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September 19, 2012

The Honorable Tom McMillin
Anderson House Office Bldg.
124 N. Capitol
N-894 House Office Building
Lansing, MI 48933

The Honorable Thomas Boyd
55th Judicial District Court – Ingham County
700 Buhl St.
PO Box 217
Mason, MI 48854

Dear Representative McMillin and Judge Boyd:

As The Constitution Project's (TCP) National Right to Counsel Committee co-chairs, we support House Bill 5804, "Michigan Indigent Defense Commission Act." The Act is an important step towards improving the delivery of indigent defense in Michigan, and we urge the Michigan House Judiciary Committee to approve it. The National Right to Counsel Committee is a bipartisan group of experts, including former judges and prosecutors, defense lawyers, and others with wide-ranging experience in our criminal justice system. In 2009, we issued *Justice Denied: America's Continuing Neglect of our Right to Counsel*, the most comprehensive examination of our country's indigent defense system in over 30 years. We applaud the work of the Governor's Commission on this issue, as well as that of the legislators who seek to implement the Commission's recommendations.

It is our understanding that the Michigan Attorney General has objected to the proposal, arguing that it is not needed because the lack of successful ineffective assistance counsel (IAC) claims in Michigan demonstrates that there are no problems with the system. We strongly disagree with the Attorney General's contention that a lack of successful claims is indicative of a healthy indigent defense system.

The United States Supreme Court only this year concluded in *Missouri v. Frye* and *Lefler v. Cooper* that the Sixth Amendment right to effective assistance of counsel applies to the plea bargaining stage

as well as trial. IAC claims based on attorney performance during the plea bargaining stage were unsuccessful in Michigan before these Supreme Court decisions, but those claims may be successful going forward. Moreover, the fact that upwards of 95% of all criminal cases are resolved through plea bargains rather than trials reinforces the reality that a lack of successful IAC claims suggests nothing about the health of the indigent defense system. We believe one cannot evaluate the health of an indigent defense system based on the small fraction of cases that go to trial.

In addition, we believe that a Supreme Court case supports our belief that the success, or lack thereof, of IAC claims is unrelated to the health of an indigent defense system. In *United States v. Cronin*, the Court rejected an exception to the *Strickland* standard for IAC based upon external factors related to the nature of the defense services provided. Accordingly, courts in considering IAC claims generally do not focus on the institutional deficiencies of a public defense system. It is those deficiencies that H.B. 5804 aims to address. Therefore, the lack of successful IAC claims is really inapposite to the arguments in support of the bill.

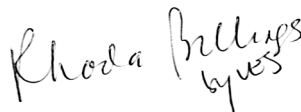
There are better gauges of the constitutional adequacy of a public defense system than the number of successful IAC claims, including all of the other factors the Governor's Commission considered in deciding to support the bill. Among these are the total number of people who go unrepresented in juvenile and misdemeanor court, the number of people who have no attorney at the bond or preliminary hearing stage, whether caseloads are controlled and reasonable, the quality (or even existence) of motion practice, and the training required and not provided. The actual components of an adequate indigent defense delivery system are rightly the focus of this reform legislation. A survey of whether courts have found individual defense attorneys' performance deficient at trials is irrelevant.

We believe the bill is a necessary and proper step towards protecting the constitutional rights of indigent defendants in Michigan, and urge its passage by the Michigan State Legislature. We stand ready to assist you in your work in any way you might desire.

Very truly yours,



Hon. Timothy Lewis



Hon. Rhoda Billings



Hon. Robert Johnson