

# Prioritizing Indigent Defense



ISSUE BRIEF: BUREAU OF JUSTICE ASSISTANCE TRAINING & TECHNICAL ASSISTANCE PROGRAM FOR STATE ADMINISTERING AGENCIES

## Introduction

As the Department of Justice (DOJ) has recognized, when State Administering Agencies (SAA) strengthen the defense function and foster collaboration, they invest in a higher functioning, more efficient, and fairer justice system. SAAs are responsible for administering federal criminal justice system grants, including Edward Byrne Justice Assistance Grant (JAG) funds, through an “inclusive planning process.”<sup>1</sup> Historically, however, public defenders have not been equal partners in this process. In 2009, Attorney General Eric Holder explained why neglected indigent defense is a burden borne by all parts of the criminal justice system: “When the system breaks down, we all lose. And this is true not just because our shared principles are undermined, but for practical reasons too. When defendants fail to receive competent legal representation, their cases are vulnerable to costly mistakes that can take a long time to correct. Lawyers on both sides can spend years dealing with appeals arising from technical infractions and procedural errors. When that happens, no one wins.”<sup>2</sup>

Consequently, beginning with the founding of the Access to Justice Initiative in 2010, DOJ has placed increased focus on including public defenders in grant programs.<sup>3</sup> Since 2010, JAG solicitations have listed indigent defense as a priority area. DOJ has also created performance measures for JAG grants that are fine-tuned to indigent defense allocations.<sup>4</sup> The JAG 2015 state solicitation therefore makes explicit that DOJ continues to assess “the extent to which the recommendation that [SAAs’ strategic planning] include all criminal justice stakeholders, including

indigent defense, [is] being followed to ensure fairness in the criminal justice system.”<sup>5</sup>

SAAs can also make indigent defense a priority by investing in planning and projects that address the issues described in this paper.

## Issues

Any project that improves the quality of indigent defense will fit naturally into the JAG programmatic purpose area for Prosecution, Courts, and Indigent Defense. Many defender projects fall under other purpose areas, as well. Projects that divert defendants from pre-trial or post-sentencing incarceration may help reduce costs and improve services for Corrections and Community Corrections. In addition, projects that expand defender research capacity or submit defender programs to independent evaluation will serve the purpose of Planning, Evaluation, and Technology Improvement. These and other JAG purposes are served by defenders who are pursuing the following priority reforms:

### *Engaging Defenders as Stakeholders*

A basic premise of the structure of the JAG program is that each jurisdiction should set its own criminal justice investment priorities through a community engagement model. For that reason, the best way for SAAs to assess which issues are most important for indigent defense providers is to engage local defenders in their strategic planning process.

Defenders must have a voice in governmental policy and practice to ensure a balanced and effective approach to justice. A 2012 report from the Government Accountability Office (GAO) found that 52% of SAAs did not include indigent defense

providers in their strategic planning or decision-making processes.<sup>6</sup> This lack of representation may explain, in part, why SAAs allocated just 0.7% of their JAG funds to indigent defense between 2005 and 2010.<sup>7</sup> A 2009 survey of SAAs by the National Criminal Justice Association (NCJA) similarly found that less than 1% of their JAG funds went to indigent defense.<sup>8</sup>

As Attorney General Holder explained, when indigent defense loses, “no one wins.” That is because, whatever the goal of a JAG-funded project, the surest means to its success and sustainability is through collaboration and consensus. When stakeholders make decisions together, they can be more certain that unforeseen costs will not be shifted to one part of the system. In addition, when each agency is high-performing, the justice system is higher performing as a whole, reaching more reliable results, more efficiently. It is therefore essential for the success of all reforms to bring the defender perspective to bear.

### ***Improving Pretrial Representation***

One priority funding area for the JAG program is pretrial reform.<sup>9</sup> BJA collaborates with the Pretrial Justice Institute and the Pew Public Safety Performance Project to save corrections costs and promote public safety by implementing evidence-based decision making practices at the pre-trial stage.<sup>10</sup> States and counties too often commit scarce corrections resources to detaining low-risk defendants while allowing more high-risk defendants to go unsupervised in their communities. Risk assessment tools are widely touted as a means of realigning cost to where it is most needed.<sup>11</sup>

Risk assessment, like any justice system reform, is only as good as its implementation. Defenders are the criminal justice system’s most effective check on the overuse of pretrial detention, especially since they are in the best position to advocate for risk-based alternatives to incarceration for their clients. In many jurisdictions, however, defenders are not present at bail hearings at all. Even where they are, defenders are not always adequately trained on using risk assessments. Studies have found that where counsel

is present at early appearance, defendants are twice as likely to be released from jail on the same day of arrest and two-and-a-half times more likely to be released on their own recognizance.<sup>12</sup> Other studies have found that when defendants are released earlier before trial, their ultimate sentences are shorter and their likelihood of recidivism is decreased.<sup>13</sup> By funding effective pretrial representation, states and counties can therefore cut significant waste from jail and prison corrections costs.

