Written Testimony

to the U.S. House of Representatives
Committee on the Judiciary Sub-Committee
on Crime, Terrorism, and Homeland Security

Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?

David Carroll

Director of Research & Evaluation
National Legal Aid & Defender Association

March 26, 2009

National Legal Aid & Defender Association

Eddie Joe Lloyd

In 1985, Eddie Joe Lloyd was convicted in Detroit of the rape and murder of an under-aged girl. The evidence of his guilt was overwhelming – Eddie Joe Lloyd's written confession gave specific information about the crime scene only the perpetrator could have known. Police also had him on tape admitting to the brutal act. It was a slam dunk case; the jury took less than an hour to convict him of 1st degree felony murder. Lamenting the lack of the death penalty in Michigan, the judge sent Eddie Joe to a maximum security prison for the remainder of his life without the possibility of parole – a measured and appropriate sentence for such a heinous crime. Justice was served… Except for one small problem —Eddie Joe Lloyd was innocent.

The road to Mr. Lloyd's wrongful conviction began with a letter he drafted to the police suggesting that he had pertinent information on the case. The letter was not unique. Eddie Joe was convinced that he had the supernatural ability to solve crimes and wrote letters to the police offering his services on previous occasions. The particular letter that set in motion his wrongful conviction was written from his bed at the Detroit Psychiatric Institute where he was non-voluntarily committed. The police interrogated Eddie Joe on at least three separate occasions at the mental health facility. Mr. Lloyd was never offered a lawyer during these interviews, during which time, as it turned out, the police officers "allowed Lloyd to believe that, by confessing and getting arrested, he would help them 'smoke out' the real perpetrator." They fed him salient information about the crime scene to make his confession more believable.

The high ethical demands of representing a capital case combined with the paltry compensation paid to lawyers in 1985 Detroit left the Wayne County district court two pools of attorneys from which to fulfill Mr. Lloyd's constitutional right to counsel – 1) those who saw accepting court-appointments and zealously defending poor people as part of an attorney's professional and ethical duty to the Bar, despite the significant personal financial loss it imposed; or 2) those who maximized their economic return on court-appointed cases by taking on as many assignments as the courts would allow while disposing of them as quickly as possible. With such a high profile case as this – Detroit had been under curfew in the months that followed the crime – the appointing judge assigned a lawyer who would not put up too many hurdles to getting Mr. Lloyd off the streets and behind bars for good.

Aiding the goal of quick convictions, Wayne County only paid a single flat fee of $150 to court appointed attorneys to cover the entire cost of pre-trial preparation and investigations. In Eddie Joe Lloyd's case, his attorney gave $50 to a convicted ex-felon to serve in the capacity of investigator and pocketed the extra $100 to cover the rest of his pre-trial expenses. Not surprisingly, the "investigator" conducted no independent inquiry into Mr. Lloyd's confession or his mental state. The lawyer too failed to interview both Mr. Lloyd's doctors and his family members about Eddie Joe's history of delusions of grandeur. And no independent investigation of the police canvass of the crime scene occurred – a simple endeavor that would have shown a number of "facts" in Mr. Lloyd's original letter to be incorrect and that later admissions only matched the police's prevailing theory of the case at the time and not the true particulars of the crime. No expert was retained to explain Mr. Lloyd's mental history to the jury or to challenge the state's expert testimony that Eddie Joe was competent despite his non-voluntarily committed status at the state facility. In 1985 Detroit, such defense expert witnesses were rarely granted by the court, and if they were, the measly reimbursement basically eliminated from testifying any decent expert other than one willing to donate his time from testifying. Whether or not Eddie Joe's attorney knew this to be the case from past experience, he never bothered to ask the court for an expert. And, despite the U.S. Supreme Court's ruling in *Miranda v. Arizona*, Lloyd's court-appointed attorney never appropriately challenged at pre-trial hearings the uncounseled custodial interrogations at the mental health facility at pre-trial hearings.

