National Legal Aid & Defender Association

EQUAL JUSTICE.
OF THE PEOPLE.
FOR THE PEOPLE.

May 9, 2011

Governor Robert Bentley
Alabama State Capitol
600 Dexter Avenue
Montgomery, Alabama 36130

Re: Indigent Defense Reform Bills (SB440 & HB601)

Dear Governor Bentley,

The National Legal Aid & Defender Association (NLADA)[1] applauds your decision to address the growing costs of the Alabama criminal justice system and the lack of accountability in the provision of constitutionally mandated indigent defense services. NLADA and I recognize and respect the right of Alabama officials to make policy decisions in the best interests of the citizenry, and we stand ready to assist you in achieving your admirable goals. Toward that end, I offer the following analysis of Senator Cam Ward and Representative Paul DeMarco's indigent defense reform bills (SB 440 and HB 601, respectively).

Efforts to control public defense expenditures that do not take into account prevailing national standards tend to have negative effects on both the efficiency of a state's courts and public safety. Policymakers have long recognized that minimum quality standards are necessary to assure public safety in the building of a hospital, school or a bridge. The taking of a person's liberty merits no less consideration.

[1] The National Legal Aid & Defender Association (NLADA) is a national, non-profit membership association dedicated to quality legal representation for people of insufficient means. Created in 1911, NLADA has been a leader in supporting equal justice for over ninety years. NLADA currently supports a number of initiatives, including the American Council of Chief Defenders (ACCD), a leadership forum that brings together the top defender executives nationwide, and the National Defender Leadership Institute (NDLI), an innovative training project to support current managers and develop future leaders.

Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems. See: *Guidelines for Legal Defense Systems in the United States* (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); *The Ten Principles of a Public Defense Delivery System* (written by NLADA officials, adopted by ABA in February 2002, published in U.S. Department of Justice *Compendium of Standards for Indigent Defense Systems, infra n.12*) (http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (NLADA, 1988; ABA, 1989), *Defender Training and Development Standards* (NLADA, 1997); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995*); Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); Standards for the Administration of Assigned Counsel Systems* (NLADA, 1989); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Evaluation Design for Public Defender Offices* (NLADA, 1977); and *Indigent Defense Caseloads and Common Sense: An Update* (NLADA, 1994). With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the governmental policy-makers themselves may lack expertise.

Foundational standards set the limits below which no public defense system should fall. The American Bar Association's *Ten Principles of a Public Defense Delivery System (Ten Principles)* present the most widely accepted and used version of national standards for indigent defense systems. Adopted in February 2002, the ABA *Ten Principles* distill the existing voluminous national standards for public defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid & Indigent Defendants, the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[2] United States Attorney General Eric Holder called the ABA *Ten Principles* the basic "building blocks" of a functioning public defense system.[3]

The use of national standards of justice to gauge whether representation is constitutionally adequate meets the demands of the United States Supreme Court. In *Wiggins v. Smith*, 539 US 510 (2003), the Court recognized that national standards -- specifically those promulgated by the ABA -- should serve as guideposts for assessing ineffective assistance of counsel claims. The ABA standards define competency, not only in the sense of the attorney's personal abilities and qualifications, but also in the systemic sense that the attorney is provided the time, resources, independence, supervision, and training to adequately represent her clients. *Rompilla v. Beard*, 545 US 374 (2005), echoes those sentiments, noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand."[4]

Senate Bill 440 and House Bill 601 are significant attempts to provide accountability to the taxpayers of Alabama while preserving the fairness of criminal proceedings in a way consistent with many of the ABA *Ten Principles.* Most notably:

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[2] American Bar Association. *Ten Principles of a Public Defense System*, from the introduction, at: http://bit.ly/ggLidF.

