



February 20, 2015

VIA U.S. MAIL AND E-MAIL

Fresno County Board of Supervisors
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Hall of Records
Fresno, CA 93721-2198
Clerk/BOS@co.fresno.ca.us

RE: Provision of Indigent Defense Services

Dear Board of Supervisors:

We are writing on behalf of the American Civil Liberties Union of Northern California and the National American Civil Liberties Union (collectively "ACLU"), and on behalf of our co-counsel, Paul Hastings LLP. We are deeply concerned that Fresno County is systemically failing to provide legal representation to indigent defendants in a manner that meets constitutionally required and legally enforceable standards.

As the U.S. Supreme Court has repeatedly emphasized for over 50 years, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an 'obvious truth' the idea that '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.'"¹ This right "is the foundation for our adversary system."² Indeed, the U.S. Supreme Court has expanded the right to counsel significantly in the years following *Gideon*. Since 1963, the Court has extended the right to counsel to children in juvenile delinquency proceedings;³ probationers in probation revocation proceedings;⁴ and indigent defendants charged with misdemeanors.⁵ More recently, the Court has found that the right to counsel attaches for all defendants at their initial appearance;⁶ and that plea bargaining constitutes a "critical stage" of any criminal proceeding, thereby requiring the effective assistance of counsel in connection with plea negotiations.⁷

Even before the U.S. Supreme Court's landmark decision in *Gideon*, California constitutional and statutory law had already secured the right to counsel for "[a]ll persons accused

¹ *Martinez v. Ryan* (2012) 132 S.Ct. 1309, 1317 (quoting *Gideon v. Wainwright* (1963) 372 U.S. 335, 344).

² *Id.*

³ *In re Gault* (1967) 387 U.S. 1.

⁴ *Mempa v. Rhey* (1967) 389 U.S. 128.

⁵ *Argersinger v. Hamlin* (1972) 407 U.S. 25 (1972)

⁶ *Rothgery v. Gillespie County* (2008) 554 U.S. 191.

⁷ *Lafler v. Cooper* (2012) 132 S.Ct. 1376; *Missouri v. Frye* (2012) 132 S.Ct. 1399.

of crime in any court in the state.”⁸ “That right include[d] the judicial appointment of counsel in cases in which the accused is financially unable to employ counsel himself.”⁹ Indeed, the California Supreme Court has recognized that the right to counsel is “among the most sacred and sensitive of our constitutional rights.”¹⁰

Both the U.S. and California Supreme Courts have specified that the right to counsel is not satisfied by mere formal appointment of a lawyer.¹¹ The U.S. Supreme Court has declared that “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”¹² And the California Supreme Court has declared that the right “includes the opportunity for counsel to prepare and conduct the case in a reasonably efficacious manner.”¹³

As the Fresno County’s Public Defender Assessment Panel recognized in February 2011, indigent defense providers must discharge a number of “responsibilities in a timely manner” including:

- thoroughly interviewing the clients;
- obtaining discovery;
- conducting an in-depth factual inquiry (including investigation);
- performing all necessary legal research;
- preserving evidence;
- securing the appointment of and utilizing necessary expert witnesses;
- informing the client of critical developments in the preparation of the case;
- bringing proper legal motions;
- preparing for trial or disposition;
- being aware of and exploring alternatives to sentencing;
- being aware of and investigating direct and collateral consequences and accurately advising the client;
- advising clients of appellate rights.¹⁴

⁸ *Ex parte Newbern* (1960) 53 Cal.2d 786, 790.

⁹ *Id.*

¹⁰ *People v. Ortiz* (1990) 51 Cal.3d 975, 982.

¹¹ *Avery v. State of Alabama* (1940) 308 U.S. 444, 446 (“The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”); *Ex parte Newbern* (1960) 53 Cal.2d 786, 790 (“the right encompasses more than the mere appointment”).

¹² *Evitts v. Lucey* (1985) 469 U.S. 387, 396.

¹³ *Ex parte Newbern* (1960) 53 Cal.2d 786, 790.

¹⁴ Fresno County, Public Defender Assessment Panel Report, Feb. 2011, at p.2 (citing *People v. Pope* (1979) 23 Cal.3d 412); The State Bar of California, Guidelines on Indigent Defense Services Delivery Systems, 2006, <http://calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326>, at pp. 8-9 (State Bar Guidelines) (same).

To ensure that counsel can meet these responsibilities, professional organizations have promulgated national standards for indigent defense providers.¹⁵ The California State Bar has referenced many of these standards in its guidelines.¹⁶ The guidelines provide:

1. **Independence:** The indigent defense provider must subordinate all other loyalties and concerns to the best interests of each client. Decisions of the defense provider, including those about what resources are reasonable and necessary to properly prepare a client's case, must be unaffected by political influence.¹⁷ "Should there develop an unavoidable conflict between the duties, responsibility or allegiance of an institutional public defender as a county manager or department of county government, and the role of said Public Defender in representing an indigent client, the duty to properly represent the client supersedes all other loyalties."¹⁸
2. **Standards of Representation:** "Indigent defense providers must act zealously to provide services meeting the mandate of being a 'reasonably competent attorney acting as a diligent, conscientious advocate.'"¹⁹
3. **Qualifications of Indigent Defense Providers:** "Cases must be assessed as to seriousness and complexity and only assigned to indigent defense providers who possess the requisite relevant experience, training and ability necessary for such matters."²⁰
4. **Quality Control:** There should exist a mechanism whereby the quality of the representation provided by indigent defense providers is monitored and accurately assessed, employing uniform standards. Likewise, should remedial training or some form of punitive action be needed, a fair and uniform approach should exist."²¹
5. **Training:** Indigent defense providers must comply with the minimum State Bar Minimum Continuing Legal Education requirements applicable to all lawyers²² and complete additional hours "of relevant legal education classes or equivalent training

¹⁵ See American Bar Association (ABA), Eight Guidelines of Public Defense Related to Excessive Workloads, 2009, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf; ABA, Ten Principles of a Public Defense Delivery System, 2002, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (ABA Ten Principles); National Legal Aid and Defender Association (NLADA), Guidelines for Legal Defense Systems in the United States, 1976, http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems (NLADA Guidelines); National Advisory Commission (NAC), The Criminal Justice Standards and Goals, 1973, ch. 13, The Defense, http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense (NAC Standards).

¹⁶ See State Bar Guidelines, *supra*, at pp. v-vi.

¹⁷ *Id.* at pp. 4-5.

¹⁸ *Id.* at p. 7.

¹⁹ *Id.* at pp. 8-9 (citing *People v. Pope* (1979) 23 Cal.3d 412).

²⁰ *Id.* at p. 11.

²¹ *Id.* at p. 14.

²² *Id.* at p. 18.

- dealing specifically with juvenile (dependency or delinquency), mental health and/or criminal law, on a calendar year basis.”²³
6. **Juvenile Practice:** Indigent defense providers must represent juvenile clients in delinquency court, engage in resource advocacy and monitor their progress while in custody of the Division of Juvenile Justice of the California Department of Corrections and Rehabilitation, camps or other placements and when released on probation.²⁴
 7. **Workload:** “Indigent defense providers shall not accept nor be burdened with excessive workloads that compromise the ability of the provider to render competent and quality representation in a timely manner, without the risk of damaging the mental/physical health and motivation of the providers.”²⁵
 8. **Resources:** “Indigent defense providers should enjoy parity, to the extent permitted by law, on a relative scaled basis, with prosecutors in access to technology, criminal history information, other criminal justice databases such as those housing DNA information, legal research tools, investigators and investigative tools, including a travel budget, experts, paralegals, forensic labs, facilities, data processing and exhibit creation capability.”²⁶
 9. **Compensation:** “There should exist, at a minimum, parity between full-time indigent defense providers and full-time prosecutors in net compensation, as well as benefits or an amount sufficient to provide benefits of the same value.”²⁷
 10. **Ethics:** “Indigent defense providers must ensure that the interests of the clients supercede all else.”²⁸
 11. **Demographics/Diversity/Culture:** “In order to become a better informed workforce with broad cultural competencies, it is important that such service providers strive to attract, hire and retain a highly qualified staff that reflects the communities which they serve.”²⁹
 12. **Management/Leadership:** It is the responsibility of anyone occupying an administrative, management or leadership position in an indigent defense provider to ensure that all of the above-mentioned guidelines are fully met.”³⁰

Unfortunately, Fresno County has failed for at least the last six years to ensure indigent defendants are provided with assistance of counsel that satisfies the minimal requirements of both the federal and state constitutions. When the Fresno County Board of Supervisors (“Board”) cut the Public Defender Office’s (“Office”) budget by \$324,728 in the 2008-09 fiscal year, the head of the Office alerted the Board that this severely impacted the Office’s ability “to provide competent and effective representation on each case” and “to staff or service all of the various

²³ *Id.*

²⁴ *Id.* at p. 21.