Then, eight days before trial, Eddie Joe Lloyd's attorney suddenly withdrew from the case. But that apparently was a mere inconvenience to the court, which quickly hand-selected another attorney who saw no ethical problem with starting the trial in approximately one week's time, since the original attorney had done "all the necessary" pre-trial work. This second attorney did not even bother to meet with Mr. Lloyd's original court-appointed attorney before trial or to cross-examine on the stand the police officer who was most responsible for Eddie Joe's coerced confession on the stand. In fact, Mr. Lloyd's new defense lawyer did not call a single defense witness to testify. His closing argument clocked in at less than five minutes. Post-conviction, Mr. Lloyd received another court-appointed lawyer to conduct his direct appeal. This one never even bothered to make a cursory visit to Eddie Joe in prison or to raise ineffective assistance of counsel claims against the two trial attorneys. After his direct appeal, Eddie Joe wrote the court to suggest he had not received an adequate defense, an act that spurred his appellate attorney to write a letter to the judge saying that Eddie Joe's claims should not be taken seriously because he was "guilty and should die."

Eddie Joe Lloyd fortunately experienced a few years of freedom after serving 17 years in prison for a crime he did not commit, before passing away from medical complications at the age of 54. Eddie Joe's freedom was secured thanks to the efforts of The Innocence Project -- a non-profit legal clinic at the Benjamin N. Cardozo School of Law that handles post-conviction cases where DNA evidence still exists in cases tried before the advent of DNA sciences -- working in conjunction with local Michigan attorney Saul Green. For failing to provide an adequate defense up front, Wayne County cost its tax payers $4 million in a settlement agreement with Mr. Lloyd's estate. Sadly, the DNA evidence that completely exonerated Eddie Joe Lloyd has not led to a match on any law enforcement database. More than twenty years after the crime, the whereabouts of the real perpetrator remain unknown.

The Right to Counsel in America

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

- U. S. Supreme Court Justice Hugo Black

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)

As world events unfold daily in far off places like Afghanistan, Iraq and Pakistan, the words of U.S. Supreme Court Justice Hugo Black speak to the core values that distinguish the United States from those countries under the repression of dictatorships, theocracies and despots. We are different. Unlike tyrannies, the Constitution of the United States of America promises those accused of crimes the presumption of innocence and equal access to a fair day in court. These core values define the beliefs we as Americans hold in common – whether we are conservative or liberal, white or black, rich or poor. We entrust our government with the administration of a judicial system that guarantees equal justice before the law – assuring victims, the accused and the general public that resulting verdicts are fair, correct, swift and final.

In the case of *Gideon v. Wainwright*, the United States Supreme Court concluded that "reason and reflection require us to recognize that 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." Declaring it an "obvious truth" that "lawyers in criminal courts are necessities, not luxuries," the Court ruled that states must provide counsel to indigent defendants in felony cases. That mandate has been consistently extended to any case that may result in a potential loss of liberty.

The Problem

The Court's "obvious truth" has been obscured or lost at the hands of state governments in the intervening 46 years. Litigation concerning the failure to meet *Gideon's* mandate in state and local jurisdictions is escalating.[1] In 2004, the American Bar Association (ABA) declared that "indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."[2]

Both the United States Supreme Court and the United States Department of Justice have indicated that standards should serve as guideposts in the administration and assessment of indigent defense representation to prevent such injustices.[3] The American Bar Association's "Ten Principles of a Public Defense System" distill the voluminous national standards to their irreducible minimum and represent the most widely accepted and used version of national standards for indigent defense.[4] The ABA Principles require, among other things, the institutional independence of the defense function, caseload controls, attorney qualifications, accountability and continuous representation of clients by the same attorney throughout the life of the case.

The failure of most states to enact measurable standards of competency and to monitor compliance has produced justice systems in which results are dictated by a person's income-level and the jurisdiction in which the crime is alleged to have been committed, rather than the factual merits of the case. And, since the overwhelming percentage of criminal cases require publicly-financed lawyers,[5] the failure to adequately fund and effectively administer public defense delivery systems results in too few lawyers handling too many cases in almost every criminal court action in the country. Under this scenario, courts face backlogs of unresolved cases. The growing backlog means that people waiting for their day in court fill local jails at taxpayers' expense. Failing to do the trial right the first time also means endless appeals on the back end – delaying justice to victims and defendants alike – and increasing criminal justice expenditures. 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.

