

A reform roadmap for the criminal justice system

by Christopher Durocher and Adrienne Lee Benson

In February of 2011, the bipartisan Smart on Crime Coalition, consisting of over three dozen of the nation's leading criminal justice policy organizations, issued *Smart on Crime: Recommendations for the Administration and Congress*.¹ The Coalition developed a comprehensive reform roadmap predicated on the conviction that the criminal justice system should be cost efficient, accurate, effective, proven, and, above all else, fair. In its review of virtually every major criminal justice issue—from the creation of new criminal laws to the reentry of ex-offenders into their communities, from helping to restore and empower victims to identifying ways to protect the rights of the accused—the report serves as both a source of information and a call to action for the Administration and Congress.

But perhaps just as importantly, the nearly 100 recommendations contained in *Smart on Crime* promote policies that provide the leaders and practitioners in the trenches—the public defenders, prosecutors, judges, prison officials and lawmakers—with the tools to address specific problems in the face of the unique challenges presented during these difficult economic times. At the same time, these recommendations recognize the importance of accountability in the criminal justice system as the states and federal government seek to reduce spending. This article provides a few examples of the recommendations that balance the

need to improve our justice system with the need to acknowledge the shrinking budgets that may hamper efforts to achieve these goals.

Cost efficient

Since the economic collapse in 2008, lawmakers in statehouses across the country have faced daunting budgetary challenges that show little sign of improving in the short term.² At the same time, criminal justice expenditures are creating a huge burden on federal, state, and local governments. In 2008, federal, state, and local governments spent approximately \$62 billion on corrections cost alone, and projections for the next five years predict the need for an additional \$27 billion in operating and capital funds for prison expansion and operation.³ In 2011, the federal government is projected to spend \$4.4 billion to *supplement* state and local spending on law enforcement, prosecution and other criminal justice functions.⁴

In the current budgetary climate, finding new money at the federal and state level for criminal justice reforms is nearly impossible. Consequently, *Smart on Crime's* recommendations largely focus on identifying cost-effective, evidence-based solutions that do not require substantial new expenditures to address the major crises facing the criminal justice system. At the federal level, cost-efficiencies can be achieved through reforms to mandatory minimum sentencing policies, expanding alternatives to

incarceration, and reducing recidivism.⁵ Among one of the most promising cost-efficient reforms is providing the Department of Justice authority to hold states accountable for patterns and practices that deny the criminally accused their Sixth Amendment right to counsel.

The Department currently has the authority to hold states accountable for constitutional violations in their juvenile justice systems through a provision that allows it to sue for a “pattern or practice of conduct... by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”⁶ Extending this authority beyond juvenile justice to include all criminal justice systems would empower the Department of Justice to rectify states' systemic violations of the Sixth Amendment.

The Department of Justice's authority to examine states' indigent defense systems would come at a minimal cost. The Civil Rights

1. *Smart on Crime* is available online at www.besmartoncrime.org.

2. National Conference of State Legislatures, State Budget Update: November 2010, available at http://www.ncsl.org/documents/fiscal/november2010sbu_free.pdf.

3. American Bar Association, *Criminal Justice System Improvements* 9 (Dec. 2008), available at http://www.abanet.org/poladv/transition/2008dec_crimjustice.pdf.

4. U.S. Dept. of Justice, *FY 2012 Summary of State, Local and Tribal Law Enforcement Assistance (OJP, COPS, OVW)* (Feb. 2011), available at <http://www.justice.gov/jmd/2012summary/pdf/state-local-chart.pdf>.

5. The Smart on Crime Coalition, *Smart on Crime: Recommendations for the Administration and Congress* 122-123, 133-134, 137-138, 140, 172-175 (2011), available at <http://besmartoncrime.org/pdf/Complete.pdf>.

6. 42 U.S.C. §14141.

Division has a total annual budget of about \$145 million, only a small portion of which is used to enforce the current juvenile justice provision through its Special Litigation Section. Between 2001 and 2007, the Special Litigation Section initiated 693 matters and filed 31 cases, compared to other Civil Rights Division sections, which initiated a total of 4,601 matters and filed 393 cases.⁷ Special Litigation Section personnel spend only 13 percent of their time on juvenile corrections matters.⁸ Juvenile correction matters, therefore, represent less than 2 percent of the matters undertaken by the Civil Rights Division, requiring a small fraction of its annual budget.