²⁵ *Id.* at p. 24.

²⁶ *Id.* at p. 30 (internal footnote omitted).

²⁷ *Id.* at p. 32.

²⁸ *Id.* at p. 35.

²⁹ *Id.* at p. 38.

³⁰ *Id.* at p. 39.

courtrooms and calendars within Fresno County.”³¹ He noted that “the caseload level for each full-time staff attorney in the Department far exceeds the American Bar Association standards and only grows each time an attorney position is deleted.”³² Focusing on the problem of being unable to staff attorneys for every courtroom and calendar, the Public Defender informed the Board that it would have to decline case appointments in the face of further staff reductions.³³ In the absence of any relief from the County, in January 2010 the Public Defender began to decline cases to deal with the court coverage problem. Although the Public Defender stopped declining cases in December 2010, attorneys in the Office are still forced to operate within a system that lacks the most basic structural elements necessary for them to provide constitutionally adequate representation to every one of their indigent clients.

On September 20, 2013, the Professional Association of Fresno County Employees (P.A.C.E.), the union representing attorney employees of the Fresno County Public Defender’s Office, submitted a letter expressing concerns about being unable to meet their “[c]onstitutional duty to effectively perform competent legal services for [their] clients due to excessive caseloads, and working out of class”—*i.e.*, beyond their experience or training.³⁴ This letter was addressed to Ken Taniguchi, the Fresno County Public Defender at the time, and was copied to each member of the County Board of Supervisors, among others.³⁵ The attorneys’ union explained that misdemeanor attorneys carried an average of 356 open cases on any given day and they had up to, if not more than, 2,000 cases assigned to them per year.³⁶ Felony attorneys carried an average of 230 open cases on any given day with up to, if not more than, 1,000 cases assigned to them per year.³⁷ This is a stark contrast to the National Advisory Commission’s standards for the maximum number of cases per year that an attorney should handle. Per those standards, which are referenced in the State Bar Guidelines, the *maximum* number of cases that

³¹ Public Defender Kenneth Taniguchi, letter to Board of Supervisors, Jan. 23, 2009, at p. 2 (Taniguchi Letter).

³² *Id.*; see ABA Ten Principles, *supra*, at p. 2 n.19 (referencing NAC numerical standards of maximum cases per year per attorney as “150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals”). “[I]t is important to note that a defender program cannot provide quality representation solely by developing a numerical set of caseload standards. Caseload standards are only one component of an effective indigent defense system.” U.S. Dep’t of Justice, Keeping Defender Workloads Manageable, Jan. 2001, <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>, at p.25. Also, the NAC numerical standards “typically form one starting point for states and localities that develop their own standards.” *Id.* at p. 7.

³³ Taniguchi Letter, *supra*, at pp. 2-3.

³⁴ P.A.C.E., letter to Public Defender Kenneth Taniguchi, cc Board of Supervisors, Fresno Superior Court Presiding Judge, and County Administrative Officer, Sept. 20, 2013, at p. 1 (P.A.C.E. letter).

³⁵ *Id.* at 1, 7.

³⁶ *Id.* at p. 2

³⁷ *Id.*

an individual defense attorney should handle is 150 felonies or 400 misdemeanors per year.³⁸ The public defenders also expressed concerns about caseloads for other staff in the Office, noting the “shortage of investigators, legal assistants and office assistants.”³⁹ In addition, they noted that every Level I public defender was working out of class, “handling an entire misdemeanor calendar including all the misdemeanor trials without any formal mentoring or training program in place,” and Level II public defenders were handling all felony cases, including those beyond the level of complexity prescribed in the County’s job specifications for those positions.⁴⁰ The public defenders concluded, “We cannot continue in this manner. *We are jeopardizing our client[s]’ constitutional rights on a daily basis.*”⁴¹ More than 80% of the attorneys working in the office—41 out of 51—signed this letter.⁴² They requested a response to these concerns by September 30, 2013,⁴³ but none was ever received and the head of the Office resigned shortly thereafter.

The Sixth Amendment Center, a national organization that advocates for indigent defendants’ constitutional right to counsel, submitted a similar letter to the Board in 2013, focusing on the Office’s shockingly excessive caseloads and the apparent lack of independence of the defense function in the County.⁴⁴ Again, the Board never responded.

On October 29, 2014, the ACLU met with the County Administrative Officer (CAO) to discuss the ACLU’s concerns about Fresno County’s provision of indigent defense services and funding in particular. Notwithstanding the clearly excessive caseloads of the Public Defender’s Office, the CAO insisted that the Office was adequately funded and staffed based on the data and funding available. The ACLU informed the CAO that the constitutional duty to provide adequate assistance of counsel to indigent defendants requires consideration of the substantive aspects of representation, such as those reflected in the State Bar Guidelines, rather than on the amount of money the County asserts is available.⁴⁵ The ACLU also notified the CAO that the ACLU would

³⁸ State Bar Guidelines, *supra*, at p. 26. The NAC numerical standards assume the indigent defense provider will “have adequate supportive services, including secretarial, investigation, and social work assistance.” NAC Standards, *supra*. For example, “a minimum of one investigator should be employed for every three staff attorneys in an office.” NLADA Guidelines, *supra*, at p. 10.

³⁹ *Id.*

⁴⁰ *Id.* at p. 4.

⁴¹ *Id.* (emphasis added).

⁴² David Carroll, Why the State of California is Responsible for the Public Defense Crisis in Fresno County, Sept. 29, 2013, available at <http://sixthamendment.org/why-the-state-of-california-is-responsible-for-the-public-defense-crisis-in-fresno-county/>.

⁴³ P.A.C.E. letter, *supra*, at p. 4.

⁴⁴ Sixth Amendment Center Executive Director David Carroll, letter to Fresno County Board of Supervisors, Sept. 29, 2013.

⁴⁵ See *Rufo v. Inmates of Suffolk Cnty. Jail* (1992) 502 U.S. 367, 392 (“Financial constraints may not be used to justify the creation or perpetuation of constitutional violations.”).

request access to public records concerning the provision of indigent defense services in Fresno County.

Recent data provided by Fresno County in response to the ACLU's Public Records Act request confirm that indigent defendants are still not receiving constitutionally adequate legal representation. Each felony attorney handles approximately 418 cases per year⁴⁶ compared to the maximum 150 felonies recommended by the National Advisory Commission.⁴⁷ This is a conservative approximation that does not include the time felony attorneys spend on supervised release cases.⁴⁸ Each misdemeanor attorney handles approximately 1,375 cases per year⁴⁹ compared to the maximum 400 misdemeanors recommended by the National Advisory Commission.⁵⁰ This approximation does not include the time misdemeanor attorneys spend on supervised release cases.⁵¹ As the U.S. Department of Justice has noted, excessive caseloads may contribute to the systemic failure of an indigent defense system:⁵²

Substantial structural limitations force even otherwise competent and well-intentioned public defenders into a position where they are, in effect, a lawyer in name only. Such limitations essentially require counsel to represent clients without being able to fulfill their basic obligations to prepare a defense, including

⁴⁶ This approximation is based on the records the County provided in response to the ACLU-NC's Public Records Act requested dated December 11, 2014. See Public Defender Elizabeth Diaz, Board Briefing Report to Board of Supervisors, Nov. 14, 2014, <http://www.co.fresno.ca.us/WorkArea//DownloadAsset.aspx?id=61644>, attachment A (FY 2013-14 BBR); Fresno County, letter to Novella Coleman, Jan. 14, 2015, Exh. 13. This caseload approximation undercounts because it does not include time a felony attorney may spend handling a misdemeanor case for a client also charged with a felony. It also assumes any senior level felony attorney has a full caseload.

⁴⁷ See State Bar Guidelines, *supra*, at p. 26.

⁴⁸ The Public Defender handled 216 parole violations, 1,051 postrelease community supervision cases, 4,138 felony violation of probation cases, and 420 mandatory supervised released cases in the 2013-14 fiscal year. FY 2013-14 BBR, *supra* (adding open and closed cases for each respective category). That adds approximately 194 more cases to each felony attorney's caseload.

⁴⁹ This approximation is based on the records the County provided in response to the ACLU-NC's Public Records Act requested dated December 11, 2014. See FY 2013-14 BBR, *supra*; Fresno County, letter to Novella Coleman, Jan. 14, 2015, Exh. 13. This caseload approximation over-counts because it assumes all misdemeanor cases are handled by Level I attorneys although some felony attorneys (Levels II, II, and IV) may handle a misdemeanor case for a client also charged with a felony. It also assumes any senior level misdemeanor attorney has a full caseload.

⁵⁰ See State Bar Guidelines, *supra*, at p. 26.

