



The American Council of Chief Defenders is a national community of criminal defense leaders

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January 20, 2012

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,

The American Council of Chief Defenders (ACCD) seeks to advance our conversation with you about improving the delivery of the constitutional right to counsel in states and localities throughout the country. This effort continues to need your special leadership.

We appreciate our meeting with you on May 16, 2011. You indicated a willingness to work on initiatives and changes. We would like to meet again at your earliest convenience so we can make progress on the right to counsel issue and discuss the next steps on:

- A national open file discovery dialogue that allows defenders and prosecutors to work collaboratively to improve justice.
- A follow-up symposium to the 2010 Department of Justice National Symposium on Indigent Defense.
- Additional federal funding to improve indigent defense systems nationwide.
- An "Injustice Tour" in the nature of former Attorney General Robert Kennedy's 1968 poverty/hunger tour as described in *Lives of Moral Leadership: Men and Women Who Have Made a Difference* (2000) by Robert Coles, a copy of which we presented to you at the meeting on May 16.

Attached are our proposals for the national discovery dialogue and the follow-up Indigent Defense Symposium. Also attached is information about the greater amount of DOJ funding states provide to prosecutors, police departments and other law enforcement entities than to public defender offices. We have also shared this report with Mark Childress, Senior Counselor for the Access to Justice Initiative.

We would like to meet with you as soon as your schedule permits.

Sincerely,

Edward C. Monahan  
Chair, American Council of Chief Defenders

CC Jo-Ann Wallace, President and CEO NLADA



American Council of Chief Defenders proposals for

- National dialogue on discovery ,and
- Next indigent defense symposium

### **DOJ's National Symposium on Indigent Defense: getting it right the first time; advancing public safety**

The US Department of Justice has held three national conferences on indigent defense, 1999, 2000, and 2010. Despite these efforts, progress on the indigent defense crisis has failed to match its critical needs. The Justice Department must be a leader in calling for progress. Supporting and defending the Constitution includes a responsibility to serve as guardians of the rights of all Americans, including the poor and underprivileged. The goal at the Department of Justice is “that justice shall be done.” That means that when the system breaks down, we all lose. And this is true not just because our shared principles are undermined, but for practical reasons too. When defendants fail to receive competent legal representation, their cases are vulnerable to costly mistakes that can take a long time to correct. Lawyers on both sides can spend years dealing with appeals arising from technical infractions and procedural errors. When that happens, no one wins. At this symposium we must join together and mobilize change to get it right the first time by providing indigent defense with adequate resources and parity within the system.

#### Objectives:

- Identify the national standards for properly functioning indigent defense system, especially the need for parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system
- Identify the practice, system problems caused by the lack of indigent defense parity of resources, inequitable grant funding and government funding
- Identify the advantages and efficiencies of a properly funded indigent defense system
- Report Findings and Recommendations to achieve indigent defense parity
- USDOJ Report and Recommendations to mobilize changes in states to increase funding to needed levels to get it right the first time

#### Participants:

- From each state: chief defender, chief justice, secretary of justice, attorney general; national groups with travel and room funded by US DOJ.

#### Moderator and Reporter:

Charles J. Ogletree, Harvard Law School

**8:30 a.m. – 9:15 a.m.**

#### **The issue**

#### **The state of indigent defense**

An assessment of how indigent defense systems fare in achieving the *ABA Ten Principles of a Public Defense Delivery System* (2002) and recommendations to mobilize changes especially the need for parity between defense counsel and the prosecution with respect to resources

-Standing Committee on Legal Aid and Indigent Defendants (SCLAID)

**9:15 a.m. - 10:00 a.m.**

#### **The state of indigent defense resources**

**A description of the gap between the current reality and parity of resources (grant and government appropriations) and the system problems and costs this gap causes**

-Pew Center on the States

**10:15 a.m. – 11:30 a.m.**

**Mobilizing progress on the indigent defense parity problem**

Partnering with and mobilizing the criminal justice stakeholders to do the adaptive work toward a solution -perhaps someone like Ronald Heifetz Harvard's Kennedy School of Government, author, *Leadership Without Easy Answers* (1994).

