

**U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security**

**Testimony of Melanca D. Clark¹, Counsel
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Thursday, March 26, 2009**

Chairman Scott and members of the subcommittee, thank you for your leadership in holding this hearing to address Michigan’s public defense system, and for inviting testimony on the need for reform.

Introduction

The Brennan Center for Justice at NYU School of Law was founded in 1995 as a living tribute to Supreme Court Associate Justice William J. Brennan Jr. The Center is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center’s work is its effort to close the “justice gap” by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Brennan Center’s activities include guiding the Community Oriented Defenders Network – a national coalition of public defender organizations that believe the representation of individuals charged with crimes is made most effective by a deep engagement of defenders with the communities in which their clients live. The Brennan

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Center also conducts a broad range of activities in support of indigent defense reform, helping to lead and to support reform campaigns in specific settings, filing amicus briefs in support of reform litigation and publishing reports illuminating solutions to intractable problems within the criminal justice system.² Most notably, the Brennan Center (through its affiliated 501(c)(4)) is one of the founding members of the Michigan Campaign for Justice, and along with other concerned parties from across the political spectrum, is dedicated to securing an effective indigent defense system in Michigan.

We submit this testimony to draw attention to the racial disparities that pervade the criminal justice system in Michigan and other jurisdictions, to make clear that failing to provide adequate representation to those who are poor exacerbates these disparities, and to endorse the Community Oriented Defender model as one that the Congress should evaluate as it considers structures with the potential for improving defender services and reducing racial disparities in the system.

Michigan's Troubled System for Providing Indigent Defense Services

Although the majority of Americans believe in basic fairness and the importance of providing justice to people of all income levels, it is readily apparent that many states fail to deliver on the promise of *Gideon* to provide indigent defense systems that protect individuals' basic rights.³ The fact that indigent defense services in Michigan rank among the worst in the country is therefore a particularly dubious distinction, as it puts Michigan near last in a race of underperformers. Michigan ranks 44th of the 50 states in public defense funding, and is one of only seven states that does not provide state funding for trial-level public defense services.

The State of Michigan has abandoned responsibility for indigent defense, leaving the matter almost entirely to the counties, which use a combination of low-bid contract attorneys, assigned counsel, and a small number of full and part time defenders, to form a patchwork of under-resourced local defense systems that, among other failings, are not independent from the judiciary, do not utilize uniform screening methods to determine

² See Appendix at p. 7 for a list of relevant Brennan Center reports.

³ National Legal Aid and Defender Association, *Developing a National Message for Indigent Defense*: (Oct. 2001) available at <http://www.nlada.org/DMS/Documents/1211996411.65/Polling%20results%20report.pd>.

eligibility for public defense services, and operate without any statewide performance standards or oversight mechanisms. Attorneys representing the poor around the state frequently lack sufficient training and support to mount effective defenses, and have caseloads well above the maximum recommended by national standards. For individuals with misdemeanor cases in the many district courts throughout the state, attorneys are not provided at all.⁴

Disproportionate Minority Contact with the Criminal Justice System

The implications of Michigan's broken public defense system are profound. The State's failure to adequately fund and oversee defense counsel may in fact raise the ultimate cost of criminal justice because it leads to the unnecessary detention of people pre-trial,⁵ multiple appeals, re-trials, conviction of the innocent, liberation of actual wrongdoers, settlements with innocent people unfairly convicted and incarcerated, an overarching problem of over-incarceration, and defense of the state against systemic litigation.

Michigan's failure to provide constitutionally mandated services to the accused not only wastes tax payer dollars and decreases public safety, but also undermines the legitimacy of the criminal justice system by creating two systems of justice, one for people with means, and an inferior system for the poor. African American and Latino defendants disproportionately rely on publicly funded counsel.⁶ When the service

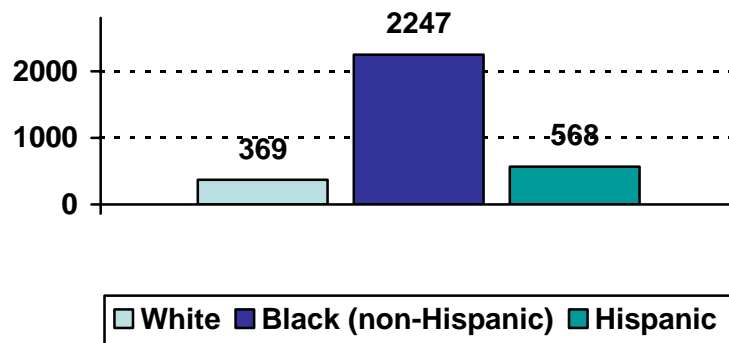
⁴ For this section, *see generally*, National Legal Aid and Defender Association, *A Race to the Bottom: Speed and Savings Over Due Process – A Constitutional Crisis* (June 2008) available at http://www.mynlada.org/michigan/michigan_report.pdf; Michigan Campaign for Justice, *Michigan's Public Defense Report Card* (Feb. 2009) available at [http://www.michigancampaignforjustice.org/docs/Report%20Card%20small\[1\].pdf](http://www.michigancampaignforjustice.org/docs/Report%20Card%20small[1].pdf).