⁵¹ The Public Defender handled 1,050 misdemeanor violation of probation cases in the 2013-14 fiscal year. FY 2013-14 BBR, *supra* (adding open and closed cases). That adds approximately 88 more cases to each misdemeanor attorney's caseload.

⁵² U.S. Dep't of Justice, Statement of Interest in *Hurrell-Harring v. New York*, No. 8866-07, Sept. 25, 2014, http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf, at p. 10.

investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing.⁵³

We therefore remain gravely concerned that Fresno County is systematically failing to provide indigent defendants with assistance of counsel that satisfies minimal constitutional standards.

We demand that the County ensure indigent defense providers have the resources, staffing, and training necessary to discharge their responsibilities in a timely manner for every indigent defendant. This will include taking the following steps to remedy the situation:

1. Establishing and implementing caseload limits and workload standards for each individual attorney, each support staff member, and each indigent defense provider in the County to assure staff is not so over worked that the quality of representation falls below constitutional and statutory standards;
2. Ensuring each indigent defense provider regularly evaluates each staff member to inform appropriate attorney case assignments and workload for all staff, including taking into account training, ability, experience and skill level;
3. Conducting regular evaluations of each indigent defense provider to monitor compliance with the State Bar Guidelines and to inform County decisions about resource allocation.
4. Ensuring that decisions about which indigent defense providers the County will use and what resources are allocated to indigent defense services are made by independent County officials or consultants;
5. Ensuring proper provision of resources, including attorney, expert and investigative resources, for every indigent defendant; and
6. Ensuring proper training, supervision and professional support of attorneys.

Because the State of California has the ultimate responsibility to ensure that indigent defendants receive constitutionally adequate assistance of counsel, we are also sending the enclosed letter to the state, demanding that it comply with those duties. Specifically, we are demanding that the State ensure all counties, including Fresno County, have the funding to provide meaningful representation to all indigent persons accused of crimes and that the State provide oversight and monitoring to those counties.

Please respond on or before March 20, 2015 indicating in concrete terms how you intend to comply with your legal duties. If you decline to do so, we will be forced to consider all of our options to address these problems, including litigation. If you have any questions or wish to discuss this matter, including the specific grievances and proposed remedies identified herein, please contact me at (559) 554-2994 x303 or ncoleman@aclunc.org.

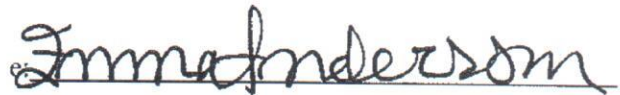
Thank you for your time and attention to this matter.

⁵³ *Id.* at pp. 11-12.

Sincerely,



Novella Coleman
American Civil Liberties Union Foundation
of Northern California, Staff Attorney



Emma A. Andersson
National American Civil Liberties Union,
Staff Attorney

Encl: ACLU letter to Governor Brown, February 20, 2015

cc: Peter Meier, Partner at Paul Hastings LLP, petermeier@paulhastings.com
Andreas Borgeas, District 2 Supervisor, district2@co.fresno.ca.us
Buddy Mendes, District 4 Supervisor and Vice Chair, district4@co.fresno.ca.us
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Debbie Poochigian, District 5 Supervisor and Chair, district5@co.fresno.ca.us
John Navarrette, County Administrative Officer, jnavarrette@co.fresno.ca.us
ATTN: Peter Krause, Legal Affairs, Governor Jerry Brown, c/o State Capitol, Suite 1173,
Sacramento, CA 95814



February 20, 2015

VIA U.S. MAIL

ATTN: Peter Krause, Legal Affairs Secretary
Governor Jerry Brown
c/o State Capitol, Suite 1173
Sacramento, CA 95814

RE: Provision of Indigent Defense Services

Dear Governor Brown:

We are writing on behalf of the American Civil Liberties Union of Northern California and the National American Civil Liberties Union (collectively “ACLU”), and on behalf of our co-counsel, Paul Hastings LLP. We are deeply concerned that Fresno County is systemically failing to provide legal representation to indigent defendants in a manner that meets constitutionally required and legally enforceable standards. This breakdown in Fresno County is a direct result of the State’s failure to provide oversight of and only minimal funding to county-administered public defense systems.

Before the U.S. Supreme Court’s landmark decision in *Gideon v. Wainwright*,¹ California constitutional and statutory law had already secured the right to counsel for “[a]ll persons accused of crime in any court in the state.”² “That right include[d] the judicial appointment of counsel in cases in which the accused is financially unable to employ counsel himself.”³ Indeed, the California Supreme Court has recognized that the right to counsel is “among the most sacred and sensitive of our constitutional rights.”⁴

Although the State has almost entirely delegated the provision of indigent defense services to the counties, it is the State’s ultimate responsibility to ensure that indigent defendants receive constitutionally adequate assistance of counsel. Over 50 years ago in *Gideon*, the U.S. Supreme Court held that the right to counsel is “a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’” such that it “is made obligatory *upon the States* by the Fourteenth Amendment.”⁵ It is thus well established that when a State criminally prosecutes an

¹ (1963) 372 U.S. 335.

² *Ex parte Newbern* (1960) 53 Cal.2d 786, 790.

³ *Id.*

⁴ *People v. Ortiz* (1990) 51 Cal.3d 975, 982.

⁵ *Gideon, supra*, 372 U.S. 335, 342-43 (emphasis added).

indigent defendant, that State is obligated to provide constitutionally adequate counsel to that individual.⁶

California has abdicated this constitutional duty by delegating indigent defense to each individual county without providing adequate funding or oversight, which has resulted in wide disparities—and inequities—in how legal services are provided to indigent defendants throughout the state. “A statewide study of defense services by the State Bar’s former Standing Committee on the Delivery of Legal Services to Criminal Defendants revealed that among California’s 58 counties, there was no consistency in the manner, cost efficiency, and quality of legal services being provided to the indigent accused throughout the state.”⁷ The State Bar has published guidelines for indigent defense providers that address the independence of the system, standards of representation, qualifications of providers, monitoring and assessment needs, training of providers, workload, resources, compensation, ethics, diversity of providers, and management.⁸ However, these are treated as mere suggestions since the State does not hold counties accountable for any of these metrics. As noted in the Standing Committee’s report, California has left “it up to each county to determine the level of funding to be provided,”⁹ and the level is often determined—as in Fresno County—“without appropriate deference to minimum standards for delivery of defense services.”¹⁰

As a result of the State’s abdication of its responsibility to guarantee the right to counsel for indigent persons, Fresno County has failed for at least the last six years to ensure these persons are provided with assistance of counsel that satisfies the minimal requirements of both the federal and state constitutions. When the Fresno County Board of Supervisors (“Board”) cut the Public Defender Office’s (“Office”) budget by \$324,728 in the 2008-09 fiscal year, the head of the Office alerted the Board that this severely impacted the Office’s ability “to provide competent and effective representation on each case” and “to staff or service all of the various

⁶ E.g., *People v. Douglas* (1964) 61 Cal.2d 430, 434 (right to counsel “is applicable in criminal trials in the state courts); *County of Los Angeles v. Comm’n on State Mandates* (1995) 32 Cal.App.4th 805, 814 (“A state is required by the United States Constitution to provide counsel for indigent defendants.”); *Anderson v. Justice Court* (1979) 99 Cal.App.3d 398, 401 (“It is settled that the state is required by the United States Constitution to provide counsel for indigent defendants.”).

⁷ The State Bar of California, *Guidelines on Indigent Defense Services Delivery Systems*, 2006, <http://calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326>, at p. 1 (State Bar Guidelines).

⁸ State Bar Guidelines, *supra*.

⁹ Cal. Comm’n on the Fair Administration of Justice, *Report and Recommendations on Funding of Defense Services in California*, Apr. 14, 2008, <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>, at p. 14.

¹⁰ Editor Gerald Uelmen, Staff Editor Chris Boscia, Cal. Comm’n on the Fair Administration of Justice, *Final Report*, <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>, “Professional Responsibility and Accountability,” 2008, at p. 96.

courtrooms and calendars within Fresno County.”¹¹ He noted that “the caseload level for each full-time staff attorney in the Department far exceeds the American Bar Association standards and only grows each time an attorney position is deleted.”¹² Focusing on the problem of being unable to staff attorneys for every courtroom and calendar, the Public Defender informed the Board that it would have to decline case appointments in the face of further staff reductions.¹³ In the absence of any relief from the County, in January 2010 the Public Defender began to decline cases to deal with the court coverage problem. Although the Public Defender stopped declining cases in December 2010, attorneys in the Office are still forced to operate within a system that lacks the most basic structural elements necessary for them to provide constitutionally adequate representation to every one of their indigent clients.