The failings of our nation's right to counsel systems are particularly acute in juvenile courts – where funding is most limited and public defender caseloads most exorbitant. At-risk juveniles, in particular, require special attention from public defenders if there is hope to change behavior and prevent escalating behavioral problems that increase the risk that they will eventually be brought into the adult criminal justice system. These are commonly children who have been neglected by parents and exist without support structures that channel children in constructive directions. When they are brought to court and given a public defender who has no resources and a caseload that dictates that he dispose of cases as quickly as possible, the message of neglect and worthlessness continues, and the risk of recidivism and an escalation of misconduct increases.

A Closer Look at Independence

The very first ABA Principle requires independence of the defense function from the judiciary. While the vast majority of judges strive to do justice in all cases, political pressures, administrative priorities such as the need to move dockets, or publicity generated by particularly notorious crimes can make it difficult for even the most well-meaning judges to maintain their neutrality. Having judges maintain a role in the supervision of indigent defense services creates the appearance of partiality -- creating the false perception that judges are not fair arbitrators. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and not on a public defender's desire to please the judge in order to maintain his job. When the public fears that the court process is unfair, people are less inclined to show up for jury duty or to come forward with critical information about crimes.

> *"[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."*
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> ***Powell v. Alabama***

In far too many regions of the United States, judges either contract directly with attorneys to provide defense services or are given complete authority to assign attorneys to cases without regard to whether the lawyer is qualified to render competent representation. Defense attorneys (especially those who have practiced in front of the same judiciary for long periods of time) instinctively understand that their personal income is tied to "keeping the judge happy" rather than zealously advocating for their clients. And, in jurisdictions that place a high emphasis on celerity of case processing, the defense attorneys simply understand they are not to do anything that will slow down the pace of disposing of cases, lest they risk the pay that a judge has been able to secure for them. Attorneys learn that filing of motions increases the life of cases – and the judge's displeasure – which in turn leads to fewer appointments or out-right termination of a contract. Over time, the defense attorney is indoctrinated into the culture of the judge's courtroom that triages the responsibilities all lawyers owe their clients. Without regard to the necessary parameters of ethical representation, the caseload creeps higher and higher. The attorney is in no position to refuse the dictates of the judge.

National standards call for the creation of independent, statewide oversight commissions. These commissions should have full regulatory authority to promulgate, monitor and enforce binding standards over the entire indigent defense system. During the past 20 years there has been a slow but steady trend to the creation of such indigent defense commissions across the United States. Currently, 22 states have commissions established to oversee the delivery of the right to counsel statewide; another six have partial commissions covering only a portion of right to counsel services (e.g., an appellate commission).

A National Crisis: State Chief Justices Speak Out

New York

"Having studied published materials and gather information from scores of knowledgeable witnesses, the Commission has convincingly concluded that the existing system [of indigent defense in New York] needs overhaul.... I have not seen the word 'crisis' so often, or so uniformly echoed by all sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties' efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color."

— Chief Judge Kaye, (State of the Judiciary, February 6, 2006)

"Last spring, the Commission on the Future of Indigent Defense Services ... issued its final report unanimously concluding that New York's indigent defense system is in severe disarray and should be replaced with a statewide system governed by consistent regulations and standards. Although most defenders are dedicated and diligent, the Commission documented how the system is so poorly designed, so badly fractured between the State and localities, and so overburdened that only a complete overhaul would suffice."

— Chief Judge Kaye, (State of the Judiciary Message, 2007)

Nevada

"What is particularly alarming to all of us is the constant creep and degradation of funding for the [indigent defense] systems in [rural] communities."

