (Recommendation 10).

[31] *See, e.g.*, MINOR CRIMES, *supra*, at 27-28.

[32] *See* JUSTICE DENIED, *supra*, at 210-13 (Recommendations 19-22).

[33] *See id.* at 200-02 (Recommendations 12 and 13).

[34] *Id.* at 200.

[35] *See, e.g.*, GIDEON'S BROKEN PROMISE, *supra*, at 41-42.

might appear to be a sound public policy to address the dilemma of indigent representation in various places around the nation. And given supporting institutions like the ABA and the gravitas of congressional and scholarly[36] advocates of the past and present, I am reticent and duly cautious in any disagreement with their collective wisdom. Nonetheless, I will briefly discuss some of my concerns regarding the call for federal involvement in the state criminal defense function, which is premised, I believe, on the widely held and often erroneous assumption that a crisis in America necessarily requires congressional action.

To begin with, I have a seemingly small but nonetheless important difference of opinion about the predicate for federal funding. The NRCC Report refers to the right to appointed counsel, first articulated in *Gideon*, as a "significant, high-cost, unfunded mandate imposed upon state and/or local governments."[37] It is an ingenious argument – attempting to analogize constitutional decisions of the U.S. Supreme Court to requirements imposed on the states by Congress – but in the end, it proves too much. As typically understood, federal unfunded mandates are the product of the discretionary actions of Congress and various federal agencies, coming in the form of normal positive law (i.e., statutes or regulations). In contrast, the Supreme Court's constitutional decisions are interpretations of the fundamental law of the land, the U.S. Constitution, which the states adopted at the framing and all state officers support by oath.[38]

The Court may have announced *Gideon*, but it is the Sixth Amendment that requires the states to provide for indigent representation. This is no more an "unfunded mandate" than, for instance, the Eight Amendment command that prisoners be provided food and other human necessities that draw upon state funds. Indeed, almost every constitutional guarantee in the criminal process, especially the full panoply of trial rights (e.g., speedy and public trials, compulsory process, impartial juries drawn from a fair cross-section of the community, etc.), imposes affirmative costs on the relevant jurisdiction.[39] Of course, it would be a nonstarter to claim that Congress thereby has an obligation to compensate the states for their criminal trials and prisons. Instead, the states assume these expenses by choosing to operate a justice system and forcing individuals through the criminal process.

Not only is federal funding of state indigent defense not required by the Constitution, it raises issues related to 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.[40] Since the founding,

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[36] *See, e.g.*, Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 843 (2004).

[37] JUSTICE DENIED, *supra*, at 5, 29-30.

[38] *See, e.g.*, U.S. CONST. art. VI, § 2.

[39] *See, e.g.*, David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1233-38 (2002).

[40] 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.

THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Federalism was enshrined in the U.S. Constitution by specifically enumerating the powers of the federal government, *see* U.S. CONST. art. 1, §8; and declaring that all other powers were "reserved to the States respectively, or to the people." U.S. CONST. amend X.

the Supreme Court has declared on a number of occasions that the federal government does not have a general police power.[41] Among the areas that the Framers sought to reserve to the states was "the ordinary administration of criminal and civil justice."[42] 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."[43]

There are various arguments in favor of federalism in this area – such as pluralistic decision-making and local experimentation[44] – that 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,"[45] 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 tyranny.[46]

These are not idle musings. As I understand it, the proposed National Center for Defense Services will not just be a task force, fact-finding committee, study commission, or center in the mold of academe. Rather, the Center will be a comprehensive, fully funded entity with the financial authority "to help the states defray the costs of defense services in criminal and juvenile cases," "providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data."[47] In other words, it will be a federal bureaucracy with the authority to make and enforce policy, and to dispense and control millions (if not billions) of dollars. Although the proposal is extremely well-intentioned, caution is warranted in creating any federal body with such powers outside of the basic constitutional framework.

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

[42] THE FEDERALIST No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism. *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). 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. *See, e.g.*, RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983). As Chief Justice John Marshall would later opine, Congress "has no general right to punish murder committed within any of the States," and "it is clear that Congress cannot punish felonies generally." Cohens v. Virginia, 18 U.S. 264, 426, 428 (1821).

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

[44] *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987). 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." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). 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.

[45] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). "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." *Id.*

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

[47] JUSTICE DENIED, *supra*, at 200-01.

Government bureaucracies tend to be acquisitive and monopolistic, seeking to maximize their funding and expand their powers. They also create agency costs, serving the self-interests of bureaucrats rather than their principals (i.e., American taxpayers). And in the end, bureaucracies have a tendency toward entrenchment and are almost impossible to eliminate or meaningfully reform after their formation, becoming part of an "iron triangle" between themselves, interest groups, and congressional committees. This is not to say that a National Center for Defense Services cannot be the exception. But relatively recent experience with federal criminal justice bureaucracy – namely, the U.S. Sentencing Commission qua "junior varsity Congress"[48] – has been less than spectacular.

Federal funding in the present context also raises questions of incentive structures. There are circumstances where federal involvement might not only fail to improve a particular problem but may also exacerbate a larger structural infirmity. Congressional funding of indigent defense in a given jurisdiction serves as a sort of "bailout," where one entity (the federal government) rescues another entity (a state) from its financial distress. The institutional beneficiaries, state lawmakers, are not viewed with the level of skepticism currently focused on corporate America. But as with other, more typical bailouts, congressional funding here raises the specter of *moral hazard*, the economic phenomenon that can be succinctly defined as "the distortions introduced by the prospect of not having to pay for your sins."[49]

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 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. This is all the more troubling given that, as mentioned above, deadbeat jurisdictions could meet their constitutional obligations: They could fully finance indigent representation through increased taxes or the diversion of funds allocated for other items. Or they could reduce the number of defendants and thus the need for indigent representation by means of decriminalization, diversion, lower sentences, and tempered enforcement. Obstinate jurisdictions have chosen neither option, however, doubtlessly because such actions are viewed as bad politics.

Moreover, 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

[48] Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). *Cf.* Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25 (2005) (critiquing the U.S. Sentencing Commission and U.S. Sentencing Guidelines).

[49] *Decade of Moral Hazard*, WALL ST. J., Sept. 25, 1998.

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.

3. CONCLUDING THOUGHTS

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. Moreover, I am not claiming that the courts would invalidate congressional funding on federalism grounds. As a doctrinal matter, Congress's Article I spending powers are essentially unfettered. Instead, the constitutional design and underlying principles caution against the federal government becoming entangled in the internal affairs or assuming the core functions of the states. The values of pluralistic decision-making and localism, as well as the danger of too much power in too few hands, are not trifling and should not be disregarded lightly.

In turn, the public policy considerations mentioned above are only broad and somewhat abstract, 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.

As described upfront, I am a staunch believer that impoverished defendants have the right to competent and appropriately compensated counsel. Although federal involvement in state indigent representation is problematic on a number of grounds, I will not lose sleep if Congress were to create and fund the National Center for Defense Services. The proposal may be flawed as a matter of constitutional principle and public policy, but at least it is based on good intentions and aimed at real constitutional violations. Before closing, however, I would like to briefly mention a few suggestions on what Congress can do without raising the aforementioned issues of constitutional law and public policy.

A. STOP FEDERAL GRANTS TO STATE CRIMINAL JUSTICE

The NRCC Report describes resource inequities between prosecutors and defense counsel, sometimes resulting from special funding to pursue particular programs, such as drug enforcement. It then recommends that "the level of federal funding for prosecution and defense should be substantially equal."[50] I agree – although rather than increasing spending for the defense function, the federal government should get out of the business of funding state criminal justice programs altogether. In general, federal grants to state and local government spur wasteful spending on overblown or altogether unnecessary programs, reduce the diversity of

[50] JUSTICE DENIED, *supra*, at 201 (Recommendation 13).

policies and the motive for innovation, breed layered bureaucracies and opportunities for questionable congressional earmarks, and blur the lines of government responsibility.[51] They also skew state and local policymaking toward federal goals, regardless of the wishes and best interests of the affected citizenry. Worse yet, federal funding under the "Byrne Justice Assistance Grant" program has underwritten law enforcement corruption, racial discrimination, civil rights abuses, and wrongful convictions, epitomized by the massive miscarriage of justice in Tulia, Texas.[52] For the most part, state and local officials should determine policy for their criminal justice systems, unaffected by the federal government; and they alone should bear the costs and consequences of these decisions.

B. CIVIL RIGHTS LITIGATION

The third chapter of the NRCC Report provides a thorough review of litigation efforts to force recalcitrant states to meet their Sixth Amendment obligations.[53] After analyzing both successful and failed efforts, it lays out a series of principles to enhance the possibility of systematic improvements. This is a fitting approach, with the precise entity responsible for the condition of indigent representation, state government, held to answer for its failure to abide by the Sixth Amendment. In addition, the Report discusses the most prominent federal civil rights statute, 42 U.S.C. §1983, as a viable cause of action and goes on to suggest that "if state courts abdicate their responsibilities, federal courts may be willing to enforce the right to counsel through a habeas corpus petition or class action complaint."[54]

Not all litigation along these lines has been successful, including lawsuits brought in federal court;[55] and the outcome is uncertain in two pending state cases alleging violations of the Sixth and Fourteenth Amendments and causes of action under §1983.[56] If it turns out that such litigation is failing in state or federal court not because of factual deficiencies but due to prudential barriers (e.g., *Younger* abstention)[57] or limitations in the underlying federal statute, Congress could consider enacting a new cause of action to enforce the Sixth Amendment. Furthermore, the U.S. Department of Justice might begin examining whether certain jurisdictions are systematically violating the Constitution by failing to provide sufficient resources for indigent representation.

C. FEDERAL GOVERNMENT AS ROLE MODEL

Whether or not federal action ensues, today's hearing serves a worthy 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 material for judicial decision-making. But Congress can also be

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[51] *See, e.g.*, CATO HANDBOOK FOR POLICYMAKERS ch. 5 (7th ed. 2009) ("fiscal federalism").

[52] *See, e.g.*, ACLU OF TEXAS, FLAWED ENFORCEMENT (May 2004), *available at* http://www.aclu.org/FilesPDFs/flawed%20enforcement.pdf; Laura Parker, *Texas Scandal Throws Doubt on Anti-Drug Task Forces*, USA TODAY, Mar. 30, 2004.

[53] JUSTICE DENIED, *supra*, at 104-46. *See also id.* at 210-13(Recommendations 19-22).

[54] *Id.* at 136.

[55] *See* Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992).

[56] *See* JUSTICE DENIED, *supra*, at 116-17 (discussing *Duncan v. State of Michigan* and *Hurrell-Harring v. New York*).

[57] *See* Younger v. Harris, 401 U.S. 37 (1971).

an exemplar for the states by reexamining the federal criminal justice system. According to a recent estimate, there are at least 4,450 federal crimes in the U.S. Code,[58] 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.[59] Moreover, federal sentencing is in real need of reform to replace the virtually incomprehensible U.S. Sentencing Guidelines regime as well as the inflexible and often draconian mandatory minimum sentences.[60] In fact, Members of this Subcommittee have sponsored bills that seek to address mandatory minimums and provide a more just sentencing scheme. By reforming the federal criminal justice system, Congress would be offering a valuable and perfectly constitutional service to the states – the federal government as role model, not dictator or underwriter.

Likewise, I would encourage Congress to support Sen. Webb's proposal to create a "National Criminal Justice Commission." This body would be a true task force or study commission, rather than a new administrative agency. According to the bill's text, the Commission would:

> undertake a comprehensive review of the criminal justice system, make findings related to current Federal and State criminal justice policies and practices, and make reform recommendations for the President, Congress, and State governments to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation's criminal justice system.[61]

It has been some time since the last comprehensive governmental study of American criminal justice, and as discussed above, the past few decades have seen the federal and state systems taking turns for the worse. Obviously, the topic of today's hearing is of critical importance and could be part of the Commission's charge. But the crisis of indigent representation is the proverbial tip of the iceberg, and any attempt to deal with that issue in isolation may well miss the massive problems that lie beneath. Although it faces a daunting challenge, the proposed Commission seems well worth the effort.

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

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[58] 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).

[59] *See, e.g.*, Luna, *Overcriminalization Phenomenon*, *supra*.

[60] *See, e.g.*, Luna, *Gridland*, *supra*.

[61] The National Criminal Justice Commission Act of 2009, S.714.

Mr. SCOTT. Thank you.
Mr. Hunter?

TESTIMONY OF MALCOLM R. "TYE" HUNTER, FORMER EXECUTIVE DIRECTOR, NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, DURHAM, NC

Mr. HUNTER. Thank you very much, Mr. Chairman. Can you hear me? Hello, good morning, is this working? Do I need it——

The light is on. Now you can hear me. I need to have it a little closer.

Mr. Chairman, Members of the Committee, thank you very much for the opportunity to be here.

I suppose on this panel, I am the career public defender. Mr. Gohmert, I am the one who should defend the lawyers who do this work. I have devoted my whole career to it. And there is no question but what there are lawyers in every state and all over the country who are doing great—some people are doing heroic jobs and a lot of people are doing good jobs.

But I think the report is correct in that, in general, the system is not working well for a combination of circumstances. I think money is probably the biggest reason.

I also don't disagree with Professor Luna that this is the state and the local folks' problem in a lot of respects, but we are here. The states aren't doing it. We don't seem to have a good way to force the states or make the states see their responsibility in a way that they provide adequate funding.

And adequate, I would say also, standards are just as important as funding for this problem. And we are in a situation where we are, in fact, sending lots of Federal money in. Lots of Federal money has gone in North Carolina, and we are like Minnesota. I stopped even applying for Byrne Grants years ago because we never got a sniff at that. The great majority—practically all of that money goes to prosecution and to law enforcement.

And so we are not living in a world where the Federal Government is not involved in state criminal justice; maybe we should be. But right now, the state's thumb is on one side and not the other. And so if we get out, if Mr. Luna's idea of the way government should work prevails, then I have no complaints. But until that happens, I think the defense function should get their fair share or at least a fair share. And so far, they are certainly not.

I want to follow up just briefly on Mr. Crotzer's story. That is not a unique story. I mean, there are five or six or seven people convicted of first-degree murder in North Carolina. Actually, a lot of them had good lawyers. Some of them had terrific lawyers but were wrongly convicted, and only through DNA years later did we find out that in fact they were not guilty.

I think what all of us need to remind ourselves about DNA is that DNA is just a window to allow—what is more important than DNA is what is the evidence that allowed judges and juries to convict somebody and find someone guilty beyond a reasonable doubt; forget about the DNA. All of those were cases where there shouldn't have been evidence that would prove their guilt beyond a reasonable doubt. You shouldn't have to prove your innocence. The state has the burden of proving you are guilty.

So we have hundreds of cases where juries are convicting, prosecutors are prosecuting, where in fact they have got the wrong person. And so we need to be aware of that. And, of course, better

counsel will be a very important part in trying to improve that situation.

But DNA is not the answer. DNA has given us a window into a criminal justice system where we are making mistakes, not most of the time, just in a small group of the cases. But we can minimize those mistakes, I think, and we need to look at what is the evidence—what are the commonalities of the evidence that we are convicting people on that later DNA is showing us that we made mistakes?

And so I hope we will look at that. And I hope, if the Federal Government gets involved in defense, that you will not just send money down to North Carolina and let somebody down there decide, you know, willy-nilly how to spread it out to make up for the gaps in what the state should be doing. I think the appropriate role for the Federal Government is limited, and it should be to encourage innovation, to encourage improved quality.

I think any money that gets sent down should be tagged so that we are not paying for what the state should be paying anyway or allowing the state to shift funds to highways or something—all of which we need in North Carolina, by the way—but that improves the situation we have got right now. And I think there are lots of opportunities for innovations and for quality that could come from outside funding.

And I will give you one example; it is in my written materials. An LEAA grant was awarded to North Carolina in 1980, and we started the Appellate Defender's Office. That was the first statewide defender we had in North Carolina. We had a few local public defenders, but we had no statewide defender office. It funded that Appellate Defender's Office for 1 year. I think it cost about $350,000 back in 1980.

That office was evaluated after that first year. The state picked up that office, decided that was an agency that was worth the state funding, and it has been going and has provided excellent representation for indigent people on appeals for 29 years now.

And in fact, I think the success of that office helped create an atmosphere where, when we tried to form the Indigent Defense Services in 2000, it was acceptable to the legislature and to the courts and to the bar because of what we had done in the Appellate Defender's Office.

So that was a small seed money, if you will, contribution by the Federal Government, which was limited in time, 1 year, and then the state decided—do they want to—is this a service that is worth picking up or not? And they did pick it up. And I think it has really been a part of the reform movement that we have had in North Carolina, where we have improved our work.

Thank you very much.

[The prepared statement of Mr. Hunter follows:]

PREPARED STATEMENT OF MALCOLM R. "TYE" HUNTER

Thank you for the opportunity to speak on the subject of indigent defense representation. My name is Tye Hunter and I recently retired after more than thirty years of direct involvement in the representation of indigent persons in state courts in North Carolina. I have served as a public defender, an appellate defender and, from 2001 through 2008 as the first executive director of the newly formed North

Carolina Office of Indigent Defense Services. In my time I'd like to make a modest suggestion about a role the federal government could take to encourage reform.

1. Justice Denied

But first I want to acknowledge the excellent work of the Constitution Project's National Right to Counsel Committee and the Committee's report, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel.* I agree with the report's criticism of our current attempts to provide counsel for indigent people accused of crimes. I also agree with the general thrust of the recommendations. I especially like that the recommendations are organized to point out what different actors could do to improve things. The bar, the state and federal judiciary, state legislatures and this Congress have all played a part in the neglect of the right to counsel and all, I think, must play a role if we are to reform our current system.

2. The North Carolina Indigent Defense Services Commission

North Carolina created an Indigent Defense Services Commission (IDS) in 2000. I am attaching a document from the IDS website, ncids.org, that summarizes the reforms undertaken by the Commission in the past eight years. These include the development of state wide rules governing the delivery of indigent legal services, expansion of public defender offices, creation of performance guidelines, improvement of training for lawyers and establishment of special state wide rosters for capital and appeal cases. While I am proud of what has been accomplished in North Carolina, we are aware that we are not nearly finished with the long and difficult work of reform. There are a number of significant reforms that would improve the quality of indigent defense in North Carolina that the Commission has been unable to accomplish, not because of lack of funds, but because of resistance to change by powerful interests among the bench and bar.

3. Money Not the Only Problem

Lack of adequate funding is the biggest problem for indigent defense, but it is not the only challenge. Although the problems with indigent defense are repeated throughout the country, most people involved with indigent defense have a narrow and local view. I have found that most lawyers and judges are sympathetic with the kind of report we are discussing today and have no problem with general criticism of the quality of indigent defense work. However, most people in positions of power feel that their own jurisdiction is an exception to the general rule of deplorable quality. People support reform until it is specifically directed at the place where they make their living. While the local indigent defense system may work very badly for indigent people accused of crime, it may work pretty well for the local judges and lawyers. Or even if it doesn't work very well for the professionals, at least they have learned how to negotiate in the current system and they are reluctant to exchange it for a system that may or may not serve them as well. Thus, it can be difficult to convince folks on the local level that they have a problem, much less that they need to change the ways they have been doing things. Anyone hoping to actually reform our current system must understand that it is really thousands of different local systems. This does not mean that a regional or national reform effort cannot succeed, but any reform strategy must either have the authority to impose reform despite local misgivings or be prepared to engage in a protracted effort one courthouse at a time.

4. A Role for the Federal Government

I suspect there will be little dispute about the fact that the right to counsel is neglected and that the neglect is nationwide in scope. The issue of what the Congress can and should try to do about it is more controversial.

As an early step, I think it would be useful if the federal government would make grants available to reward and encourage indigent defense reform. Currently, federal grants and assistance coming to North Carolina for public safety or criminal justice almost never make their way to indigent defense.