On September 20, 2013, the Professional Association of Fresno County Employees (P.A.C.E.), the union representing attorney employees of the Fresno County Public Defender’s Office, submitted a letter expressing concerns about being unable to meet their “[c]onstitutional duty to effectively perform competent legal services for [their] clients due to excessive caseloads, and working out of class”—*i.e.*, beyond their experience or training.¹⁴ This letter was addressed to Ken Taniguchi, the Fresno County Public Defender at the time, and was copied to each member of the County Board of Supervisors, among others.¹⁵ The attorneys’ union explained that misdemeanor attorneys carried an average of 356 open cases on any given day and they had up to, if not more than, 2,000 cases assigned to them per year.¹⁶ Felony attorneys carried an average of 230 open cases on any given day with up to, if not more than, 1,000 cases assigned to them per year.¹⁷ This is a stark contrast to the National Advisory Commission’s standards for the maximum number of cases per year that an attorney should handle. Per those

¹¹ Public Defender Kenneth Taniguchi, letter to Board of Supervisors, Jan. 23, 2009, at p. 2 (Taniguchi Letter).

¹² *Id.*; see American Bar Association, Ten Principles of a Public Defense Delivery System, 2002, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf, at p. 2 n.19 (ABA Ten Principles) (referencing National Advisory Commission (NAC) numerical standards of maximum cases per year per attorney as “150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals”). “[I]t is important to note that a defender program cannot provide quality representation solely by developing a numerical set of caseload standards. Caseload standards are only one component of an effective indigent defense system.” U.S. Dep’t of Justice, Keeping Defender Workloads Manageable, Jan. 2001, <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>, at p.25. Also, the NAC numerical standards “typically form one starting point for states and localities that develop their own standards.” *Id.* at p. 7.

¹³ Taniguchi Letter, *supra*, at pp. 2-3.

¹⁴ P.A.C.E., letter to Public Defender Kenneth Taniguchi, cc Board of Supervisors, Fresno Superior Court Presiding Judge, and County Administrative Officer, Sept. 20, 2013, at p. 1 (P.A.C.E. letter).

¹⁵ *Id.* at 1, 7.

¹⁶ *Id.* at p. 2

¹⁷ *Id.*

standards, which are referenced in the State Bar Guidelines, the *maximum* number of cases that an individual defense attorney should handle is 150 felonies or 400 misdemeanors per year.¹⁸ The public defenders also expressed concerns about caseloads for other staff in the Office, noting the “shortage of investigators, legal assistants and office assistants.”¹⁹ In addition, they noted that every Level I public defender was working out of class, “handling an entire misdemeanor calendar including all the misdemeanor trials without any formal mentoring or training program in place,” and that Level II public defenders were handling all felony cases, including those beyond the level of complexity prescribed in the County’s job specifications for those positions.²⁰ The public defenders concluded, “[w]e cannot continue in this manner. *We are jeopardizing our client[s]’ constitutional rights on a daily basis.*”²¹ More than 80% of the attorneys working in the office—41 out of 51—signed this letter.²² They requested a response to these concerns by September 30, 2013,²³ but none was ever received, and the head of the Office resigned shortly thereafter.

The Sixth Amendment Center, a national organization that advocates for indigent defendants’ constitutional right to counsel, submitted a similar letter to the Board in 2013, focusing on the Office’s shockingly excessive caseloads and the apparent lack of independence of the defense function in the County.²⁴ Again, the Board never responded.

In December 2014, the ACLU submitted Public Record Act requests to the Governor’s Office, the State Controller’s Office, and the Department of Finance. The requests sought information about what the State is doing to ensure that the counties to which it has delegated its own constitutional obligation are providing adequate legal representation to indigent defendants. All of the state agencies indicated that they had no responsive records.

¹⁸ State Bar Guidelines, *supra*, at p. 26. These numerical standards assume the indigent defense provider will “have adequate supportive services, including secretarial, investigation, and social work assistance.” NAC, The Criminal Justice Standards and Goals, 1973, ch. 13, The Defense, http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense. For example, “a minimum of one investigator should be employed for every three staff attorneys in an office.” National Legal Aid and Defender Association (NLADA), Guidelines for Legal Defense Systems in the United States, 1976, http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems, at p. 10.

¹⁹ *Id.*

²⁰ *Id.* at p. 4.

²¹ *Id.* (emphasis added).

²² David Carroll, Why the State of California is Responsible for the Public Defense Crisis in Fresno County, Sept. 29, 2013, available at <http://sixthamendment.org/why-the-state-of-california-is-responsible-for-the-public-defense-crisis-in-fresno-county/>.

²³ P.A.C.E. letter, *supra*, at p. 4.

²⁴ Sixth Amendment Center Executive Director David Carroll, letter to Fresno County Board of Supervisors, Sept. 29, 2013.

Recent data provided in Fresno County's response to the ACLU's Public Records Act request confirm that indigent defendants are still not receiving constitutionally adequate legal representation. Each felony attorney handles approximately 418 cases per year²⁵ compared to the maximum 150 felonies recommended by the National Advisory Commission.²⁶ This is a conservative approximation that does not include the time felony attorneys spend on supervised release cases.²⁷ Each misdemeanor attorney handles approximately 1,375 cases per year²⁸ compared to the maximum 400 misdemeanors recommended by the National Advisory Commission.²⁹ This approximation does not include the time misdemeanor attorneys spend on supervised release cases.³⁰ As the U.S. Department of Justice has noted, excessive caseloads may contribute to the systemic failure of an indigent defense system:³¹

Substantial structural limitations force even otherwise competent and well-intentioned public defenders into a position where they are, in effect, a lawyer in name only. Such limitations essentially require counsel to represent clients without being able to fulfill their basic obligations to prepare a defense, including investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing.³²

²⁵ This approximation is based on the records the County provided in response to the ACLU-NC's Public Records Act requested dated December 11, 2014. See Public Defender Elizabeth Diaz, Board Briefing Report to Board of Supervisors, Nov. 14, 2014, <http://www.co.fresno.ca.us/WorkArea/DownloadAsset.aspx?id=61644>, attachment A (FY 2013-14 BBR); Fresno County, letter to Novella Coleman, Jan. 14, 2015, Exh. 13. This caseload approximation undercounts because it does not include time a felony attorney may spend handling a misdemeanor case for a client also charged with a felony. It also assumes any senior level felony attorney has a full caseload.

²⁶ See State Bar Guidelines, *supra*, at p. 26.

²⁷ The Public Defender handled 216 parole violations, 1,051 postrelease community supervision cases, 4,138 felony violation of probation cases, and 420 mandatory supervised released cases in the 2013-14 fiscal year. FY 2013-14 BBR, *supra* (adding open and closed cases for each respective category). That adds approximately 194 more cases to each felony attorney's caseload.

²⁸ This approximation is based on the records the County provided in response to the ACLU-NC's Public Records Act requested dated December 11, 2014. See FY 2013-14 BBR, *supra*; Fresno County, letter to Novella Coleman, Jan. 14, 2015, Exh. 13. This caseload approximation over-counts because it assumes all misdemeanor cases are handled by Level I attorneys although some felony attorneys (Levels II, II, and IV) may handle a misdemeanor case for a client also charged with a felony. It also assumes any senior level misdemeanor attorney has a full caseload.

²⁹ See State Bar Guidelines, *supra*, at p. 26.

³⁰ The Public Defender handled 1,050 misdemeanor violation of probation cases in the 2013-14 fiscal year. FY 2013-14 BBR, *supra* (adding open and closed cases). That adds approximately 88 more cases to each misdemeanor attorney's caseload.

³¹ U.S. Dep't of Justice, Statement of Interest in *Hurrell-Harring v. New York*, No. 8866-07, Sept. 25, 2014, http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf, at p. 10.

³² *Id.* at pp. 11-12.

We therefore are gravely concerned that Fresno County is failing to provide indigent defendants with assistance of counsel that satisfies minimal constitutional standards.

We demand that the State ensure that Fresno County—and all counties’ indigent defense providers—have the resources, staffing, and training necessary to discharge their responsibilities in a timely manner for every indigent defendant.³³ This will include taking the following steps to remedy the situation:

1. Requiring all counties to establish and implement caseload limits and workload standards for each individual attorney, each support staff member, and each indigent defense provider in the county to assure that staff is not so over worked that the quality of representation falls below constitutional and statutory standards;
2. Requiring all counties to regularly evaluate each staff member to inform appropriate attorney case assignments and workload for all staff, including taking into account training, ability, experience and skill level;
3. Conducting regular evaluations of all counties’ indigent defense systems, including all county indigent defense providers, to monitor compliance with the State Bar Guidelines and inform decisions about resource allocation;
4. Ensuring that decisions about which indigent defense providers counties will use and what resources are allocated to indigent defense services are made by independent government officials or consultants;³⁴
5. Ensuring proper provision of resources, including attorney, expert and investigative resources, for all county indigent defense providers; and
6. Ensuring proper training, supervision, and professional support of attorneys for all county indigent defense providers.