### ***Expanding Data & Research Capacity***

The JAG program is characteristic of federal grant programs in requiring the use of evidence-based practices for reform. A 2011 expert working group convened by the National Institute of Justice (NIJ) and the Access to Justice Initiative (ATJ) specifically stated the need for evidence-based research in the field of indigent defense;<sup>14</sup> the 2012 GAO report echoed this sentiment.<sup>15</sup>

Unfortunately, there is a dearth of data on indigent defense. Many defenders do not have the resources or expertise to collect data or analyze data about their workloads or case outcomes. The result is that it is very difficult for defenders to demonstrate the impact that their work has on the fairness and efficiency of the criminal justice system as a whole – which, as we have seen in states like Kentucky, can be significant.

### **Implementing Holistic, Community-Oriented Defense**

Holistic defense considers the legal needs of clients in context of their non-legal needs and the needs of their communities.<sup>16</sup> A holistic approach therefore encompasses interdisciplinary assessments of clients’ mental health or drug abuse problems; assistance with re-entry and collateral consequences; and public outreach to effect systemic change. By broadening their perspective to see beyond the immediate criminal charges, holistic defenders are better able to identify forces that drive criminality and recidivism in their communities. Their work falls squarely with the JAG program’s priority areas of reducing recidivism and improving mental health services.<sup>17</sup>

Last year, the NIJ highlighted holistic defense as a promising area of future research;<sup>18</sup> NIJ has also funded a multi-site evaluation of the effectiveness of holistic defense, especially in curbing corrections costs.<sup>19</sup> Other current studies include evaluations of holistic defender programs, including the Louisiana Center for Children’s Rights and the Bronx Defenders.<sup>20</sup>

## Practice Pointers

Though indigent defense initiatives receive a tiny fraction of overall JAG funding, examples of defense-involved projects illustrate the value of investing in defense. Where states have incorporated indigent defense into their JAG portfolio, they have benefitted from measurable improvements to their justice systems. Additionally, studies of non-JAG projects have confirmed that the following are promising practices.

### *Inclusive Planning Realigns Resources and Strengthens Reforms*

**California** faced a staggering statewide prison overcrowding problem in 2012.<sup>21</sup> It therefore established the Board of State and Community Corrections (BSCC) and designated it as the SAA as part of its broader justice realignment initiative. BSSC overhauled the strategic planning process by expanding the reach of its justice system survey, realigning priorities based on the survey results, and rewriting its request for proposals so that counties were required to create more inclusive JAG steering committees. The results were striking: whereas, in 2014, 95% of JAG spending went to drug and gang task forces, in 2015, spending was distributed among a variety of agencies and initiatives, with 80% of spending going toward crime prevention and alternatives to incarceration.

**Wisconsin** has made its county-based Criminal Justice Coordinating Councils (CJCCs) a priority area for the state’s JAG funds.<sup>22</sup> The 37 county-based CJCCs bring together criminal justice agencies to work on common reform initiatives. An evaluation by the National Center for State Courts (NCSC) found that many reforms would have not have been as

successful, or even possible, without the collaborative efforts of CJCCs.<sup>23</sup> Essential to the success of CJCCs is, of course, inclusion of all criminal justice actors – public defenders among them.<sup>24</sup>

### *Holistic Representation Reduces Jail and Prison Incarceration*

Since 2000, the San Francisco Public Defender has used JAG funding to employ six social workers who assess the mental health and substance abuse needs of clients, create individualized case and treatment plans, and refer clients to supportive community programs.<sup>25</sup> By providing district attorneys, judges, and corrections officials with psychosocial information about clients, social workers were able to re-route clients from incarceration. A 2009 study found that these alternative sentences saved **California** over \$5 million and San Francisco County over \$1 million in jail and prison costs.<sup>26</sup>

In 2006, the **Kentucky** Department of Public Advocacy (DPA) – the statewide public defender office – began using JAG funds to employ social workers to better assess the mental health and substance abuse needs of their clients and create treatment plans.<sup>27</sup> An independent evaluation found that judges accepted these plans 86% of the time, which resulted in savings of more than \$100,000 in jail and prison costs per social worker.<sup>28</sup> The DPA has been recognized for the success of this program by the Bureau of Justice Assistance, the National Criminal Justice Association, the Council of State Governments, and the Ash Center for Democratic Governance and Innovation at Harvard University’s John F. Kennedy School of Government.<sup>29</sup>