I know that many are suspicious of further federal involvement in what they think should be the responsibility of the state or county or city. I can tell you about one federal program that funded an indigent defense project in North Carolina that has had a very positive impact. In 1980, the federal government awarded an LEAA grant to North Carolina to fund an Appellate Defender's Office for one year. That was the first statewide indigent defense program in North Carolina. During that first year a thorough evaluation was conducted and published. The Office of the Appellate Defender was picked up for state funding the second year and has lifted the quality of indigent representation for appeals for 29 years. The success of that office helped set the stage for other statewide defenders and for the acceptance of IDS in

2000. The lawyer who had been the first Appellate Defender in 1980 served as the first Chair of the IDS Commission in 2000. That small and limited time investment by the federal government paid large dividends for reform in North Carolina.

Any funding from the federal government should be aimed at improving the status quo rather than merely filling the budget gap for state or local programs. I would reward programs that agree to standards consistent with the recommendations of the Right to Counsel Committee's report and groups like American Bar Association, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers. I would also encourage innovators. A few of our thousands of local systems can serve as pilot programs as we try to discover better ways to accomplish the goal of creating a truly effective system of indigent defense. While many jurisdictions fail to provide even minimal representation, others have tried new approaches. These experiments should be encouraged. All programs that are funded should be evaluated to determine whether they should be continued.

Thank you again for your invitation, thank you for your interest in this very important problem, and I am happy to answer any questions you may have.

ATTACHMENT

INDIGENT DEFENSE SERVICES' MAIN ACCOMPLISHMENTS SINCE JULY 2001
(Updated July 2008)

The following list summarizes IDS' main accomplishments since assuming responsibility for North Carolina's indigent defense fund in July 2001. While the accomplishments have been grouped into four main categories—improving quality, controlling spending, enhancing data collection and reporting, and oversight of other programs—many accomplishments actually relate to more than one category.

IDS' annual reports to the General Assembly describe these initiatives and accomplishments, as well as others, in much more detail than is set forth below. The reports are posted on the IDS website (www.ncids.org) under the "Reports & Data" link.

Initiatives to Improve Quality and Enhance the Independence of Defense Counsel:

- *IDS Rules:* The IDS Commission developed and published rules governing the delivery of services in non-capital and non-criminal cases at the trial level, capital cases, and non-capital and non-criminal appeals. *See* Rules of the Commission on Indigent Defense Services (July 1, 2001, last amended June 6, 2008), *available at* www.ncids.org.
- *Statewide Attorney Rosters:* The IDS Rules contain detailed qualification standards for attorneys to be included on the Capital Trial (Lead and Associate), Capital and Non-Capital Appeal, and Capital Post-Conviction Rosters. IDS Office staff, in conjunction with the Capital and Appellate Defenders, continue to review applicants' qualifications and enhance the rosters of qualified attorneys in each district across the State.
- *Appointment and Compensation of Attorneys and Experts:* In all potentially capital cases and appeals, as well as all proceedings before the new Innocence Inquiry Commission, IDS has assumed direct responsibility for appointing and compensating attorneys, and approving and compensating necessary experts.
- *Public Defender Appointment Plans:* The IDS Commission and staff worked with all public defender offices to develop plans for the appointment of counsel in non-capital cases in their districts, and required that those plans provide for more significant oversight by the public defenders over the quality and efficiency of local indigent representation.
- *Model Appointment Plan for Non-Public Defender Districts*: In March 2008, the IDS Commission adopted a model indigent appointment plan for non-public defender districts. The plan is modeled after the public defender appointment plans discussed above, and includes qualification standards for the various indigent lists, provides for more oversight by a local committee appointed by the President of the District Bar, and includes some basic reporting requirements to the IDS Office. Office staff have begun working with districts across the State to implement some version of the model plan at the local level.
- *Capital Defender Expansion:* The IDS Commission established a statewide Capital Defender position, expanded the capital defender office in Durham, and created new regional capital defender offices in Beaufort, Forsyth, and New Hanover counties.

- *Improved Training:* In conjunction with other groups, IDS has developed and offered new and innovative training programs for criminal defense attorneys, as well as attorneys working in specialized areas of non-criminal representation. Examples of these new training programs include: a hands-on program for private appellate attorneys; new programs for attorneys who handle involuntary commitment cases; training for attorneys who represent respondent parents in abuse, neglect, dependency, and termination of parental rights proceedings ("Chapter 7B cases"); training for attorneys who represent juveniles in delinquency proceedings; a new five-day trial advocacy program for public defenders; and a management training program for public defenders and their administrative assistants. Materials that are used in IDS co-sponsored programs are posted on the IDS website (www.ncids.org) and are available for free to attorneys who were unable to attend the training. IDS plans to continue expanding its training calendar in the coming years.
- *Improvements to the North Carolina Defender Manual:* IDS provided funding for improvements to the School of Government's North Carolina Defender Manual, and has made that manual available to more attorneys by posting it on the IDS website.
- *Development of Other Manuals:* IDS provided funding for the development of a North Carolina Civil Commitment Manual, a North Carolina Guardianship Manual, and a North Carolina Immigration Consequences Manual, which were published jointly by IDS and the School of Government. The manuals are available for free on the IDS website.
- *Electronic Communication:* Through electronic means, IDS has taken significant steps to increase communication with and resource-sharing among the bar.
  - ✓ IDS developed an independent website (www.ncids.org) that allows greater and more comprehensive communication with the bar, bench and public, and enhances the resources available to defense attorneys across the State. The website contains news and updates links addressing the state of indigent defense funding, timing of attorney payments, and any other recent developments or matters of interest. In addition, the following materials, among others, are posted: all approved minutes of IDS Commission meetings; IDS rules, policies, and procedures; reports and data generated by Office staff; fillable applications for the capital and appellate rosters; attorney and expert fee application forms; the public defender appointment plans; all of the North Carolina indigent defense manuals referenced above, as well as an Innocence Inquiry Proceedings Manual and an orientation manual for new assistant public defenders; materials used in IDS co-sponsored training programs; an index of all posted training materials by topic; an index of capital case trial motions; and an appellate brief bank.
  - ✓ In conjunction with other groups, the IDS Office has established listservs for attorneys representing indigent persons on appeal, capital trial attorneys, capital post-conviction attorneys, involuntary commitment attorneys, public defenders and assistant public defenders, attorneys representing respondent parents in Chapter 7B cases, attorneys representing juveniles in delinquency proceedings, and mitigation specialists.
- *Performance Guidelines for Attorneys Handling Non-Capital Criminal Cases:* The IDS Commission has adopted "Performance Guidelines for Indigent Defense Representation

in Non-Capital Criminal Cases at the Trial Level." The guidelines are based largely on the National Legal Aid and Defender Association Performance Guidelines, but have been tailored to the nuances of practicing law in North Carolina. Proposed draft guidelines were mailed to the bar and bench for comments in August 2004. After making a number of improvements to the draft based on the comments that were received, the IDS Commission adopted final guidelines in November 2004. The guidelines are posted on the IDS website under the "IDS Rules & Procedures" link.

- *Improved Juvenile Representation and Office of the Juvenile Defender:* In conjunction with the ABA Juvenile Justice Center, the National Juvenile Defender Center, and the Southern Juvenile Defender Center, the IDS Office conducted a statewide assessment of juvenile delinquency representation in North Carolina. The ABA released its report in October 2003, which identified a number of deficiencies in the services being provided to our State's children. In response to the ABA's report, the IDS Commission formed a Juvenile Committee to review the ABA's findings and prepare recommendations for reform initiatives. The Committee's primary recommendations were to create a new statewide Juvenile Defender position so that someone would be working full time on needed reform initiatives and to develop and offer comprehensive training programs for juvenile defense attorneys. The General Assembly subsequently authorized the creation of a new statewide Juvenile Defender position, and the Commission appointed an attorney to that position in November 2004.

  The Juvenile Defender began work in January 2005. Some of his duties are to serve as a central resource and contact person for individual juvenile defenders and juvenile associations statewide; to develop ways to connect and support juvenile defense attorneys across the State; to evaluate the existing systems and practices, and the current quality of representation, in various areas of the State; to identify training needs and work with the School of Government and other groups to formulate a long-term training plan; and to develop and maintain a clearinghouse of materials on North Carolina juvenile law and practice. The Juvenile Defender has also undertaken a number of long-term responsibilities, such as developing specialized performance guidelines for juvenile defense attorneys. Model qualification standards for attorneys who represent juveniles in delinquency proceedings have also been developed and implemented in all but three of the existing public defender districts.

- *Performance Guidelines for Attorneys Handling Juvenile Delinquency Cases:* The IDS Commission has adopted "Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level." Proposed draft guidelines were mailed to the bar and bench for comments in July 2007. After making a number of improvements to the draft based on the comments that were received, the IDS Commission adopted final guidelines in December 2007. The guidelines are posted on the IDS website under the "IDS Rules & Procedures" link.

- *Improved Representation of Respondent Parents and Parent Representation Coordinator:* In the Fall of 2006, the IDS Commission established a new position in the Office of the Appellate Defender called the Parent Representation Coordinator; that position was filled in November 2006. Among other things, the Parent Representation Coordinator is responsible for coordinating appellate representation of indigent parent-

respondents in abuse, neglect, dependency and termination of parental rights proceedings ("Chapter 7B cases"); appointing counsel in all indigent Chapter 7B appeals statewide; helping ensure that appellate counsel are able to comply with the expedited deadlines in Rule 3A of the Rules of Appellate Procedure; working with the School of Government, Court Improvement Project, and others to develop training programs for trial and appellate lawyers who handle Chapter 7B cases; evaluating appellate briefs in Chapter 7B cases for inclusion in a statewide on-line brief bank; and performing case consultations with trial and appellate attorneys who represent respondent parents.

- *Performance Guidelines for Attorneys Representing Respondent Parents:* The IDS Commission obtained grant funding from the North Carolina Court Improvement Project to develop "Performance Guidelines for Attorneys Representing Indigent Parent Respondents in Abuse, Neglect, Dependency and Termination of Parental Rights Proceedings at the Trial Level." Starting in January 2006, the IDS Office contracted with a parent attorney to staff the project, and he then worked with a multi-disciplinary committee to develop guidelines that are tailored to North Carolina law and practice in this area. The new Parent Representation Coordinator joined that committee when she began work in November 2006. Proposed draft guidelines were mailed to the bar and bench for comments in July 2007. After making a number of improvements to the draft based on the comments that were received, the IDS Commission adopted final guidelines in December 2007. The guidelines are posted on the IDS website under the "IDS Rules & Procedures" link.
- *Qualification Standards for Mitigation Specialists:* On May 6, 2005, the IDS Commission adopted qualification standards for individuals who want to serve as mitigation specialists in capital cases. The standards include three different levels of mitigation specialists, which are based on educational background and experience. The IDS Office has developed a procedure for applicants to seek approval for one of the levels, and has set hourly pay rates for the various levels.
- *Systems Evaluation Project:* One of the IDS Commission's main statutory responsibilities is to evaluate the existing methods of service delivery in North Carolina and to implement changes where they may be needed to improve quality. To accomplish this goal, the Commission has begun work on developing an objective tool to evaluate the quality of overall indigent defense systems at the county, district, and statewide levels. The Commission plans to involve other stakeholders in the criminal justice system in the process of developing an evaluation tool. Because there are no existing national models for this type of evaluation, IDS expects this project to be a long-term undertaking. For information about this project, go to www.ncids.org and click on the "Systems Eval. Project" link.

Initiatives to Standardize and Control Spending:

- *Billing Policies and Financial Audits:* The IDS Office has developed detailed financial audit policies that are applied to all fee petitions where IDS sets the amount of the award, and has adopted billing policies in cases where judges are still responsible for setting the fees. (These policies are posted on the IDS website under the "IDS Rules & Procedures" link.) In December 2007, the Office also worked with the North Carolina Bar

Association and the School of Government to develop a video training program on billing in indigent cases. In addition, IDS Office staff perform random audits of appointed attorney fee applications.

- *Standard Hourly Rate:* Based on a study of fees set in district and superior court during the first quarter of fiscal year 2001-02, the IDS Commission established an uniform statewide hourly rate of $65 in all non-capital and non-criminal cases. That rate was intended to be revenue-neutral, but had the advantages of increasing the stability and predictability of payments to private assigned counsel, and improving pay equity and fairness across the State. The IDS Commission and IDS Office worked to obtain an additional appropriation from the General Assembly to increase the standard hourly rate to $75, effective February 1, 2008.
- *Increased Recoupment Revenues:* IDS has strived to increase the amount of revenues to the indigent defense fund by improving recoupment. IDS Office staff worked with all public defender offices to increase the levels of recoupment in public defender districts, and held a number of meetings with court personnel in other districts around the State. Total revenues from recoupment during fiscal year 2006-07, including the $50 attorney appointment fee required by G.S. 7A-455.1, amounted to $9.06 million, which represented an increase of 5.3% over fiscal year 2005-06.
- *Slowed the Overall Rate of Growth in the Fund:* During its first 6 fiscal years of existence, IDS has slowed the rate of increase in spending and obligations for indigent defense. During the 7 years before IDS was created, the average annual increase in the fund was more than 11%. During IDS' first 6 years of operation, the average increase in overall spending and obligations on indigent defense has been 6.1%: Spending and obligations during fiscal year 2001-02 were 1.4% above fiscal year 2000-01; spending and obligations during fiscal year 2002-03 were 4.6% above fiscal year 2001-02; spending and obligations during fiscal year 2003-04 were 7.6% above fiscal year 2002-03; spending and obligations during fiscal year 2004-05 were 7.1% above fiscal year 2003-04; spending and obligations during fiscal year 2005-06 were 11.1% above fiscal year 2004-05; and spending and obligations during fiscal year 2006-07 were 4.8% above fiscal year 2005-06. The higher 11.1% growth in demand during fiscal year 2005-06 was attributable to a number of factors, including new deadlines for the submission of fee applications.
- *New Public Defender Offices:*
  - ✓ *Forsyth County:* Based on the IDS Commission's recommendation, the 2002 Appropriations Act established a new Forsyth County Public Defender Office. After the Chief Public Defender was appointed, IDS Office staff members assisted him in establishing the new office and developing a plan for the appointment of counsel in non-capital cases. By May 2003, the new office was fully staffed and disposing of cases on a regular basis. The office now employees 15 assistant public defenders.
  - ✓ *First Judicial District:* Based on the IDS Commission's recommendation, the 2004 Appropriations Act established a new First District Public Defender Office, which is responsible for providing representation in indigent cases in Camden, Chowan, Currituck, Dare, Gates, Pasquotank, and Perquimans counties. The

Chief Public Defender was appointed in October 2004, and IDS Office staff subsequently worked with him to develop a plan for the appointment of counsel in non-capital cases and to get the office operational. The office began accepting cases on December 1, 2004 and now employs nine assistant public defenders. Upon request by the bench in the Second Judicial District and with the permission of the General Assembly, attorneys in the First District Office also began handling indigent cases in two counties in the Second District (Tyrrell and Washington counties) during fiscal year 2006-07.

- ✓ *Wake County*: The 2004 Appropriations Act also established a new Wake County Public Defender Office, effective July 1, 2005. The Chief Public Defender was appointed in March 2005, and IDS Office staff subsequently worked with him to develop a plan for the appointment of counsel in non-capital cases and to get the office operational. The office began accepting cases on July 1, 2005 and now employs 23 assistant public defenders.
- ✓ *District 29B:* The 2007 Appropriations Act established a new District 29B Public Defender Office, which is responsible for providing representation in indigent cases in Henderson, Polk, and Transylvania counties. The Chief Public Defender was appointed in October 2007, and IDS Office staff subsequently worked with him to develop a plan for the appointment of counsel in non-capital cases and to get the office operational. The office began accepting cases on February 5, 2008 and now employs five assistant public defenders.
- ✓ *New Hanover County:* The 2007 Appropriations Act also established a new New Hanover County Public Defender Office. The Chief Public Defender was appointed in December 2007, and IDS Office staff subsequently worked with her to develop a plan for the appointment of counsel in non-capital cases and to get the office operational. The office began accepting cases on March 17, 2008 and now employs nine assistant public defenders.
- ✓ *Other Areas for Public Defender Expansion:* IDS Office staff regularly analyze cost data to determine where new public defender offices may result in substantial savings. Based on those studies, the IDS Commission periodically recommends new areas for expansion of North Carolina's public defender system.

- ❖ *Public Defender Cost-Effectiveness Studies:* The IDS Office conducts annual studies of the cost-effectiveness of all public defender offices, and has conducted a cost-benefit analysis of the Office of the Appellate Defender.
- ❖ *Consultation about Cost-Saving Measures:* Section 14.2 of the 2005 Appropriations Act directed IDS to "consult with the Conference of District Attorneys of North Carolina, the Conference of District Court Judges, and the Conference of Superior Court Judges in formulating proposals aimed at reducing future costs" and to "include these proposals in its reports during the 2005-2007 fiscal biennium." Pursuant to that legislation, IDS consulted with other court system actors and made a series of recommendations in its March 2007 report to the General Assembly, including: 1) pilot testing alternative scheduling systems in district and/or superior court that would minimize attorney wait time; 2) funding a joint study by IDS and the North Carolina Sentencing and Policy Advisory Commission to identify misdemeanors that should be decriminalized;

3) expanding and regionalizing the public defender system, and creating a more effective management and supervisory relationship between IDS and the chief public defenders; 4) enhancing the ability of and incentives to clerk's offices to improve recoupment of attorney fees; and 5) eliminating felony murder as a ground for a death sentence.

Initiatives to Improve Data Collection and Reporting:

- *Data Collection for Capital Cases and Appeals and Innocence Inquiry Proceedings:* The IDS Office developed a detailed internal database to track, among other things, all attorney appointments, expert authorizations, and payments in the cases under IDS' direct oversight—namely, potentially capital cases and appeals. The database was later modified to track similar data on proceedings before the new Innocence Inquiry Commission. That database has significantly improved the Office's ability to collect, analyze, and report data concerning those cases.
- *Data Collection for Non-Capital Cases at the Trial Level:* IDS Office staff periodically work with the Administrative Office of the Courts' Forms Committee to revise the fee application forms for private appointed counsel to capture increasingly nuanced data about the cases under IDS' oversight. In addition, effective July 2006, IDS assumed direct responsibility for and supervision of the accounts payable staff who process attorney fee applications. On an ongoing basis, IDS staff takes steps to develop and implement more detailed and helpful data collection and reporting systems.
- *Analyses of Budgetary Trends and Fund Demand:* Because of the increased availability of data, IDS Office staff regularly conduct analyses of budgetary trends, as well as caseload and financial demand on the indigent defense fund, which are increasingly more accurate and reliable than previous studies.
- *Studies of Average Hours Claimed by Appointed Attorneys in District and Superior Court:* In order to assist judges in evaluating fee petitions, the IDS Office has completed statewide studies of appointed attorney fee applications in district and superior court, including average hours and frequency distributions by type of charge. The district court study was mailed to all district court judges in August 2005, and the superior court study was mailed to all superior court judges in January 2006. Both reports are available on the IDS website.
- *Private Assigned Counsel Waiting in Court Study:* The IDS Office completed a study of the costs to IDS during fiscal year 2004-05 from private assigned counsel waiting in court for their cases to be called. The study demonstrated that defense attorney wait time under the current scheduling systems adds substantial costs to indigent defense and the taxpayers. The IDS Office hopes to use this study, which is available on the IDS website, to work with other system actors to identify ways to reduce these unnecessary expenditures.

Oversight and Evaluation of Other Programs:

- *Sentencing Services:* In 2002, IDS assumed responsibility for the Office of Sentencing Services ("OSS"), which develops alternative sentencing plans for the courts and helps engage offenders in appropriate treatment. Under IDS' leadership and oversight, the

programs have increased their efficiency and continue to operate in most counties despite significant reductions in OSS' legislative appropriation.

- *Evaluation of North Carolina Prisoner Legal Services:* Pursuant to a contract with the State of North Carolina, North Carolina Prisoner Legal Services, Inc. ("NCPLS") provides legal advice and assistance to prisoners in the custody of the Department of Correction. NCPLS also works toward administrative resolutions of inmate problems, and provides representation in state and federal court in criminal post-conviction proceedings, jail credit cases, and civil proceedings challenging conditions of confinement or the actions of government officials. Effective October 1, 2005, the General Assembly transferred NCPLS' contract from the Department of Correction to IDS, and directed IDS to evaluate the program and report its findings. IDS in turn enlisted the assistance of a UNC School of Government Professor who specializes in program evaluation. The evaluation consisted of documenting NCPLS' case-management process in work-flow format, recruiting 16 specialists in one or more of the areas covered by the contract to review a random sample of case files, and interviewing NCPLS staff. IDS' report on the evaluation was submitted to the General Assembly in May 2007. IDS is continuing to work with NCPLS to make improvements to the program's services and to ensure that inmates receive quality legal services.