Please respond on or before March 20, 2015 indicating in concrete terms how you intend to comply with your legal duties. If you decline to do so, we will be forced to consider all of our options to address these problems, including litigation. If you have any questions or wish to discuss

³³ Because the counties operate the indigent defense systems throughout the State, we have also written to Fresno County to demand that it comply with its duties. Specifically, we are demanding that Fresno County establish and implement caseload limits, and workload and case assignment standards to ensure the quality of representation does not fall below constitutional and statutory standards. We are also demanding that Fresno County conduct regular evaluations of each county indigent defense provider to monitor compliance with the State Bar Guidelines and to inform County decisions about resource allocation.

³⁴ The indigent defense provider must subordinate all other loyalties and concerns to the best interests of each client. Decisions of the defense provider, including those about what resources are reasonable and necessary to properly prepare a client’s case, must be unaffected by political influence. State Bar Guidelines, *supra*, at pp. 4-5. “Should there develop an unavoidable conflict between the duties, responsibility or allegiance of an institutional public defender as a county manager or department of county government, and the role of said Public Defender in representing an indigent client, the duty to properly represent the client supersedes all other loyalties.” *Id.* at p. 7.

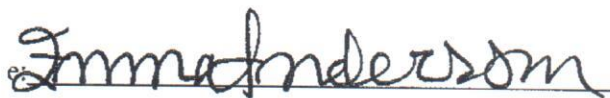
this matter, including the specific grievances and proposed remedies identified herein, please contact me at (559) 554-2994 x303 or ncoleman@aclunc.org.

Thank you for your time and attention to this matter.

Sincerely,



Novella Coleman
American Civil Liberties Union Foundation
of Northern California, Staff Attorney



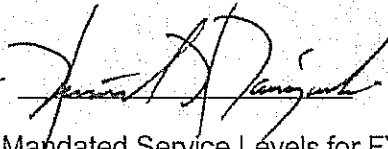
Emma A. Andersson
National American Civil Liberties Union,
Staff Attorney

- Encl: ACLU letter to Fresno County Board of Supervisors, February 20, 2015
Public Defender Kenneth Taniguchi, letter to Board of Supervisors, Jan. 23, 2009
P.A.C.E., letter to Public Defender Kenneth Taniguchi, cc Board of Supervisors, Fresno Superior Court Presiding Judge, and County Administrative Officer, Sept. 20, 2013
Sixth Amendment Center Executive Director David Carroll, letter to Fresno County Board of Supervisors, Sept. 29, 2013
Fresno County, letter to Novella Coleman, Jan. 14, 2015, Exh. 13
- cc: Peter Meier, Partner at Paul Hastings LLP, petermeier@paulhastings.com
Office of the Attorney General, P.O. Box 944255, Sacramento, CA 94244-2550
Fresno County Board of Supervisors, Clerk/BOS@co.fresno.ca.us



Agenda Date: _____

Board Briefing Report

DATE: January 23, 2009
TO: Board of Supervisors
FROM: Kenneth Taniguchi, Public Defender 
SUBJECT: Public Defender Budget Status and Mandated Service Levels for FY 2008-09

EXECUTIVE SUMMARY

The purpose of this Board Briefing Report is to provide information regarding the Public Defender's status in meeting its FY 2008-09 Adjusted Budget of \$14,634,725 and in meeting its mandated service levels. As of December 31, 2008, the Department has expended \$6,964,958. By the end of the current fiscal year, the Department projects an increase in net County cost of \$665,000.

The expected increase in net County cost includes a total year-to-date annual leave payout of \$75,000 and a decrease in estimated revenues of \$65,000. It is unknown if the Department will incur additional annual leave payouts for the remainder of the fiscal year. The Department plans to come to your Board at a later date to request a transfer of funds from the Annual Leave Designation. The decrease in estimated revenues is primarily due to lower than expected court ordered attorney fees, and an over accrual of the FY 2007-08 DUI Grant revenue.

On August 26, 2008, the Board approved a \$3.2 million budget reduction to meet a shortfall in Foster Care resulting in a \$324,728 reduction in the Public Defender's current year budget. It is predominately this additional budget reduction and a lack of attrition within the Department that has caused the current projected shortfall.

Fresno County is statutorily and constitutionally mandated to provide representation to indigents charged with criminal offenses and in certain other statutorily defined cases. The Board was informed in the August 26, 2008, budget reduction agenda item that any further cuts in personnel would result in the inability of the Public Defender to staff all courts and fulfill 100% of its mandated functions. In the current fiscal year, the Department has suffered a reduction of six attorney positions, an investigator position, and an office assistant position.

HISTORY/STATUS

The Public Defenders Office has a long history of doing more with less. However, there are limits as to what can be accomplished when staffing levels are so severely cut that basic mandated service levels cannot be met. The budget process for the current fiscal year resulted in the elimination of four defense attorney positions and one investigator position. The loss of these positions placed a severe strain on the Department and substantially jeopardized the Department's ability to fulfill 100% of its mandated services. Then, on August 26, 2008, the Board approved a \$324,728 budget reduction for the Department, as it's pro rata share of the \$3.2 million allocation reduction to meet the shortfall in Foster Care. This budget reduction resulted in the elimination of an additional two defense attorney positions and one office assistant position. Thus, within the last six months, the Department has lost a total of eight positions which calculates to six percent of its workforce.

AS stated in the Executive Summary, Fresno County is statutorily and constitutionally mandated to provide representation to indigents charged with criminal offenses and in certain other statutorily defined cases. Implicit within and legally required by these mandates is that each individual who is appointed counsel is entitled under the law to competent and effective legal representation. In fulfilling these mandates, the challenge for the Department is twofold. First, to provide competent and effective representation on each case and for each individual for which the Public Defender is appointed. And, second, to staff or service all of the various courtrooms and calendars within Fresno County. This not only requires a trained staff of competent attorneys, but also a *sufficient number* of staff attorneys. Without a sufficient number of staff it is not only impossible to maintain the controllable workload levels per attorney necessary to meet the legally required level of competent representation, but it is also impossible to meet the demands of the Superior Court for the necessary staffing of all of the various courtrooms throughout Fresno County. Currently, the caseload level for each full-time staff attorney in the Department far exceeds the American Bar Association standards and only grows each time an attorney position is deleted.

Consequently, without sufficient staff the Public Defender is legally forced to decline appointment on a certain number of new cases.¹ Even though the Public Defender becomes unavailable to accept appointment, Fresno County's obligation to provide indigent defense counsel remains. Thus, the County must either provide outside counsel at additional cost or the Courts will appoint private counsel at the County's expense. Either way, the cost unavoidably falls upon the County. It makes fiscal and practical sense for the Board to remain in full control of these costs by insuring that the Public Defender is sufficiently staffed to be able to accept all case appointments. Otherwise, the County will spend more money; have less control, less quality assurance, and do so at a level of uncertainty that makes it impractical to manage.

It is also important to note that the progress made by the Department since 2006 in helping to alleviate jail overcrowding has essentially come to a halt due to the continued reduction of attorney positions. In October 2006, the Board made a determination that pre-trial detainees were the major contributing factor to jail overcrowding. In order to process this segment of the jail population more efficiently, and with less delay, the Board added positions to all of the Justice Departments – the Public Defender, the District Attorney, and Probation. However, with successive budget reductions and fewer attorney positions over the last two fiscal years, this plan for reducing jail overcrowding has been rendered ineffective.

STATUS OF ACTION PLAN

The Department has implemented creative management techniques and restructured several internal operations. The dedicated attorney staff has frequently worked in excess of a 40-hour work week (without additional compensation) and has allowed the Department to continue to meet its goal of covering 100% of its mandated services. However, any further reduction of staff, or the use of hiring controls to limit the Department's ability to fill its vacancies as they arise, places the Department in peril of being unable to meet this

¹ Federal law and The State Bar of California legally compel the Public Defender to seek the appropriate amount of resources from the Board in order to fulfill the Department's mandated functions. If those resources are not forthcoming, the Public Defender is legally compelled to refuse to accept that portion of cases that the Department is unable to adequately represent due to understaffing. This duty is summarized in The State Bar of California's *Guidelines on Indigent Defense Services Delivery Systems (2006)*, as follows:

Should a Chief Defender determine that the combination of the existing and incoming workload exceeds the capacity of institutional defender employees (all of them not only lawyers) to provide necessary services in a competent fashion in a timely manner and without unduly risking the health of the defender workforce, it is incumbent upon such a Chief Defender to secure the additional resources necessary or to refuse to accept that portion of the incoming workload that exceeds the capacity of the defender program. Failure of a Chief Defender to effectively address workloads may result in personal liability for an adverse civil judgment and jeopardize the right of the Chief Defender to practice law in any capacity.