[3] United States Attorney General Eric Holder. *Address before the Department of Justice's National Symposium on Indigent Defense: Looking Back, Looking Forward 2000-2010.* Washington, DC February 18, 2010. http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html

[4] Citation to national public defense standards in court decisions is not limited to capital cases. See, for example: 1) *United States v. Russell*, 221 F.3d 615 (4th Cir. 2000) (Defendant was convicted of prisoner possession of heroin; claimed ineffective assistance of counsel; the court relied, in part on the ABA Standards to assess the defendant's claim); 2) *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1993) (Defendant convicted of being a felon in possession of a weapon; filed appeal arguing, in part, ineffective assistance of counsel. Court stated: "In addition, under the *Strickland* test, a court deciding whether an attorney's performance fell below reasonable professional standards can look to the ABA standards for guidance. *Strickland*, 466 U.S. at 688." And, "[w]hile *Strickland* explicitly states that ABA standards 'are only guides,' *Strickland*, 466 U.S. at 688, the standards support the conclusion that, accepting Blaylock's allegations as true, defense counsel's conduct fell below reasonable standards. Based on both the ABA standards and the law of the other circuits, we hold that an attorney's failure to communicate the government's plea offer to his client constitutes unreasonable conduct under prevailing professional standards."); 3) *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990) (Defendant pleaded guilty to conspiracy to violate the Arms Control Export Act. The court followed the standard set forth in *Strickland* and looked to the ABA Standards as a guide for evaluating whether defense counsel was ineffective.)

1. *Principle 2* requires that indigent defense delivery systems consist of both staffed public defender offices and private attorneys in jurisdictions where caseloads are sufficiently high.[5] Both the Senate and House bills give the Director of the Office of Indigent Defense Services, in consultation with local interests, the ability to establish public defender offices. A number of reports note the cost savings produced by staffed public defender offices, particularly in urban jurisdictions.[6] Currently, Alabama relies on private assigned counsel in most urban areas.[7] The proposed legislation would bring Alabama closer to compliance with *Principle 2*'s requirements.

2. *Principle 5* requires that the workload of defense counsel be controlled to permit the rendering of quality representation. Each client is constitutionally entitled to be represented by a public defense attorney who has sufficient time and resources to fulfill the basic parameters of attorney performance on behalf of that client. Yet the time that each attorney can allocate to each client is most directly limited by the fact that public defense attorneys have no control over the number of clients that come into the system. Instead, public defender clients are generated through the convergence of decisions made by other governmental agencies. State legislatures may criminalize additional behaviors or increase funding for additional police positions; law enforcement may crack down on a particular problem in a community by making more arrests; and, prosecutors may decide to go forward with marginal cases rather than dismissing them. All of these decisions are beyond the control of indigent defense attorneys and systems. Workload controls, as required by ABA *Principle* 5 and anticipated in SB 440 and HB 601, allow public defenders to spend the time necessary to fulfill the required parameters of adequate attorney performance.

3. *Principle 6* requires that the ability, training, and experience of defense counsel match the complexity of the case to which they are appointed. Just as you would not go to a dermatologist for a heart operation even though heart and skin specialists are both doctors, it is

[5] Footnotes to the ABA *Ten Principles* note that "sufficiently high" can generally be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

[6] For example, the North Carolina Indigent Defense Services (IDS) has produced a report almost every year since its inception (2002) comparing the costs of public defenders versus private assigned counsel. The *FY10 North Carolina Public Defender and Private Assigned Counsel Cost Analysis* concludes that in fiscal year 2010 public defender offices handled 35.3% of the total number of indigent disposed cases while accounting for only 25.9% of the total trial-level expenditures.

And, though the study admittedly takes no position on comparing the quality of public defender representation to assigned counsel representation, the question of whether and where to consider public defender expansion is hinder in that state by a codified catch-22. Though IDS is require to provide the most cost-effective representation, and has the ability to determine the most cost-effective method of delivering right to counsel legal services in each district, it lacks the authority to actually make the final determination on such services. Instead, the IDS Director is instructed to consult with the local bar and judges of the district and solicits written comments from the same. The Commission's recommendation and the local written comments are then forwarded to the members of the General Assembly representing that district. A legislative act is then required in order to establish a new office or to abolish an existing office. SB 440 and HB 610 both avoid such convoluted decision-making authority.