— Chief Justice James Hardesty, (hearing of the Nevada Supreme Court Indigent Defense Commission, January 6, 2009)

New Mexico

"There are three essential parts of the criminal justice system, the courts, the prosecutor, and the defender. I have been quoted in the newspaper as characterizing the criminal justice system as like a three-legged stool.... When one leg is weakened, you know what happens. You end up on the floor. Well, we are not on the floor yet, but we are not far off. The fiscal needs of the public defender are so dire, their situation seems so hopeless, that many times prosecutions cannot go forward due to lack of sufficient personnel. We in the Supreme Court grant extensions in criminal prosecutions every week, by the dozen, most of the time because the public defender is so far behind. I ask for your help, not because we favor criminal defendants over the prosecution, but because without your help, the system will collapse. When that happens, when delay becomes so pervasive, those who suffer the most are the victims of crime, twice victimized if you will, their hope of justice a mere illusion."

— Chief Justice Richard Bosson, (State of the Judiciary Message, January 20, 2005)

Virginia

"The issue of funding for court-appointed counsel has been a major concern for many years ... Court-appointed counsel in Virginia are the poorest paid in the nation, and we must work hard to eradicate this problem."

— Chief Justice Hassell, (State of the Judiciary Message, 2005)

Washington

"Unfortunately, our public defender systems in this state are not in good shape—I wish I could say otherwise, but I can't. Because almost the entire financial responsibility for providing counsel is being borne by local government, we have a situation where no two defender systems in Washington are the same. The result is that we have a crazy quilt of systems. Although the systems in some counties are better than in others, the most common feature that these systems share is public defender caseloads that are too large, a lack of training, and proper supervision for public defenders, and, almost always, a lack of adequate support services. The system, in other words, is broken and in crisis."

— Chief Justice Gerry L. Alexander, (State of the Judiciary Message, January 18, 2005)

North Dakota

"I will not belabor you with all of the deficiencies of our present contract [indigent defense] system other than to underscore that in addition to the conflict of interest resulting from judges operating the indigent defense system, we are woefully underfunded and finding it increasingly difficult to interest attorneys in providing contract services.... Although lack of resources is not the only problem, this lack of funding has exacerbated the flaws inherent in our current system."

— Chief Justice Gerald VanderWalle, State of North Dakota (State of the Judiciary Message, January 5, 2005)

Massachusetts

"[A]ccess to justice in this Commonwealth is not always equal….[O]ur system of representation for criminal defendants is severely strained. We cannot fulfill the constitutional mandate of Gideon unless we provide adequate resources to make that possible. Consider this fact: the average loan burdening a law school graduate is more than twice the annual salary of new prosecutors and public defenders. How can we expect new lawyers to accept and remain in these critical positions when compensation is so low?"

— Chief Justice Margaret Marshall, (Address to the Massachusetts Bar Association, January 24, 2004)

Louisiana

"I admonish you [the State Legislature] to simply do the right thing. Provide for a workable and adequately funded indigent defense system, so that another victim does not have to go through the agony of an overturned conviction and repeat of grueling trial testimony, or so that an innocent person is spared the ordeal of an unjust conviction and punishment."

— Chief Justice Pascal Colagero, (State of the Judiciary Message, May 3, 2005)

Hawaii

"We are, however, finding it increasingly difficult to secure private attorneys who can afford to represent indigent defendants at the current statutory rate. It is clearly insufficient to cover even the most basic overhead expenses, let alone provide appointed-counsel fair compensation for their time… I realize that criminal defense attorneys and those accused of crimes do not have much of a popular constituency, but we need to remember: first, that attorneys perform a vital and necessary role in the administration of justice; second, that persons accused of crimes face the awesome power of the State; and, third, any system of justice worthy of the name must assure that an individual's liberty is not taken away without putting the prosecution's evidence to the time-honored tests of examination, cross-examination, and proof beyond a reasonable doubt. I, therefore, implore you to examine and address this issue during this legislative session before it reaches the kind of constitutional crisis that has occurred and is occurring in other jurisdictions."