Mr. SCOTT. Mr. Hall?

TESTIMONY OF JOHN WESLEY HALL, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, LITTLE ROCK, AR

Mr. HALL. Mr. Chairman, I am here on behalf of the National Association of Criminal Defense Lawyers. And we are the organization that represents the mission of the United States criminal defense lawyers to ensure due process of those accused of crime. We have 12,000 direct members and approximately 40,000 indirect members through our state and local affiliates, and we are committed to preserving fairness within the criminal justice system.

The sixth amendment to the United States Constitution guarantees to every accused person the right to effective assistance of counsel, and it is one of the hallmarks of American justice. It is also a core value of our constitutional guarantees, because it is in the Constitution explicitly. Defense counsel is recognized by the sixth amendment. The court is not; the prosecutor's not. But the defense counsel is.

Criminal defense lawyers are, of course, the natural defenders of all these rights. As already noted by the Chair, 80 percent of all persons accused are represented by appointed counsel, and public defense is, in fact, the backbone of American criminal justice.

And public defenders, I submit to you, get no respect at all. I do a fair amount of post-conviction work, and I asked the clients, "Who represented you at trial?" And they said, "I didn't have a lawyer; I had a public defender." And that is an appalling comment at what people convicted of crime think about their representative. They shouldn't think that way, but they do because criminal defense—excuse me—appointed criminal defense lawyers are just overwhelmed in their work. They have a constitutional and ethical duty not to take any more cases when they get overwhelmed.

In Louisiana, lawyers in some counties have sued the court or the state to say, "I cannot take any more cases; I need help. I am overwhelmed. My clients are being convicted because I can do nothing more to defend them when I have to." There is a case in Louisiana, New Orleans for instance, where they have 19,000 cases, misdemeanor cases, per public defender. That is 7 minutes a case. You cannot represent somebody in 7 minutes.

And the example of the death penalty Mr. Quigley raised—if the state wants to have a death penalty, then they have to pay for it. They have to pay for the prosecution, they have to pay for the investigation, and they have to pay for the defense. And 998 out of 1,000 death penalty cases have appointed counsel. Occasionally somebody can afford to pay for counsel; usually they cannot.

The soundness of our entire system depends upon the accuracy of results. Mr. Crotzer's case points that out. If the wrong person is convicted, that means that the perpetrator is still on the street. While he spent 20 years in jail, the guy that actually did it is still out there. He may have been arrested later for that crime but maybe not.

But all this erodes public confidence in the system of justice. And I agree with Mr. Gohmert that there are, in fact, good examples. We should study those examples to learn from them.

But every state manages its own public defense system, and some have no system at all. But those systems, the good systems, are the exception rather than the rule. I don't think that even new money is necessarily required; just require that when you give, say, a million dollars for—or excuse me—a million dollars for prosecution that some percentage of that should be guaranteed for the defense, be it 10 percent, 5 percent, something so that at least we see how it works at the state and local level. Because they will take all this money, and they will put it all in prosecutors; they will put it all in investigators and give nothing for defense because defense is secondary to them.

But I said before, it is a core value of the sixth amendment, and don't let it become an empty right. It continues to be an empty right in some states, and it should stop being an empty right.

Thank you.

[The prepared statement of Mr. Hall follows:]

PREPARED STATEMENT OF JOHN WESLEY HALL

Written Statement of
John Wesley Hall
President
National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Re: "Indigent Representation: A Growing National Crisis"
June 4, 2009

Mr. Chairman, Mr. Gohmert and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and timely issue of indigent defense. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 12,000 direct members – and 80 state, local and international affiliate organizations with a total of 35,000 members — include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

Introduction

Although the vast majority of accused individuals first come into contact with the criminal justice system through a minor offense, known as a misdemeanor, remarkably little attention has been devoted to understanding what happens to defendants at the misdemeanor level. Criminal justice reform efforts often have noted that extensive problems exist in misdemeanor courts but rarely have focused exclusively on these courts.

The volume of misdemeanor cases is staggering. The exact number is not known because states differ in whether and how they count the number of misdemeanor cases processed each year. The National Center for State Courts collected misdemeanor caseload numbers from 12 states in 2006. Based on these 12 states, a median misdemeanor rate of 3,544 per 100,000 was obtained.[1] If that rate held true across the states, the total number of misdemeanor prosecutions in 2006 was about 10.5 million, which amounts to 3.5 percent of the American population.[2] While this overplays the actual prosecutions by population, because of non-citizen prosecutions and individuals charged multiple times, it is a startling reminder of the breadth of the impact of these courts.[3]

In late April 2009, NACDL released its comprehensive examination of misdemeanor courts, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts." The culmination of an eighteen-month study, this report encompasses a review of existing studies and materials, site visits in seven states, an internet survey of defenders, two conferences, and a webinar. All of these pointed to one conclusion: misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution.

The explosive growth of misdemeanor cases is placing a staggering burden on America's courts. Legal representation for misdemeanants is absent in many cases. When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Across the country, misdemeanor defenders report caseloads six and seven times greater than the national standards. In Chicago, Atlanta, and Miami, defenders carry more than 2,000 misdemeanor cases per year.[4] With these massive caseloads, defenders have to resolve approximately 10 cases a day – or one case every 45 minutes – not nearly enough time to mount a constitutionally adequate defense.

Counsel is unable to spend adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools. These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and insufficient knowledge of their cases. This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.

There is a growing body of evidence that suggests that innocent people frequently plead guilty. As early as the 1960s, scholars observed the likelihood that pressures to plead were resulting in innocent people pleading guilty.[5] Innocent defendants often plead guilty because the punishment offered by the prosecutor in the plea agreement sufficiently outweighs the risk of greater punishment at trial.[6] In the misdemeanor context, this pressure can be even more compelling because the punishment in the plea offer, frequently time served or probation, appears minimal, and the prospect of fighting the charge has not only the risk of more substantial punishment, but also tremendous inconvenience, including possible ongoing pretrial detention, missing additional days of work, and having to find alternate child care, among others.[7] Adding to this pressure is the demonstrable fact that the assigned defense attorney has neither the time nor the resources to adequately prepare a trial defense.

The Rights of Misdemeanor Defendants

Misdemeanor defendants, like all those accused of crimes, are entitled to due process.[8] They have the right to receive evidence against them and present evidence in their defense. They have a right to confront witnesses. A misdemeanor defendant is entitled to a jury trial when facing more than six months in prison.[9] Most importantly, they have the right to have their guilt proved beyond a reasonable doubt.

To vindicate these rights, the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." In the 1972 decision *Argensinger v. Hamlin*, the U.S. Supreme Court interpreted this right to require the state to provide counsel to a defendant charged with a misdemeanor who could not afford to hire his own counsel.[10] The importance of counsel advising a person of his or her rights in any criminal case cannot be underestimated. Even in a simple case, the law can prove complex.

For example, the law of trespass may seem clear cut – either a person was on private property or the person was not. But, there are a number of factors that can complicate a trespass case: Was the property obviously private or was there some reason to believe it was public property? Was there a warning, either posted or verbal? Was an event occurring that was open to the public? The answer to these questions can mean the difference between innocence and guilt. Without an attorney to sort through all the facts and assess what is legally important, these critical distinctions too easily can be overlooked.

Severe Collateral Consequences

The sentence and collateral consequences[11] can be quite different depending on which crime is found to have been committed. Therefore, a lawyer also is needed to help the accused person sort out the implications of plea bargains offered by the prosecutor.

This is no small matter. In the years since the *Argersinger* decision, the collateral consequences that can result from any conviction, including a misdemeanor conviction, have expanded significantly. These consequences can be quite grave. The defendant can be deported,[12] denied employment, or denied access to a wide array of professional licenses.[13] A person convicted of a misdemeanor may be ineligible for student loans and even expelled from school.[14] Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family.[15] Fines, costs and other fees associated with convictions can also be staggering and too frequently are applied without regard for the ability of the defendants to pay the assessed amounts.[16]

Overcriminalization

The most pervasive problem to the entire misdemeanor court system is the overcriminalization of crimes that are not a risk to public safety. The need to reduce caseloads to ensure that indigent defendants across the country receive competent representation is obvious, and overcriminalization is an impediment to that reduction.

During the course of our study, defenders and judges across the country complained that misdemeanor dockets are clogged with crimes that they believe should not be punishable with expensive incarceration. Right now, taxpayers expend on average $80 per inmate per day[17] to lock up misdemeanants accused of things like turnstile jumping, fish and game violations, minor in possession of alcohol, driving with a suspended license, pedestrian solicitation, and feeding the homeless. These crimes have utterly no impact on public safety, but they have a huge impact on state and local budgets across the country.

- The offense of sleeping in a cardboard box is criminalized in New York under the New York City Administrative Code § 16-122(b). It is punishable by a fine of not less than $50 or more than $250, imprisonment for not more than 10 days, or both.[18]

- It is also a crime in New York to occupy more than one seat, sleep, or litter on a subway.[19] Each of these crimes is punishable by a fine of up to $25, imprisonment for not more than 10 days, or both.[20]

- The city of Las Vegas prohibits a number of activities in city parks as misdemeanors, including hitting golf balls, the use of metal detectors, and feeding the homeless.[21]

A number of defenders explained that their courts' dockets are clogged with these crimes that defenders and judges alike think should not be punishable by jail.

Increasingly, civil infractions and diversion is seen as a practical alternative to full criminal court prosecution of minor offenses. The American Bar Association has urged "federal, state, territorial and local governments to develop, and to support and fund prosecutors and others seeking to develop, deferred adjudication/deferred sentencing/diversion options that avoid a permanent conviction record for offenders who are deemed appropriate for community supervision[.]"[22]

Lack of Counsel

Despite the clear ruling by the U.S. Supreme Court that persons accused of misdemeanors have a right to court-appointed counsel, a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them. A Bureau of Justice Statistics Special Report in 2000 cited a survey of jail inmates conducted in 1989 and 1996. In the survey, 28.3 percent of jail inmates charged with misdemeanors reported having had no counsel.[23]

Documentation and reports from across the country confirm the frequency with which the right to counsel is completely disregarded in misdemeanor courts:

- **TEXAS:** "Three-quarters of Texas counties appoint counsel in fewer than 20 percent of jailable misdemeanor cases, with the majority of those counties appointing counsel in fewer than 10 percent of cases. The vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas."[24]

- **CALIFORNIA:** In Riverside County, California, more than 12,000 people pled guilty to misdemeanor offenses without a lawyer in a single year.[25]

- **MICHIGAN:** "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."[26]

It is indefensible that, despite *Gideon, Argersinger* and *Shelton,* a significant percentage of defendants in misdemeanor courts do not have a lawyer to represent them. The U.S. Supreme Court has, time and again, acknowledged that defense counsel is an integral part of the adversary system and necessary to ensure accurate outcomes in court. The absence of counsel in misdemeanor cases fundamentally undermines the fairness and reliability of the criminal justice system. Appointment of counsel should be automatic for any defendant who appears without counsel until it is demonstrated through a fair and impartial eligibility screening process that the defendant has the financial means to hire an attorney to represent him or her in the matter charged.

Counsel must be appointed to any defendant who is financially unable to hire counsel.[27] In other words, if a person cannot afford to hire an attorney without substantial financial hardship, counsel should be appointed.[28] Substantial hardship should be determined by looking at the typical cost of hiring counsel for the type of charge the defendant is facing. Moreover, the individual's ability to pay must not only assess his or her income and available resources, but also his or her expenses, including family support obligations and debts.[29]

Staggering Caseloads

If an indigent person is lucky enough to be appointed counsel, the attorney may be too overwhelmed by her caseload to adequately defend the client. No matter how brilliant and dedicated the attorney, if the attorney is given too large a workload, he or she will not be able to provide clients with adequate and appropriate assistance.

In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. This process is known as "meet-and-plead" or plea at arraignment/first appearance. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, "legal advice" often amounts to a hasty conversation in the courtroom or hallway with the client. Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant's case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken.

The National Advisory Commission (NAC) on Criminal Justice Standards and Goals set the following caseload limits for full-time public defenders: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals.[30] Established more than 20 years ago, these standards have withstood the test of time as a barometer against which full-time indigent defender caseloads may be judged.

Similarly, in 2007, the American Council of Chief Defenders ("ACCD") issued a "Statement on Caseloads and Workloads" recommending that defenders handle no more than 400 misdemeanors per year.[31] Caseloads should never surpass the maximum caseload standards. In fact, there are a variety of reasons – for example, travel distance to court and supervisory duties – that caseloads should be lower than the standards propose.

Despite these standards, across the country, lawyers who are appointed to represent people charged with misdemeanors have caseloads so overwhelming that they literally have only minutes to prepare each case. The standards are disregarded and, in some instances, the maximum caseload is exceeded by five-hundred percent:

- The acting director of the New Orleans public defender office reported that part-time defenders are handling the equivalent of 19,000 cases per year per attorney, which literally limits them to five minutes per case.

- In at least three major cities, Chicago, Atlanta, and Miami, defenders have more than 2,000 misdemeanor cases each per year.[32]

- According to a response to the survey, in Dallas, Texas, misdemeanor defenders handle 1,200 cases per year.

- One attorney working in federal magistrate court in Arizona reported in a survey response that misdemeanor attorneys there carry 1,000 cases per year.

- In response to the survey, one Tennessee defender reported that the average misdemeanor caseload per attorney in his office was 1,500 per year. Two other defenders in Tennessee reported handling 3,000 misdemeanor cases in one year, which is 7.5 times the national standards.

- In Kentucky, the defenders were assigned an average of 436 cases per lawyer in fiscal year 2007, of which 61 percent were misdemeanors.[33] In other words, each defender had 170 felonies, which is more than a full caseload for one attorney, *plus* 266 misdemeanors, which by itself is two-thirds of a full-time caseload under the national standard.

- An attorney from Utah reported that misdemeanor public defenders in that state carry caseloads of 2,500.

- In 2006, the four defenders in Grant County, Washington, misdemeanor court averaged 927 cases each.[34]

Nearly 70 percent of the survey respondents said that the caseload standards and limitations are not observed in their jurisdiction. Moreover, some of the respondents who noted an applicable standard referred not to a standard in their jurisdiction, but to the NAC or NLADA recommendations. Sixty-three percent said there was no limit by internal office policy.

A lawyer who takes three weeks of vacation and 10 holidays a year has 47 weeks available to work for clients. If the lawyer never takes a day of sick leave and works 10 hours a day, five days a week,[35] the attorney's schedule would only allow about one hour and 10 minutes per case if the lawyer had a caseload of 2,000 cases per year. A lawyer with a caseload of 1,200 would have less than two hours to spend on each case.

The time per case has to cover the client interview, talking with the prosecutor, reading police reports and other relevant discovery, conducting legal research and factual investigation, preparing for court, writing motions and memoranda, including sentencing memoranda, and attending court hearings. That leaves no time for training, reading new appellate cases, or attending meetings at the courthouse or the local bar association related to misdemeanor practice.

Ethical Proscriptions

In most state ethical rules, as in the Model Rules of Professional Conduct, the very first substantive rule states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[36] A number of ethical opinions have concluded that if her caseload is threatening her ability to competently defend current clients, a public defender must refuse to accept further cases. Additionally, if refusing future cases is insufficient, the public defender has a duty to seek to withdraw from existing cases to ensure competent representation for other defendants.

More recently in 2006, the ABA issued a similar ethics opinion, finding:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being

> assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. … [L]awyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

ABA Ethics Opinion 06-441 (2006).[37] The ABA Opinion further concluded that if a supervisor fails to relieve an individual defender of an overwhelming caseload, the individual defender must pursue the matter further, including seeking relief directly from the court.[38] Thus, all persons representing indigent defendants should be subject to caseload limits that take into account the unique nature of the jurisdiction and its misdemeanor practice and, under no circumstances, exceed national standards.

To avoid a breach of the attorney's ethical duty, a defender office or individual defender confronting an excessive caseload is obligated to move the court to cease appointment of new cases and, if necessary, move to withdraw from existing cases.[39] In the past few years, a number of public defender offices have successfully petitioned courts to reduce their caseloads to prevent violations of the attorneys' ethical obligations and ineffective assistance. These cases provide ample precedent for the duty of defenders to reduce caseloads to prevent breaches of their ethical obligations.

Caseload Standards in Practice

A number of defender offices successfully set and maintain caseload standards. The Defender Association in Seattle, Washington, for example, maintains a caseload maximum of 380 cases per year per attorney in the Seattle Municipal Court. This limit is imposed both by city ordinance, which the Defenders helped to draft, and by collective bargaining agreement.[40] Similarly, the King County District Court lawyers have an annual ceiling of 450, and the county budgeting process is based on that number. The Defender Director noted that in the last several years her office has managed to keep the district court caseloads lower than the 450 case credit ceiling.[41]

In Massachusetts, the Committee for Public Counsel Services uses assigned counsel to handle most of its misdemeanor cases. The lawyers are limited to 300 cases a year and "[a]ny counsel who is appointed or assigned to represent indigents within the private counsel division is prohibited from accepting any new appointment or assignment to represent indigents after he has billed 1,400 billable hours during any fiscal year."[42]

In Wisconsin, caseload limits for public defenders are set by statute.[43] The standards were, in part, based on a case-weighting study conducted in the early 1990s by The Spangenberg Group.[44] The statute acts as a "safety-valve."[45] When caseloads reach the standards set forth in the statute, the public defender can obtain relief, and overflow cases are assigned to private counsel by the courts.

To the extent misdemeanor offenses carry a possibility of incarceration, the legislative body with responsibility for funding the public defender program must appropriate funds that permit defenders to maintain reasonable caseload limits. Funding should be based on estimates of the number and types of cases the program is expected to handle in the upcoming year, with the expectation that each defender will have a caseload appropriate for the jurisdiction while not exceeding national standards.[46] In the event that the caseload increases, the program should be permitted to seek supplemental funds, or be permitted to stop accepting cases in order to maintain appropriate caseloads.

Lack of Performance Standards

Performance standards serve to guide a defense attorney through every step of litigating a criminal case. For example, national performance standards address preparing and conducting the initial client interview, preparing for arraignment, conducting investigations, obtaining discovery, filing pretrial motions, negotiating with the prosecutor, preparing for trial, conducting *voir dire*, making opening statements, confronting the prosecution's case, presenting the defense case, making closing statements, drafting jury instructions, and preparing post-trial motions.[47]

While each step need not be undertaken in every case, the standards set out what steps should be considered by the defense attorney, how the attorney should evaluate whether the step is necessary, and, if the attorney decides the step is necessary, how the attorney should proceed. As one set of state standards notes, "These standards are intended to serve as a guide for attorney performance in criminal cases at the trial, appellate, and post-conviction level, and contain a set of considerations and recommendations to assist counsel in providing competent representation for criminal defendants."[48]

Enacting performance standards establishes an expectation about the thought process that will be used to evaluate the case of each accused defendant. They also serve to synthesize the ethical obligations with the actual practice of public defense, and provide support for defenders when they seek continuances or caseload reductions in order to ensure that all clients receive adequate representation. The absence of standards too often has the opposite effect of confirming that there should be no expectations with regard to services. The lack of standards can lead to excessive caseloads, inadequate compensation, and ineffective representation.

Lack of Supervision and Training

As in other professions, before undertaking something independently, lawyers should be supervised. Supervision is critical to ensuring that attorneys just out of law school, new to the jurisdiction, or just starting to practice criminal law, do not make a mistake. For this reason, the American Bar Association's Ten Principles of a Public Defense Delivery System require defense counsel to be "supervised and systematically reviewed for quality and efficiency."