**11:30 a.m. – Noon**

**Our opportunity**

**Remarks**

William. T. Robinson III , President, American Bar Association

Eric Holder Attorney General – the leadership role US DOJ has in advancing achieving parity between defense counsel and the prosecution with respect to resources and defense counsel's inclusion as an equal partner in the justice system

Noon – 1:30

**Lunch**

**1:30 p.m. – 3:00 p.m.**

**Reforms making progress**

Nontraditional groups

21st century public defender office: client-centered and holistic in its approach

Louisiana

**3:30- 4:30**

**Discussions by state: a plan for reform**

Small group structured discussions

**4:30 – 5:30 p.m.**

**Reports by state**

**5:30**

**Close**

**A national dialogue that allows defenders and prosecutors to work collaboratively to improve justice  
Advancing Public safety: Timely, Full Open File Discovery**

The criminal justice system seeks reliable and valid outcomes. The integrity of the criminal justice system at the state and federal levels requires defendants to be timely informed of all evidence the prosecutor and the prosecutor's agents have related to the case and the defendant.

*Brady v. Maryland*, 373 U.S. 83, 86 (1963) determined that the Constitution requires the prosecution to provide exculpatory evidence to the defense as a matter of due process. However, that constitutional rule has not been fully effective in making sure defendants receive evidence they are constitutionally entitled to receive.

The ABA's Rules of Professional Conduct, Rule 3.8 Special Responsibilities Of A Prosecutor requires disclosure beyond the Constitution, "The prosecutor in a criminal case shall:....(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal...." However, this ethical requirement has not insured full disclosure.

More is required. Statutory requirements for full discovery of all evidence in possession of the prosecutor and prosecution agents are necessary. These would provide fair processes and greater efficiencies. "The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment." Robert P. Mosteller, Exculpatory Evidence, Ethics, and the Road to Disbarment of Mike Nifong: the Critical Importance of Full Open-File Discovery, Duke Law School Legal Studies Research Paper Series No 182, January 2008.

Together this dialogue will chart a course for how the system insures fair and impartial justice for all Americans.

Objectives:

- Identify the practice, system issues with lack of full, timely open file discovery
- Identify the national standards of discovery
- Identify the advantages and efficiencies of full, timely open file discovery
- Report Model Act for full, timely open file discovery
- Mobilize changes to state and federal statutes and rules and practice to advance the reliability and validity of the results and increase efficiencies

Outcome:

- USDOJ Report and Recommendations on requiring full, timely open file discovery in criminal cases in the states and federal system

Participants:

- Leaders of national associations, including prosecutors, defense, law enforcement, state Bar leaders, ABA

Moderator and Reporter:

- Charles J. Ogletree, Harvard Law School

**8:30 a.m. – 9:00 a.m.**

**The issue**

**Our current discovery context**

A brief description of what states and federal government require for discovery in criminal cases; what national standards recommend; practice, system issues

See: The Justice Project's *Expanded Discovery in Criminal Cases: A Policy Review* (2007)

[http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death\\_penalty\\_reform/Expanded%20discovery%20policy%20brief.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf)

Charles J. Ogletree, Harvard Law School

**9:00 a.m. – 9:45 a.m.**

**The problem**

**The failure to provide full open discovery undermines the integrity of the criminal justice process: A case example**

Perhaps the attorneys in the Duke Lacrosse case with a description of the statutory/rule changes made as a result Joe Cheshire Raleigh, NC; Brad Bannon

**10:00 a.m. – 11:00 a.m.**

**What is working**

**Open file discovery is working, increasing efficiencies and outcomes that are reliable and valid, including recorded interrogations and eyewitness proceedings**

Panel of prosecutors, defense attorneys (Thomas Maher, NC; Tim Young, OH), law enforcement, judges, ABA

11:00 a.m. – Noon

**Our opportunity**

**Remarks**

William. T. Robinson III , President, American Bar Association

Eric Holder Attorney General

Noon – 1:30

**Lunch**

**1:30- 2:30**

**Open file discovery: detailing the advantages; ingredients of the best practice, including automatic and mandatory, timing, certification, remedies for noncompliance**

Small group structured discussions

**2:45- 3:45 p.m.**

**Reports from small groups**

**4:00 – 5:00 p.m.**

**Close**

**North Carolina's recently amended provision is a reference**

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DEFENDER  
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September 15, 2011

Mark B. Childress  
Senior Counsel  
Access to Justice Initiative  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Re: Byrne Grant Funding Disparities

Dear Mr. Childress:

Thank you for attending the joint meeting of the American Council of Chief Defenders (ACCD) and the Community-Oriented Defender Network in July in New York City. It was a pleasure for me to meet you for the first time there and for all of us to hear about your plans for the Access to Justice Initiative.