— Chief Justice Ronald Moon, (State of the Judiciary Message, January 26, 2005)

Alabama

"I want to make sure poor defendants are getting a good solid criminal defense and that Alabama's tax dollars are being spent wisely… Everyone is entitled to equal justice under the law. We believe that establishing an indigent defense commission will not only make that an inspirational ideal but a true foundation of our court system in Alabama."

— Chief Justice Sue Bell Cobb (August 20, 2008)

A Spotlight on Michigan:
Summary of *A Race to the Bottom* — Speed & Savings over Due Process

The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan's denial of its constitutional obligations has produced myriad public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county – giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one's crime is alleged to have been committed instead of the factual merits of the case – NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

These conclusions were reached after an extensive year-long study of indigent defense services in ten representative counties in partnership with the State Bar of Michigan and on behalf of the Michigan Legislature under a concurrent resolution (SCR 39 of 2006). To ensure that a representative sample of counties was chosen to be studied, and to avoid criticism that either the best or worst systems were cherry-picked to skew the results, NLADA requested that an advisory group be convened to choose the sample counties. Created by SCR 39-sponsor Senator Alan Cropsey, the advisory group was composed of representatives from the State Court Administrator's Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges. Ten of Michigan counties were studied: Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne. The advisory group ensured that the county sample reflected geographic, population, economic and defense delivery model diversity.

The report opens with a retelling of the first right to counsel case in America – the case of the "Scottsboro Boys" in 1932, (*Powell v. Alabama*). Chapter I presents an overview of our findings and concludes that many of the systemic deficiencies identified over three quarters of a century ago in the Scottsboro Boys' story permeate the criminal courts of Michigan today: judges hand-picking defense attorneys; lawyers appointed to cases for which they are unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in public courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trials or sentencings; attorneys violating their ethical canons to zealously advocate for clients; inadequate compensation for those appointed to defend the accused; and, a lack of sufficient time, training, investigators, experts and resources to properly prepare a case in the face of a state court system that values the speed with which cases are disposed of over the needs of clients for competent representation.

Chapter II presents the obligations that all states face under *Gideon v. Wainwright* – the mandate to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation. Unfortunately, the laws of Michigan require county governments to pay for the state's responsibilities under *Gideon* at the trial-level without any statewide administration to ensure adequacy of services rendered. This stands in contradistinction to the majority of states, thirty of which relieve their counties entirely from paying for the right to counsel at the trial-level.

Collectively, Michigan counties spend $74,411,151 (or $7.35 per capita) on indigent defense services; 38 percent less than the national average of $11.86. Michigan ranks 44th of the 50 states in indigent defense cost per capita. The practical necessity of state funding and oversight for the right to counsel is premised on the fact that the counties most in need of indigent defense services are often the ones that least can afford to pay for it. The financial strains at the county level in Michigan have led many counties to choose low-bid, flat-fee contract systems as a means of controlling costs. In low-bid, flat-fee contract systems an attorney agrees to accept all or a fixed portion of the public defense cases for a pre-determined fee – creating a conflict of interests between a lawyer's ethical

duty to competently defend each and every client and her financial self-interests that require her to invest the least amount of time possible in each case to maximize profit. Chapter II ends with a documentation of Michigan's historic, but ultimately ineffective, struggles to implement *Gideon*, including previous reports, case law, state bar actions and pending litigation.

The United States Supreme Court extended the right to counsel to misdemeanor cases in two landmark cases: *Argersinger v. Hamlin* and *Alabama v. Shelton*. The third chapter of the report documents abuses of the right to counsel found throughout Michigan's misdemeanor courts – the district courts. 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. These include uninformed waivers of counsel, offers by prosecutors to "get out of jail" for time served prior to meeting or being approved for a publicly-financed defense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures. district courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution. In fact, the emphasis on speed of case processing has led one jurisdiction – Ottawa County – to colloquially refer to the days on which the district court arraigns people as "McJustice Day" (their terminology, not ours). Our general observations across the state suggest that the Ottawa local vernacular is apt for describing Michigan's valuing of speed over substance.