Supervision of misdemeanor defenders is sorely lacking, and, often, performance reviews are non-existent. Many defenders report that supervision in their offices is informal. One former Florida public defender noted that, officially, there were two senior attorneys assigned to supervise the approximately 30 misdemeanor attorneys in the office. However, the supervising attorneys had active felony caseloads. If a misdemeanor lawyer wanted assistance, he or she had to seek out a senior attorney and ask for assistance. She noted that,

when one did this, the attorneys were happy to help when they could. When asked about a supervisor coming to court with her, the defender said, "Occasionally you could get a senior public defender to come with you if you needed to pressure the prosecutor to offer a plea."

Appropriate training is critical to law practice, regardless of level. Misdemeanor practice, like felony practice, involves trials. To be effective, lawyers must understand, among other things, how to conduct a direct examination and a cross-examination of a witness, how to navigate the rules of evidence, how to give an opening and closing argument, and how to authenticate evidence. Attorneys representing clients in driving while intoxicated cases need to understand the forensic evidence, such as how breath tests work, to be able to assess whether there is an appropriate challenge to the test, and how to bring such a challenge. And, in any number of crimes, defenders need to understand police identification procedures and the science behind eyewitness identification in order to understand the reliability of the evidence offered against their clients. Attorneys also need to understand sentencing options, including, for example, what is involved in domestic violence treatment, to be able to advise and advocate effectively for their clients.

CONCLUSION

The problems of misdemeanor courts, and their solutions, are related and interdependent. It is unlikely that the adoption of any one recommendation alone will solve the problem. But viewed holistically, implementing caseload standards along with the decriminalization of offenses that are not a risk to public safety, will dramatically improve the functioning of misdemeanor courts, and ensure that all defendants receive justice, regardless of the seriousness of the crime with which they are charged, and regardless of socioeconomic, racial, or ethnic background.

The Federal government can play a vital role in this area by ensuring that state law enforcement and related funding is balanced with indigent defense funding. Funding only the investigative and prosecution functions – which has been the historic practice – fosters harmful imbalances in state systems and undermines the search for the truth, public safety, and our system of justice. Among the alternatives to consider is whether existing justice grant programs should be amended to require more equitable grant-making determinations.

Aside from the crisis facing many state misdemeanor courts, our study revealed another fundamental problem: there is no central repository for the collection, analysis and dissemination of public defense data. The United States Department of Justice should be required to fill his void by annually collecting and publishing data on, among other things, state indigent defense expenditures, caseloads by provider and case types, and the structures of state and local indigent defense systems.

NACDL further believes that the issue of overcriminalization, as it pertains to the federal criminal code, warrants this Committee's attention. Hearings on this problem and a bipartisan effort to rein in the federal criminal code might help lead the way for similar state efforts.

[1] National Center for State Courts, 2007 Criminal Caseloads Report at 45, *available at* http://www.ncsconline.org/D_Research/csp/2007_files/Examining percent20Final percent20-percent202007 percent20- percent207 percent20- percent20Criminal.pdf (last visited Mar. 2, 2009).

[2] Other experts have presented similar estimates. Testifying in Congress on June 25, 1997, Chief Judge George P. Kazen of the U.S. District Court for the Southern District of Texas stated that in 1996 there were 9.4 million misdemeanors filed in state courts. *See* Transcript, House Judiciary Committee Hearing (June 25, 2007), *available at* http://commdocs.house.gov/committees/judiciary/hju43386.000/hju43386_0f.htm (last visited Mar. 2, 2009).

[3] The volume of misdemeanors in federal court is much lower than in state court, but it is growing. A recent federal court newsletter reported: "The Border Patrol has proposed filing 26,000 petty and misdemeanor offenses a year in the Tucson division at this time, or 100 per work day added to the court's normal daily docket. Ultimately, the goal of the Border Patrol is to prosecute an additional 700 defendants a week, or 36,000 new cases a year." *Federal Courts Hit Hard by Increased Law Enforcement on Border*, THE THIRD BRANCH (July 2008).

[4] Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHICAGO SUN TIMES, (July 24, 2006); Erik Eckholm, *Citing Workload, More Public Defenders Are Refusing Cases*, N.Y. TIMES (Nov. 8, 2008) (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor attorneys in 2006-2007. By the 2006-2007 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

[5] Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-69 (1968) (offering anecdotal evidence that plea bargaining induces innocent defendants to plead guilty); *see also* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practice in the Federal Courts*, 89 HARV. L. REV. 293 (1975).

[6] *See, e.g.*, John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants*, 126 U. PA. L. REV. 88 (1977).

[7] *Cf. id.* at 96-97 (noting that an innocent defendant might plead guilty because of: "the disparity in punishment between conviction by plea and conviction at trial; ... a desire to protect family or friends from prosecution; ... the conditions of pretrial incarceration; ... desire to expedite the proceedings, among other reasons").

[8] *See, e.g.*, *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Smith v. Illinois*, 380 U.S. 129 (1968).

[9] *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 117 (1970). Some states provide for a jury trial in all cases in which a jail sentence is possible. *See, e.g.*, CAL. PEN. CODE § 689 (2008).

[10] 407 U.S. 25 (1972).

[11] "The term 'collateral sanction' means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence." *Collateral Sanctions and*

Discretionary Disqualification of Convicted Persons, American Bar Association Criminal Justice Section Standards, Standard 19-1.1.

[12] For a summary of New York law concerning criminal convictions and deportation, *see* Manucal Vargas, *Immigration Consequences of New York Criminal Convictions, available at* http://blogs.law.columbia.edu/4cs/immigration/ (last visited Mar. 16, 2009).

[13] *See* Clyde Haberman, *Ex-inmate Denied Chair (and Clippers)*, N.Y. TIMES (Feb. 25, 2003) at B1; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999) (noting that professional licenses for which ex-offenders can be ineligible "range from lawyer to bartender, from nurse to barber, from plumber to beautician").

[14] *See* Editorial, *Marijuana and College Aid,* N.Y. TIMES (Nov. 2, 2007) at A26.

[15] Most collateral consequences are established by state and local law, and thus the impact of a conviction varies widely by jurisdiction. There are a couple of guides that index the collateral consequences for specific jurisdictions. The New York State Unified Court System, in conjunction with Columbia University, created a Web site that summarizes collateral consequences in New York State. The Web site, Collateral Consequences of Criminal Charges – New York State, is hosted by Columbia University and is *available at* http://www2.law.columbia.edu/fources/ (last visited Mar. 16, 2009). The Washington Defender Association publishes a guide for defenders entitled *Beyond the Conviction, available at* http://www.defensenet.org/publications.byond-conviction (last visited Mar. 2, 2009).

[16] *See* Bridget McCormack, *Economic Incarceration*, WINDSOR Y.B. ACCESS TO JUST. 25, no. 2, 223-46 (2007).

[17] Pew Center on the States, *One in 31: The Long Reach of American Corrections,* The Pew Charitable Trusts (March 2009), at 12.

[18] *Betancourt v. Bloomberg*, 448 F.3d 547, 554 (2d Cir. 2006), *cert. denied* 549 U.S. 1034 (2006) (upholding arrest for sleeping in a cardboard box against constitutional vagueness challenge).

[19] *See* 21 N.Y.C.R.R. § 1050.7; *see also Man Hauled Off by Cops for Using 2 Subway Seats*, WORLD NET DAILY (July 19, 2003), *available at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=33662 (last visited Mar. 2, 2009).

[20] 21 N.Y.C.R.R. §1050.10.

[21] Las Vegas City Code § 13.36.055. Orlando and other Florida cities have similar laws against feeding the homeless. *See* AP, *In Orlando, a Law Against Feeding Homeless and Debate Over Samaritans' Rights*, Associated Press (Feb. 3, 2007), *available at* http://www.iht.com/articles/ap/2007/02/04/america/NA-FEA-GEN-US-Do-Not-Feed-the-Homeless.php (last visited Mar. 16, 2009). The same AP article reported, "In Fairfax County, Virginia, homemade meals and meals made in church kitchens may not be distributed to the homeless unless first approved by the county. … 'We've seen cities going beyond punishing homeless people to punishing those trying to help them, even though it's clear that not enough resources are being dedicated to helping the homeless or the hungry,' said Maria Foscarinis, Executive Director of the National Law Center on Homelessness and Poverty, a non-profit in Washington, D.C." *See also* National Law Center on Homelessness and Poverty, *Feeding Intolerance* (Nov. 2007), *available at* http://www.nlchp.org/content/pubs/Feeding_Intolerance.07.pdf (last visited Mar. 16, 2009).

[22] ABA Commission on Effective Criminal Sanctions Report I: Alternatives to Incarceration (Feb. 2007), *available at* http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/ReportI.PDF.121306.pdf.

[23] Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, NCJ 179023 (Nov. 2000) at 6, Table 13. In fiscal year 1998, 38.4 percent of people charged with misdemeanors federal court did not have counsel. *Id.* at 3, Table 2.

[24] Texas Fair Defense Project Web site, http://www.fairdefense.org/about.php (last visited Mar. 16, 2009).

[25] National Legal Aid and Defender Association, *Evaluation, Report & Recommendations, Riverside County Public Defender* (Dec. 2000). Since the publication of the NLADA report, Riverside County has changed its practices.

[26] National Legal Aid and Defender Association, *A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis* (June 2008), at 15, *available at* http://www.mynlada.org/michigan/michigan_report.pdf (last visited Mar. 16, 2009).

[27] ABA Criminal Justice Standards, Providing Defense Services, Std. 5-7.1 and Commentary:

> Counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship. Counsel should not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

[28] *See id.*

[29] *See, e.g.* Rev. Code of Wash. 10.101.020 (2)

> In making the determination of indigency, the court shall also consider the anticipated length and complexity of the proceedings and the usual and customary charges of an attorney in the community for rendering services, and any other circumstances presented to the court which are relevant to the issue of indigency. The appointment of counsel shall not be denied to the person because the person's friends or relatives, other than a spouse who was not the victim of any offense or offenses allegedly committed by the person, have resources adequate to retain counsel, or because the person has posted or is capable of posting bail.

[30] A number of states also have established caseload standards. *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Keeping Defender Workloads Manageable* (Jan. 2001), *available at* http://www.ncjrs.org/pdffiles1/bja/185632.pdf (last visited Mar. 2, 2009).

[31] Statement *available at* http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDCASELOADSTATEMENTsept6.pdf (last visited Mar. 2, 2009).

[32] Abdon M. Pallasch, *Call to Limit Cases Amuses Public Defenders*, CHI. SUN TIMES (July 24, 2006), at 18; Erik Eckholm, *Citing Workload Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), at A1 (noting Miami misdemeanor public defenders have approximately 2,400 cases). Regarding Miami, according to documents filed in court, the defender office in Dade County had 21 misdemeanor

attorneys in 2006-07. By the 2006-07 fiscal year, those attorneys handled 46,888 new cases (2,232 per attorney). By the 2007 calendar year, they handled 50,115 cases (2,386 per attorney).

[33] Kentucky Department of Public Advocate, *Realizing Justice, Defender Caseload Report Fiscal Year 2007*, at 5, *available at* http://apps.dpa.ky.gov/library/DefenderCaseloadReport07.pdf (last visited Mar. 2, 2009).

[34] Grant County's public defense services have been under the supervision of the court system following the settlement of a lawsuit alleging systemic deficiencies in felony representation. The caseload information is derived from monthly reports to the county commissioners by the attorney who supervises the defense contractors pursuant to the settlement. Reports were made available through a public disclosure request.

[35] This schedule would require working more than 2,300 hours per year, far in excess of even the billable hours required by large civil defense law firms in most major cities. National Association for Law Placement, *Billable Hours Requirements at Law Firms*, NALP BULLETIN (May 2006) ("Although billable hour requirements ranged from 1,400 to 2,400 hours per year in 2004, most offices reporting a minimum require either 1,800 or 1,900 hours (24 percent and 21 percent of offices, respectively)."). The Washington Defender Association standards recommend 1,650 billable hours per year. *See* Washington Defender Association, Standards for Public Defense Services, Standard Three, Commentary. The Office of Management and Budget (OMB) has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. *Performance of Commercial Activities*, OMB Cir. No. A-76 (Revised) (Aug. 1983), at p. IV-8.

[36] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1; *see also* ARIZ. ETHICAL RULE, Rule 1.1.; ARK. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, Rule 1.1.

[37] ABA Ethics Op. 06-441, *available at* http://www.abanet.org/cpr/pubs/ethicopinions.html#06441 (last visited Mar. 2, 2009). The American Council of Chief Defenders came to a similar conclusion in 2003:

> A chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case. The elements of such representation encompass those prescribed in national performance standards including the NLADA Performance Guidelines for Criminal Defense Representation and the ABA Defense Function Standards. When confronted with a prospective overloading of cases or reductions in funding or staffing which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases.

ACCD Ethics Opinion 03-01 (2003), *available at* http://www.nlada.org/DMS/Documents/1082573112.32/ACCD%20Ethics%20opinion%20on%20Workloads.pdf (last visited Mar. 16, 2009).

[38] *See id.* at 6.

[39] *See, e.g.*, ABA Ethics Opinion 06-411, *supra.*; ACCD Ethics Opinion 03-01, *supra.*

[40] *See* City of Seattle Ordinance 121501 (June 14, 2004).

[41] Even though the 380 level is one of the lowest in the country, some defenders feel it still is too high. A lawyer from one of the other King County defender offices noted that the 380 caseload standard did not allow effective representation, and stated in her survey response: "The caseload standard is too high, and it results in us very often not being able to do as much for each client as we'd like to do." She added that the greatest challenge in the practice is "doing justice to each case when there is such an overwhelming caseload."

[42] MASS. GEN. LAWS ANN., Ch. 211D, §11 (2008).

[43] WIS. STAT. ANN. § 977.08(bn) (2008).

[44] *See Keeping Public Defender Caseloads Manageable*, *supra*, at 13-14.

[45] *Id.* at 14.

[46] *See* Recommendations – Excessive Caseloads, *supra*.

[47] *See generally* NLADA Performance Guidelines for Criminal Defense Representation, *supra*.

[48] Nevada Indigent Defense Standards of Performance, Standards 1(b), *available at* http://www.nvsupremecourt.us/documents/orders/ADKT411AdoptStandards.pdf (last visited Mar. 16, 2009).

Mr. SCOTT. Ms. Billings?

TESTIMONY OF RHODA BILLINGS, CO-CHAIR, NATIONAL RIGHT TO COUNSEL COMMITTEE, FORMER JUSTICE AND CHIEF JUSTICE OF THE NORTH CAROLINA SUPREME COURT, LEWISVILLE, NC

Judge BILLINGS. Good morning, Chairman Scott and Chairman Conyers and distinguished Members of the Subcommittee. Thank you for the opportunity to comment on the issues that are raised by the report of the National Right to Counsel Committee, of which I am a member.

Having listened to the statements of the Members of the Subcommittee and of my co-witnesses, I have decided to depart completely from my prepared remarks, in part because I think everyone here expresses the same agreement that there is a serious problem, a real crisis, in indigent defense across America. A system of criminal justice that does not convict the guilty fails society because it leaves on the streets those people who have committed crimes and will probably commit them in the future. But a system of criminal justice that convicts the innocent, does not exonerate the innocent, is totally contrary to our entire American view of justice.

And we know that people are being convicted who are innocent of the crimes. The rate at which our citizens are being incarcerated or, even if not incarcerated, are given criminal records that interfere with their ability to find employment and earn a living for themselves and their dependents, a rate that is the highest of any nation in the world, is a national disgrace.

I have some statistics on a report from the Pew Center on the States and their report released a little over a year ago entitled, "More than One in 100 Adults Are Behind Bars". That report also deals not just with the ones who are behind bars but those who are under some present supervision in the form of parole, probation or incarcerated.

In my state of North Carolina, one in 38 adults are under that kind of control. In the state of Virginia, it is better; it is one in 46 adults. In the District of Columbia, it is one in 21. In New York, it is one in 53. In Texas, it is one in 22. Those are people that society has either taken away their liberty or has given them a mark that prevents them from gaining employment.

Are we as a Nation that bad? I don't think so. What we have had is an explosion in the kinds of behaviors that are made criminal. What we have had is an explosion in the length of sentences that are imposed on citizens who are convicted of crimes. And what we have had is a system that does not protect from a finding of guilt those people who are wrongly accused.

Yes, there are dedicated criminal defense lawyers across this state and this Nation. But, as Bob Johnson told you, we don't have enough of those people, and the people who are dedicated to the defense function are burned out in a very short period of time. They have so many cases; they can't do a good job no matter how dedicated they are because they simply don't have the resources. They don't have the time. They finally give out of energy.

I am proud of what North Carolina has done, and Tye has been a tremendous asset to the state and was our first director of the Office of Indigent Defense Services—set in place a number of policies and a number of studies that have, I think, moved North Carolina very far ahead. But we are a long way from having solved the problem, because it is, in large part, a problem of having the money and the time to give to those people who are providing the defense the things that they need in order to succeed—the training.

In my state—which you will notice that my experience as a lawyer was that the first time I was in court, shortly after I graduated from law school, I defended a person charged with murder. My husband tells and in my statement I tell about my husband representing a defendant who was charged with common law robbery, something that has potential sentence of 20 to 30 years. The judge pressured, pressured, pressured him to accept a plea of guilty. His client accepted a guilty; he refused to.

That pressure still comes from some judges. We have to stop it. The judge says, "If you don't accept the plea, I will extend the sentence to be a maximum for whatever he is sentenced for or convicted of." And he was convicted of simple assault in about 30 days. The judge says, "Okay, now it is time for me to set your fee—4 days of trial, $75." My husband turned and walked away and said, "I didn't try this case for the money, your honor. You can keep your $75."

Those are the kinds of things that we see throughout the system time after time after time. What we are here today for is to talk about what can we do about it. All governments are struggling with budgets. All governments are trying to spend their money wisely. How do we get the attention of state legislators who are struggling with budget to see that this is an important priority?

And there is where I think, in addition to the other suggestions that have been made, that we can have the Federal Government provide leadership in showing the states, bringing it to their attention, the problems that we have in indigent defense and assisting in getting them to recognize the problem and that this is a more serious problem than some of the things that they are using their money to support.

Thank you.

[The prepared statement of Ms. Billings follows:]

PREPARED STATEMENT OF RHODA B. BILLINGS

STATEMENT OF RHODA B. BILLINGS

Professor Emeritus, Wake Forest University School of Law
Former Chief Justice of North Carolina

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Hearing on

INDIGENT REPRESENTATION: A GROWING NATIONAL CRISIS

June 4, 2009

STATEMENT BEFORE THE SUBCOMMITTEE ON CRIME,

TERRORISM, AND HOMELAND SECURITY
June 4, 2009

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence

"We, the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity do ordain and establish this Constitution for the United States of America." Constitution of the United States of America, Preamble

"No person shall . . . be deprives of life, liberty, or property, without due process of law." Constitution of the United States of America, Amendment V.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Constitution of the United States of America, Amendment VI.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Constitution of the United States of America, Amendment XIV.

An often-touted founding principle of our nation is that we are a free people, that we cherish liberty, for ourselves and others.

To ensure that liberty, we established an adversarial system of criminal justice in which accused persons are presumed to be innocent and the government cannot deprive a person of liberty unless an unbiased jury of the person's peers is convinced by the evidence, beyond a reasonable doubt, that the accused person in fact is guilty.

To make the adversarial system work, the accused has a Federal Constitutional right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense".

Why, then, does the United States, the "Land of the Free", incarcerate more people than any other country in the world?[1] Why were more that 2.3 million (one in one hundred) adult Americans in our prisons and jails in 2008?[2] Why, as of June 2006, did one of every six Americans over age 16 have a criminal record?[3]

Obviously, the answers are many and complicated, not the least of which is the fact that in recent decades we, as a society, have criminalized more and more behaviors and imposed mandatory sentences for many offenses, causing inmates to serve longer time in prison.

But a contributing factor surely is our failure, as a nation, to make our adversarial system work as it is intended to work.

Any competition - and an adversarial system of justice is indeed a competition - produces a fair result only if the competitors compete under rules in which no one is placed at an unfair disadvantage. An adversarial justice system in which one side is represented by trained and experienced lawyers, assisted by state-paid investigators (police, sheriffs, state and federal agents) and expert witnesses and the other side has either no legal representation at all or representation that is underpaid, overworked, hampered by lack of training and support personnel, and has little or no investigative resources or access to expert witnesses, is not likely to produce a fair result.