### *Accurately Implementing Risk and Needs Assessment Tools Promotes Evidence-Based Decision Making*

**Wisconsin** has used JAG funds to support its Assess, Inform and Measure (AIM) Project to pilot risk and needs assessment tools in eight counties. The data collected from AIM goes into a “feedback loop” that generates information about recidivism that is shared throughout state and county justice systems.<sup>30</sup> In 2013, the Planning and Policy Advisory Committee of the Supreme Court of Wisconsin reported that AIM

has helped county courts and corrections systems to identify the services required to address the needs of their communities and to target them accurately.<sup>31</sup> In addition, a 2012 evaluation by NCSC found that 58% of judges in AIM pilot sites were routinely using “needs” information to make sentencing decisions.<sup>32</sup> The pilot judges hoped to expand the use of assessments and to have access to them to earlier in deliberations.

NCSC advised Wisconsin that “training of judges, staff, and other stakeholders is critical for the successful implementation and use of risk-and-needs-assessment information.”<sup>33</sup> There is a growing national consensus around this recommendation. For example, 17 states that participated in the Justice Reinvestment Initiative agreed that the “single most important step” to effective, data-driven criminal justice reform (including accurate implementation of risk and needs assessment) was early and frequent engagement of multiple stakeholders.<sup>34</sup> This engagement includes the training of defenders about risk and needs assessments so that judges and others stakeholders receive accurate data. And, as in Wisconsin, defender agencies must also be part of a “feedback loop” that shares data across justice systems.

### ***Reentry Services Reduce Recidivism***

In 2015, **Colorado** funded a collaboration between the State Public Defender and the Colorado Criminal Defense Institute to assist people seeking to seal their criminal records.<sup>35</sup> Colorado has recently expanded eligibility for record sealing, but navigating the rigorous process demands the advice of legal counsel. Research has found that sealing criminal records can expand opportunity for employment, which is critical to reducing recidivism.<sup>36</sup>

## **Recommendations**

### ***1. Engaging Defenders as Stakeholders***

- SAAs should include indigent defense providers on their governing boards.

- SAAs should reach out to indigent defense providers directly when assessing the local priorities of their criminal justice system.
- SAAs should list indigent defense projects as a priority in their requests for proposals.
- SAAs should encourage or require agencies to collaborate on projects with indigent defense providers.
- SAAs should use performance measures that capture indigent defense participation in JAG programs.

### ***2. Pretrial***

- SAAs should fund programs that seek to improve representation by defense counsel at first appearance (e.g. bail hearings).
- SAAs should fund programs that train defenders on using risk assessment tools.

### ***3. Expanding Data & Research Capacity***

- SAAs should support research of indigent defense services by allocating funds to projects that measure defender performance through, for example, improved case management systems and independent evaluations.
- SAAs should seek to integrate data collection across criminal justice agencies.

### ***4. Implementing Holistic Defense, Community-Oriented Defense***

- SAAs should fund defense team social worker involvement before trial, so as to connect defendants with alternatives to jail.
- SAAs should fund defense team social workers at the sentencing phase, so as to connect defendants with alternatives to prison.

SAAs should fund defenders providing holistic legal services to their clients and communities, including formerly incarcerated people.

*The National Legal Aid and Defender Association (NLADA) is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. We serve as a voice for indigent defense at all levels of government, while also providing training and technical assistance in the field to public defense advocates seeking justice for all. Our member network of public defense professionals provides insight into which issues are most urgent to improve the quality of justice.*

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<sup>1</sup> Bureau of Justice Assistance (BJA), *Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2015 State Solicitation* at 9, April 2015 (hereinafter "JAG 2015 Solicitation"). <http://1.usa.gov/228ZYWt>

<sup>2</sup> Attorney General Eric Holder, Remarks presented at the American Council of Chief Defenders Annual Conference, Washington, DC, June 24, 2009. <http://1.usa.gov/1NxNgH8>

<sup>3</sup> "Bringing All Criminal Justice Stakeholders to the Table," *The United States Department of Justice Blogs* (blog). <http://1.usa.gov/1JcwziK>; Access to Justice Initiative of the U.S. Department of Justice, *Resource Publication for Courts and Indigent Defense Providers*, 2012. <http://1.usa.gov/1P8RfOS>; National Criminal Justice Association, "DOJ Access to Justice Initiative Works for Inclusive System Planning for Byrne JAG Grantees," *Justice Bulletin*, February 2013. <http://bit.ly/1ZcM2s4>

<sup>4</sup> Bureau of Justice Assistance, *Justice Assistance Grant (JAG) Program Accountability Measures: General Information Module*, June 2015. <http://bit.ly/1P8gdfu>; Bureau of Justice Assistance, *Justice Assistance Grant (JAG) Program Accountability Measures: Indigent Defense Module*, June 2015. <http://bit.ly/1O9y5tm>

<sup>5</sup> JAG 2015 Solicitation, *supra* note 1.