During that meeting, the members of the ACCD expressed a great deal of frustration in their efforts to obtain funding for public defender offices under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. The ACCD members promised to provide you with examples of the disparities in funding between public defender offices and law enforcement entities that cause this frustration.

Enclosed you will find a memorandum describing some of the disparities. I hope you will have the opportunity to read the memorandum and let me know if you have any questions. I have written separately to invite you to attend the ACCD's next meeting on Thursday, December 8, at the Washington Marriott Wardman Park Hotel. Perhaps you will be able to attend and to discuss these examples with the ACCD members. In either event, the ACCD members would be happy to have your response to this memorandum.

You may reply to me by letter, by email at [abuchanan@pdsdc.org](mailto:abuchanan@pdsdc.org), or by telephone at (202) 824-2370.

Sincerely,



Avis E. Buchanan  
Member, Executive Committee  
American Council of Chief Defenders

## MEMORANDUM

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To: Mark Childress  
Senior Counselor  
Access to Justice Initiative

From: Avis E. Buchanan  
Member  
Executive Committee  
American Council of Chief Defenders

Date: September 15, 2011

Re: Byrne Justice Assistance Grant Funding

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### LAW ENFORCEMENT AGENCIES RECEIVE A DISPROPORTIONATE AMOUNT OF JAG FUNDING IN COMPARISON WITH PUBLIC DEFENDER OFFICES

At the July 2011 meeting of the American Council of Chief Defenders, the ACCD agreed to provide you with examples of disparities in grant funding support provided to law enforcement versus public defender offices. The ACCD solicited examples of disparities and proposed solutions from its membership.

#### I. EXAMPLES OF DISPARITIES

**KENTUCKY:** Seventy-five percent of Byrne Grant funds support drug task forces without any consideration of or funding for the effect of the increased funding on the courts, prosecutors, and defenders. In 2010, these task forces arrested 6,368.

**LOUISIANA:** As historically administered, the Byrne Grant process in Louisiana supports the police and the prosecution, as noted on the “Louisiana Commission on Law Enforcement and Administration of Justice” web site<sup>1</sup> and as further indicated by the almost exclusive presence of law enforcement representatives on the Commission. The sole non-police/prosecutor member of the Commission is the State Chief Defender.<sup>2</sup>  
From the Commission’s website:

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<sup>1</sup> <http://lcle.la.gov/index.asp>.

<sup>2</sup> The current State Chief Defender is Jean Faria.

“The Edward Byrne Memorial Justice Assistance Grant (JAG) program allows states and local governments to support a broad range of activities to prevent and control drug trafficking, drug related crime, and violent crime. Based on their own local needs and conditions, agencies are provided with the flexibility to prioritize and place justice funds where they are needed most.

Jag [sic] funds can be used for state and local initiatives, technical assistance training, personnel, equipment, supplies, contractual support, and information systems for criminal justice for any one or more of the following purpose areas:

- Law enforcement programs.
- Prosecution and court programs.
- Prevention and court programs.
- Corrections and community corrections programs.
- Drug treatment and programs.
- Planning, evaluation, and technology improvement programs.

Local agencies apply for funding through the District Local Law Enforcement Planning Councils and the statewide agencies apply through the Louisiana Commission on Law Enforcement. “

<http://www.cole.state.la.us/programs/byrnejag.asp> (emphasis added).

The most recent application review resulted in awards to certain grantees as indicated in the attachment.<sup>3</sup> Of the \$1.537 million in awards issued in July 2011, none were made to public defender offices. Below is a summary of the award categories and the amounts awarded.

**LOUISIANA COMMISSION ON LAW ENFORCEMENT  
& ADMINISTRATION OF CRIMINAL JUSTICE**

**Applications Approved at the Commission Meeting of July 21, 2011**

Program Type	Number of Agencies	Funding Level
<b>A Juvenile Accountability Block Grant</b>	<b>9</b>	<b>222,575</b>
<b>B Drug Control and Violent Crime</b>	<b>16</b>	<b>272,552</b>
<b>C Crime Victim Assistance Program</b>	<b>9</b>	<b>178,086</b>
<b>J Juvenile Justice &amp; Delinquency Prevention</b>	<b>1</b>	<b>3,098</b>
<b>M Violence Against Women</b>	<b>24</b>	<b>568,695</b>
<b>N Residential Substance Abuse Treatment</b>	<b>1</b>	<b>292,694</b>
<b>TOTAL BY FUND TYPE</b>	<b>60</b>	<b>1,537,700</b>

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<sup>3</sup> The list was printed from <http://lcle.la.gov/programs/uploads/grants/07212011.pdf>.