The Report of the National Right to Counsel Committee of The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, points out how the adversarial system in many of our states fails to provide competent lawyers and the tools for lawyers

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[1]. *The Pew Center on the States, One in 100; Behind Bars in America 2008 3 (2008).*

[2]. Id.

[3]. Id.

necessary to make their criminal justice systems worthy of the claim that the American criminal justice system is the best in the world.

The Report cites areas of the country where criminal defendants are pressured to waive the right to counsel and plead guilty, despite a claim of innocence, in order to obtain pre-trial release so they can return to work to support themselves and their dependents; states where, even if a lawyer is appointed, investigative services are completely or nearly completely unavailable; states where a defense attorney is not appointed for days or weeks after a suspect is arrested, and innocent persons charged with crime lose their jobs as they sit in jail awaiting trial; or places where, because of backbreaking caseloads or inadequate compensation, appointed attorneys do not contact and confer with their clients until the day of trial and do little or no pretrial investigation.

Gideon v. Wainwright[4] was decided the year I entered law school - 1963. When I graduated from law school three years later, unlike the federal government, that required lawyers to represent indigent defendants without pay, North Carolina was complying with Gideon to the extent that the state paid lawyers who were appointed to represent persons charged with serious felony offenses. However, my experience as appointed counsel was altogether too typical. As soon as I was sworn in to practice, I was put on the list for appointed counsel and assigned to my first case - a jury trial representing an elderly, indigent African-American man charged with murder. While he admitted to shooting the victim, he claimed that the shooting was in self defense. With no one else to "investigate" the case, I did what I could to locate and talk with witnesses and present my client's defense, even though the district attorney tried to intimidate me by telling me that I had violated ethical rules by talking with "his" witnesses without his permission. Fresh out of law school, I was

[4]372 U.S. 335 (1963).

not competent to preserve my client's rights in a jury trial. He was convicted of manslaughter and died in prison.

My husband, who also is a lawyer, often tells the story of representing a client charged with common law robbery, a felony punishable by imprisonment for up to 20 years. The judge kept insisting throughout the trial that the defendant should accept a plea offer made by the district attorney and, in fact, said that if he did not accept the plea and was found guilty, the judge would impose the maximum sentence. In fact, the defendant was found guilty - of simple assault. The judge kept his word; he sentenced the defendant to the maximum, 30 days in jail. Of course, at that time judges also set the attorney fees, and the amount was totally within the judge's discretion. After four days of trial, the judge, appearing upset that he had not been able to complete his week's court work early, set the total fee at $75. Risking contempt, my husband replied, "Judge, you can keep your $75.00. I didn't try this case for the money."

In many states, little has changed over the last 40- plus years. There are no standards that a lawyer must meet to be eligible for appointment to represent persons charged with serious crimes. Little or no investigative assistance is available. Judges control compensation for appointed defense counsel and thus, if they are so inclined, may attempt to use that power to exercise control over the attorney.

But the Report also reveals some encouraging trends. A number of states have undertaken to provide state funding for criminal defense, instead of relying on inconsistent patterns of financial support from the counties, although in many of those states, the pay is woefully inadequate. In addition, several states have either established or are in the process of establishing boards or commissions, like the ones recommended in the Report, with the responsibility for overseeing the

delivery of legal assistance to indigent criminal defendants.

Fortunately, since 1966 and my first appearance in court, my state of North Carolina has made significant changes. It is one of those states with an Indigent Defense Services Commission, and I have served on that Commission for the past eight years. We feel that we have made great strides in fulfilling the promise of the Sixth Amendment Right to Counsel as interpreted in Gideon and Argensinger v. Hamlin[5], although we know we still have a long way to go.

Since their creation in 2001, the Office of Indigent Defense Services and the Indigent Defense Services Commission have:

1) Expanded the number of counties with Public Defender Offices.

2) Established uniform hourly rates across the state for payment of private assigned counsel.

3) Established guidelines for eligibility for appointment to represent indigent criminal defendants and juveniles.

4) In conjunction with the School of Government, provided numerous affordable CLE programs for attorneys in Public Defender offices and private assigned counsel.

5) Established listservs to provide networking for Public Defenders and private assigned counsel and on which training materials, performance guidelines, trial manuals, and other materials are available.

6) Entered into contracts for private counsel to represent indigent defendants in situations where establishment of a Public Defender's Office would not be cost effective.

7) Obtained funding for investigators in Public Defender offices and for private assigned counsel when needed.

8) Obtained funding for expert witness availability in those cases, such as insanity defenses or capital sentencing hearings, when expert testimony is necessary.

9) Assumed responsibility for and expanded the staff of the Capital Defender, who now has the

[5] 407 U.S. 25 (1972) (extended the right to counsel to any case in which a defendant is sentenced to confinement).

responsibility for representing or appointing and providing assistance to lawyers for persons accused of capital murder.

10) Assumed responsibility for and expanded the staff of the Appellate Defender.

11) Established the Office of Juvenile Defender to investigate and assist in meeting the needs of the juvenile justice system, including promulgation of standards of practice, training, and investigation of the accuracy of dispositional orders. Creation of this position was prompted by the 2003 report prepared by the ABA Juvenile Justice Section and the Southern Juvenile Justice Center following an assessment of access to counsel and quality of representation in delinquency proceedings in North Carolina, supported in part by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs of the U.S. Department of Justice.

12) Conducted numerous studies on matters that affect the cost or effectiveness of programs of indigent defense, providing the Commission with information upon which to base decisions, evaluate program effectiveness, and advocate to the legislature or other parts of the criminal justice system for change. Among those are (a) a study of minor offenses for which imprisonment is possible but never imposed, to be used as a basis for urging decriminalization of those offenses and significant cost savings; and (b) a capital case study showing how much money is spent unnecessarily when prosecutors charge as capital homicide cases that eventually are disposed of at a much lower level.

The National Right to Counsel Committee's Report encourages all states to provide state funding for indigent criminal defense and to create a board or commission to oversee all components of indigent defense services. For states that have not yet established such a board or commission, the Report recommends a task force or study commission to gather information and make recommendations for change. This is likely to be a hard sell to legislatures in these difficult economic times. However, our experience tells us that, not only does a well-run state-wide system increases the effectiveness of representation and provide consistent quality across the state, a state-wide system is no more expensive than county funded systems and, in fact, can effect cost savings that are not possible when the delivery of defense services is fragmented. Of course, the overall system will cost more if the state is paying inadequate compensation to defense attorneys and the

board or commission can convince the legislature to appropriate a reasonable amount for those services.

We think the federal government can help the states to fulfill their Constitution responsibility to indigent criminal defendants in a number of ways, and Recommendations 12 and 13 in the Report speak to the federal government's possible role.

Recommendation 12 asks the federal government to establish a National Center for Defense Services to assist state governments to provide quality legal representation to indigent criminal defendants. As the Commentary to that Recommendation states, "The Center's mission would be to strengthen the services of publicly funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data."

Recommendation 13 requests that, until a National Center is established, the Department of Justice provide financial assistance through grants or other programs to conduct research and to provide funding in support of indigent defense. As I mentioned earlier, the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs of the U.S. Department of Justice provided funding for a study by the American Bar Association and the Southern Juvenile Justice Center of access to counsel and quality of representation in delinquency proceedings in a number of states, including North Carolina. The results of that study was the impetus for the North Carolina General Assembly to provide funding for the Office of Juvenile Defender within the Office of Indigent Services. This is the kind of seed money that can move states forward in recognizing a need and meeting their obligations to their most vulnerable citizens.

In the past couple of decades we have had to face the reality that in these United States, we

do, in fact, convict and even execute innocent people. The exonerations that occurred through DNA analysis were not cases in which the defendants did not have lawyers. They usually involved charges of rape or murder - the types of case in which all jurisdictions provide counsel. But if, even with the assistance of counsel for the defense, the system of justice fails to protect the innocent, how much more likely is it that an innocent person facing the power of the state without counsel or with counsel who is poorly trained, distracted by an excessive caseload, unable because of the pressure of too many clients and too little time to investigate adequately, if at all, or is simply not competent, will be found guilty? The skill of a dedicated and trained defense lawyer is especially needed when the identity of the perpetrator of a crime cannot be established by DNA evidence but is dependent upon eyewitness identification, or when the defendant is faced with perjured testimony, a coerced confession, or falsified scientific evidence. Only an advocate effective in cross examination, schooled in motions practices, and a master of evidence and exclusionary rules can defend against a false verdict of guilty. And because, in the absence of DNA evidence, there is no scientific fact that can show that a witness who makes an eyewitness identification is mistaken, if the jury accepts the identification, an appellate court has no basis for overturning the conviction, even if the evidence causes members of the court to have doubts.

Only if we as a society are willing to make a commitment to providing at least as much assistance to exoneration of the innocent as we are to conviction of the guilty can we truly claim to be "one nation, under God, with liberty and justice for all".

Respectfully submitted,

Rhoda B. Billings

Mr. SCOTT. Thank you, and now we recognize ourselves under the 5-minute rule.

Justice Billings, you are not on the supreme court now——

Judge BILLINGS. Correct.

Mr. SCOTT. If counsel was so ineffective, how do you get a final judgment? Why isn't the supreme court overturning convictions on the basis of ineffective counsel?

Judge BILLINGS. There are, I think—I would give two answers to that question. One is that the United States Supreme Court has established a standard for ineffective assistance of counsel.

Mr. SCOTT. And does that mean that that burden has not been met, notwithstanding the fact that you can show that your attorney was asleep during the trial?

Judge BILLINGS. You have to be able to show not only that counsel was ineffective but that, in the absence of that ineffectiveness, the result would have been different. And that is a very difficult thing to show when you don't have the evidence that backs up what—that is you don't have the evidence that would have been presented to the court had counsel been effective.

The other thing, of course, and the other second sort of answer to your question, Chairman Scott, is that the appellate courts really are not able to substitute their judgment for that of the jury. They don't know what evidence was out there but not obtained. And they don't have the ability to say, "Well, I don't believe this witness, who is an inmate who testified that the defendant made a statement confessing his guilt, when in fact that inmate who is the witness against the defendant was only attempting to curry favor so that his sentence might be reduced or he might get some benefit from the state." So there is no way that really the appellate courts can rectify the deficiencies that result from ineffective assistance——

Mr. SCOTT. Well, Justice Billings, let me ask you another question, just a kind of philosophical question. Is a guilty person entitled to a fair trial?

Judge BILLINGS. Yes.

Mr. SCOTT. If you are on appeal and have to show that the result would have been different, that is that there would have been an acquittal—if he is in fact guilty, you find he wouldn't have gotten an acquittal if you had a fair trial. And therefore, how, on appeal, can a guilty person be guaranteed a fair trial if on appeal the question is: Is he guilty?

Judge BILLINGS. Well, we don't know if he is guilty if he was not given a trial in which the——

Mr. SCOTT. But if you can't prove his innocence on appeal, that is that if you found the evidence they would have found that I didn't do it—if he in fact did it.

Judge BILLINGS. The problem, I think—I am not, I guess, maybe I am not quite following the question.

Mr. SCOTT. Well, if they did it—you are on appeal. If they found out—any evidence they find would only confirm the fact that he in fact was guilty.

Judge BILLINGS. But, you see, the appellate court doesn't get additional evidence. The appellate court——

Mr. SCOTT. Well, whatever evidence they got, it wouldn't have been a different—it would not have been a different result. And therefore, under the present system, a guilty person really isn't entitled to a fair trial, because when he gets on appeal, he can't prove his innocence; he can't prove that it would have been any different because if he had gotten a fair trial, he probably would have been found guilty.

Judge BILLINGS. That is presupposing that the person is guilty, but we don't know until we have had a fair trial whether he is guilty.

Mr. SCOTT [continuing]. That is true. But if he is in fact guilty, according to this scenario, he really isn't entitled to a fair trial because, on appeal, unless he can show some difference, that is he would have been acquitted—he shouldn't have been acquitted; he was guilty.

And so they have a sham trial, he gets on appeal, and he is really in a—and like, you are right, you don't know whether he is guilty or not. So if a guilty person isn't entitled to a fair trial and you get on appeal, an innocent person is stuck with having to prove his innocence.

Judge BILLINGS. Chairman, I would say that everyone is entitled to a fair trial. If, as the result of that fair trial, the person is found guilty, well, absolutely they should suffer the consequences of their guilt.

Now, one of the things that we have seen happening in some of the states—and again making reference to my own state of North Carolina, we have an actual innocence commission that has been put in place as the result of the number of exonerations that we have been seeing, primarily as the result of DNA testing. Now, those commissions are looking back at the question of did this person's—was this person's trial fair and is there other evidence.

Mr. SCOTT. That is to show whether they did it or not, whether they are in fact innocent.

Judge BILLINGS. Where they are in fact.

Mr. SCOTT. And if the person is in fact guilty——

Judge BILLINGS. They would not recommend that it be reviewed further.

Mr. SCOTT. And if a person on appeal cannot represent, as part of the allegation, that I didn't do it—if he in fact did it but just didn't get a fair trial, there is nothing there for him. He is not entitled—a guilty person is not entitled to a fair trial.

Judge BILLINGS. I still say that our Constitution entitles everyone to a fair trial.

Mr. SCOTT. Well, in the present system, there is nothing to guarantee that for a person who is in fact guilty.

Judge BILLINGS. There is nothing to guarantee that a person who is in fact guilty will not be found guilty and punished.

Mr. SCOTT. Even if the trial is not fair, because when he gets on appeal, he did it. So the fact that he got a unfair trial—there is no reversible error for a guilty person being convicted in an unfair trial.

Judge BILLINGS. I cannot say that it is not—there are a lot of cases that are reversed on appeal even though the defendant may be guilty. The appellate process is not to determine guilt or inno-

cence so much as it is to determine whether there was a fair trial. And if some defect in the trial violates the rules, then the appellate courts will reverse and send it back for a fair trial to determine whether the defendant in fact is guilty.

Mr. SCOTT. That is the way it ought to work, but as you have heard, unless you can—on ineffective counsel, you have to show the result would have been different, which only an innocent person can do, not a guilty person. So if you have someone like Mr. Crotzer, who was innocent, he can pursue his case because he was in fact innocent. Had he in fact been guilty and gotten that kind of representation, what would have happened?

Judge BILLINGS. The——

Mr. SCOTT. My time is expired. I have got a bunch of other questions. [Laughter.]

Let me go to the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. The present Chair of the Crime Committee in Judiciary is the finest one that I have ever worked with since I have been on the Committee, which goes back an incredibly long amount of time. But he has a—he also is a psychological student, and he uses reverse psychology in some of his questions, which could confound the normal mind. I am used to it, though. [Laughter.]

I want to commend him for this series of hearings that he has held. This is an enormous subject. And I am not concerned with the media, except there is only one reporter in the Judiciary Committee during this hearing. Chairman Scott made me feel a lot more comfortable when he told me they are all looking at it up in the gallery in their offices. I want to believe that, too. [Laughter.]

And that puts a finger on the problem, doesn't it? This is not a sexy subject. Who wants to listen? Hey, look, let us—look at all the talking heads and drama shows and crime shows and law, how prosecutors bust criminals, all that going on, and here we are talking about a whole history of a serious constitutional problem, and we scrape up one reporter.

And I commend all six of you this morning because nobody—we have been extremely legalistic, and I am so glad that nobody has raised the question of race or racism. I am proud of you. And I am not raising it either; I want to keep this discussion clean of that. But it occurred to one smart-aleck staffer that the reason for most of this is race. So I commend all of you for wanting to do something about it.

We apologize to Rhoda Billings. Her sign should read Chief Justice Rhoda Billings. Since we are putting on she is the former justice, why don't we put on former chief justice? And she has done such—all of you have done such a commendable job.

Professor Luna deserves a hearing on the constitutional questions that he raises. That could be a panel of serious discussion, because I respect your integrity and the way you pose not only the problem but the solution to the problem. All of you have done such a great job.

Now, the question is—and I think it was Malcolm Hunter who put it succinctly—it is not just spending, but how will we revisit the standards and make them workable? I think that is the crux of which I hope our Chair will continue these hearings.

Now, this raises another subject for the Committee. This is one part of the Constitution that is failing to uphold its commitment. I mean, everybody—I walk around with a Constitution in my pocket. This thing is failing; we are failing miserably, and this is the first major effort to redress it.

And so one of the questions then—and we are going to be in contact now; you are part of our extended legislative committee now. There are a lot of—there is so much going on that we could go into this further, but it is a huge undertaking. You could put another Subcommittee—we could create another—he has got so many problems: disparity, the state of the prisons, the fact that many people are further criminalized after they are incarcerated. He has got stacks of stuff.

And so we have got to look at this as effectively as—you have brought in people who have dedicated your careers—Johnson could have—all of you could have gone on into much less trying aspects of the law or the practice of law, and yet you are here. And that is what makes me so very proud of you. We have got a huge job to do, and, when we do it, we make the Constitution believable.

I close with this thought. I keep asking myself how people in this country, the greatest democracy, wealthiest, most powerful that civilization has ever recorded—and yet you have an election and 12 percent of the people even bother to cast a ballot, some of them people who would have had to pay with their lives to try to cast a ballot not that long ago.

And I think that it goes, Professor Luna, into making people believe that this all amounts to something. This is one of the things I am inquiring into. "Why didn't you vote?" "Well, we like you, Conyers; we know you are going to get reelected. And, you know, I was busy, on my way to work. I am being foreclosed on." And so this is what plays a much larger role in the psychological dimension of our citizens who say, "Vote for what?"

We got a prison-to-pipeline system going in nearly every state in the union, and they are not all bad people or sub-Klansmen or people with a fanatical racist attitude. Look, folks, it is just the system, Conyers; all these people we are bringing into Federal court in your city, all punks on the corner, you arrest them one night, there is another group there that are back selling narcotics.

And they will be in—the next week, they will be brought in in chains. And in your heart, you know they are done for. The odds against any of them—and it is not that they are all innocent or that they were framed, but the system goes for—someone said it—overincarceration, overprosecution.

Look, we caught this guy on the corner, and you know what? And with disparity kicking in, another one of his problems, he is going to get the max, first time. Sure, he violated the law, but those of us who make the law have to ask the question: Is this what this country is really all about?

Is there any way, Luna, that we can devise a system that doesn't coddle criminals or allow us to be told that we are soft on crime but yet can understand the dimensions of a community where you got 70 percent of the people unemployed? They talk about a 9-percent unemployment rate. Are you kidding?

And the people that are driving around and looking flashy, they are all violating the law hand over fist and everybody knows it, and so kids know. We have got graduates now that can't find a job. People are saying—and it really hurts—"I am not going to college. What is the diff? I can make as much money without going to college. What do I need a degree for?"

It is incredible that we could have come to this situation, and yet, as you say, we are the primary shareholders in General Motors and at the same time that they are closing plants in Detroit, Hamtramck, Trenton and moving out of the country with billions of taxpayer dollars. So I can't tell you how important your insights are to me and how important this Committee is to me.

Mr. SCOTT. Gentleman from Puerto Rico?

Mr. PIERLUISI. Thank you, Mr. Chairman. I commend you as well.

The first thing I am going to say is that it is so much easier for elected officials to talk about law enforcement as opposed to the rights of the accused, and that is why this is—it is a tough one for many.

But all of us who have been officers of the court know that this is about justice; it is about the adversarial system that we are supposed to have in America. And the way it works is by both sides having access to competent counsel, the prosecution as well as the defense, the accused. Right now, it is clear that this is not working.

And one thing that was mentioned in here—I believe it was, well, both Mr. Johnson and I believe also Professor Luna—is that we talk about funding. Perhaps this is not a matter of spending more money, but we have to also look for a balance in the way that the Department of Justice uses its resources.

There is a wide range of Federal programs assisting prosecutors, assisting police and prevention as well, so we have to then determine ways in which we can use Federal funding to improve the way we go about complying with the sixth amendment. It could be in the area of standards. It was mentioned by Mr. Hall. It could be in the area of innovation and quality, trying to spur that. Perhaps we are talking about formula grant programs. It could be discretionary programs, but we have to be creative.