Presumably, given its experience and expertise, the Special Litigation Section would be tasked with enforcing Sixth Amendment rights through the new cause of action.⁹ If the level of enforcement is similar to the level of enforcement for the juvenile cause of action after which it is modeled, this would require only a few million dollars in additional expenditures. This is a *relatively* minor, yet critical investment, since establishing federal standards for effective counsel is crucial to addressing the shortfalls in our current indigent defense systems.

In 2010, the Bureau of Justice Statistics reported that 73 percent of county-based public defender offices exceeded the maximum caseload per attorney, while state public defender offices had a median 67 percent of the attorneys necessary

to meet caseload limits.¹⁰ These overall numbers suggest that jurisdictions throughout the United States are denying constitutionally adequate counsel to the criminally accused by appointing over-worked, under-resourced attorneys to their cases. Empowering the Department of Justice to investigate the most egregious of these under-resourced jurisdictions will be a step toward creating more uniformity in quality of counsel. This, in turn, will reduce the risk that an individual's chance of receiving constitutionally adequate counsel will largely depend on the jurisdiction in which he or she faces prosecution.

The cause of action would also strike the appropriate balance between federal and state interests. If modeled after the juvenile justice cause of action, it would allow each state the flexibility to tailor its indigent defense systems to its unique needs. The Department of Justice would not have the authority to require a particular indigent defense model, but rather would simply evaluate the constitutional adequacy of the model a state chooses to adopt. For example, a state could choose a state-wide or county public defense system or appoint counsel from a panel of private attorneys. A state could choose to employ an elected or appointed chief public defender, a public defense commission or board, and could employ a variety of funding schemes to ensure adequate compensation and resources for indigent defense attorneys.

Nor would the cause of action create excessive litigation between the federal and state governments. Since its creation in 1996, the juvenile justice cause of action has resulted in very little litigation. More commonly, the federal and state governments reach an agreement to address constitutional violations and work together to remedy the problems.¹¹ An early example in the juvenile justice context is instructive.

In March 1998, the Department of Justice and the State of Georgia executed a Memorandum of Agreement outlining steps the State of Georgia would take to remedy constitutional violations the federal government identified in its juvenile corrections system.¹² As part of the memorandum, it was acknowledged that the agreement was "necessary to ensure compliance with federal law, while also preserving the state's legitimate interests in... determining the philosophy by which it shall operate its juvenile justice system within federal constitutional and statutory limits."¹³ This acknowledgement of a state's right to design its own constitutionally adequate system remains central to agreements between the Department of Justice and states.¹⁴

Additionally, the Department of Justice has used the cause of action as an opportunity to engage states in efforts to improve their systems. The Department encourages states to adopt Master Action Plans (MAPs), to evaluate and improve their systems in a systematic manner, and offers "technical assistance to the state in developing the initial and subsequent iterations of the MAP."¹⁵

Similar to the juvenile justice context, the Justice for All Reauthorization Act (JFAA), a bill Senator Patrick Leahy (D-VT) recently introduced in the Senate, would provide states technical assistance for improving their indigent defense systems. The JFAA also prescribes a two year waiting period after its passage before the Department of Justice can pursue litigation against a state. The combination of technical assistance and the two year waiting period provides states the opportunity and incentive

7. Government Accountability Office, U.S. Dept. of Justice: *Information on Employment Litigation, Housing and Civil Enforcement, Voting, and Special Litigation Sections' Enforcement Efforts from Fiscal Years 2001 through 2007*, 16-22 (Oct. 2009), available at <http://www.gao.gov/new.items/d1075.pdf>.

8. *Id.* at 160.

9. The Special Litigation Section has responsibility for four main areas: (1) the Americans with Disabilities Act (ADA) and the Civil Rights of Institutionalized Persons Act (CRIPA); (2) Police misconduct and discriminatory policing; (3) Freedom of Clinic Entrances Act (FACE); and (4) the Religious Land Use of Institutionalized Persons Act (RLUIPA).

10. Bureau of Justice Statistics, U.S. Dept. of Justice, *Census of Public Defender Offices, 2007: State Public Defender Programs* 13 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sdpd07.pdf>.

11. See generally U.S. Dept. of Justice: Civil Rights Division Special Litigation Section Cases and Matters, <http://www.justice.gov/crt/about/spl/findsettle.php> (last visited April 4, 2011).