[See *Miranda v. Clark County, Nevada* (2003), 319 F.3d 465, 471 C.A. 9 (Nev.); *In Re Matter of Robert Pinto Public Defender San Benito County* (California State Bar Court Case No. 93-0-10027); *California Business & Professions Code* § 6086.7(a)(2).]

service goal. A recent situation illustrates just one of the Department's ongoing efforts to cope with less staff and still meet its mandated service levels. Soon after the budget reduction of \$324,728 was approved, the Public Defender was prepared to declare the unavailability to staff the Kerman Court and to defend Kerman felony cases. However, a declaration of unavailability was avoided by working with the Superior Court to consolidate the entire misdemeanor-felony Kerman calendar into Firebaugh, thus avoiding the necessity of having the County pay for outside counsel to handle the Kerman cases.

The courts have not remained stagnant in their demands for Public Defender services. For example, in June 2008, the Superior Court opened the Adult Behavioral Health Court. To date, the Department has been able to staff this court but it is becoming increasingly difficult. In addition, the Superior Court continues to place higher demands on the services of the Public Defender in order to solve its own workload problems. In April 2008, the Superior Court expanded its Home Court model. Home courts are where the bulk of all Fresno felony cases are handled, pretrial. In order to alleviate congestion in its own workload, the Court added a new, additional sixth felony home courtroom. This is a full-time courtroom that requires the services of four defense attorneys per week. The Public Defender reorganized, reconfigured and managed to staff this courtroom with no additional attorneys.

Our efforts to improve efficiency and to cover more courts with less staff are ongoing. Nevertheless, maintaining our mandated service level will remain a challenge without additional staff and with hiring controls restricting our ability to fill vacancies. With any further decrease in staff it is clear that we will be unable to provide 100% of our mandated services.

ADDITIONAL CONCERNS

It should be noted that Professional & Specialized Services (expert witness fees, DNA analysis, etc.), are becoming increasingly more expensive. The increase by law enforcement in the use of DNA evidence and other sophisticated forensic techniques has caused expert witness costs to soar. We also explained during budget hearings that we were making a concerted effort to clear up a backlog of cases in our Mental Health unit (sexually violent predator cases, mentally disordered offender cases, not guilty by reason of insanity cases, etc.) These cases rely heavily upon expert testimony. During the FY 2008-09 Budget Hearings, the Department requested an amount based upon projected costs for these services; however, the amount was significantly reduced. In addition, our educational and associated mileage expenses are currently exceeding projections. The original amount we requested was also significantly reduced during budget hearings. Maintaining competent legal representation, training newly hired attorneys, and preparing even the more experienced attorneys for increasingly complex cases, has placed a strain on educational expenses. The Department is currently scrutinizing the use of these funds but these expenses remain an area of concern.

CONTACT PERSONS

For additional information or questions, please contact:

Kenneth Taniguchi, Public Defender, 488-3546

Gary Shinaver, Chief Defense Attorney, 488-3546

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Fresno, California 93709-0661

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Secretary – Daniel Brickey
Shop Steward – Eric Christensen

Vice President – Kristin Maxwell
Treasurer – Kathy Marousek
Member at Large – Doug Feinberg

September 20, 2013

Ken Taniguchi, Public Defender
2220 Tulare Street, Ste. 300
Fresno, CA 93721

Mr. Taniguchi,

Pursuant to the American Bar Association Standards for Criminal Justice, the ABA Model Rules, California Rules of Professional Responsibility section 3-110, and ABA formal opinion 06-441 we the undersigned are informing management of the Fresno County Public Defender's Office of our concern regarding our Constitutional duty to effectively perform competent legal services for our clients due to excessive caseloads, and working out of class.

Attorneys in this office are over-burdened with a staggering number of cases. All are concerned about being singled out for punishment should an individual complaint be voiced due to the recent termination of an attorney colleague. In light of our concern we are bringing this request for a solution to you through our Association.

In 2009, prior to declining cases assigned to the Public Defender's Office, you informed the Board of Supervisors the following:

"The Board was informed in the August 26, 2008, budget reduction Item that any further cuts in personnel would result in the inability Of the Public Defender to staff all courts and fulfill 100% of its Mandated functions." "Currently the caseload level for each Full-time staff attorney in the Department far exceeds the American Bar Association standards and only grows each time an attorney Position is deleted." (***Public Defender Budget Status and Mandated Service levels for FY 2008-09; January 23, 2009.***)

You explained to the BOS that our constitutionally mandated duty of providing effective legal representation to the indigent of Fresno County was dangerously close to overload due to budget cuts. You informed them that further cuts to our staff would force you to decline cases and that your failure to act would subject you to personal liability. (***Please see attachment "A".***)

When you wrote the above-referenced budget status report to the BOS the Public Defender was staffed with 78 attorneys, 6 legal assistants, 18 investigators and 22 office assistants. Since 2009, according to budget reports by the District Attorney's Office and this office,

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criminal filings have increased by at least 16%. At this time the Public Defender's Office has a total of 56 attorneys, 4 legal assistants, 9 investigators, and 11 office assistants: 38 attorneys are handling a criminal caseload of more than 23,000 cases per year. (**Please see inner-office telephone list; 2013-14 budget reports for DA and PD; PD Budget Report FY 2012-13.**)

For a brief time in 2009 you complied with your Constitutional mandate of insuring the caseloads did not exceed a designated number and once we reached a cap you declined new cases. While criminal filings have continued to greatly increase, our office has been reduced by at least 1/3 of its staff yet you have not declined any cases since 2009.

As of July 1st, 2013, the misdemeanor attorneys are carrying an average of 356 open cases (**Please see attachment "B"; Public Defender Annual Report FY 2012-13.**) with up to, if not more than, 2,000 cases assigned per year to each attorney. (**Please see attachment "D".**) The ABA recommends only 400 total cases per attorney per year in reference to misdemeanors.

The felony attorneys are carrying an average of 230 cases as of July 1st, 2013 with up to, if not more than, 1,000 cases assigned per year to each felony attorney. (**Please see Public Defender Annual Report FY 2012-13 and attachment "C."**) The ABA rules recommend a total of 150 felony cases per year per attorney.

The major crimes attorneys each have approximately 16-22 cases currently assigned including specials cases, homicides, complex gang crimes, etc. An attorney handling a specials case, at the maximum, may carry one or two other non-specials cases. It is taking an average of three to four years to get a homicide case to trial, and an average of one to two years to get a non-homicide major crimes case to trial.

In light of the above, all of the undersigned attorneys are hereby giving notice that we are at risk of being ineffective in representing our clients due to excessive caseloads, shortage of investigators, legal assistants and office assistants.

"Defense counsel should not carry a workload that, by reason of its Excessive size, interferes with the rendering of quality representation, Endangers the client's interest in the speedy disposition of charges, or May lead to the breach of professional obligations." (**ABA standards 4-1.3.**)

We are asking that management address the issue of excessive caseloads immediately due to the severity of the situation and the imminent harm that could befall our clients coupled with the stress and emotional toll it is taking on the attorneys and support staff. This office is in a crisis and management has not addressed these concerns when brought up by individual attorneys. We have lost over 40 attorneys in the last four years and 11 attorneys have taken extended leaves, yet during the last budget hearings you have not asked for any additional funding for desperately needed staff in order to adequately and competently represent our clients.

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The second issue is attorneys working out of class. According to Fresno County personnel job specifications every Level I and Level II attorney in this office is working outside of their job specifications.

“Upon assignment, the Defense Attorney I may make court appearance in Minor cases. MOST TRIAL WORK IS PERFORMED BY HIGHER LEVEL CLASSES IN THE DEFENSE ATTORNEY SERIES.” (*Defense Attorney I, Fresno County Job Specifications.*)

Every Defense Attorney I in this office is currently working outside of the above classification. Each attorney is handling an entire misdemeanor calendar including all the misdemeanor trials without any formal mentoring or training program in place.