The American Bar Association's *Ten Principles of a Public Defense Delivery System* constitute the fundamental standards that a public defense delivery system should meet if it is to deliver – in the ABA's words – "effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." To show the interdependence of the ABA *Ten Principles*, NLADA chose one jurisdiction – Jackson County – around which to explain the importance of the *Principles* and to document how Michigan counties fail to meet them. That analysis, set forth in Chapter IV extensively details how judicial interference impacts attorney workload and performance. In so doing, Jackson County becomes the poster child for reform in the state – not because county officials and policy-makers are inured to the problems of the poor, but because they fail to provide constitutionally adequate services despite their desire to do so.

Chapter V is a documentation of how the other representative counties fail the ABA *Ten Principles* highlighted in the previous chapter. This section begins with an analysis of how Bay County is devolving from a public defender model into a flat-fee contract system because of undue political interference. The chapter also recounts the lack of an adversarial process in Ottawa County, where indigent defense services has devolved to the point where defense attorneys call the prosecuting attorney and ask him to have law enforcement conduct further investigations rather than conducting independent investigations themselves. Despite the overall dedication and professionalism of thousands of citizens employed in the police and prosecution functions in Michigan, it is simply impossible to always arrest and prosecute the right defendant for the right crime and mete out accurate and just sentences in every instance. Without a functioning adversarial justice system, everyday human error is more likely to go undiscovered and result in the tragedy of innocent people being tried, convicted and imprisoned.

In addition, Chapter V discusses many other systemic deficiencies in the delivery of the right to counsel across the state, including:

- The failure of the representative counties to ensure that their public defenders are shielded from undue judicial interference, as required by *Principle 1*. In Grand Traverse County, for example, the judiciary forces public defense attorneys to provide certain legal services for which they are not compensated if they wish to be awarded public defender contracts.
- The failure of the representative counties to manage and supervise its public defense attorneys' workload as required by ABA *Principles 5* and *10*. In Oakland County, one judge indicated that because attorneys are not

barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance and sometimes struggle with. Beyond that nothing is done to ensure the rendering of quality representation.

- The failure of the representative counties to provide public defense attorneys with sufficient time and confidential space to attorney/client meetings as required by *Principle 4*. The district court in Chippewa County, for example, provides no confidential space within which an attorney may meet with clients. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others will talk softly in the corridor.
- The failure of Michigan counties to adhere to ABA *Principles 6* and *9* requiring that public defense attorneys have experience and training to match the complexity of the case. It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers. Even the training provided in the large urban centers is inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against and present scientific evidence and testimony of expert witnesses.
- The failure of the representative counties to provide indigent defense clients with vertical representation, i.e., continuous representation by the same attorney from the time counsel is appointed until the client's case is resolved as recommended in ABA *Principle 7*. Judges in Wayne County, for example, spontaneously appoint attorneys in courtrooms as "stand-ins" when attorneys fail to appear or remove the appointed attorney from the case and appoint an attorney who happens to be in the courtroom.

One of the reasons why *Gideon* determined that defense lawyers were "necessities" rather than "luxuries" was the simple acknowledgement that states "quite properly spend vast sums of money" to establish a "machinery" to prosecute offenders. This "machinery" – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without appropriate resources, the defense is unable to play its role of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching. Chapter VI looks specifically at the ABA *Ten Principles'* call for parity of the defense and prosecution functions. In detailing the great disparity in resources all across the state, the report notes that an NLADA representative had the privilege of attending a conference of the Prosecuting Attorneys Association of Michigan (PAAM) in which prosecuting attorneys made presentations on how prosecutors are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult. The deficiencies of the prosecution function highlight how exponentially worse is the underfunding of the defense function.

