



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.

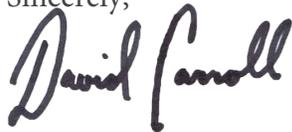
Conclusion

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, slightly slanted style.

David Carroll, Executive Director

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Cc:

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