Defense Attorney IIs are handling felony home courts and are assigned all felony cases excluding those designated a major crimes case or MDO, NGI or SVP. According to the job specification a Level II attorney should be handling cases of “average difficulty.” Instead they are handling all felonies including life-top cases, three strikes cases, complex cases such as home invasion robberies, first degree burglaries, gang allegations, sex crimes, large paper cases including welfare fraud, worker’s compensation fraud and check fraud involving thousands of pages of discovery. Not only are these cases time intensive, they also involve a high level of stress on both the attorneys and the clients due to high exposure and complexity. Placed in further perspective: A DA level II attorney is only allowed to work on misdemeanor cases and they do not face the same potential repercussions with the State Bar Association as a defense attorney. (*Please see Attachment “E.”*)

It appears that you are aware how the majority of felony cases currently fall outside the Level II Attorney job specifications, as you set forth in your report to the Board in November of 2012:

“Felony cases include a wide spectrum of violations, from low level Felonies to the most serious and violent cases such as homicides. Many cases in the ‘other’ and ‘felony’ categories require skills in Areas that include understanding of the bearing of client’s mental illness diagnoses and psychotropic medications, ability to interact And communicate with mentally ill clients and the ability to effectively Conduct cross examination of complex case expert witnesses. (*Public Defender FY 2011-12 Summary and FY 2012-13 First Quarter Report, November 7, 2012, Ken Taniguchi.*)

A Level II attorney who recently resigned from the Fresno County Public Defender’s Office was a certified legal specialist with the State Bar of California. This Level II attorney had over five years of experience in criminal law, had completed numerous complex felony jury trials, hearings and appeals, passed a State Bar certification exam and peer review

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committee, yet he was only considered a level II attorney in this office. In juxtaposition, there are several Level II attorneys with less than 2 years criminal law experience. It is apparent from the disparity of experience that the job specifications are not being adhered to, to the disregard of our clients and the attorneys.

From 2009 to 2013 we have lost the following chief, senior and level IV attorneys due to resignations:

1. Pete Jones
2. Ron Perring
3. Mike Aed
4. Julie Bowler
5. Mike Bowler
6. Garrick Byers
7. Franz Criego
8. Todd Eilers
9. Debra Girard
10. Paul Hinkly
11. Manny Nieto
12. Carl Reed
13. Ralph Torres
14. Tom Zynda

Not a single senior or Level IV position has been replaced despite the fact that the County promotion freeze was lifted on October 23, 2012. (*Please see attachment "F."*) In addition there have been several demotions:

1. Donna Miller Level V to IV
2. Angelica Rivera Level IV to III
3. Kristen Maxwell Level IV to III
4. Adrienne Harbottle Level IV to III
5. Cindy Cohn Level IV to III
6. Judith Sanders Level IV to III

The above attorneys have not been restored to their previous classification levels yet at least 18 new attorneys have been hired since the demotions were imposed.

We cannot continue in this manner. We are jeopardizing our client's constitutional rights on a daily basis. We are discouraged and demoralized due to the decimation of staff, greatly increased caseloads, lack of training, lack of mentoring, and refusal to promote anyone beyond a Level II within the previous five years. This office must hire and retain additional staff to attain manageable caseload numbers. Also, attorneys should no longer be assigned cases that are clearly outside their job specifications.

We ask that you respond to our concerns by September 30, 2013. Thank you.

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Sincerely,

Scott Baly

Kathy A. Marousek

Kristin Maxwell, PACE Vice President

Eric Christensen

Dan Brickey

Beth Ann Lee

Eric Christensen

John Lee

Alan de Ocampo

[Signature]

[Signature]

[Signature]

Jens Mikkelsen

Avery Mikkelsen

Jan Lee

Scott Baly

Roberto Rodriguez

[Signature]

[Signature]

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Janet K Dana

Alan M - W

E L Duran

Russell

Angel Rina

Marena Pincus

Johnna Edwards

Mary Huff

Heidi J

Mrs Bader

W. B.

Jared Johnson

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CC: Liz Diaz, Assistant Public Defender
Gary Shinaver, Chief Attorney
Robert Delmare, Chief Attorney
Supervisor Henry Perea
Supervisor Debbie Poochigian
Supervisor Andreas Borgeas
Supervisor Judy Case
Supervisor Phil Larson
Gary Hoff, Fresno Superior Court Presiding Judge
John Navarette
National Legal Aid and Defense Association
California Attorneys for Criminal Justice
ACLU Fresno Division



SIXTH AMENDMENT CENTER

P.O. Box 15556, Boston, MA 02215

September 29, 2013

Fresno County Board of Supervisors
2281 Tulare Street, Room 301
Fresno, CA 93721-2198

In care of: Bernice Seidel, Clerk to the Board of Supervisors
Clerk/BOS@co.fresno.ca.us

Re: Excessive Public Defender Caseloads

Dear Fresno County Board of Supervisors,

The Sixth Amendment Center (6AC) is a national non-profit organization that seeks to ensure that no person faces potential time in jail without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the United States Constitution. We do so by measuring public defense systems against established standards of justice. When shortcomings are identified, we help states and counties make their courts fair in ways that promote public safety and fiscal responsibility.

The 6AC was founded to assist states and local governments in meeting their constitutional obligation. The 6AC Board of Directors believes that the right to counsel is a non-partisan issue, and an effective defense in our criminal courts reflects a balanced criminal justice system and sound fiscal policy. Our board comes to this issue from conservative and liberal backgrounds. We have former state Supreme Court justices, law enforcement personnel, state legislators, academicians, constitutional scholars, and mental health experts. Some of our board members have worked as public defense attorneys while others have been prosecutors. Despite their diverse backgrounds, the 6AC board is united in its commitment to ensuring that everyone gets a fair day in court before their liberty can be taken away by the state.

The 6AC also recognizes that it is difficult, at best, for county policymakers to keep abreast of ever evolving right to counsel case law and government's obligation to those of limited means under the Sixth and Fourteenth Amendments. As the Executive Director of the 6AC, I write today because of the serious allegations raised in the September 20, 2013 letter to Public Defender, Ken Taniguchi, from the Professional Association of Fresno County Employees ("P.A.C.E. letter"). If true, the excessive caseloads, lack of

training, and the use of non-qualified lawyers detailed in the P.A.C.E. letter are in breach of all national indigent defense standards, as detailed below.

The American Bar Association, *Ten Principles of a Public Defense Delivery System*

In February 2002, the American Bar Association (ABA), House of Delegates adopted the *Ten Principles of a Public Defense Delivery System*, noting that the *Principles* “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”¹ In 2012, our country’s top law enforcement official, U.S. Attorney General Eric Holder, stated that the ABA “literally set the standard”² for indigent defense systems with the promulgation of the *Ten Principles* and called the *Ten Principles* the basic “building blocks”³ for overcoming right to counsel deficiencies.

The fifth of the *Ten Principles* states that “[d]efense counsel’s workload is controlled to permit the rendering of quality representation.” Commentary to the standard notes that workload should never “be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations,” and that “counsel is obligated to decline appointments above such levels.” *Principle 5* concludes that “[n]ational caseload standards should in no event be exceeded.”

The “national caseload standards” referred to in the *Ten Principles* are the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a U.S. Department of Justice-funded initiative. For felony attorneys, the NAC standards state that an attorney should handle no more than 150 felonies annually, and nothing else. That is, a felony attorney with 150 felony cases must not have any supervisory responsibilities, nor handle misdemeanors (or other case types), nor engage in any private practice whatsoever.

Though we have not conducted an independent assessment of the allegations put forth in the P.A.C.E. letter, the authors of the letter detail that Fresno County felony attorneys’ average *open* cases (that is, those they are actively working at any given time) exceed the *annual* caseload standards by more than 53%. “The felony attorneys are carrying an average of 230 cases as of July 1st, 2013,” the letter declares, going on to determine that the

¹ American Bar Association. *Ten Principles of a Public Defense Delivery System*. February 2002. Available at: http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciples_booklet.authcheckdam.pdf.

² Holder, Eric, United States Attorney General. Speech before the American Bar Association National Indigent Defense Summit. New Orleans, Louisiana. February 4, 2012. Speech available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.

³ See: “Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010, Washington, D.C. ~ Thursday, February 18, 2010” at: <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>

average felony attorney handles more than 1,000 cases per year (or, 566% above national standards).

To put it another way, if each attorney works 2,080 hours per year (40 hours per week multiplied by 52 weeks per year), the Fresno County public defender office averages approximately two hours and five minutes per felony case. That means an attorney has slightly more than two hours per felony case from appointment to initial interview to plea negotiations through all final court appearances, including, if necessary, trial and sentencing, but *only if* every single minute of every single working day is spent on case-related matters, and the attorney never takes a vacation, observes a holiday, or engages in professional development.

Based solely on the number of cases reported in the public defender [FY 2012-13 annual report](#) in comparison to the NAC standards, the office needs 139.5 full time equivalent (FTE) lawyers just to handle felony, misdemeanor, delinquency, and mental health cases, representing an increase of approximately 88.5 attorneys (a 174% increase from the current staff size). And that is *before* factoring in violations of probation cases, contempt, infractions and other cases that the office handles, such as dependencies. The public defender's staffing needs are therefore even greater than accounted for by national standards alone.

A Statement of Interest submitted jointly by the U.S. Department of Justice, Civil Rights Division and the DOJ's Access to Justice Initiative on August 14, 2013, in the federal lawsuit *Wilbur v. City of Mount Vernon*, helps to further illuminate how far off the mark the alleged caseloads in Fresno County appear to be. At the heart of the case is the issue of how excessive caseloads of public defense attorneys result in deficient representation under the Sixth Amendment to the U.S. Constitution. In its Statement of Interest, DOJ urged the court to consider that "caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement of a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties." (Emphasis in original.)