[7] Only five Alabama counties currently have public defender office: Escambia County (one attorney); Conecuh & Monroe Counties (one office, and two attorneys, both part time); Shelby County; and, Tuscaloosa County (contract office). Jefferson County contracts out a minor part of their services to the Birmingham Legal Aid Society, but the majority of services are provided through appointed private counsel.

wrong to expect that everyone with a bar card has the ability to provide adequate criminal defense representation. Representing a juvenile in a delinquency proceeding or defending a person charged with capital murder are very different than preparing a will or real estate conveyance instrument or defending an insurance malpractice claim, for example. SB 440 and HB 601 address the requirements of *Principle* 6 by specifically vesting the Director of the Office of Indigent Defense Services with authority to prescribe "minimum experience, training and other qualifications" for attorneys handling public counsel cases.

4. *Principle 10* requires accountability from and by defense systems, so that taxpayers and policymakers and victims and clients alike can all know whether a system's attorneys are properly fulfilling their obligations to each client. In over-simplified terms, this means that a system establishes performance standards and evaluates compliance with those standards to ensure that an attorney is able to and does: meet and interview the client; prepare and file necessary motions; receive and review the prosecution's responses to motions; conduct a factual investigation, including locating and interviewing witnesses, locating and obtaining documents, locating and examining physical evidence; perform legal research; conduct motion hearings; engage in plea negotiations with the state; conduct status conferences with the judge and prosecutor; prepare for and enter a plea or conduct the trial; and prepare for and advocate at the sentencing proceeding when there is a guilty plea or conviction following trial; among others. SB 440 and HB 601 both require the Director of the Office of Indigent Defense Services to set standards for the "performance of appointed counsel, contract counsel, and public defenders" and to "supervise compliance with standards adopted by the office."

Despite these significant improvements to Alabama's indigent defense system contemplated by the proposed legislation, I must point out what I consider to be a major deficiency in both indigent defense reform bills.[8]

The very first of the ABA *Ten Principles* calls for an independent right to counsel oversight board, whose members are appointed by diverse authorities so that no single official or political party has unchecked power over the indigent defense function.[9] This independent board should be responsible for selecting the director of indigent defense services, based on a non-partisan merit procedure to ensure that the most qualified candidate is appointed. And once chosen the director should serve for a specific term of years, during which she is not removed from office except for good cause. Neither the Senate nor the House bill provides for a commission at all, opting instead to have the Director of the

[8] The ABA *Ten Principles* are a set of standards that are interdependent. That is, the health of an indigent defense system cannot be assessed simply by rating a jurisdiction's compliance on each of the ten criteria and dividing the sum to get an average "score." For example, a jurisdiction may have a place set aside in the courthouse for confidential attorney-client discussions (*Principle 4)*, yet this does not make the delivery of indigent defense services any more adequate if the appointment of counsel comes so late in the process (*Principle* 3), or if the attorney has too many cases (*Principle 5*), or if the attorney lacks the necessary training (*Principle 8)*, as to render those conversations ineffective for serving the client's representation needs.

[9] To help jurisdictions in the establishment of independent public defender boards or commissions, NLADA has promulgated guidelines. NLADA's *Guideline for Legal Defense Services* (Guideline 2.10) states: "A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members." States such as Louisiana and North Carolina provide good examples of such commissions.

Office of Indigent Defense Services report to and serve at the pleasure of the Director of Finance. Although such a reporting structure will assuredly provide fiscal oversight for the system, states do not balance fiscal responsibility *and* constitutional obligations have become the subject of class action lawsuits.[10]

An oversight commission made up by diverse appointing authorities brings a variety of perspectives to the provision of indigent defense services. For example, appointees of the judiciary, the state bar association, and/or accredited law schools may focus on the constitutional requirements of the system, while appointees of the executive and legislative branches may desire to provide more accountability to the state's tax payers. Together diverse appointees ensure that both of these crucial needs are met. While your administration and the current budget director surely share the twin goals of adequate services and cost containment, there may come a time when a different administration will not be so concerned with the constitutionality of services rendered and the motivating factor will be only securing the cheapest possible service delivery model. Any legislation passed today regarding indigent defense services in Alabama should create a system capable of weathering the political winds through changing administrations in the future. It is when cost-containment overrides all else that public safety is put at risk.[11]