<sup>6</sup> Government Accountability Office (GAO), *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support This Purpose*, May 2012, 28. <http://1.usa.gov/1IVGBd0>

<sup>7</sup> *Id.* at 24.

<sup>8</sup> National Criminal Justice Association (NCJA), *Byrne JAG Funding by Project Type*, 2009. <http://bit.ly/1mp3VGj>

<sup>9</sup> JAG 2015 Solicitation, *supra* note 1 at 7.

<sup>10</sup> *Id.*

<sup>11</sup> Cynthia A. Mamalian, "State of the Science of Pretrial Risk Assessment," *Pretrial Justice Institute*, 2011. <http://bit.ly/1GzIQwu>

<sup>12</sup> Douglas L. Colbert, Raymond Paternoster, and Shawn Bushway, "Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail," *23 Cardozo L. Rev.* 1719 (2002). <http://bit.ly/1IV1aaW>; Ernest J. Fazio Jr. et al., "Early Representation by Defense Counsel Field Test: Final Evaluation Report," *National Institute of Justice* (1985). <http://1.usa.gov/1k3VcHH>

<sup>13</sup> Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "The Hidden Costs of Pretrial Detention," *Laura and John Arnold Foundation* (2013). <http://bit.ly/1RTXTcF>

<sup>14</sup> U.S. Department of Justice, *Expert Working Group Report: International Perspectives on Indigent Defense*, September 2011. <http://1.usa.gov/1RqVnLM>

<sup>15</sup> GAO, *Indigent Defense*, *supra* note 6 at 28.

<sup>16</sup> Robin Steinberg, "Heeding Gideon's Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm," *70 Wash & Lee L. Rev.* 961, 963 (2013). <http://bit.ly/1RUy5rZ>; Community Oriented Defender Network, "Ten Principles of Community Oriented Defense," *Brennan Center for Justice* (2010). <http://bit.ly/1RUyRFA>

<sup>17</sup> JAG 2015 Solicitation, *supra* note 1 at 7.

<sup>18</sup> Nadine Frederique, Patricia Joseph, and R. Christopher C. Hild, "What Is The State Of Empirical Research On Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research," *78 Alb. L. Rev.* 1317 (2014). <http://bit.ly/1Oa4z0o>

<sup>19</sup> National Institute of Justice, *Indigent Defense Research*, <http://bit.ly/1TSMx7h>.

<sup>20</sup> Cynthia G. Lee, Brian J. Ostrom, and Matthew Kleiman, "The Measure of Good Lawyering: Evaluating Holistic Defense in Practice," *78 Alb. L. Rev.* 1215, 1233 (2015). <http://bit.ly/1IXb0aU>

<sup>21</sup> Criminal Justice Planning Agency (CJPA), "Shifting Priorities: How California Moved from Legacy Funding to Delinquency Prevention," *CJPA Justice Bulletin* (April 10, 2015). <http://bit.ly/1k5wiHC>

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<sup>23</sup> *Id.* at 59.

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<sup>28</sup> Dr. Gerard “Rod” Barber and Dr. Ramona Stone, “Social Work Pilot Project Report: Kentucky Department of Public Advocacy,” *Kent School of Social Work, University of Louisville* (2008). <http://1.usa.gov/1IXicDX>; Robert Walker, M.S.W., L.C.S.W., Jennifer Cole, M.S.W., Ph.D.,

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<sup>29</sup> Bureau of Justice Assistance, “Kentucky Alternative Sentencing Social Worker Program,” *Success Stories*, <http://1.usa.gov/1Rs2aEU>.

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<sup>31</sup> Supreme Court of Wisconsin Planning and Policy Advisory Committee (PPAC) Effective Justice Strategies Subcommittee (EJS), “Phase II: Progress and Accomplishments” (2013), <http://bit.ly/29z0wR3>.

<sup>32</sup> See “Effective Justice Strategies in Wisconsin,” note 22.

<sup>33</sup> *Id.*

<sup>34</sup> Nancy LaVigne et al., “Justice Reinvestment Initiative State Assessment Report,” The Urban Institute (2014), <http://urbn.is/29uK9qd>.

<sup>35</sup> Colorado Department of Public Safety, “2015 JAG Recipients,” <http://bit.ly/29xJmFS>.

<sup>36</sup> “Integrated Reentry and Employment Strategies: Reducing Recidivism and Promoting Job Readiness,” The Council of State Governments Justice Center (2013), <http://bit.ly/29ubit1>.