12. Memorandum of Agreement Between the United States and the State of Georgia Concerning Juvenile Justice Facilities (Mar. 18, 1998), available at <http://www.justice.gov/jmd/2011summary/html/fy11-cr-t-bud-summary.htm>

13. *Id.* § I

14. See e.g., Settlement Agreement Between the United States and the State of New York (July 14, 2010), available at http://www.justice.gov/crt/about/spl/documents/NY_juvenile_facilities_settle_07-14-10.pdf. "As long as the State's policies and procedures are in accordance with federal law and meet constitutional standards and the requirements of this agreement, the State of New York has the right to determine the philosophy by which it will operate its juvenile justice system." *Id.* at § I ¶ 13.

15. *Id.* at § IV ¶ 65.

to work with the Department to address those patterns and practices that effectively deny the criminally accused their Sixth Amendment rights. This, along with the Department's experience with the juvenile justice cause of action, suggests that providing the Department authority to hold states accountable for Sixth Amendment violations would increase cooperation between state and federal authorities and create opportunities for meaningful, cost-efficient reforms to indigent defense systems throughout the country.

Improving indigent defense systems is, in itself, a step towards increasing cost-efficiency in the broader criminal justice system. Our adversarial system of justice only operates properly when both prosecutors and indigent defenders have the resources available to zealously advocate their side. As Attorney General Holder observed, "Every taxpayer should be seriously concerned about the systemic costs of inadequate defense for the poor. When the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense."¹⁶ Reforms to indigent defense are fundamental to creating a more cost-effective system of justice.

Accurate

Government exercises its greatest powers over individual liberty through the criminal justice system. The deprivation of property, liberty, familial ties, the right to vote, access to social services, and even one's life can be legally carried out by government force when one is convicted and sentenced for a crime. Wrongful convictions not only affect the innocent, but they leave the real perpetrators out on the streets to threaten public safety. The stakes are high, and so the information used to identify, investigate, charge, try, and sentence an individual must be accurate and available to all parties.

The ability of traditional law enforcement procedures to produce reliably accurate evidence has been

challenged in the past two decades by the growing numbers of exonerates—many from death row—who were victims of unreliable evidence. The leading contributor to wrongful convictions is non-biological evidence, including faulty eyewitness testimony and false confessions. Despite popular conceptions about forensic science promoted by television shows, probative DNA evidence is available in less than 10 percent of serious criminal cases. The rarity of probative DNA evidence increases the importance of accuracy in the production and use of other forms of evidence.

To improve evidence provided by eyewitnesses, *Smart on Crime* recommends a series of procedural safeguards when interviewing witnesses. First, identification procedures such as line-ups should be administered by a "blind investigator" who does not know who the suspect is and who provides the witness with instructions that do not compel the witness to make a choice. Second, members of the line-up should be selected based on their resemblance to descriptions originally provided by any eyewitnesses to the crime—not based on their resemblance to the police's suspect. Third, after identification, witnesses should provide a statement in their own words about the level of certainty with which they identified the suspect. Investigators should create and preserve a complete record of the identification process. Given that public defenders or appointed indigent defense attorneys often do not have the time or resources to re-investigate cases built on eyewitness accounts, these types of records are critical to determining how to address eyewitness identifications.

Preventing false confessions and ensuring the accuracy of guilty pleas is fundamental to the legitimacy of the entire justice system, particularly in light of the fact that over 95 percent of federal criminal cases end in a plea bargain. As the number of exonerations continues to mount it is becoming increasingly clear that confessions are not

necessarily reliable indications of guilt, but rather indications of the conditions under which an individual was interrogated. Approximately 25 percent of the 265 wrongful convictions overturned by DNA evidence involved false confessions. The key to understanding why someone would confess to a crime they didn't commit, even a serious crime that carries a life sentence or the death penalty, is evaluating their immediate decision-making capacity while under interrogation. When a suspect is intoxicated, mentally impaired, suffering from exhaustion, subject to the threat of a harsh sentence, or perceives that she or he is at risk of physical harm, a suspect may confess out of confusion, fear, or to simply end an interminable interrogation. False confessions not only lead to the incarceration of the innocent, they also waste law enforcement and court resources that could otherwise be used to investigate, charge, and try the truly guilty.