We have to deal with this. We cannot simply let it continue happening because it ends up with a travesty of justice, like in your case, Mr. Crotzer, and in so many others. I wonder, then, what is the best way of dealing with this from the point of view of the Federal Government and the point of view of limited Federal resources.

So I just throw the question, and I assume that any of you, particularly Mr. Johnson or Professor Luna or any of you, could address it—creative ideas, ways in which we can come up with programs at the Federal level to improve the way that we are handling this, because frankly it is really, really, really disturbing. And it should be disturbing.

Mr. JOHNSON. We will pass it down.

Mr. Chairman, remember, I raised that, and, as you have described, I think it is a very important issue that when you are considering funding some aspect of the state criminal justice system, that there be direction to the Department of Justice, if we are routing it through Justice, that that be parsed to all parts of the sys-

tem, that you can't, as you very accurately recognize, that you can't fund one part of the system and continue to have a system that is going to deliver justice because the other parts have to also come into play.

You can't fund specialty courts unless you are also going to fund the defense aspect of the specialty courts. You can't put enormous amount of money into drug interdiction if you are going to deal with the drug problem through the criminal justice system. You can't just provide that to drug task forces and to prosecutors to prosecute that. You also have to provide funds if you are going to have a system of justice to the defense side, too, so that we can effectively deal with those and perhaps not quite as harshly as we historically have been doing.

Mr. HALL. Mr. Chairman, I would suggest that you look at the Administrative Office of the Courts. They fund the Federal defender system. And the Federal defender employees make as much as the U.S. attorneys make. They are adequately staffed. They have caseload numbers. And when they reach a caseload maximum, they put other people on staff, the same as the U.S. attorney does.

Just look at that system. It is administered throughout the Federal Government by the Judiciary on the defense side, but the Department of Justice has an equal balance through the Federal defender.

The problem is, what happens when it gets down to the state level? You give the money to the states, and they get whatever number of millions of dollars for prosecution; none of that goes for defense. And that just gives another overwhelming advantage to the prosecution. Some part of that money could be delegated to the defense. So you are not spending any more, but you are requiring them to guarantee the sixth amendment right to counsel in these new prosecutions that they are trying to instill.

Mr. LUNA. I would commend Chairman Conyers for his words. And just to add a little—this is to add on to what he said. If you placed a prison wall around North Dakota, South Dakota and Wyoming and counted every person as an inmate, it would not equal the total prison and jail population in America. And only to give—you would have to add American Samoa, Guam and the U.S. Virgin Islands penal colonies for it to get very close. That is the problem is we are looking into obviously indigent defense and, as was said earlier, it is constitutionally required. There is no doubt about that. But unfortunately, it is at the very end of the line.

There is a lot that happens before then to lead to this problem. Overcriminalization is a real problem. The abuse of the criminal justice system, the incentive structures that police and prosecutors have to arrest and to prosecute—those are very troubling in our adversarial system. In terms of what Congress can do, I think there are many things that it can do that are consistent with the Constitution.

I would throw this out. I know this won't be very popular with law enforcement and with the prosecutor's office, but one possibility is to simply end Federal funding and the Byrne Grants, which have, among other things, led to the scandal in Tulia, Texas. And that is a possibility. That is a very easy way to end disparity.

I understand that is probably unlikely, given the constituents and their desires for Federal funds.

I think a way forward that is very plausible is for the Federal Government to be a role model. The Federal criminal code, if you want to call it—and it is no criminal code; it is spread throughout the U.S. Code—contains more than 4,000 different provisions that are punishable as crimes. That is quite simply ridiculous. Mandatory minimums, which are being addressed by Members of this Committee, should be looked at and, I believe, eliminated. You have sentencing guidelines—are absolutely indescribable, truly indescribable, and they should be looked at as well.

And I would advocate your support for Senator Webb's call for a study commission on the criminal justice system as a whole because, again, indigent defense is constitutionally required. Truly, we should be outraged that the states are not meeting their obligations, but it is part of a larger problem as to why, at the end of the day, they are not getting representation.

Mr. PIERLUISI. Can I use a bit more of my time? Actually, I think it expired a moment ago, Mr. Chairman.

Mr. SCOTT. The gentleman's time is expired. The gentleman is given an additional 2 minutes.

Mr. PIERLUISI. Just thought a variation of your proposal on the Byrne Grant could be that you track caseloads. You track what is happening and then you condition this funding upon complying with the constitutional requirement and improving upon your record, tying one thing to another. That could be an avenue.

I wonder, are there recent studies comparing the conviction rates and length of sentences between defendants represented by appointed counsel as opposed to those represented by privately hired attorneys? Are there any recent studies? Because if not, the Federal Government could also—Congress could provide some funding to conduct them. But do you know of any?

Mr. LUNA. I personally don't. Maybe Chief Justice Billings might have heard of something.

Judge BILLINGS. I am trying to remember—and, Tye, maybe you can help—that I think in some of the studies that Margaret Gressens from your staff is conducting that there is some information on that disparity in the study that she did. But I don't have it——

Mr. SCOTT. Which way is the disparity?

Judge BILLINGS. That those who are represented by private counsel, in similar situations, get much shorter sentences, come out with a much better result, but I really can't support this. It is just something that is a memory of something that I have read in an effort that the IDS in North Carolina has conducted, but I can't be sure about it.

Mr. CONYERS. Mr. Chairman, for a moment.

Mr. SCOTT.—Puerto Rico yield?

Mr. PIERLUISI. I yield.

Mr. CONYERS. I would like to put this on the record because I would like—I would like you six to help me develop it. We have had all of you here. I would like to invite some people that may have a different experience and even a different view.

I remember Reed Walters, the district attorney from Jena, Louisiana, in September 3 years ago, who went to a school there and he lectured the students about—that were involved in the protest, and he said: I can be your best friend or your worst enemy; I can take away your lives with a stroke of my pen. I would like Attorney Walters to be a witness at one of these hearings.

I would like to have the U.S. attorney for the Eastern District of Michigan be a witness. And I would like to—I think we should entertain, with the openness of which this Committee operates, people who may have a different—a legitimate different point of view from what has been expressed here. I think it is important that we listen.

There are some people that seriously and honestly believe that locking them up and throwing away the key apply to as many people as we can get our hands on. And I think there ought to be a hearing of that point of view, just to see, get a feel of where we are, Chairman Scott.

Mr. SCOTT. Thank you, the gentleman's time is expired. We will start another round.

And, Mr. Hunter, could you describe the agency that you head right now? Is it a support group or do you provide actual court representation?

Mr. HUNTER. The Center for Death Penalty Litigation is a nonprofit law firm. We actually litigate. We represent clients at trial and——

Mr. SCOTT. Just the death penalty?

Mr. HUNTER. Just for death penalty cases. Prior to that, I was the director of the Office of Indigent Defense Services, which Chief Justice Billings was a commission member, one of my bosses in that, and that was a administrative office that oversaw the provision of indigent defense for people all over North Carolina.

Mr. SCOTT. Now, do you have public defenders, as opposed to court-appointed attorneys?

Mr. HUNTER. We have a mix. We have public defenders in about 40 percent of the state, mainly where we have our larger towns, and then we have an appointed list in our more rural areas in North Carolina.

Mr. SCOTT. And do you provide resources for attorneys' education, professional CLE and that kind of stuff?

Mr. HUNTER. We do provide training. We have manuals, you know, that we make available, actually free of cost. You can download them from off the Internet.

Mr. SCOTT. Now, how much does that service cost? One of the things that occurs to some of us—that a resource like that statewide would be better than trying to have each county figure out what they are doing or even a national so that each state doesn't have to replicate the same kind of resource. How much does that cost to keep the Services Commission up and running?

Mr. HUNTER. I think, well, the cost of our office is—I don't know—is about maybe a million or a million and a half dollars. The total cost of indigent defense in North Carolina is, I think, around maybe a little bit higher than the middle of the road if you look at cost per citizen for indigent defense and you look at the 50 states. The last time I looked at one of Mr. Scanshenberg's

rundowns of that, we were a little bit above the average. We were in the 20's among the 50 or 51 jurisdictions——

Mr. SCOTT. And how much money was spent——

Mr. HUNTER. I don't remember—well, we——

Mr. SCOTT. I am looking for what portion of the defense cost was spent on the Indigent Services Commission staff.

Mr. HUNTER. Well, less than 1 percent.

Mr. SCOTT. Okay.

Mr. Crotzer, how long after the conviction, your conviction, did they test the evidence, the DNA?

Mr. CROTZER. Approximately 23 years.

Mr. SCOTT. Why did they still have the evidence?

Mr. CROTZER. Well, they thought they didn't. My evidence was found in a FDLE crime lab in the basement in a file cabinet where the maintenance man probably would look. And it sat there in a climate-controlled environment, five microscopic slides.

Mr. SCOTT. And did the DNA point to the person that actually did it?

Mr. CROTZER. What the DNA did was totally exclude me. My lawyers told me that I was the most fortunate unfortunate person they ever met because BHR was double rape, and this biological evidence from the actual rape kits, the swabs, cuttings from the undergarments—all those things were intact in those five microscopic slides from both rape victims. So what it did—it excluded me. And the individual that you are asking about, as far as him ever paying for the crime, the statute of limitations would not allow him to be prosecuted for that.

Mr. SCOTT. But it did point to him?

Mr. CROTZER. No, it did not—because they were never allowed to ask for DNA. They couldn't approach him because he was never incarcerated.

Mr. SCOTT. Do they know who it is?

Mr. CROTZER. They found out who he was through two people that were charged with me, two blood brothers that their homeboy grew up with. So that is how they found out who he was. But he wouldn't even come forward even after knowing that he would not be charged to even testify on my behalf to try to free me prior to DNA testing.

Mr. SCOTT. Mr. Hunter, you talked about a fair share of resources. Is the prosecutor's office in an area more expensive to run than defense?

Mr. HUNTER. Generally, yes. It really depends on the area. You know——

Mr. SCOTT [continuing]. All cases, some cases where the person—you can do a freebie on; there is not a whole lot of defense work to be done.

Mr. HUNTER. Well, if you look—that is true, Mr. Chairman. If you look at the typical what we call district court, which is our lower-level court, there is usually an assistant district attorney who is in there handling cases. And there might be 100 or 150 cases that are resolved in a day with one assistant district attorney in that case.

Defense lawyers, you cannot have 150 clients in 1 day; even on the 7-minute rule you can't have 150 clients in 1 day. So we talk

about parity in funding. They are really not mirror-image functions, especially, I think, at the lower level where a lot of the work has been done by law enforcement and the prosecutor is just carrying that to the court.

Defense has a duty to do an independent investigation, which I would say it is almost never done in lower-level cases, and then advise the client on how to proceed. So that is quite a different role than the prosecutor's role, which is largely consulting with the arresting law enforcement officer who has already done an investigation and a report.

I know that doesn't work—you don't need to tell me, Mr. Johnson—that doesn't work perfectly every time. The point I am making is that the roles are really not mirror images. And I think sometimes that can make it even worse, the disparities in funding, especially at the lower level.

Mr. SCOTT. Let me ask Mr. Hall, on the lower level, what is it about misdemeanor cases that makes resolving ineffective counsel issues more difficult?

Mr. HALL. Misdemeanor cases usually don't end up being a part of the ineffective assistance claims that are brought. Those are brought by people in prison saying, "I shouldn't be here at all because my lawyer was ineffective."

But people are herded through the criminal justice system at the low end for misdemeanors. They are given offers they can't refuse: Take probation and be done with it. And then they find out later that that probation or short term in jail ended up costing them more.

For instance, the poor are especially vulnerable for those types of outcomes because they can't pay a fine; they can't pay a lawyer. So they end up going to jail in lieu of paying a fine sometimes, and then they find out there are collateral consequences. For instance, somebody pleads to an offense and now they can't stay in public housing anymore; they are not entitled to some type of public assistance and even get kicked out of college for misdemeanors.

Mr. SCOTT. Do most states have automatic rights of appeal de novo for misdemeanors?

Mr. HALL. Many states do; I don't know how many do. My state for one does. Most of the states around me do. But that doesn't mean that those rights will ever be exercised.

The person goes off to jail, gets a 5-day sentence, for instance, and that may cost the county $500 to keep that person for that 5 days. And that is added cost when they shouldn't have ever been prosecuted in the first place because it is an overcriminalization problem in part. It is throw everybody in jail, as Mr. Conyers said, also in part.

And the focus of the system just seems to be convict them all; let God sort it out. And it should be everybody should get a measure of justice to at least decide whether or not they are really guilty before they plea to it. Sometimes it is easier to plea than to confess; at least that is the view that they see in the lower-level courts.

Mr. SCOTT. Well, particularly it is true if the pleading just gets you the collateral consequences later. You don't serve any jail time

now, and you walk out of court. And you think that is the end of it until you try to get a job.

Mr. HALL. And you don't even know about the collateral consequences sometimes for years. Sometimes you find out the next day, but sometimes you don't find out for a long time.

Mr. SCOTT. Professor Luna, you mentioned the moral hazards. Is one of the moral hazards that is not being paid for in the system the fact that you are not having good literacy programs in the third grade and those children get into the cradle-to-prison pipeline?

Mr. LUNA. That is a problem. I don't think it quite fits the definition of moral hazard, but certainly it is a problem. The possibilities in the individuals—I mean, this is in a very real sense—and I don't disagree with anything that has been said here. But in a very real sense, the criminal justice system has become a war on the poor. And that should concern everyone. I have no doubt that that is something that needs to be addressed. Again, my concern is how to address it, rather than whether it needs to be addressed.

Mr. SCOTT. One of the things that keeps coming up is the excessive caseloads. Why can't lawyers ethically say no to additional cases when they are obviously—when, I mean, 19,000 in Louisiana—why don't they just say no and not accept the cases?

Mr. Johnson?

Mr. JOHNSON. Mr. Chairman, oftentimes the defenders have a lot of pressure put on them by the court. The court will tell them that they are going to defend this person, and it takes a lot of courage when you are supporting a family as a defender to say no and put themselves at risk.

And then the head of their agency may not be as sympathetic to them saying no. It is both an individual and an agency responsibility to draw the line. And if there is a lot of pressure in the system for them to just bow to the wishes of the system——

Mr. SCOTT. And do any lawyers put on the record the fact that, at the beginning of the case, that they have not had an adequate time to prepare because of their caseload and let the appellate courts see that?

Mr. JOHNSON. Mr. Chairman, I understand that that has been done around the country, but they will put it on the record, and it won't be of any significant consequence that they put it on the record, and then go on from that. Again, all the circumstances surrounding——

Mr. SCOTT. Because ineffective counsel is for harmless error?

Mr. JOHNSON. Right. If I might, Mr. Chairman, add one thing on another matter that Mr. Conyers had—or Chairman Conyers had raised. And that is there are a lot of prosecutors in this country who think that incapacitation is protecting public safety, and they honestly believe that. That is, I suggest—and if I would like to have you consider this aspect of it—we do criminal justice in the United States quite differently from the rest of the world.

Every place else in the world, prosecutors are appointed; they are not elected. Everyplace else in the world, they are big systems where people in those systems have a time to think about criminal justice policy and what is the appropriate thing to do. I do a fair amount of work with international prosecutors and understand the

way that they can think about criminal justice systems in their system.

In the states, we have over 2,400 little empires like mine, where I am the absolute authority as to criminal justice. Most of the prosecutors of that over 2,400 are in very small systems. They are moving cases. They don't have time to think about criminal justice policy, what is right. The answer for them is real easy: Put them in prison. And it doesn't go any further than that.

Very few big systems, like Chicago or L.A., where they sit back and can think about and study—in other countries—you have one prosecution system in England, one in Ireland. In Canada, it is one for every province. In Australia, it is one for every state. And they sit back and really think about criminal justice and what is the right thing to do.

In other countries, prosecutors don't lobby. In the states, we hire lobbyists. We are in the halls of the legislature every day. That influences criminal justice policy. And that is what drives the criminal justice policy in the states and the, in my mind, the major reason that we have the type of system we have.

Mr. SCOTT. Justice Billings?

Judge BILLINGS. One obviously should never speak unless they have the facts on which to base their statement, and I just want to correct my sort of side comment about a study on disparity of sentences. What this was was not disparity of properly assigned counsel versus appointed counsel; it was disparity between guilty pleas and going to trial.

And this raises another issue that we really haven't talked about that is also a matter of great concern with the indigent defense system. And that is that because of the inability of counsel to investigate because counsel aren't appointed soon enough, we have a lot of people who are sitting in jail awaiting trial, and that period of time that they are sitting in jail awaiting trial, they lose jobs; they are unable to support their families. They reach the point where they will plead guilty simply to get out of jail.

And the study that I was remembering incorrectly was that following—the sentences following jury trials are 44.5 months or 3¾ years longer than those following guilty pleas, which is a pressure on people to plead guilty because, if they exercise their right to jury trial, they will be punished for exercising that right, which is another travesty within our system.

Mr. SCOTT. I would suspect that there is a difference between court-appointed and public defenders. Public defenders are criminal law specialists; court-appointed in a—you don't know what you are going to get. You might have a real estate specialist taking a case that they don't know a lot about. But a public defender is a criminal law specialist, so I think you might get better representation there if there is a rational caseload.

Mr. Hunter?

Mr. HUNTER. Well, I think you get more variety. You can get absolutely great lawyers who are court appointed. Most real estate lawyers, frankly, unless real estate is terrible, they are not interested in accepting an appointed case. But you can also get—they are not real estate specialists but they are lawyers that, frankly, are not making it in the private sector, and so they are appointed

cases. You know you don't have to—your client doesn't have to agree to hire you. He is stuck with you.

And that, I think, is another problem with our indigent defense system that we haven't touched on is the fact that clients have so little power. In lawyers in private practice, the market operates in some way. People don't always choose wisely when they have the money to hire a lawyer, but in general I think the market works. We don't have that in indigent defense.

I mean, one of the innovations I would love to see is to have a system where people who require appointed counsel get to pick their lawyer from a list. I just think that one thing might make a big difference in both the way lawyers feel about their clients and about the way the client feels about the lawyer. One thing about a hired lawyer is you have committed to that lawyer. You went somewhere and you decided this is the person who I want to represent me. If someone is just presented to you, of course you don't have the same feeling; you didn't make the decision.

And so that is one. It wouldn't cost any money; it would just be a different way of trying it. And I would like to see that. I think that might, you know—that is an innovation I would just like to see tried somewhere and see where it goes. But I think that would be an improvement without spending any more money.

Mr. SCOTT. Thank you.

Mr. Hall, did you have a comment?

Mr. HALL. Yes, sir, again I would suggest you look at the Federal model. In my jurisdiction, there are probably 20 assistant U.S. attorneys and maybe seven in the Federal defender's office, but the Federal defender cannot represent everybody in a multidefendant conspiracy case. They represent one and the rest go to appointed counsel under the Criminal Justice Act.

And in the Eastern District of Arkansas, there are about 5,500 to 6,000 lawyers in that district, but only 39 are on the appointed list, and they have to go through screening by the district court to get on the list. They are all criminal law specialists, and I am proud to say I am on that list.

Mr. SCOTT. That is in the Federal system.

Mr. HALL. That is in the Federal system.

Mr. SCOTT. Well, I want to thank our witnesses for being with us today. The Members may have additional written questions for witnesses, which we will forward to you and ask that you answer as promptly as you can so the answers may be part of the record.

The Brennan Center for Justice has submitted written testimony which, without objection, will be included in the record.

[The information referred to follows:]

PREPARED STATEMENT OF MELANCA D. CLARK, COUNSEL,
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW

BRENNAN
CENTER
FOR JUSTICE

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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
June 4, 2009

Chairman Scott and members of the subcommittee, thank you for your leadership in holding this hearing to address the state of our nation's indigent defense systems, 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, including the persistent racial and ethnic disparities in the criminal justice system.

We submit this testimony, together with the testimony previously submitted to this subcommittee focusing on the indigent defense crisis in Michigan,[2] to draw attention to the racial disparities that pervade the criminal justice system, 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.

Our 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]

As detailed most recently in the National Right to Counsel Committee's report, *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, the problems are myriad: inadequate funding of public defense functions, overwhelming case loads, and in many states, lack of independence from state and local authorities providing funding, absence of uniform screening methods to determine eligibility, and absence of state wide performance standards or oversight mechanisms.[4] Consequently

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[2] *See* Hearing on Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and other States Before the H. Subcomm. on Crime, Terrorism and Homeland Security, 111th Cong. (March 26, 2009) (statement of Melanca Clark, Counsel, The Brennan Center for Justice).