Conclusion

Although the Sub-Committee Hearing focuses on the Sixth Amendment crisis in Michigan, NLADA could have focused on the crises related to public defender work overload in Kentucky, Tennessee, Missouri or Florida, or the lack of enforceable standards in Mississippi, Maine, Arizona, Utah or South Dakota. Our focus could have been on the difficult decisions county managers face in Ohio or Nevada when state government continually breaks promises of financial support for the right to counsel or the way elected officials unduly impact the independence of defense providers in Illinois or New Mexico. We could have discussed the prevalence of flat fee contracts in rural California, or highlighted how a judge in Pennsylvania financially benefited from unfairly sending juveniles to detention centers, in part, because of the failure of the defense function to effectively advocate for its clients in a state that has washed its hands entirely of its constitutional obligations under *Gideon*. Instead of focusing on Michigan, this could just have easily been a hearing on the failure of state policy-makers in

New York to ensure *Gideon's* promise in the hundreds of town and village courts, despite the passage of three years since New York's then-Chief Justice Kaye declared the system in crisis and in need of a complete overhaul.

Our constitutional rights extend to all of our citizens, not merely those of sufficient means. The majority of people requiring appointed counsel are simply the unemployed or underemployed – the son of a co-worker, the former classmate who lost her job, or the member of your congregation living paycheck-to-paycheck to make ends meet. Though we understand that policy-makers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed due to insufficient funds.

About NLADA

The National Legal Aid & Defender Association (NLADA) is the oldest and largest national, nonprofit membership organization devoting all of its resources to advocating equal justice for all Americans. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation and provides a wide range of services and benefits to its individual and organizational members.

NLADA serves the equal justice community in two major ways: providing first-rate products and services and as a leading national voice in public policy and legislative debates on the many issues affecting the equal justice community. NLADA also serves as a resource for those seeking more information on equal justice in the United States. For more information visit www.nlada.org.

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1 The ACLU successfully sued the State of Connecticut in Rivera v. Rowland, resulting in significantly increased the staff of the state's public defender system, doubling the rates of compensation paid to special public defenders and substantial enhancement of training, supervision and monitoring of state public defender attorneys. See: www.aclu.org/crimjustice/gen/10138prs19990707.html?s_src=RSSS. The ACLU also successfully sued Allegheny County, Pennsylvania (Pittsburgh) reaching similar reform in the settlement decree for Doyle v. Allegheny County Salary Board. In 2004, NACDL filed a class action lawsuit against the State of Louisiana alleging systemic denial of counsel in Calcasieu Parish (Anderson v. Louisiana). For more information see: "Justice Failing in Calcasieu Parish: Lawsuit Seeks Systemic Reform and Relief for Defendants Deprived of Constitutional Rights." In Lavallee, et al., v. Justices in the Hampden Superior Court, et al., 442 Mass. 228, SJC-09268 (Massachusetts) See: www.masslawyersweekly.com/signup/gtwFulltext.cfm?page=ma/opin/sup/1013904.htm. New York City and State were sued in 2002 for claims relating to the low rate of compensation paid to assigned counsel who represent minors and indigents in both family and criminal actions in New York County Lawyers' Association v. State, 763 N.Y.S.2d 397, 414 (N.Y. Sup. Ct. 2003). Quitman County, an impoverished Delta community, sued Mississippi in 1999, alleging that the state law requiring local governments to pay for indigent defense was a violation of the U.S. Constitution and the Mississippi Constitution. The state supreme court rejected the county's contention, however, and refused to find unconstitutional the state's failure to provide any funding for indigent defense.

2 American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's* Broken Promise available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

3 Wiggins v. Smith, 539 US 510 (2003) and Rompilla v. Beard 545 US 374 (2005).

4 American Bar Association. Ten Principles of a Public Defense System, from the introduction. at: http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

5 Throughout our country, more than 80% of people charged with crimes are deemed too poor to afford lawyers. See: Harlow, U.S. Department of Justice, Office of Justice Programs, Defense in Criminal Cases at 1 (2000); Smith & DeFrances, U.S. Department of Justice, Office of Justice Programs, Indigent Defense at 1 (1996). See generally: Stuntz, The Virtues and Vices of the Exclusionary Rule, 20 Harv. J. L. & Pub. Pol. 443, 452 (1997).