To reduce the risk of false confessions, *Smart on Crime* recommends that the federal government require the recording of custodial police interrogations. Over 500 jurisdictions nationwide, including 17 states and the District of Columbia, currently require electronic recording of interrogations in many circumstances. Similar to legislation previously introduced by Representative Keith Ellison of Minnesota and Representative Hank Johnson of Georgia, Congress should require federal law enforcement agencies to electronically record all interrogations in which a reasonable person would consider him- or herself in law enforcement custody. Any unrecorded confession made in law enforcement custody should be inadmissible in court.

Procedures that provide greater assurances for the accuracy of eyewitness testimony and information

16. Attorney General Eric Holder, Address at the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010), available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>.

from custodial interrogations are critical to the proper function of the adversarial system. An accurate record that is made available to law enforcement, prosecutors, and indigent defense attorneys, maximizes our limited resources, protects the liberty of innocent suspects, and increases the chances of successfully prosecuting the guilty.

Effective

It may seem an oversimplification, but the criminal law has to work. We can no longer afford to expand our criminal justice system in ways that create the appearance of “tough on crime” but fail to make us any safer. Policymakers must act with care to ensure that the language of laws or regulations will achieve their stated goals without overreach. Without concern for effectiveness, criminal justice policy is at best costly symbolism—and at worst a threat to the liberty of even those acting in good faith and with respect for the law.

Although effectiveness may seem a self-evident principle for good policymaking, it has proven dangerously elusive, as overcriminalization has become the norm. Too frequently, policymakers enact laws without sufficient concern for how they will operate in practice or whether they are best designed to achieve their goals. Policymakers acting in good faith can create ineffective criminal justice policy if they lack the specialized expertise in the subject matter to understand how the law will impact an already-complex system.

In other cases, the disconnect occurs when policymakers are motivated to satisfy a political demand rather than effectively solve a policy problem. When a newsworthy event—for example, the financial crisis of September 2008—captures the attention of the voting public, Congress faces pressure to fix the problem as quickly as possible. Too often, elected officials do not consider whether current criminal laws already effectively address the problem; they simply need to be *seen* and *perceived* by voters as doing something. The result is policy that lacks

the careful craftsmanship that is necessary for effective criminal laws.

Vagueness and imprecise drafting of criminal statutes is a major concern for criminal justice advocates across the ideological spectrum. Individuals who lack the resources to self-police by hiring lawyers to track and analyze new federal criminal laws, or who lack the legal expertise to understand the development of case law around vague criminal statutes are particularly at risk. Although such people may face prosecution for violations of a new federal criminal law, the intent of Congress remains unfulfilled because the criminal behavior was not prevented in the first place. Given that, on average, Congress enacts a new federal crime every week, the need to eliminate vagueness in the federal criminal code is immediate and growing.

There are several recommendations in *Smart on Crime* that would aid Congress in reducing the statutory vagueness that inhibits deterrence and reduces the effectiveness of the federal criminal code. The report recommends that any proposed federal crimes be referred to the Judiciary Committees for review by the members and staff who have the greatest expertise and familiarity with criminal law. Although the Judiciary Committees are the only committees with express jurisdiction over criminal law, legislative additions to the criminal code frequently pass through other committees; in the 109th Congress, over half of new criminal offenses were not sent to a Judiciary Committee for review. Judiciary Committee review certainly does not guarantee clarity, but according to a recent study by the Heritage Foundation and the National Association of Criminal Defense Lawyers, it does have a positive impact on reducing overcriminalization and vagueness.

Smart on Crime also recommends that Congress enact legislation mandating reporting on any new or modified criminal offenses or penalties. A reporting requirement would compel Members of Congress to provide analysis and justification for proposed changes to federal

criminal law. *Smart on Crime* recommends that Congress pass legislation similar to the Federalization of Crimes Uniform Standards Act of 2001, which would have provided a standardized process by which the federal government would produce a report with justification, costs, and benefits of all new or modified criminal laws. Such an analysis would increase the likelihood that Congress would undertake only proposals for effective new criminal offenses. Adding new criminal offenses and penalties is relatively easy and politically popular; a reporting requirement would provide the opportunity for analysis and would encourage more precise drafting of legislation.

The strong political incentive to appear “tough on crime” and to respond quickly to public demand has produced poorly drafted, often incomprehensible statutes that cannot effectively regulate the behaviors Congress seeks to target. When even citizens acting in good faith cannot tell the difference between legal and criminal actions, and unwittingly become ensnared in the criminal justice system, it is time for Congress to reevaluate the effectiveness of current criminal law.