A very recent development showed a slight deviation from the historical pattern. The Louisiana Public Defender Board learned in late August 2011 that Louisiana's State Administering Agency has set aside approximately \$126,000 in Byrne grant funds for the Board for the current fiscal year. (An equal amount of funding has been set aside for the Louisiana District Attorneys Association as a "state agency," despite the fact that it is a nongovernmental organization.) The Board also learned that individual defenders may apply to their local regions for funding on the local level.

### **MINNESOTA:**

In Minnesota, the public defender system is state-funded, and the prosecutor's office is funded by the county. A common response to problems associated with methamphetamine abuse has been that the county sheriff would get state law enforcement help to make multiple arrests; the county prosecutor would get state and federal help to prosecute; the court would get extra state funds to hire retired judges to try the cases; but the public defender office, which is supported solely by state funding, would not receive extra assistance from any source. The prosecutors enjoy an almost three-to-one staffing advantage, and they use the state-funded Attorney General's staff as a resource in prosecuting cases, and then the Byrne grant process gives the prosecutors even more resources.

For example, during a methamphetamine epidemic in 2005 or 2006, the Attorney General's office provided a great deal of assistance in prosecuting cases, but the public defender office had no access to outside resources. In addition, the Attorney General's office received Byrne grant funding to hire two additional lawyers to assist the counties in prosecuting methamphetamine cases. This exacerbated the existing resource imbalance between the prosecution and the public defender office.

**OHIO:** Two police and prosecution grants doubled the number of felonies in Meigs County. The county is now almost bankrupt. The grants did not fund additional probation, jail, or defense costs; the county is responsible for these costs, some of which approximately doubled. Essentially, the DOJ and Byrne grants have cost this county a fortune without much benefit - there had been no real increase in crime, just in prosecutions.

**SOUTH CAROLINA:** In FY 2006, the South Carolina Public Safety Coordinating Council oversaw the award of \$3.6 million in JAG funds. South Carolina Senator Jake Knotts, a member of the Council who had a career in law enforcement before being elected to the state House of Representatives and then the state Senate, blocked public defenders from even being considered for JAG funds awards and did so despite the Council staff's interest in making such awards.

[Council staff member Burke Fitzpatrick] then proceeded to bring the recommendation for the Aiken County Public Defender's Office to the Council's attention. Mr. Fitzpatrick acknowledged the Council's past positions on grants to public defenders but also noted that it was the responsibility of the [Office of Justice Programs] staff to bring their best recommendations for final decision by the Council. As with previous public defender grants, the staff sees an opportunity to break a justice system bottleneck in a

jurisdiction which would reduce jail populations, taxpayer costs and bring more rapid resolution to cases for victims of crime.

Senator Knotts made a motion to deny the grant. The discussion not to present Public Defenders grants before the Public Safety Coordinating Council (PSCC) was then made. Senator Knotts made a motion to deny the Aiken County Public Defender recommendation. The motion was properly seconded and carried. Senator Knotts proceeded to make a motion that JAG funds are not to be used for Public Defenders. The motion was properly seconded and carried. Chairman Lott clarified for Mr. Fitzpatrick ~~that~~ OJP staff could accept grant applications from Public Defenders, but must not recommend them for funding. (Any future applications from public defender corporations will be notated in the Master List and appear in the “Recommended for Denial” section of the summaries - BOF).

Minutes of meeting of South Carolina Public Safety Coordinating Council, p. 2, May 8, 2006.

The Council did approve at least two law enforcement-oriented awards – one to the County Sheriff’s Office for court security and the other to the Abbeville County Sheriff’s Office for its Drug Task Force – and considered a number of others.

**TENNESSEE:**

**In 2008**, Knox County, Tennessee received \$77,047 in JAG funds. Approximately \$58,000 was spent to establish a secondary booking site in the City-County Building, a project in which the Knox County Public Defender's Community Law Office (CLO) had some influence. The remaining approximately \$19,000 was divided equally between the Knoxville Police Department, which used the money for technology for prisoner transport wagons, and the Sheriff’s Department, which used the money for tasers.

