



May 13, 2015

The Honorable Chuck Grassley
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Patrick J. Leahy
Ranking Member, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20515

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Re: ACLU Supports Congressional Response to the Indigent Defense Crisis

Dear Chairman Grassley and Ranking Member Leahy:

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. Consistent with this mission, the ACLU has long advocated for the fulfillment of the Sixth Amendment right to counsel, having filed a friend of the court brief in *Gideon v. Wainright* (372 U.S. 335).

The ACLU commends the Senate Judiciary Committee for providing a much needed examination of the indigent defense crisis in this country. More than 50 years after *Gideon*, the promise of equal access to justice remains unfulfilled. In deciding *Gideon* in 1963, the Supreme Court held that our Constitution guarantees the right to counsel for anyone accused of a felony offense, even if they cannot afford one. Subsequent Supreme Court decisions affirmed this mandate and went further, with the Court extending the right to counsel to those incarcerated for a misdemeanor offense in *Argersinger v. Hamlin* (407 U.S. 25) in 1972.

The Country Faces an Indigent Defense Crisis

Nevertheless, the right to counsel evades many in our criminal justice system. Approximately 80% of criminal defendants cannot afford counsel. Nationwide, public defenders or assigned counsel are ill equipped to meet this demand. They are often forced to juggle hundreds of cases at once, without resources to investigate, conduct legal research, or prepare in even the most basic fashion for hearings and trial. Often, public defenders meet

their clients for the first time minutes before critical proceedings. There are many courts around the country where cases are adjudicated without the presence of counsel at all. Additionally, public defenders are frequently outgunned by prosecutors armed with greater resources, larger staffs, and partnerships with local police departments.

The Indigent Defense Crisis Is Exacerbated by Misdemeanor Offenses

These failures are even more glaring when considering the deprivation of the right to counsel in misdemeanor cases. As demonstrated through litigation and other advocacy, the ACLU shares the concerns of the Committee and others that “justice” is “blindingly swift” for the millions of Americans charged with misdemeanors each year.

Misdemeanor charges, which account for 70% to 80% of criminal cases annually, are how a majority of Americans are exposed to our criminal justice systems. And unfortunately, misdemeanor convictions can have consequences similar to felony convictions – fines, jail time, and loss of employment opportunities. Despite these consequences, it is estimated that one in every four misdemeanor defendants facing jail time is not represented by a lawyer.¹

Indigent Defense Failures Fuel Mass Incarceration

Additionally, ineffective handling of indigent defense cases, including misdemeanor cases, fuels mass incarceration. The failure to provide zealous representation throughout a criminal case results in more people being detained pretrial, more convictions (and hence more people with criminal records, which have both direct and indirect consequences on future incarceration), and more sentences of incarceration. Along with numerous other factors, inadequate indigent defense systems have resulted in the United States representing 5% of the world’s population but nearly 25% of its inmates.

By the close of 2010, America had 1,267,000 people behind bars in state prisons, 744,500 in local jails, and 216,900 in federal facilities – more than 2.2 million people incarcerated. The “tough on crime” politics of the 1980s and 1990s – which has inundated our court system with misdemeanor cases – has also fueled an explosion in incarceration rates. Mass incarceration has proven more costly than providing adequate counsel to poor defendants.²

In New York, Named Plaintiff Charged with Misdemeanor, but Pleads to Felony

In October 2014, the New York Civil Liberties Union settled *Hurrell-Harring et al., v. State of New York* (15 N.Y.3d 8 (2010)) having challenged New York’s public defense system. The law suit argued that New York’s failure to provide adequate funding, resources, and oversight to the public defense system threatened to deprive indigent

¹ John R. Emshwiller and Gary Fields, *Justice Is Swift as Petty Crimes Clog Courts*, WSJ, Nov. 30, 2014, available at <http://www.wsj.com/articles/justice-is-swift-as-petty-crimes-clog-courts-1417404782>.