Proven

When designing new criminal offenses, criminal penalties, policing strategies, reentry programs, or any other policy related to criminal justice, Congress and the Administration should base their decisions on reliable research, not emotional or political appeals. Moreover, once policies are in place, rigorous data collection should be conducted and the results easily accessible to the public. This will allow the effectiveness of criminal justice policy to be studied both by the government as well as by independent researchers, creating the empirical record necessary for future evaluations and improvements. All strategies and practices that the criminal justice system employs should meet evidence-based or, when possible, objective scientific standards.

Smart on Crime provides many recommendations for criminal justice policies that have been proven effective through research and the experience of practitioners. For example, the report recommends investment in corrections-based education because participation in such programs have been shown to lower recidivism by 15 percent for formerly incarcerated individuals who earn an associate's degree,¹⁷ and the Correctional Education Association has found that states experience a "[return of] at least \$2 for every \$1 spent" on education "in terms of savings in cell space on those who do not return to the system."¹⁸ Because every dollar spent on mentoring, after-school activities, and drop-out reduction strategies has been proven to yield up to \$13 in juvenile justice savings, *Smart on Crime* also recommends fully funding the federal grant programs that support such initiatives. Additionally, the report recommends reforming the use of incentivized testimony from "jailhouse informants," whose testimony has been shown to contribute to wrongful convictions. These and many other *Smart on Crime* recommendations have been studied and proven to work.

Indigent defense, unlike other criminal justice areas, like reentry or wrongful convictions, does not lend itself easily to quantitative study. While recidivism is fairly straightforward—either someone was convicted of a new crime or they were not—there is no single measure of attorney "competence," "inadequate" compensation, or "ineffective" assistance of counsel. One well-documented failure of indigent defense systems, though, is the corruption of the rule of law caused by the dependence of defense attorneys on judges for both litigation expenses and their livelihood. A lack of institutional and personal independence of public defense attorneys has been proven to undermine the Sixth Amendment right to counsel for indigent defendants.

In systems without an independent public defender's office, collusion between unscrupulous attorneys

and judges can result in the frequent appointment of those attorneys to cases so that they can collect fees—regardless of whether they provide a modicum of representation. For example, in Texas, the appointment process allows judges to favor attorneys who are politically connected, with the result that attorneys with no experience in juvenile law managed to make over \$150,000 per year just from appointments to juvenile cases by judges to whom they were professionally and personally connected.¹⁹ In Mobile, Alabama, where judges appoint defense counsel, more than one quarter of the entire indigent defense budget went to pay the fees of six attorneys, with one attorney earning over \$260,000 by handling 523 cases in one year. A survey found that 54 percent of district judges in Nebraska did not maintain a list of attorneys for indigent defense appointments, indicating that they relied on personal relationships to make appointments, as many of them conceded.²⁰

Dependence on the judge, prosecuting party, or politicians for funding creates a strong incentive for the attorneys to act not in the interest of their clients, but in the interest of their funders, who may be more interested in quickly clearing a docket or cutting costs than fairly hearing a case. In several states, public defense systems have been found to come under tremendous political pressure to fire staff and to provide half-hearted defense services under threat of the power of the purse held by judges or elected executives.

Because of the corruption of justice that has been proven to arise when indigent defense attorneys lack personal and institutional independence, *Smart on Crime* recommends that Congress create an independent federal agency for the provision of federal indigent defense so that defenders can focus on their duties to clients rather than the political interests of those who control their budget. Another option would be to give local federal defender organizations authority over appointment and case budgets or, at the very

least, require federal judges to defer (absent good cause to the contrary) to appointment recommendations from the federal defender organization. Adopting these minor changes to appointment authority has been proven to solve the well-documented problem of indigent defense counsel lacking independence, which corrupts the adversarial process and the rule of law.

Fair

The nation's system of justice, at both the state and federal level, draws its legitimacy from the assumption that it is fair. We assume that a person who is the subject of criminal investigation, arrest, prosecution, conviction, and incarceration has the opportunity for a full hearing of his or her case and is provided due process at every stage. Too often, the reality falls far from this ideal: lax oversight of state crime laboratories results in the loss or suppression of potentially exculpatory evidence; aggressive and abusive interrogation techniques lead to false confessions; procedures fail to protect against the admission of unreliable eyewitness identification; and the criminally accused are too often denied meaningful access to indigent defense counsel.