It is clear that Fresno County has not promulgated any caseload limits, but it is the DOJ's second point that merits further consideration. Recognizing that Fresno County is geographically vast, and that alleged crimes can occur throughout the county, it is necessary to augment attorneys with appropriate support staff, like investigators to locate witnesses, investigate crime scenes, etc. However, the P.A.C.E. letter states that the staff investigators positions have been reduced to the point where most attorneys must conduct their own investigations (down from 18 investigators in 2009 to nine today). So, that average of two hours spent per felony case includes any driving time or needed

investigations. Additionally, other support staff positions have also been downsized from six legal assistants to four, leaving most attorneys to conduct their own legal research and other non-legal tasks. The national caseload standards discussed above anticipate public defenders supported by an appropriate level of investigators, social workers, paralegals, and legal assistants. This means that the lawyers in the Fresno County OPD are required to do *a greater percentage of the workload* on each felony “case” than would an adequately staffed public defender office.

The DOJ Statement of Interest notes that one must take into account “the defender’s skill and experience” when assessing workload. It is our understanding that a Defense Attorney II classification in Fresno is designated as an attorney who can only handle misdemeanor cases. But as noted in the P.A.C.E. letter, Defense Attorney IIs are handling all types of felonies, including “life-top cases, three strike cases, complex cases such as home invasion robberies, first degree burglaries, gang allegations, sex crimes, large paper cases including welfare fraud, worker’s compensation fraud and check fraud involving thousand of pages of discovery.” Having inexperienced lawyers handling serious cases is also a violation of ABA *Principle 6* which states that “[d]efense counsel’s ability, training, and experience match the complexity of the case,” re-emphasizing that “counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.”

Independence of the Defense Function

In our experience, excessive caseloads are almost always rooted in a lack of independence of the defense function. What do we mean by this? In 1981, the United States Supreme Court determined that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages [*Polk County v. Dodson*, 454 U.S. 312 (1981)].” Observing that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court concluded in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”

I note that – though it is not binding – the constitutional necessity for the public defender independence was acknowledged in Justice Sandra Day O’Conner’s dissent in *Georgia v. McCollum*, 505 U.S. 42 (1992): “Moreover, we pointed out that the independence of defense attorneys from state control has a constitutional dimension. *Gideon v. Wainwright*, 372 U.S. 335 (1963), ‘established the right of state criminal defendants to the guiding hand of counsel at every step in the proceeding against [them].’ Implicit in this right ‘is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.” Justice O’Connor concluded, “the defense’s freedom from state authority is not just empirically true, but it is a constitutionally mandated attribute of our adversarial system.”

National standards of justice reflect these aims. The American Bar Association’s *Ten Principles* explicitly states that the “public defense function, including the selection,

funding, and payment of the defense counsel, is independent.” In the commentary to this standard, the ABA notes that the public defense function “should be independent from political influence.”

Independence of the defense function is the first of the ABA *Principles* because without it, most of the other ABA *Principles* are unobtainable. Let’s say a county Board of Supervisors, for example, calls for all county departments to take a 10% cut. The problem is that, unlike other aspects of the criminal justice system, public defenders are constitutionally required to defend all people appointed to them from the court. The defense practitioners do not control their own workload. Therefore a 10% budget cut is impossible to implement if it is not met by a 10% cut in workload – at least it is impossible if one is concerned about maintaining parameters of ethical representation. But, despite the ethical considerations, the public defender that is a direct county appointee is likely to cut 10% rather than risk being replaced by someone who will do what the executive says.

Fearing the loss of their jobs by not pleasing the judge or the county/state executive who hired them, defenders will take on more cases than they can ethically handle (in violation of *Principle 5*), will delay working on a case (in violation of *Principle 3*), will triage their hours available in favor of some clients, but to the detriment of others, and thereby failing to meet the parameters of ethical representation owed to *all* clients (*Principle 10*).

From an outside view, this appears to be precisely what happened in Fresno County when the county solicited bids to privatize the defense function the time the Fresno Public Defender declared case overload in 2010. Evidenced by the conditions of the office described by the P.A.C.E. letter, it appears that the Public Defender got the message that he would lose his job if he continued to refuse new assignments.

The commentary to ABA *Principle 1* specifically recommends that in order to “safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.” Footnotes to ABA *Principle 1* refer to National Study Commission on Defense Services’ (NSC), *Guidelines for Legal Defense Systems in the United States (1976)*. The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states that “a special Defender Commission should be established for every defender system, whether public or private,” and that the primary consideration of appointing authorities should be “ensuring the independence of the Defender Director.”

Fresno County has no such independent commission. We respectfully suggest that you create such a commission and let the commission hire the next public defender. The Sixth

Amendment Center stands ready to assist you should you choose to follow this national standard.

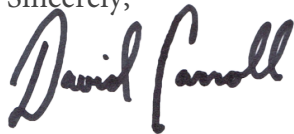
Conclusion

In *United States v. Cronin*, 466 U.S. 648 (1984), the U.S. Supreme Court stated that of “all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” Because of that realization, the Court found systemic deficiencies in how right to counsel services are provided will cause the criminal justice system to lose “its character as a confrontation between adversaries,” making the system itself constitutionally inadequate. *Cronin* details what those systemic deficiencies are, including but not limited to: a lack of defender independence, a lack of time to sufficiently defend a case, and a lack of attorney qualification to properly handle the complexity of the cases assigned. If the allegations in the P.A.C.E. letter prove true, an objective assessment would conclude that the Fresno County public defense system should be declared to be presumptively ineffective.

In closing, I note that the 6AC does not actively engage in litigation of these issues, but there are a number of national organizations who do, including the American Civil Liberties Union and the National Association of Criminal Defense Lawyers. But perhaps the thing Fresno County should be most concerned about is that the U.S. Department of Justice itself has begun to enforce the right to counsel. On December 18, 2012, the U.S. Department of Justice announced an agreement with Shelby County (Memphis), Tennessee, to usher in major reforms to the method for representing children in delinquency proceedings. Sweeping changes are afoot, including systemic safeguards discussed above, including independence, reasonable caseloads, attorney qualification standards, and training for the defense function, among others – basically the majority of the standards envisioned by the *ABA Ten Principles*. Should the Department of Justice turn next to Fresno County, it could become very costly for the counties to try to defend a federal lawsuit.

Thank you for your attention to this matter. Please feel free to contact me with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "David Carroll". The signature is written in a cursive, flowing style.

David Carroll, Executive Director

Sixth Amendment Center

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Cc:

Deborah Leff, Acting Senior Counselor for Access to Justice
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Washington, DC 20530

EXHIBIT

13

Public Defender Office Staff as of: 12-29-14

| Last Name | First Name | Employment Position | Assignment |
|--------------------------|------------|---------------------|------------------|
| Department Head | | | |
| 1 | Liz | PD | |
| 2 | Gary | Asst. PD | |
| Senior Management | | | |
| 1 | | | |
| 2 | Robert | Chief Def Atty | |
| Senior Attorneys | | | |
| 1 | Eric | Senior Def Atty | MCT |
| 2 | Lourdes | Senior Def Atty | Dependency Lead |
| 3 | Adrienne | Senior Def Atty | Lead |
| 4 | Antoinette | Senior Def Atty | Delinquency Lead |
| 5 | | | |
| Attorney IV's | | | |
| 1 | Elaine | Defense Atty IV | DV |
| 2 | Douglas | Defense Atty IV | Dependency |
| 3 | Peter | Defense Atty IV | MCT |
| 4 | Roberto | Defense Atty IV | MCT |
| 5 | Michael | Defense Atty IV | DV |
| 6 | Scott | Defense Atty IV | MCT |
| 7 | Alan | Defense Atty IV | MCT |
| 8 | Jane | Defense Atty IV | MCT |
| 9 | Cheryl | Defense Atty IV | Dependency |
| 10 | Jennifer | Defense Atty IV | Felonies |
| 11 | Marina | Defense Atty IV | Juvie |
| 12 | Jason | Defense Atty IV | MCT |
| 13 | Beth | Defense Atty IV | MCT |
| 14 | Kathy | Defense Atty IV | MCT |
| 15 | Kristin | Defense Atty IV | MCT |
| Attorney III's | | | |
| 1 | Vang | Defense Atty III | Juvie |
| 2 | Angelica | Defense Atty III | J2K |
| 3 | Phillip | Defense Atty III | DV |
| 4 | Avery | Defense Atty III | SVP4 |
| 5 | Hyung | Defense Atty III | Conservatorship |
| 6 | Cynthia | Defense Atty III | Felonies |