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[10] The American Civil Liberties Union (ACLU) successfully sued the state of Connecticut (*Rivera v. Rowland)*, forced comprehensive substantive reform in Montana through a class action lawsuit (*White v. Martz)*, and is now engaged in litigation in Michigan (*Duncan v. State of Michigan*). The National Association of Criminal Defense Lawyers (NACDL) class action litigation in Louisiana (*Anderson v. State of Louisiana*) was a contributing factor in that state's successful reform in 2007. NACDL is now suing the state of Colorado (*Colorado Criminal Defense Bar v. Ritter).* On May 6, 2010, New York's highest court ruled that a class action lawsuit brought by the New York Civil Liberties Union (*Hurrell-Harring v. State of New York*) is an allegation not for ineffective assistance of counsel, but for basic denial of the right to counsel under *Gideon v. Wainwright,* 372 U.S. 335 (1963). On November 24th of 2010, the Iowa Supreme Court reached much the same conclusion in handing down a unanimous decision in finding that a rigid fee cap of $1,500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel" because " [l]ow compensation pits a lawyer's economic interest … against the interest of the client." The decision, in essence, bans flat fee contracting for right to counsel services.

[11] Because American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the police investigation, the lawfulness of any searches and seizures, the arresting officers' tactics, the credibility of the evidence, and the district attorney's theory of the case. In this way, an effective defense serves *to improve the overall quality and effectiveness of law enforcement itself*. Arguably, it is because of our strong adversarial process that the United States is in the forefront of cutting edge public safety technologies such as DNA evidence that help to exonerate the innocent while convicting the guilty.

Since the great majority of criminal cases requires public defenders, the failure to adequately fund and effectively administer the right to counsel delivery system results in too few lawyers handling too many cases in almost every criminal court. Courts then face backlogs of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at public expense because: a) no defense lawyers are present at bail hearings; or, b) the public lawyers have so little time as to make no credible case for a defendant's release back into a community; or c) public defenders are unable to prepare the cases in a timely fashion and must ask for continuances.

Failing to do trials right the first time may also result in endless appeals on the back end, delaying justice to victims and defendants alike and increasing criminal justice expenditures. Significant appellate resources in Michigan, for example, have been spent to uncover a raft of sentencing errors that should have been detected by trial counsel. These errors resulted in poor people serving longer prison terms than required, costing the state millions. In states with prison overcrowding situations, sentencing errors can lead to dangerous people being released to make room for incoming less violent offenders.

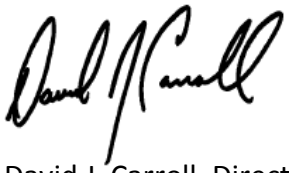
Children who come in contact with delinquency courts too often have been neglected by the full range of support structures that normally channel children in appropriate constructive directions. When they are brought to court and given a public defender who has no resources and too little time to do anything beyond disposing cases as quickly as possible, the message of neglect and worthlessness continues, and the risk that the juvenile will commit more — and worse — crimes increases.

The collapse of justice breeds distrust of the criminal justice process, especially amongst those communities disproportionately represented in the system. The loss of faith has many repercussions, including reluctance of community members to show up for jury duty and, more critically, a disinclination to cooperate with police in solving crime. And, when an innocent person is sent to jail as a result of public defenders not having the time, tools and training to effectively advocate for their clients, the true perpetrator of the crime remains free to victimize others and put public safety in jeopardy.

In conclusion, I again applaud your desire to reduce the overall criminal justice expenditures in your state and to create accountability that ensures quality services are rendered in return for the dollars spent. I respectfully recommend that the most prudent way to reduce indigent defense expenditures is to reduce the need for public defense attorneys by removing non-violent misdemeanors and low-level felonies from the formal justice system through diversion and/or reclassification of crimes to non-jailable infractions, where it is safe, reasonable and prudent to do so. This will not only reduce the indigent defense budget, but all of the attendant costs of the formal criminal justice system.

Please feel free to contact me with any questions or concerns.

Sincerely,



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