Access to counsel is particularly important to ensuring fairness in the criminal justice system, since the availability of counsel will oftentimes determine whether denials of due process are detected and remedied before they impact an investigation or prosecution. Shortfalls in indigent defense funding or failures to appoint counsel also create drastic imbalances

17. See Center on Crime Communities & Culture, Occasional Paper Series No. 2, *Research Brief: Education as Crime Prevention* (Sept. 1997), available at http://www.prisonpolicy.org/scans/research_brief_2.pdf.

18. Stephen Steurer, Linda Smith & Alice Tracy, *The Three State Recidivism Study Summary*, Correctional Education Association (2001), available at <http://dpscs.md.gov/publicinfo/publications/pdfs/three-state-recidivism-study-summary.pdf>.

19. Rick Casey, *Judge Sure Keeps This Lawyer Busy*, Houston Chronicle, Oct. 16, 2007; see also Rick Casey, *County Hires Bad Lawyers, Bans Good*, Houston Chronicle, Oct. 19, 2007.

20. Nebraska Minority Justice Committee, *Report to the Nebraska Supreme Court on Indigent Defense Systems and Fee Structures* (2006).

between defenders and prosecutors, which undermines the very basis of our adversarial legal system.

Unfortunately, nearly 50 years after the Supreme Court recognized the right to counsel as “fundamental and essential to fair trials,”²¹ indigent defense services in the United States remain in a perpetual “state of crisis.”²² In fact, the Bureau of Justice Statistics reports that in 2007, 73 percent of county-based public defender offices exceeded the maximum caseload per attorney.²³ Similarly, state public defender offices had a median 67 percent of the attorneys necessary to comply with caseload limits.²⁴

Many states are unwilling or unable to adequately fund and administer indigent defense delivery systems. As a consequence, states permit the judiciary (and sometimes the prosecution) to improperly inject itself into the defense function; force attorneys to carry excessive caseloads; fail to provide attorneys with investigators, experts, and essential support services needed for an adequate defense; neglect to provide meaningful supervision of lawyers; allow significant delays in the appointment of counsel; and refuse to make available on-going training to keep attorneys abreast of ever-evolving criminal justice sciences and other matters related to their professional obligation. These dysfunctional systems of indigent defense prevent lawyers from providing constitutionally and ethically adequate representation of their clients.

By virtue of its massive funding of state and local law enforcement, the federal government unintentionally

exacerbates the abrogation of the constitutional right to a lawyer. States consistently spend either none or only a miniscule portion of their federal criminal justice grant money for public defense programs, directing a vastly greater share to law enforcement and prosecutorial programs. For example, in 2009, of the \$1.2 billion in federal criminal justice funding to states through the Byrne Justice Assistance Grant (JAG), only \$3.2 million was spent on indigent defense, while prosecutors and courts received over \$171 million and law enforcement received more than \$521 million.²⁵

For Fiscal Year (FY) 2012, the Obama Administration is requesting \$3 billion to support state and local law enforcement, through programs like the Office of Community Oriented Policing Services (COPS), which would receive over \$600 million.²⁶ In addition, under the President’s budget, state and local law enforcement and prosecutors would receive the lion’s share of the \$1.2 billion for State and Local Law Enforcement Assistance through programs like Byrne JAG, the Byrne Competitive Grant, and State Criminal Alien Assistance Act.²⁷ As in years past, for FY 2012, federal funding for direct support of state indigent defense functions is paltry, totaling only \$2.75 million compared to the hundreds of millions of dollars directed to law enforcements and prosecutors.²⁸

Without comparable federal resources, indigent defense systems are unable to effectively represent the additional clients resulting from increased arrests and prosecutions

that are possible because of federal support for law enforcement and prosecutors. Therefore, Congress should provide sufficient financial support to state and local governments for the provision of indigent defense services comparable to federal support for prosecution.

To achieve this without increasing federal spending, Congress should amend the Capital Litigation Improvement Program. Currently, each state receiving the grants must use the money for training and must apportion the funds equally between prosecutors and indigent defenders, regardless of existing resource disparities. Congress should allow for exceptions to the required equal allocation to enable states to use the grants to create parity between prosecution and indigent defense resources. Additionally, Congress should permit states to use grants under this program to hire counsel for capital defendants, rather than restricting funding to training.