⁵ Michigan is one of just four states to spend more money on prisons than higher education. The administration of the state's correction systems costs Michigan tax payers over \$2 billion a year. The Pew Center on the States, *One in 100, Behind Bars in America 2008* (Feb. 2008) available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

⁶ Nationally, 77 percent of African Americans and 73 percent of Latinos in state prisons were represented by public defense attorneys. U.S. Dep't of Justice, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

provided by such counsel is inadequate, racial disparities that persist at every stage of the criminal justice system are exacerbated.⁷ Michigan incarcerates Latinos at 1.5 times the rate of whites, and African Americans at 6 times the rate of whites. Disparities are also rampant in Michigan's juvenile system where African-American youth are 88% more likely than white youth to be arrested; 50% more likely to be petitioned to the juvenile court; 2.6 times more likely to be placed in secure detention; and 4.2 times more likely to be placed in a correctional/residential treatment facility.⁸

Michigan Incarceration Rates per 100,000 population



Source: Bureau of Justice Statistics, Prison and Jail Inmates at Midyear 2001.

The over-involvement of minorities in the criminal justice system imposes a massive societal burden, which includes not only the costs of incarceration and parole

⁷ These disparities, prevalent throughout the system, are particularly salient in the context of drug offenses where, despite similar rates of drug use, African Americans are three times more likely to be arrested for drug offenses than whites, and nearly ten times as likely to enter prison for drug offenses. See The Sentencing Project, *Disparity by Geography: The War on Drugs in American Cities* (May 2008) available at http://sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_drugarrestreport.pdf; Human Rights Watch, *Targeting Blacks: Drug Law Enforcement and Race in the United States* (May 2008) available at http://www.hrw.org/sites/default/files/reports/us0508_1.pdf.

⁸ Michigan State University, DMC Assessment Project, *Measuring Disproportionate Minority Contact in the Juvenile Justice System: An Examination of the Michigan Relative Rate Index* (Mar. 2005), available at http://www.michigan.gov/documents/DHS-dmc-mich-06_142983_7.pdf

supervision, but also the destruction of the social fabric and economic health of minority communities, with, in turn, still larger societal impacts.

The collective failure to provide sufficient resources and sufficient oversight to Michigan's indigent defense system thus reflects an affirmative choice to allow racial inequality to endure.

A Better Path Forward - The Case for Community Oriented Defender Services

Over the past five years, through its coordination of the national Community Oriented Defender Network, the Brennan Center has had the privilege of working with a coalition of public defender organizations that believe the representation of individuals charged with crimes is made most effective by a deep engagement of defenders with the communities in which their clients live. These model "community oriented defender" programs, when supported by adequate funding, training, and other assistance, are able to help clients avoid negative police interaction, make contact with social service providers who can identify alternatives to prison, facilitate client reentry at the front and back ends of the criminal justice process, and combat the structural problems that turn courthouse entrances into revolving doors for increasing numbers of minorities and the poor. They are making a difference not only in individuals' lives, but for families and communities.

For example:

- In Connecticut, the Division of Public Defender Services has a permanent seat on the state's Commission on Racial and Ethnic Disparity, which provides a forum for stakeholders to focus on fixing policies, traditions, and cultures which promote racial disparities.
- In Massachusetts, the Committee for Public Counsel Services, the statewide public defender, is partnering with the Brennan Center to develop legislation to improve the collection, review, and monitoring of data on race as a factor in law enforcement traffic stops with the goal of eliminating racial profiling.
- In San Diego, the chief defender spearheaded the creation of a problem-solving court for homeless defendants. The court resolves outstanding warrants and misdemeanor offenses by sentencing defendants to activities in shelter programs, including drug treatment, as an alternative to incarceration.

By moving from an exclusive concentration on the individual circumstances affecting each client to a fuller consideration of the institutional forces impacting multiple clients, these problem solving defender organizations (and other participants in the Community Oriented Defender Network) are partnering with government to reduce racial bias in the system, and to correct a variety of systemic problems. Such advocacy leads to more effective representation of clients, the advancement of practical solutions, and promotion of a fairer criminal justice system.⁹

Conclusion

Our nation's current economic crisis adds a new urgency to the work of addressing the public defense crisis in Michigan and across the nation. It is critical that the resources of the public fisc be efficiently deployed and that the pressures of fiscal austerity not be permitted to undercut further the fundamental integrity of the system. The underlying problem of racial injustice must not be ignored, and the transformational potential of models such as the Community Oriented Defender Network should be explored. Reform of the indigent defense system in Michigan is long overdue. The people of Michigan simply can not afford the price of the status quo.

The Brennan Center applauds the committee for holding this important hearing.

⁹ Notably, exploration of and advocacy for “programs that improve the system and reduce recidivism” has been recognized as one of eleven fundamental principles for a public defense delivery system once a defender office is in place. *The Eleven Principles of a Public Defense Delivery System*, Michigan Public Defense Task Force (adopted by the State Bar of Michigan's Representative Assembly and Board of Commissioners).

Appendix

Brennan Center Reports Related to Indigent Defense:

- Access to Justice: Opening the Courthouse Door *available at* http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf
- Eligible for Justice: Guidelines For Appointing Defense Counsel *available at* http://brennan.3cdn.net/c8599960b77429dd22_y6m6ivx7r.pdf
- Maryland's Parole Supervision Fee: A Barrier to Reentry (forthcoming)
- Prosecutorial Discretion and Racial Disparities in Federal Sentencing *available at* http://www.brennancenter.org/content/resource/prosecutorial_discretion_and_racial_disparities_in_federal_sentencing/
- Taking Public Defense to the Streets *available at* http://brennan.3cdn.net/3e336561b5c87c36e4_a3m6bo95w.pdf
- The Case for Community Defense in New Orleans *available at* <https://www.policyarchive.org/bitstream/handle/10207/8686/communitydefenseNOLA.pdf?sequence=1>