[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.

[4] THE CONSTITUTION PROJECT, REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

many defense attorneys representing the poor around the country frequently lack sufficient training and support to mount effective defenses, and have caseloads well above the maximum recommended by national standards. For individuals with cases in misdemeanor courts throughout the nation, attorneys are often not provided at all.[5]

Disproportionate Minority Contact with the Criminal Justice System

The implications of 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, 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 the expense of defending the state against systemic litigation.[6]

Our nation's failure to assure provision of 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.[7] When the service provided by such counsel is inadequate, racial disparities that persist at every stage of the criminal justice system are exacerbated.

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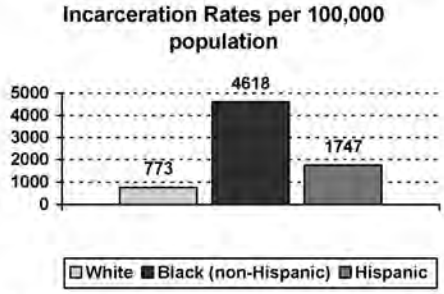
[5] *See* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS INDIGENT DEFENSE COMMITTEE, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14-20 (2009) (describing prevalence of complete disregard and/or uninformed waiver of the right to counsel in misdemeanor cases) *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

[6] Total state spending on corrections systems was over $49 billion in 2007. 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.

[7] 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.

In our nation's prisons, Hispanics are incarcerated a little over two times the rate of whites, and African Americans at six times the rate of whites.[8] In some states, like Iowa, New Jersey and Connecticut, the African American to white ratio of incarceration is more than ten to one. Nearly 6 in 10 individuals housed in local jails are racial or ethnic minorities.[9] In the juvenile system African-American youth, who constitute only 16% of the population, experience 28% of juvenile arrests, and constitute 37% of the detained population and 58% of youth committed to state adult prison.[10]

Racial disparities, prevalent throughout the criminal justice 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.[11]



Source: U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2007.

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[8] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf

[9] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007, *available at* http://www.ojp.gov/bjs/pub/pdf/jim07.pdf

[10] NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (Jan. 2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf.

[11] 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.pd; 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.

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 supervision, but also the destruction of the social fabric and economic health of minority communities. This, in turn, still larger societal impacts. The collective failure to provide sufficient resources and sufficient oversight to our nation's indigent defense systems 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.[12] 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.

Community Oriented Defenders 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.

[12] For further information about the Community Oriented Defender Network see http://www.brennancenter.org/content/section/category/community_oriented_defender_network.

- 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, advancement of practical solutions, and a fairer criminal justice system.

Federal grants support police use of community-based models in crime prevention.[13] The Department of Justice has supported studies of community strategies for state prosecutors and probation, and the Judiciary has long been active in the development of drug and youth courts.[14] The community oriented activities of public defenders should similarly be embraced and supported.

Conclusion

Our nation's current economic crisis adds a new urgency to the work of addressing the public defense crisis 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 is long overdue. We simply cannot afford the price of the status quo.

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[13] For a description of the U.S. Department of Justice's Community Oriented Policing Program see http://www.cops.usdoj.gov/Default.asp?Item=35.

[14] *See e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, COMMUNITY PROSECUTION STRATEGIES (Aug. 2003).

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

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Mr. SCOTT. And also the reports that I indicated, "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," a report of the National Right to Counsel Committee,* and "Minor Crimes, Massive Waste: The Terrible Toll of America's

*Note: The information referred to, "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," a report of the National Right to Counsel Committee, April 2009, is not reprinted here but is available at the Subcommittee. The report can also be accessed at: http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied__%20Right%20to%20Counsel%20Report.pdf

Broken Misdemeanor Courts," by the National Association of Criminal Defense Lawyers,** will also be made part of the record.

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

And without objection, the Subcommittee stands adjourned.

[Whereupon, at 11:22 a.m., the Subcommittee was adjourned.]

**Note: The information referred to, "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts," a report of the National Association of Criminal Defense Lawyers, April 2009, is not reprinted here but is available at the Subcommittee. The report can also be accessed at: http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf

APPENDIX

Material Submitted for the Hearing Record

OFFICE OF THE DISTRICT ATTORNEY, KINGS COUNTY

RENAISSANCE PLAZA at 350 JAY STREET
BROOKLYN, N.Y. 11201-2908
(718) 250-2500

CHARLES J. HYNES
District Attorney

June 12, 2009

Hon. Bobby Scott
U.S. House of Representatives Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
2138 Rayburn House Office Building
Washington, D.C. 20515

Hon. Louie Gohmert
U.S. House of Representatives Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
2138 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearing: *Indigent Representation: A Growing National Crisis*;
Response to the testimony of Robert M. A. Johnson

Dear Chairman Scott and Ranking Member Gohmert:

On June 4, 2009, Robert M. A. Johnson, a longtime prosecutor in Anoka County, Minnesota, and past president of the National District Attorneys Association, testified at a hearing on "Indigent Representation: A Growing National Crisis," that was held before the House Subcommittee on Crime, Terrorism and Homeland Security. Mr. Johnson, in thoughtful but passionate terms, spoke about this nation's indigent defense bar's desperate need for greater funding so that attorneys may provide their clients with the defense to which they are constitutionally entitled and may thereby help ensure the proper functioning of our adversary system of criminal justice. While I fully agree and support much of Mr. Johnson's testimony, I do take issue with his characterization of the funding that prosecutors currently receive and write to you in order to present a different viewpoint on that matter.

I have been on both sides of the courtroom. I started my legal career as a public defender with the Legal Aid Society in New York City. And for over two decades now, I, like Mr. Johnson, have been a prosecutor, first as an assistant district attorney and, for the last nineteen years, as the elected district attorney of Kings County (Brooklyn), New York. I know all too well how limited funding can hamper both defense attorneys as they seek to zealously and effectively represent their clients, and prosecutors as they strive to discharge their duty to see that justice is done and public safety protected.

Mr. Johnson, in his hearing testimony, and the National Right to Counsel Committee, in its exhaustive April 2009 report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, have ably set out the compelling reasons for better funding indigent defense. Informed by my experience as a past president of the New York State Association of District Attorneys, a past vice-president of the National District Attorneys Association, and the chair-elect of the Criminal Justice Section of the American Bar Association, I believe that such funding, while fully justified, should not come at the expense of slashing the already tight budgets of prosecutors.

First, contrary to the suggestions of Mr. Johnson, district attorneys' offices across the country are *not* receiving "massive funding" from their state and county governments, and in several states, monies allocated to prosecution do *not* exceed those allocated to indigent defense, especially in light of inequitable caseloads. As borne out by information gleaned from my colleagues around the country, Mr. Johnson paints with too broad a brush in his attempt to garner support for his cause. In Wisconsin, for example, while the number of criminal cases has risen in the past few years, the number of prosecutors funded by the state has dropped and salaries have remained frozen; the result -- burnt-out prosecutors overburdened by growing caseloads. In Massachusetts, the state Senate recently passed a budget that allocated an additional $10 million to public defenders; by contrast, the budget of district attorneys, who carry a substantially larger workload than the public defenders, was increased by a mere $200,000. In Texas and Virginia, among other states, the starting salary of prosecutors is about $5 thousand less than that of public defenders. In Pima County (Tucson), Arizona, there are 75 prosecutors, each carrying an average felony caseload of 69 cases, and prosecution is allocated a $15.6 million budget; by contrast, there are 115 attorneys for indigent defense, each carrying an average felony caseload of 26 cases, and indigent defense has a

budget of $26.4 million. In Kentucky, prosecutors were so drastically underfunded during the last fiscal year that a majority of them were forced to place their employees on three weeks of unpaid furlough. Most prosecutors were buying supplies out of their own pockets, had no travel budgets, were unable to pay court reporters to transcribe minutes, and were running out of funds to pay for expert witnesses at trial. In short, the image of prosecutors having an abundance of resources and funds at their disposable is simply not an accurate one.

Second, prosecution offices desperately need all the funding they do receive for a variety of very good reasons, all of which further the cause of justice. The prosecution, of course, has the burden of proof in every criminal case, and that burden has a cost. Prosecutors struggle to keep up with new technology used by criminals and with the new forensic science, such as DNA, that, if available, can (and should) be used to prove a case. Investigations, especially undercover drug or gun gang-related investigations, are often both time- and money-consuming. Addressing the special needs of victims in cases of sexual violence, domestic violence, and child abuse can be especially challenging for a prosecutor's office, but can nevertheless be critical to the successful prosecution of such cases and the well-being of these crime victims. Additionally, a growing concern is witness intimidation. Fear of violence in a "don't-be-a-snitch" atmosphere has many prosecutors scrambling to fund witness protection programs. These are but a few examples of cash gobbling that have been part of my own experience and that I've heard from colleagues around the country.

Furthermore, as prosecutors increasingly adopt pro-active, preventive, and boundary-spanning strategies to reduce crime and improve public safety, their creation of and participation in these innovative programs, while ultimately saving state and local government money on incarceration, police, and health-care costs, often strain their own budgets. Prosecutors' implementation of their own alternative-to-incarceration programs and their participation in specialized, problem-solving courts that divert offenders from incarceration and into treatment (e.g., drug courts, mental health courts, and domestic violence courts) can be very time consuming. Prosecutors have a responsibility to thoroughly screen the cases for admission to these programs and to follow an offender's progress in treatment.

For example, in Brooklyn, since 1990, I've operated Drug Treatment Alternative-to-Prison ("DTAP"), the nation's first prosecution-run alternative to

incarceration program for non-violent drug-addicted repeat felony offenders, a population often considered to high-risk for diversion. The National Center on Addiction and Substance Abuse (CASA) at Columbia University has studied and validated DTAP as a cost-effective measure for reducing crime and substance abuse among chronic, drug-addicted offenders. As of June 1, 2009, 1,165 offenders had completed DTAP, and our analysis of the savings realized on correction, health care, public assistance and recidivism costs resulting from diversion to DTAP combined with the tax revenues generated by these DTAP graduates has resulted in economic benefits of $46.6 million dollars. A key to DTAP's success is vigilant prosecution oversight, accomplished through the careful screening and monitoring of those offenders participating in the program and through the use of the district attorney's warrant enforcement team to swiftly apprehend any absconders who drop out of treatment. Several district attorneys' offices throughout New York State have launched their own DTAP programs, but we all struggle to ensure that the costs of such programs are covered in our budgets.

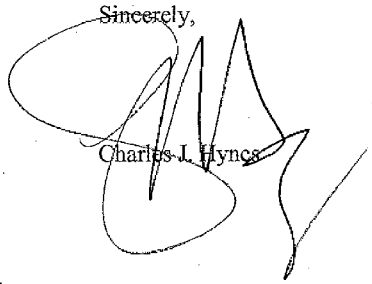
Likewise, in 1998, my office launched ComALERT, a re-entry partnership designed to ensure that formerly incarcerated individuals returning to Brooklyn remain drug-free and are successfully re-integrated into their communities as employed and productive citizens. Professor Bruce Western of Harvard University completed an evaluation of ComALERT and concluded that it was effective at reducing criminal recidivism among this parolee population. I feel that it's important to devote prosecutorial resources to this program, because ultimately, it reduces crime and increases public safety. However, again, the program, while potentially saving the city and state millions of dollars in incarceration and other crime-related costs, in the short run, puts a strain on my budget.

These innovative prosecution-run programs, in the end, save money and benefit the individual defendant and the community at large. Prosecutors should be encouraged to implement them and to engage in other collaborative programs designed to reduce recidivism. Cutting prosecution budgets in order to boost defense bar budgets is not going to accomplish that goal.

Again, let me express my complete support for adequate funding of indigent defense. If our adversary system is to work properly, then defense attorneys *must* have the resources to provide clients with meaningful representation. However, no

less importantly, if the prosecution is to fulfill its mission of doing justice and protecting public safety, it too must be adequately funded. Robbing Peter to pay Paul will cripple our system and thwart the cause of justice.

Sincerely,



Charles J. Hynes

cc: Hon. Anthony Weiner
2104 Rayburn House Office Building
Washington, D.C. 20525

MICHAEL P. JUDGE
PUBLIC DEFENDER

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EXECUTIVE OFFICE

June 3, 2009

Honorable Bobby Scott
Chairman
House of Representatives Subcommittee on
Crime, Terrorism, and Homeland Security
1201 Longworth House Office Building (HOB)
Washington, DC 20515

Re: Hearing June 4, 2009 "Indigent Representation: A Growing National Crisis

I am writing on behalf of the California Council of Chief Defenders and the California Public Defenders Association to ensure that the subcommittee is aware of the realities of the institutional Public Defender system in California. Of course, inasmuch as I have been the Chief Public Defender in Los Angeles County, the oldest and largest local Public Defender's Office in the nation, for the past 15 years, my information is informed by my own experience as well.

Due to the short deadline, I will limit our input to a single especially critical issue. It appears to California defenders that there is a strong bias in favor of a state defender system, as opposed to a local system, among the commentators from which the subcommittee is receiving information.

A move from a local (county-based) to a state-based system in California would be disastrous for the existing county Public Defender offices and, in turn, for their clients. The California county Public Defender offices pay significantly higher compensation to all their employees than the state Public Defender's Office (which due to budget restrictions is only able to handle some of the direct capital case appeals in California) and the state Habeas Corpus Resource Center (which due to budget constraints is only able to do some of the California's capital case habeas cases).

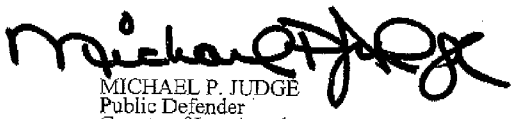
Please see the attached news article regarding the lawsuit by 3500 attorneys who work for the State of California (including the state Attorney General's Office) who failed to prevail despite compensation that ranges from 20 - 40% <u>less</u> than those who work for local defender and prosecutor offices. In almost every county in California there is parity in compensation between prosecutors and institutional Public Defenders. In one county the compensation is actually higher for Deputy Public Defenders. As a result, the local Public Defender Offices in California are in a superior competitive position in recruiting and retention compared to the state offices.

The overall resources for local institutional defenders are more stable than for state offices in California. The state defenders were suffering from freezes and cuts long before the current fiscal crisis actually materialized for other state employees in California. The state Public Defender's Office in Los Angeles (which generates by far the most criminal appeals in the state) was closed many years ago and never was restored.

It seems to us in California that there should be an explicit acknowledgment that no single system design should be preferred. Rather, the goal should be to ensure adequate resources, competitive compensation to attract and retain highly-qualified employees, reasonable workload controls and zealous effective advocacy utilizing whatever design is most appropriate in any particular jurisdiction.

I am so pleased we have been able to continue with our mutual efforts to enact the Youth Promise Act (YPA). Deputy Public Defender Shelan Joseph has reported to me the very positive reception accorded to her recently in Washington, DC as my representative in this regard. Likewise, with respect to Los Angeles City Council Member Tony Cardenas, with whom we are collaborating on behalf of YPA.

With high regards,



MICHAEL P. JUDGE
Public Defender
County of Los Angeles
And on behalf of
California Council of Chief Defenders
California Public Defenders Association

MPJ:dp

CITIZENS FOR LAW AND ORDER, INC.
"dedicated to law and order with justice for all"

June 15, 2009

House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
Chairman, Robert "Bobby" Scott & Ranking Member, Louie Gohmert
2138 Rayburn House Office Building
Washington SC 20515
Attention: Kimani Little, Kimani@mail.house.gov

RE: OPPOSITION TO H.R. 2289

Dear Committee Chairman, Robert "Bobby" Scott
and Ranking Member, Louie Gohmert,

Citizen's for Law and Order strongly opposes HR 2289.

Citizen's for Law and Order (CLO) is a social welfare organization. For almost 40 years, CLO has successfully encouraged ordinary citizens to actively involve themselves through lawful means in the active support of law and order in our nation, our state, and our local communities. We are committed to reducing violent crime, bringing about a fair and balanced criminal justice system, and rooting out inequities from our judicial processes. We also hold a very special concern for victims and survivors of violent crime and strive constantly to insure for them a central position within the justice system.

The sentence, life without the possibility of parole, is reserved for individuals who have committed the most **egregious** crimes.

HR 2289 creates a defacto lifer hearing process for LWOP juveniles that is costly and unnecessary. Currently, in our nation, all persons are afforded ample screening under state laws to determine their guilt or innocence. If found guilty of a crime, in determining whether to apply the sentence of life without the possibility of parole, the prosecutor, the judge and the jury must all agree that the sentence fits the crime. In the case of jury trials, judges have the authority to over-ride a jury's decision. Though this discretion is rarely if ever used, it is there as a safeguard. If a convicted individual does not agree with their sentence, there are remedies that include filing an appeal, or a habeas petition - a judicial mandate to a prison official ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. In addition, the Governors of each state have the power to grant clemency and pardons.

1809 S Street, #101316, Sacramento, CA 95811
Phone 916-273-3603 Toll Free/Fax 888-235-7067

HR 2289 is a bully tactic that will force states to comply with a decision that many do not agree with. Especially in these tough economic times, limiting law enforcement funds if the states do not abolish LWOP for juveniles will place states in a position that will leave them with no other choice then to adhere to the will of the federal government.

HR 2289 will override the will of the people in many states, overturning statewide initiatives that were placed on the ballot and voted for by the people of that state. In addition, state legislatures and Governors across the country have continued to support this punishment as suitable for the most violent and dangerous individuals.

There are currently legal remedies in place for those who believe that they have been wrongly convicted, there is no justification for this costly legislation.

Citizen's for Law and Order vehemently opposes HR 2289.

Sincerely,
Christine Ward
President

1809 S Street, #101316, Sacramento, CA 95811
Phone 916-273-3603 Toll Free/Fax 888-235-7067

National District Attorneys Association
44 Canal Center Plaza, Suite 110, Alexandria, Virginia 22314
703.549.9222/703.863.3195Fax
www.ndaa.org

11 June 2009

The Honorable Bobby Scott
Chairman
The Honorable Louie Gohmert
Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives
B-370 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Ranking Member Gohmert:

As President of the National District Attorneys Association (NDAA), I wish to add to the record of the hearings of June 4th on "Indigent Representation: A Growing National Crisis" and particularly respond to comments of Robert M. A. Johnson, Anoka County Attorney.

The NDAA supports efforts to provide trained attorneys to indigent defendants; toward this end we have achieved passage of the John R. Justice Prosecutors and Defenders Act, which authorizes student loan assistance to attorneys who work as public defenders.

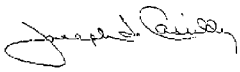
Although Mr. Johnson was President of NDAA sometime ago, his views do not represent the position of the NDAA or of most prosecutors. First, Mr. Johnson states that there are serious inequities between the budgets of police and prosecutors and those of indigent defenders. We take issue with the accuracy of this. As you know, Congress recently passed a massive COPS funding bill to assist jurisdictions across the United States who were laying off police officers due to budget shortfalls. These same budget shortfalls are devastating prosecutors' offices; I am currently struggling with the decision to lay off my own staff.

While NDAA agrees with the needs that some indigent defenders may have, we don't want this to become a "rob Peter to pay Paul" solution. Indigent defenders are often well-funded at the State level, while prosecutors - many of whom are part-time - are funded by struggling counties and cities. Further, evidence favorable to the defense generated by government-funded crime labs is provided to defense counsel.

Additionally, we would take issue with the implication that innocent persons are being convicted because they do not have access to counsel. Although the Innocence Project found that 15 to 30 years ago there were errors that resulted in the conviction of innocent people, an examination of those cases reveals that lack of counsel was not a basis for those convictions. Moreover, the Innocence Project has not found recent cases of wrongful convictions because resources that have been devoted to improving crime lab capacity have enabled police and prosecutors to focus on the guilty.