² ACLU, *Mass Incarceration*, available at <https://www.aclu.org/issues/mass-incarceration>.

defendants of their constitutional right to meaningful and effective assistance of counsel. The named plaintiff Kimberly Hurrell-Harring, who committed a misdemeanor, was advised by her public defense attorney to plead guilty to a felony, causing her to lose her job and home while in jail.³

The terms of the settlement agreement reflect the substantial and systemic reforms that are needed in the New York indigent defense system. Indigent criminal defendants will now have a lawyer at the first court appearance, where bail is often set and pleas are taken. Caseload standards will be imposed to now substantially limit the number of cases any lawyer can carry. The Office of Indigent Legal Services will also serve as a state-level oversight entity that ensures the constitutional provision of public defense service.

In Mississippi, Failure to Pay Bail Results in Indefinite Detention (Even for Misdemeanors)

In September 2014, the ACLU brought a class action suit in Scott County, Mississippi (*Burks, et al. v. Scott County, Mississippi*, 3:2014cv00745 (S.D. Miss)), where people who can't afford bail are routinely held in jail for as long as a year without appointed counsel or an indictment. In Mississippi, there is no limit on how long a prosecutor has to indict someone. One Scott County resident was held in the county jail three times in seven years with no formal charges against him and without the assignment of counsel. For this ACLU client, these three arrests have meant over three years in jail without being found guilty of a crime – each time, he was eventually released from the jail without a trial or conviction.⁴

Indefinite detention in Mississippi is not limited to felony offenses. A 2003 NAACP LDF report featured the story of a Gulfport misdemeanant shoplifter who was incarcerated for 14 months before trial.⁵ And unfortunately, Mississippi is not an isolated example, with poor people throughout the country confined to jail indefinitely because they cannot afford bail and are waiting for an indictment or public defender.⁶

³ NYCLU, *Hurrell-Harring et al., v. State of New York (Challenging New York State's failure to provide adequate public defense services)*, available at <http://www.nyclu.org/node/1538>.

⁴ ACLU, *ACLU Sues Scott County on Behalf of Mississippians Jailed Indefinitely Without Lawyer or Indictment*, Sept. 24, 2014, available at <https://www.aclu.org/news/aclu-sues-scott-county-behalf-mississippians-jailed-indefinitely-without-lawyer-or-indictment>.

⁵ NAACP LDF, *ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS*, Feb. 2003, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

⁶ *Supra* note 4.

In Washington, Indigent Misdemeanor Defendants Deprived of Right to Counsel

Reforms are also underway in Washington's Mt. Vernon and Burlington municipal defense systems as a result of litigation brought by the ACLU of Washington State. In December 2013, in *Wilbur v. City of Mt. Vernon* (989 F. Supp. 2d 122 (W.D. Wash. 2013)), the U.S. District Court in Seattle found that the public defense system of Mt. Vernon and Burlington deprives indigent persons who face misdemeanor criminal charges of their fundamental right to assistance of counsel.

In Mt. Vernon and Burlington, public defenders had excessively high caseloads, rarely provided an opportunity for the accused to confer with them in a confidential setting, rarely engaged in investigations or researched possible legal defenses, and overall failed to meaningfully represent their clients. Further, it found that city officials made deliberate choices that directly led to the deprivation of rights and failed to monitor or evaluate the system, turning a blind eye to its obvious problems. The court concluded that the defense services for indigent clients amounted to little more than a "meet and plead" system.⁷

In Michigan, District Judge Has Over 100 Misdemeanors on His Docket Every Day

In June 2013, as result of ACLU litigation and advocacy with allies, Michigan created an indigent defense commission – a statewide structure for the delivery of public defense services. The commission goals include a more independent defense system; county-based systems with reasonable caseload requirements; additional resources to provide experienced and quality representation of counsel; and regular oversight and support to ensure the right to counsel is protected.⁸ However, in cities like Detroit, court statistics show that a district judge may have over 100 misdemeanor cases – or one every four minutes – on his or her docket every day.⁹

In Pennsylvania, Public Defender Office Stops Representation in Misdemeanor Cases

In April 2012, the ACLU of Pennsylvania filed a class action lawsuit against Pennsylvania's Luzerne County (*Flora v. County of Luzerne*, No. 14-1854 (3d Cir. 2015), alleging that gross and chronic underfunding of its Office of the Public Defender has led to widespread violations of indigent defendants' constitutional right to adequate counsel. Overwhelming caseloads in Luzerne County caused the Chief Public Defender to restrict new cases to only the most serious ones, such as murder, sex and other felonies that resulted in pre-trial detention. As a result, many individuals face criminal prosecutions

⁷ ACLU, *Ruling says individuals "not represented in any meaningful way,"* Dec. 5, 2013, available at <https://www.aclu.org/news/federal-court-finds-public-defense-system-violates-constitutional-rights-indigent-defendants>.

