



March 1, 2011

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder,

In view of the upcoming one year anniversary of the historic 2010 United States Department of Justice (DOJ) Indigent Defense Symposium and the recent one year anniversary of our January 15, 2010, letter to you describing our national priorities, the American Council of Chief Defenders (ACCD) seeks to advance its important dialogue with you about the need for improving the delivery of the constitutional right to counsel in states and localities throughout the country. This effort continues to need your special leadership.

First, though, the members of the ACCD express our heartfelt thanks for the opportunity to discuss and debate our issues with state policy-makers during the DOJ-sponsored symposium. Your message that the chronic long-standing and deep-rooted indigent defense problems are both “morally untenable” and “economically unsustainable” has helped these officials understand that the failure of states and counties to properly fund and administer right to counsel systems is against the best interests of public safety and efficient use of tax-payer resources.

The one year anniversary of our January 15, 2010, letter to you gives us an opportunity to review where accomplishments have been made during the past year.

Promulgation of new laws and policies that will allow the federal government, including DOJ’s Civil Rights Division, and individuals to vindicate the right to counsel through litigation: We thank you for your leadership concerning provisions in the Justice for All Reauthorization Act (JFAA), which was introduced in the current legislative session. Assisting states to improve on their obligations under the Sixth and Fourteenth Amendments, while simultaneously authorizing the DOJ to sue those that do not, is a fundamentally powerful approach to making *Gideon*’s promise a reality across our great country. We agree that DOJ should have the authority to bring federal lawsuits against any state, county or individual – or any indigent defense provider – that is involved in a systemic denial of competent representation.

However, we believe that the bill's current language delaying the DOJ authorization to sue for two years from the date JFAA becomes law is problematic. If the bill is enacted even on the fastest of time tables, the ability of DOJ to sue over systemic right to counsel deficiencies will not occur until after the presidential elections of 2012.

Action is needed sooner. We ask that you seek authorization to sue sooner.

Creation of a Federal Right to Counsel Office to ensure a permanent place in the federal government that safeguards the right to counsel and that provides funding, technical assistance and support, collects data and sets national standards for public defense systems and their clients: We applaud the creation of DOJ's Access to Justice Initiative (AJI) as a positive step. At the same time, we see AJI as falling considerably short of our expectations. We recognize that Professor Laurence Tribe had to resign unexpectedly because of his health, but even under his leadership the resources dedicated to AJI were less than what is needed for assistance, support and standards promulgation. People in need of public defense services often have dire civil legal needs, and an investment in civil legal aid could reduce a community's reliance on the formal criminal justice system to solve societal ills. With so much at stake the right to counsel in criminal cases is a constitutional demand that merits more treatment as the national crisis that it has become.

If substantial progress is going to be made in addressing the indigent defense crisis it is critically important that Professor Tribe's successor be someone who not only possesses the same national stature, but must also be an individual who is knowledgeable about the issues confronting public defense systems. We encourage you and the President to fill the position as soon as possible, and to ensure that the office and its leader have adequate resources dedicated to the criminal component of AJI's mission.

Institutional DOJ support for full funding of the John R. Justice Prosecutors and Defender Incentive Act of 2008 that is proportionately allocated to indigent defense practitioners and continued inclusion of the ACCD in developing the John R. Justice Act program: We thank you for DOJ's assistance in getting John R. Justice Prosecutors and Defender Incentive Act of 2008 (JRJ) partially funded.

We ask you to continue to work with Congress to see the JRJ Act fully-funded to encourage lawyers to dedicate themselves to public service through state criminal justice advocacy.

Appropriation of federal funding to study apparent disparity in defender funding when compared to law enforcement, highlight the need for balanced funding, and advocate for our nation's public defense systems to be funded at the level necessary to handle the workloads with which they are entrusted: The Bureau of Justice Statistics (BJS) confirmed in the fall of 2010 the existence of serious deficiencies in the way states and counties deliver Sixth Amendment right to counsel services, most notably in the excessive caseloads public defenders are forced to carry. While we are inspired and hopeful as a result of the above mentioned activities, so much more remains to be done by the DOJ in order to make significant progress in addressing this fundamental problem.

The BJS state reports results from the survey of 957 public defender offices across 49 states and the District of Columbia determined that 79% of reporting state public defender systems (15 of 19) exceeded nationally-recognized workload standards. This should not be surprising, given the finding by BJS in *State Public Defender Programs, 2007* that, from 1999 to 2007, caseloads at state public defender programs increased 20% while staffing increased by just 4%. The situation is actually much worse. BJS acknowledges that its methodology undercounts workload demands because the formula only counts new assignments per attorney per year, while national standards are based on every case *worked* in a given year (*i.e.*, pending cases + new assignments). Additionally, the survey divided the total number of new cases by the total number of attorneys in an office, including management & supervising attorneys without regard to whether they actually carried a full caseload. It should also be mentioned that the BJS studies detail information from 2007, before the recent severe recession.