Finally, we take issue with the assertion that prosecutors dispose of cases without regard to doing justice for the defendant. I have been a prosecutor for 32 years. The ethical standard for prosecutors in the National Prosecution Standards, which NDAA created, specifically directs "2-7.2 Communication with Unrepresented Defendants - When a prosecutor communicates with a defendant charged with a crime who is not represented by counsel, the prosecutor should make certain that the defendant is treated with honesty, fairness, and with full disclosure of his or her potential criminal liability in the matter under discussion". Prosecutors are responsible for the existence of drug courts and mental health courts to provide treatment for defendants, regardless of whether they are represented or not.

Respectfully,



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June 4, 2009

Honorable Robert C. Scott
Chairman, Subcommittee on Crime, Terrorism
And Homeland Security
Committee on the Judiciary
U.S. House of Representatives
1201 Longsworth House Office Building
Washington, D.C. 20515

Honorable Louie Gohmert
Ranking Member, Subcommittee on Crime, Terrorism
And Homeland Security
Committee on the Judiciary
U.S. House of Representatives
511 Cannon House Office Building
Washington, D.C. 20515

Dear Chairman Scott and Ranking Member Gohmert:

On behalf of the NAACP Legal Defense & Educational Fund, Inc. (LDF), I write to urge you to support federal legislation upgrading and sustaining national indigent defense services. Over 45 years after the landmark decision of *Gideon v. Wainwright,* this country still fails to realize *Gideon's* mandate to provide effective counsel to poor people charged with crimes. This miscarriage is a mark of shame on our legal system and LDF recommends that the United States Congress intervene to right a wrong that is long overdue. Specifically, LDF recommends that Congress adopt the following recommendations for reforming the nation's indigent defense systems: the creation of an independent federal Office of Public Defense Services ("OPDS") that would provide expanded funding, training, and technical assistance for state public defense systems; the promulgation and enforcement of national indigent defense standards; the collection, analysis, and distribution of uniform and comprehensive data pertaining to the right to counsel; and the equitable distribution of federal funds between the prosecutorial and defense function.

Racial disparity remains a pervasive problem in the criminal justice system and that the absence of effective and constitutionally adequate counsel for the poor not only exacerbates this problem of racial disproportionality but also heightens the animosity and distrust felt by African-Americans and other underserved communities toward the judicial system. We hope that you will consider seriously our recommendations for improving defender services and, as a result, commit to reducing unjust racial disparities in the criminal justice system.

I. The Right to Counsel

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Thus, in *Gideon v. Wainwright* the United States Supreme Court held that states have a constitutional obligation to provide counsel to poor people charged with crimes when a potential loss of liberty is at stake.[2] The Supreme Court subsequently recognized that this right would not be meaningful unless it was understood to mean *effective* assistance of counsel.[3]

National standards, supported by the American Bar Association and the National Legal Aid & Defender Association, ensure that *Gideon* meets its promise of providing effective legal counsel to the poor by adopting practical and realistic guidelines for funding and oversight of state indigent defense systems.[4] Unfortunately, notwithstanding these strong legal and policy dictates, many states fail to provide adequate funding for indigent defense services and thereby ensure widespread and often systemic deprivations of the Sixth Amendment right to counsel. It is therefore imperative that the federal government intervene to ensure that the poor receive the level of representation to which they are constitutionally entitled.

II. A Crisis of Indigent Defense

The problems that contribute to the nationally deficient and ineffective representation of the poor include:

> Inadequate compensation for assigned counsel; undue pressure on juvenile and adult defendants to waive counsel; inconsistent standards of indigence; incompetent or inexperienced counsel; delayed appointment of counsel; increased pressure on defendants by defense attorneys to accept guilty pleas to expedite the movement of cases; substantial differences in provision of services between urban versus rural representation; lack of investigative resources; and understaffing of public defense offices.

These inadequacies are often the result of a complete lack of adequate funding, support or training for appointed counsel.

Since its inception in 1940, LDF has been deeply involved in the struggle for legitimacy and fairness in the American criminal justice system and, more particularly, in the effort to eliminate racial discrimination in the administration of justice. LDF has consistently advocated for pragmatic reform of indigent defense representation and sought to end policies and practices that impose a disproportionately negative burden on communities of color.[5] Consistent with this

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[2] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
[3] *See generally, Strickland v. Washington*, 466 U.S. 668, 686 (1984).
[4] The obligation of state governments to fund 100% of indigent defense services is supported by the American Bar Association, Ten Principles of a Public Defender System; see also Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services, U.S. Department of Justice, 1976).
[5] For example, LDF (in conjunction with the ACLU) made recommendations to the Nevada Supreme Court, following an investigation of problems in Nevada, urging the state to develop a system to monitor the impact of inadequate indigent defense services upon racial and ethnic minorities and to adopt caseload limitations. LDF's recommendations led to the Court's adoption of a series of reforms regarding the representation of indigent

commitment, LDF has participated in regional indigent defense reform efforts by issuing reports, providing testimony, bringing litigation and/or filing *amicus curiae* briefs in such jurisdictions as Nevada, Mississippi, Texas, Maryland and New York. Although each of these States has a very different indigent defense structure, LDF has found each jurisdiction to suffer a similar panoply of inadequacies. LDF's experiences in this handful of states is emblematic of the crisis around the nation and demonstrates why federal intervention and support is warranted.

For example, in a 2003 study of indigent defense in Mississippi, LDF found that inadequate funding for indigent defense, coupled with the absence of a statewide public defender system and the lack of caseload limits, created a crisis that heavily affected the the ability to provide poor people with adequate representation. As a result of being overburdened, lawyers had difficulty maintaining appropriate contact with their clients; they failed to conduct thorough investigations; failed to file an appropriate number of motions; and failed to adequately explain plea and sentencing options to their clients. Needless to say, trial presentation suffered and, in many cases, appeals were not pursued.[6]

A year later, LDF published the results of a study, "Economic Losses and the Public System of Indigent Defense: Empirical Evidence on the Pre-Sentencing Behavior from Mississippi," which examined the economic impact of Mississippi's indigent defense system. This first of its kind study found that the establishment of a statewide, full-time public defender system had fiscal benefits that included the possibility of increasing personal income in Mississippi by over $90 million annually. The study also confirmed that defendants represented by full-time public defenders receive better representation and spend less time in pre-trial detention.[7]

In 2004, LDF filed an *amicus curiae* brief, in support of litigation filed by Quitman County, Mississippi, alleging that the State's failure to provide funding for lawyers who defend the indigent in criminal cases violated the United States and Mississippi Constitutions. LDF's brief explained how Mississipi's broken system had a disproportionate impact on the State's African-American population and that the effect of this inadequate representation extended beyond the courtroom. Specifically, a felony conviction in Mississippi often operates as a "civil death," depriving convicted persons of the right to vote, the right to certain types of employment, and access to numerous public benefits. Mississippi's failing indigent defense system, therefore, contributed to a wider breakdown in the black community. Seven former state court judges from Mississippi, Georgia, Missouri, and North Carolina, including former justices of each state's supreme court, also filed a brief in support of the lawsuit. The judges asserted that indigent defense reform was necessary to improve accuracy of criminal convictions and public confidence in Mississippi's criminal justice system.

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defendants in criminal and juvenile cases. As described in more detail below, LDF has also published reports about Mississippi and Schuyler County, NY; brought litigation in Mississippi; and submitted *amicus curiae* briefs in various litigation efforts to preserve and promote the right to effective counsel for the poor.

[6] *See generally, Assembly Line Justice: Mississippi's Indigent Defense Crisis*, NAACP Legal Defense & Educational Fund, Inc. (March 2003), *available at* http://www.naacpldf.org/content/pdf/indigent/Assembly_Line_Justice.pdf.

[7] *See generally, Economic Losses and the Public System of Indigent Defense: Empirical Evidence on Pre-Sentencing Behavior from Mississippi*, NAACP Legal Defense & Educational Fund, Inc. (date?), *available at* http://www.naacpldf.org/content/pdf/indigent/Mississippi_Economic_Study.pdf.

In 2005, LDF, along with the Southern Center for Human Rights (SCHR), filed a lawsuit against the City of Gulfport, Mississippi. LDF challenged Gulfport's practice of routinely incarcerating poor people for being unable to pay fines and pattern of violating the right to counsel. In response to the lawsuit, the court created a new filing system, implemented an "Amnesty Week" that allowed people to pay overdue fines without penalty, doubled its budget for public defendants, and instituted alternatives to incarceration. In light of these much-needed reforms, LDF and SCHR dismissed the lawsuit in 2007.

In a 2003 report on Schuyler County, New York, LDF found that the provision of indigent defense services woefully failed to meet the requirements of *Gideon*. Specifically, LDF found:

> There was no provision for timely entry of lawyers into cases or for consultation with clients before substantive hearings; defendants languished in jail pre-trial without speaking to a lawyer before resolution of their cases; defendants accepted pleas without every speaking to a lawyer; defendants were arraigned and bail was set without the assistance of counsel; procedures and/or guidelines for determining client eligibility were so defective that defendants who should qualify for court-appointed lawyer were turned away and forced to represent themselves; and appointed counsel received inadequate resources for their cases.[8]

In 2008, LDF also filed an *amicus curiae* brief to Maryland's highest court in *Richmond v. District Court of Maryland*, a class action challenging the City of Baltimore's failure to provide legal counsel for poor people at initial appearances where important decisions, such as bail determinations and probable cause for arrests, are made. Similar to the rest of the country, African Americans are disproportionately and detrimentally affected by Baltimore's failure to appoint counsel: due to income disparities, African Americans are more likely to languish in pre-trial detention and rely more heavily on state-appointed counsel.

The problems LDF found in Mississippi, New York, and Maryland are hardly unique. They plague indigent defense systems – and African-American communities – nationwide. Indeed, LDF observed similar failures during recent court observations in New Orleans, Louisiana, where countless Municipal Court defendants are unrepresented and speak directly to the local prosecutor to negotiate pleas without first even being advised of their right to counsel. Unfortunately, these stories are not exceptional and are, instead, are representative of a national crisis affecting countless jurisdictions throughout the country. It is a crisis that demands federal intervention.

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[8] *See, generally*, Carl Brooking and Blakely Fox, *The Status of Indigent Defense in Schuyler County*, NAACP Legal Defense & Educational Fund, Inc., *available at* http://www.naacpldf.org/content/pdf/schuyler/Schuyler_County_NY_Indigent_Defense_Report.pdf (last visited on June 3, 2009).

III. Inadequate Provision of Counsel Disproportionately Affects African-American Communities[9]

A state's failure to provide adequate indigent defense services has a particularly significant impact upon the African-American community. A disproportionate number of people who are arrested – and particularly those in custody – are African American. African Americans comprise 13% of the population but 28% of those arrested and 40% of those incarcerated.[10] At midyear 2008, there were 4,777 black male inmates in state and federal prisons and local jails per 100,000 black males, compared with 1,760 per 100,000 Hispanic males and 727 per 100,000 white males.[11] Not coincidentally, African Americans are more likely to live in poverty and, thus, are more likely to depend on appointed counsel. African Americans are almost five times more likely to need representation from a public defender than whites and two times more likely than Latinos.[12] As a result, African Americans bear a disproportionate burden of the failure to provide adequate indigent defense services.[13] This disturbingly high rate of African-American incarceration, which is partially due to a failure to provide adequate representation to the indigent, is an epidemic that violates constitutional safeguards and demands attention.

The consequences of these failures, and their broad and disproportionate impact on communities of color, are well-documented and dramatic. A 2005 study by the Sentencing Project found that not only were Blacks and Latinos more likely to rely on appointed counsel, but that the hiring of a private attorney tended to result in less severe sentences. Possibly the most stark and direct example of how the failure to provide the poor with adequate defense counsel has real and disproportionate consequences is obtained by reviewing exonerations. A 2004 study by the Innocence Project identified 328 exonerations nationwide between 1989 and 2004. Of these persons, 55% were African American and 13% were Hispanic. For exonerations on rape charges, 64% of those wrongfully convicted were African-American. Many of these wrongful convictions are directly attributable to failures of indigent defense systems.

These failures, and particularly the disproportionate burden of the failures borne by communities of color, harm not only the individual defendants, but also the community-at-large. "Incarceration plays a role in constructing the meaning of race by defining race and crime in terms of each other – the disproportionate rates of incarceration have made the image of black criminality a social reality."[14] Study after study supports the notion that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law

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[9] Although this section addresses the impact of indigent defense failures on African Americans, it is important to note that Latinos nationwide are also disproportionately affected by inadequate defense systems.

[10] Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System*, National Council on Crime and Delinquency, Mar. 2009, at 11, 14, *available at* http://www.nccd-crc.org/nccd/pdf/CreatedEqualReport2009.pdf.

[11] U.S. Dep't of Justice Office of Justice Statistics -- Bureau of Justice, *Prison Statistics*, (June 30, 2008), *available at* http://www.ojp.usdoj.gov/bjs/prisons.htm.

[12] Hartney & Vuong, at 14, *available at* http://www.nccd-crc.org/nccd/pdf/CreatedEqualReport2009.pdf.

[13] Nationally, seventy-seven percent of African Americans and seventy-three percent of Latinos in state prisons were represented by public defense attorneys. U.S. DEP'T OF JUSTICE, Bureau or Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000) *available at* http:www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf. Clients of appointed counsel are less likely to go to trial and more likely to be convicted at trial.

[14] R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug Wars*, 56 STAN. L. REV. 571, 598 (2003).

enforcement, or enforce the law themselves". This cycle of distrust and hostility can be attributed to the communities' interaction with legally legitimate factors that lead to unjust means.[15] This community impression is reinforced by defense attorneys ill-equipped to assist their clients properly, and, once again, African Americans disproportionately suffer the consequences. Reforms such as caseload limits and performance standards will help to ensure that zealous and competent representation are the standard experience of those going through the criminal justice system, and that the justice people receive is not determined by their economic status or race.

IV. Balance of Resources: Parity Between Defense Attorneys and Prosecutors Is Necessary to Guarantee the Sixth Amendment

The federal government has a responsibility to address this indigent defense crisis and ensure that the constitutional right to counsel, a cornerstone of our democracy, is not abrogated. The Congress is uniquely situated to ensure that America's poor receive a consistent level and quality of legal representation and, indeed, its failure to provide support and/or oversight to state indigent defense systems has allowed for systemic underrepresentation of the poor. By taking the actions recommended in this letter, the federal government will go a long way toward balancing the scales of justice: currently state and local governments spend three times as much on prosecution as they do on public defense and the federal government provides *millions* of dollars in grants, forensic assistance, investigative support, and other technical assistance to state and local prosecutor offices and police agencies while offering almost no funding for public defense services.[16] The federal government has an obligation remedy these inequities.

The inequity of federal support between the defense and prosecution thwarts our country's ability to provide poor people with the constitutionally mandated representation to which they are entitled and, as described above, imposes great hardships on the African-American community. Examples of the unbalanced federal funding include:

- The federal government provides training for state prosecutors but no comparable training for appointed defense counsel. In South Carolina, a joint venture of the U.S. Department of Justice and the National District Attorneys Association established a National Advocacy Center to train state prosecutors from around the country. The federal government spent $26 million just to build the campus, and the program continues to receive "congressional appropriations of $20 million annually for operations, including $5 million to train state and local prosecutors."[17] Needless to say, the training provided to appointed counsel fails to compare.

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[15] Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1165 (2006).

[16] *See* Noexception.org, *No Exceptions: A Campaign to Guarantee a Fair and Equal Justice System for All*, 1 http://www.noexceptions.org/pdf/sept_pub.pdf (last visited June 1, 2009) (citing Justice Expenditure and Employment, Bureau of Justice Statistics, U.S. Department of Justice, 1990. Recent examples: Kentucky (prosecution $56 million; indigent defense $19 million); Delaware (prosecution $16 million; indigent defense $6.9 million)).

[17] *See* Noexceptions.org, *supra* note 9 at 5; *see also* National District Attorney's Association, *NDAA Training at the National Advocacy Center*, http://www.ndaa.org/education/nac_index.html (last visited June 1, 2001 – 2009?).

- The Edward Byrne Memorial Justice Assistance Grant Program (JAG) allows for the distribution of federal funding amongst law enforcement programs; prosecution and court programs; prevention and education programs; corrections and community corrections programs; drug treatment and enforcement programs; planning, evaluation, and technology improvement programs; and crime victim and witness programs.[18] JAG Grants are funded by the United States Congress, and issued to state and local governments to fight crime.[19] Limited, if any, money is allocated to defense counsel who play an equally vital role in the criminal justice system.

- The California Prosecutor Education, Training and Research (LV) Program is principally funded by federal dollars ($341,582 out of the $349,582 budget is from federal funds); however, its stated purpose is to "conduct training, distribute publications, maintain a Violence Against Women Brief Bank, and develop and distribute manuals *for prosecutors*."[20]

- The San Bernardino County District Attorney's Office has seventy attorney positions provided without charge to the county, all courtesy of federal grants. The Public Defender Office, on the other hand, has none.[21]

- In Pennsylvania, the public defender agency has a budget less than half of the District Attorney's budget even though their caseload is at least seventy-five percent of the District Attorney's office.[22]

- In Texas, prosecutors have free access to DNA and chemistry analyses, psychological and ballistic experts, and investigative resources from police officers. Court-appointed defense attorneys, however, must pay for comparable services themselves and are generally limited to $5000 per case.[23]

Only the federal government has the requisite capacity to remedy these pervasive and startling disparities in a meaningful fashion.

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[18] U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: FY 2009 State Solicitation*, 2, *available at* http://www.ojp.usdoj.gov/BJA/grant/09JAGLocalSol.pdf.

[19] *Id.* (emphasis added).

[20] California Office of Emergency Services, *Prosecutor Education, Training and Research (LV) Program*. http://www.oes.ca.gov/Operational/OESHome.nsf/Content/A3CCE3C27DD924FB882572C1007240A8?OpenDocument (last visited June 1, 2009) (emphasis added).

[21] "Evaluation Report and Recommendations: San Bernardino County Public Defender Office," Findings: Staffing (NLADA, Nov. 2001) at 47.

[22] "Justice in Crisis: Venango County, PA's Indigent Defense System Fact Sheet and Report," ACLU, (June 7, 2001).

[23] "Fair Defense Report: Findings and Recommendation: Analysis of Indigent Defense Practices in Texas," (Dec. 2000). Also note that in Quitman County, Mississippi, only once in a consecutive eight years did a public defender ask for an expert to assist in a defendant's case because the county was unable to compensate experts. Kevin Johnson, *How Good A Defense Should A Suspect Get?* USA TODAY, Apr. 29, 2003, at 1A.

V. Conclusion

It is our hope that Congress will respond to the crisis of indigent defenses services and act quickly to meet *Gideon*'s mandate to provide all community members with constitutionally adequate counsel in criminal proceedings.

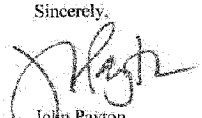
Specifically, LDF recommends that Congress establish an independent and adequately funded federal Office of Public Defense Services ("OPDS") that would provide expanded funding, training, and technical assistance for state public defense systems. OPDS would primarily serve as a grantor to local and state defense services, dramatically increasing federal funds to jurisdictions in crisis that are interested in reform but unable to pursue it due to financial restraints. OPDS would also be given the power to promulgate and enforce national standards, act as the repository of public defense data and support the establishment of an accreditation/certification process for defense programs. Then OPDS could ensure that the distributed federal funds are used to create and support public defense systems that comport with national standards and the Sixth Amendment by conditioning funds on compliance with OPDS guidelines.

In addition, Congress should ensure that pre-existing federal grant funds are equitably distributed in a manner that will promote balance, reliability and fairness in the administration of justice. This includes, but is not limited to, equitable distribution of BYRNE and JAG grants to both prosecutorial and defense agencies. Congress should also require the Department of Justice's Office of Justice Programs to collect, analyze, and publish uniform and comprehensive data pertaining to the right to counsel, including data on the disparate impact of failing systems on communities of color. Finally, Congress should amend the Antiterrorism and Effective Death Penalty Act ("AEDPA") to enable clients who fail to receive effective counsel to vindicate their Sixth Amendment rights in the Federal Courts.

A real and sustained federal commitment is necessary not only to ensure we meet our constitutional obligations, but also to assist in eliminating the disproportionate impact of the current system on the African-American community.

Thank you or considering our views.

Sincerely,



John Payton
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