**In 2009**, Knox County and the City of Knoxville received a total of \$259,411 in JAG funds. The City of Knoxville and Knox County each received \$116,735, and the County received the remaining \$25,941 to manage the grant. The City of Knoxville Police Department used the City of Knoxville’s money to fund a partial position, to purchase access to a law enforcement database, to buy a new cruiser, and to do training. Knox County’s money went to the Sheriff’s Department for technology upgrades.

The Knox County Public Defender’s Community Law Office unsuccessfully applied for \$48,590 per year for three years (for a total of \$170,064) for a social worker for a proposed Intensive Redicivism Reduction Project.

**In 2009**, the City of Knoxville and Knox County received \$1,066,180 in Recovery Act JAG funds. Knox County received \$53,309 to manage the grant. The remainder was split equally between the City of Knoxville and Knox County. The City of Knoxville received \$506,435.50 that went to the Knoxville Police Department for nine patrol cars, assistance to a prosecutorial/law enforcement center to help victims of domestic abuse and other crimes, partial funding of a planning/management position, and laptops and remote access cards for the forensic

unit. Knox County received approximately \$32,000 for Juvenile Court for live scan/fingerprinting equipment; the Sheriff's Department received \$207,000 for parts and service for its aviation unit and approximately \$267,000 for server/backup/technology upgrades for the department's information systems.

The CLO did not apply for local funding. The CLO did apply for and receive state Byrne funding for Drug and Alcohol Specialist and Employment Counselor positions in the amount of \$190,854 over two years (\$95,427 per year).

**In 2010**, the City of Knoxville received an unknown amount in JAG funds. The City managed this grant for an unknown sum. Knox County and the City of Knoxville each received approximately \$114,000. The CLO does not know how the City of Knoxville used its \$114,000. Knox County used its money for five new patrol cars for the Sheriff's Department.

The CLO contacted the Community Development Office to inquire about applying for funding; they were told that the Office would consult with mayor. The CLO was informed later that all the money would be devoted to law enforcement for IT upgrades.

**In 2011**, the City of Knoxville and Knox County applied for \$214,722 in JAG funds. If the application is granted, the City of Knoxville and Knox County will split the money equally (\$107,361 each). The City of Knoxville will use its grant for training, efforts to combat human trafficking, and GPS devices for probation supervision. The Knox County Sheriff's Department will use the money for technology upgrades.

The CLO did not apply for local funding because it received information in 2010 that the grant money was to be used for law enforcement.

**WISCONSIN:** Local news accounts show that Wisconsin counties successfully apply to the state's Office of Justice Assistance, which administers Byrne grants and similar funding, for money to support hiring prosecutors. No Office of Justice Assistance money goes to the defense function, despite the fact that generally, having additional prosecutors increases the defense's workload. The new prosecutor positions are for a limited duration, but often are extended many times.

From the National Legal Aid & Defender Association's webpage describing the Byrne Grant program:

“How funds have been distributed in the past

Historically, very little of JAG funding has ever reached indigent defense systems. In 2010, [the National Criminal Justice Association] conducted a survey of [State Administering Agencies], seeking answers about how states and local communities used their JAG funds. The survey compiled data on how funds were spent in 2009 (which could include money from 2007, 2008, and 2009 JAG awards, as well as special Recovery Act awards made in 2009). The results show that, of a total of \$1,203,538,214

spent during 2009, only \$3,208,686 was spent on public defense -- or roughly 1/4 of 1 percent (0.0027).”

[http://www.nlada.net/library/article/na\\_byrnejagfundingpublicdefense02-25-2011](http://www.nlada.net/library/article/na_byrnejagfundingpublicdefense02-25-2011).

## **II. SUGGESTIONS FOR ADDRESSING DISPARITIES**

Grant applications should require that applicants describe or measure the impact funding for one criminal justice agency will have on others (e.g., increased funding for police departments, sheriff's offices, or prosecutors' offices will result in a \_\_\_% increase in the number of arrests which will lead to a \_\_\_% increase in caseloads for courts and public defender offices, increased \_\_\_% in jail and prison populations, etc.)

Follow the practice of King County (Washington State) where the budget office has identified Byrne grant-type funding imbalances as a policy issue that needs to be addressed whenever a department or separately elected official applies for any grant, not just those offering support to the criminal justice system.

Have the application and application review processes be made more transparent – New York City does not make very clear what the process is for applying for grants.