In addition, many states do not fully account for the manner in which they spend federal grant money for criminal justice initiatives. Without such data, decisionmakers are left to form policy based on anecdotal information, speculation, intuition, presumption, and even bias. This has consistently resulted in states failing to consider the impact of their spending decisions on the already limited resources of their indigent defense systems. The Department of Justice should strengthen its regulations related to reporting requirements for state grant recipients and, if necessary, Congress should empower the Department to withhold a portion of a state’s formula grant for failure to meet reporting requirements. Congress should also request that the Government Accountability Office gather data and then regularly track the distribution of all federal funds to state and local criminal justice systems to assess how it is divided between law enforcement, prosecution and indigent defense activities.

Congress should amend the Byrne JAG authorizing legislation, adding indigent defense to the list of seven

21. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

22. See e.g., American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise* (2006), available at www.indigentdefense.org; The National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect for Our Constitutional Right to Counsel* (2009), available at www.tcpjusticedenied.org.

23. Bureau of Justice Statistics, U.S. Dept. of Justice, *Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices 8* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>.

24. For FY2011, the Department of Justice requested \$2.5 million and 10 positions for the Access to Justice Initiative. Bureau of Justice Statistics, U.S. Dept. of Justice, *Census of Public Defender Offices, 2007: State Public Defender Programs 13* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>.

25. National Criminal Justice Association, *Byrne JAG Funding: A Snapshot from the States*, http://www.ncja.org/NCJA/Policies_and_Practices/Byrne_JAG_Data_Collection/NCJA/Navigation/PoliciesPractices/Byrne_JAG_Data_Collection.aspx?hkey=8bd3d63b-a641-4009-a9a1-bb977cc00e31 (last visited January 14, 2011).

26. U.S. Dept. of Justice, *FY 2012 Budget Summary* (2011), available at <http://www.justice.gov/jmd/2012summary/pdf/fy12-bud-summary-request-performance.pdf#bud-sum>.

27. Office of Management and Budget, Executive Office of the President, *Fiscal Year 2012 Budget of the U.S. Government: Appendix 737* (2011) available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/appendix.pdf>.

28. *Id.* at 740

specific program categories identified in the statute.²⁹ This will clarify for Department of Justice and state personnel that support for indigent defense services is one of the central purposes of the Byrne JAG programs. Furthermore, either Congress, through legislation, or the Department of Justice, through its rulemaking authority,³⁰ can require that each state include at least one representative of the state's indigent defense systems as a member of its

State Administering Agency (SAA), the state agency that administers federal criminal justice grants. This will ensure, at a minimum, that the needs and interest of the indigent defense system are heard during an SAA's deliberation process, and will highlight to the indigent defense community its right to seek Byrne JAG funding.

Additionally, Congress should require states seeking Byrne JAG funding to submit a criminal justice

impact statement. The statement would describe the state's plan for spending federal funds, including the specific criminal justice programs that would receive grant money, the impact such funding would have on other criminal justice programs in the state, and the means by which the state would ensure that affected programs would have adequate resources to address the impact of the federal funding. This fully integrated approach to evaluating Byrne JAG funding encourages states to comprehensively examine the operations of their criminal justice systems. Each of these changes seek to increase the fairness of the criminal justice system through changes to current federal policy that promotes good government, while also helping to highlight the resource disparity from which state and local indigent defense providers currently suffer.

Even in these hyper-partisan times, *Smart on Crime's* approach of eschewing ideology in favor of sensible solutions that are fair, accurate, effective, proven, and cost-efficient, has piqued the interest of Democrats and Republicans alike. Since its release, the Coalition has used *Smart on Crime* to engage with policymakers, most recently in a briefing in June at the U.S. Capitol entitled *Protecting Public Safety in a Budget Crisis: Lessons from the States*. While no one policymaker or party may endorse all its recommendations, *Smart on Crime* serves as a critical source for the best and most contemporary ideas to address the problems plaguing our criminal justice system. ❧

CHRISTOPHER DUROCHER

is Government Affairs Counsel for the Criminal Justice Program at The Constitution Project.

ADRIENNE LEE BENSON

is an Associate for the Criminal Justice Program at The Constitution Project.

29. See 42 USC § 3751(a)(1).

30. DOJ can amend 28 CFR § 33.12(a) to achieve this result.