The situation in county-based programs is equally dire, as reported in *County-based and Local Public Defender Offices, 2007*. Seventy-three percent of county-based public defender programs exceed national caseload standards, a number skewed slightly lower by the inclusion of the Public Defender Service of the District of Columbia in the county grouping (arguments can be made that D.C.'s right to counsel system operates more similarly to a statewide system). Not surprisingly, only 15% of county or local public defender offices had formal caseload limits, and only 36% have the authority to turn back cases due to case overload. The more cases a local public defender program received, the more likely they were to exceed national standards. Four out of every five offices receiving more than 2,500 new assignments per year exceeded the national standards for workload. Only 27% of county-based public defender offices reported sufficient numbers of attorneys to meet national caseload standards, with nearly a quarter of all reporting offices stating that they have less than half the number of attorneys required by the standards. The inability of county-based public defender programs to address case overload is due, in part, to a lack of independence. Independent commissions, as required by the ABA *Ten Principles of a Public Defense Delivery System* (2002) exist in only 36% of the local and county-based systems.

Though the two 2010 BJS reports confirm what equal justice advocates have long known about excessive public defender workload, the majority of indigent defense services in the country is provided by private attorneys paid under contract or by hourly wages. The two 2010 BJS reports address only indigent defense services provided by staffed public defender offices. The problems associated with flat fee contracts and/or ad-hoc, unregulated assigned counsel systems are equally severe, if not worse. State and county governments neglect providing any type of meaningful supervision to hold these public defense lawyers accountable and refuse to make available on-going training to keep attorneys abreast of ever-evolving criminal justice practice. Far too often, public attorneys in these ad-hoc systems are beholden to judges presiding in their cases for their paychecks, creating a direct conflict between a lawyer's ethical duty to advocate solely on behalf of his client and his personal financial well-being.

Despite some legislative victories since the DOJ-sponsored symposiums, most notably the achievement of independence for the Maryland State Public Defender and South Carolina's sweeping bill reversing the trend toward incarcerating non-violent criminals who pose little to no public safety risk, most of the state level news has been dire over the past year. Caseload crises continue unabated in Florida, Minnesota, Tennessee, Kentucky and Rhode Island, among others, while the right to counsel continues to devolve in states like Alabama, Michigan, Idaho, Pennsylvania, Utah and Mississippi. Most recently, on January 24, 2011, Massachusetts Governor Deval Patrick proposed comprehensive and destructive changes to the delivery of indigent defense services in the state most see as one of the very few that have been able to implement all ten of the ABA *Ten Principles*. The changes include abolishing the existing independent commission that oversees the Committee for Public Counsel Services (CPCS), effectively bringing undue political interference where there had previously been none.

Defense counsel, prosecutor, victims, judges, and others with a stake in the fairness and accuracy of the system should work together to make our system work as well as possible.

We ask that you support and advocate for federal, state and local commitment to the principles of fairness, transparency, efficiency, uniformity and collaboration as explained above.

Creation of National Defender Training capacity for public defender managers, leaders, and practitioners from around the country: The capacity should support and oversee high quality regional and local training. Though the national training project funded by the Bureau of Justice Assistance (BJA) through the American Bar Association (ABA) is a significant upgrade on DOJ-training dollars dedicated to indigent defense, the project does not come close to filling the need expressed in our recommendation to create training center in which defenders can receive excellent training.

We ask that you exercise your leadership in creating training parity with prosecutors.

The ACCD continues to commend your commitment to upholding the constitutional right to counsel. However, it is an all-too-familiar experience to have policy-makers tell us that they understand our problems and then be caught up in other important issues of the day and fail to actually bring about substantive change. People in need of public defender services oftentimes are undereducated, inarticulate, mentally ill, developmentally delayed, under-aged, and/or suffering from substance abuse. They need, as the United States Supreme Court reminds us, "the guiding hand of counsel" at "every stage of the proceeding" against them. Instead, defendants in most states count themselves among one of several hundred vying for the attention of a single lawyer who lacks the time and resources to adequately advocate on their behalf.

Thank you for considering our requests, and again, for your leadership around these issues. We expect more from you because you are our clients' best hope for positive change.

(Continued)
Attorney General Eric Holder
Page 5 of 5

We would like to meet with you as soon as practical to understand the progress on the Department-wide efforts you announced in your address to us June 24, 2009 in Washington D. C. and to work to continue to achieve the ACCD priorities.

Sincerely,



Edward C. Monahan
Chair
American Council of Chief Defenders