⁸ Tanya Greene, *Victory! Michigan Turns the Corner on Public Defense Reform*, ACLU BLOG, July 1, 2013, available at <https://www.aclu.org/blog/victory-michigan-turns-corner-public-defense-reform>.

⁹ *Supra* note 1.

without lawyers. The defender's office has turned away at least 300 people. Since unmanageable caseloads prevent lawyers from providing representation that met constitutional and professional standards, the ACLU is seeking manageable caseloads, public defender hiring, and assignment of private counsel for Luzerne's public defender office.¹⁰

In 1996, the ACLU sued Pennsylvania's Allegheny County in *Doyle v. Allegheny County Salary Board* (No. GD-96-13606 (Penn. Ct. Com. Pl. 1997)), alleging that their Office of the Public Defender failed to provide constitutionally adequate representation to indigent criminal defendants, juveniles charged with delinquency, and people subject to involuntary mental health commitments. After two years of contentious litigation, the lawsuit resulted in an agreement designed to improve the office, which called for increased funding, staffing, training and management, as well as written policies promoting best practices. Today, while the county met the funding and staffing requirements, reforms remain for the office to adopt necessary standards, maintain high-level training, and implement practices that are an indispensable part of a constitutionally adequate indigent defense system.¹¹

Congress' Role in Indigent Defense Reform

As this Committee examines the failures of states and localities to provide indigent defense in accordance with the Constitution, there is a role for the federal government to play. Congress should consider how to incentivize state and local jurisdictions to use federal dollars for indigent defense. A Government Accountability Office (GAO) study revealed that little more than half of grantees knew that Department of Justice federal dollars could be used for indigent defense. And for those grantees that did allocate federal dollars to indigent defense, they allocated just 2% to 14% for this purpose.¹²

Congress should explore legislation that would create a national clearinghouse that would support state and local indigent defense systems and provide training to improve the quality of representation provided to indigent clients. Representative Ted Deutch's (D-FL) National Center for the Right to Counsel Act, H.R. 2063, would create such a resource.

Congress should consider legislation that would give the U.S. Attorney General the authority to obtain appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct that deprives persons of their rights to assistance of counsel. The

¹⁰ ACLU of PA, *Flora v. Luzerne County*, available at <http://www.aclupa.org/our-work/legal/legaldocket/flora-v-luzerne-county1/>.

¹¹ ACLU of PA, *A Job Left Undone: Allegheny County's Fork in the Road*, available at <http://www.aclupa.org/issues/criminaljustice/indigent-defense-reform/job-left-undone-allegheny-countys-fork-road/>.

¹² GAO, *DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose*, May 2012, available at <http://www.gao.gov/assets/600/590736.pdf>.

Gideon's Promise Act, S. 597 sponsored by Senator Patrick Leahy (D-VT) in the last Congress, would provide the Attorney General with this authority.

The House and Senate Judiciary Committees should continue examining indigent defense through hearings, including oversight hearings of the Department of Justice's Access to Justice (ATJ) office. Congress should support ATJ and its mission to address the access-to-justice crisis in the criminal and civil justice system. ATJ, along with the Civil Rights Division, has taken an active role in addressing the indigent defense crisis by filing statements of interest in right to counsel cases.

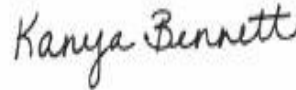
Finally, Congress should consider the impact of sequestration on federal public defender offices. In order for the federal public defender system to continue serving as a model for indigent representation, funding may need to be restored to pre-sequestration levels.

Thank you for considering our concerns with the country's indigent defense systems. Please contact legislative counsel Kanya Bennett at (202) 715-0808 with any questions or comments.

Sincerely,



Michael W. Macleod-Ball
Acting Director



Kanya Bennett
Legislative Counsel

cc: Members of the Senate Judiciary Committee