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President

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September 13, 2013

Honorable Eric H. Holder, Jr.
Attorney General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Attorney General Holder:

I write on behalf of the American Bar Association to address several important recent developments in what you have accurately termed as "...our well documented...national difficulty to meet the obligations recognized in *Gideon*." That candid acknowledgement, as well as many other honest and forthright descriptions of the "crisis of indigent defense" contained in the Statement of Interest filed by the Department of Justice in the *Wilbur v. City of Mount Vernon* case in Washington state, was a significant and welcome development.

The American Bar Association shares the concerns about the state of indigent defense expressed in that Statement of Interest, as well as the similar concerns you expressed in your public remarks on June 21, 2013, cited in the Statement of Interest, that "...in some places America's indigent defense systems...do little more than process people in and out of courts." We also share your conviction in your remarks at the ABA Annual Meeting in San Francisco that "America's indigent defense systems continue to exist in a state of crisis."

At our Annual Meeting in San Francisco, ABA Resolution 113E (and accompanying Report) was adopted by the House of Delegates and now represents official ABA policy. I have enclosed a copy of the Resolution and the Report for your review. This Resolution was proposed by the ABA's Criminal Justice Section, which is comprised of both prosecutors and defense lawyers. In Resolution 113E the ABA opposes plea or sentencing agreements that waive a criminal defendant's post-conviction claims addressing ineffective assistance of counsel ("IAC") unless based upon past instances of such conduct that are specifically identified.

We have grave concerns that recent filings by the Department of Justice in Kentucky take precisely the opposite position on this issue, asserting that defense counsel may ethically advise their clients to waive their claims for ineffective assistance against their own lawyers. (See, *United States of America, By and Through the United States Attorneys for the Eastern and Western Districts of Kentucky v. Kentucky Bar Association*).

September 13, 2013

Page 2 of 2

In its memorandum in the Kentucky case, the government argues that the ethics opinion of the Kentucky Bar Association was in error when it concluded that an IAC waiver creates an automatic conflict for defense counsel that cannot be waived and also when it concluded that a prosecutor who makes a plea offer containing such a waiver violates the Rules of Professional Conduct. The government argues that there is no such conflict “if there is no reason to believe that a defense attorney’s representation has been ineffective.”

Critical to the government’s argument is the position laid out at pp. 12-14 of its memorandum that where the defense attorney knows of no IAC and the defendant has not raised any IAC claim, there is no Rule 1.7(a)(2) “significant risk” that the defense counsel’s representation during the plea negotiations has been materially limited by a concurrent conflict. This is so, the government argues, because of *Strickland*’s “strong presumption that counsel’s conduct falls within the wide range of professional assistance.”

Asserting that *Strickland*’s “strong presumption” of effectiveness should ameliorate any concerns we should have in this situation is, we believe, clearly inconsistent with what you have candidly acknowledged about the crisis in indigent defense on numerous occasions, including your public statements recited in the Statement of Interest filed by your Civil Rights Division in the Washington state case. Under these circumstances, *Strickland*’s oft-criticized “strong presumption” of effectiveness is simply irrelevant to any fair analysis of Rule 1.7(a)(2)’s “significant risk” test.

The true state of indigent defense in this nation, on the other hand, is highly relevant to that analysis, and the government owes a duty of candor to the courts to so inform the courts. The government did the opposite of that in the Kentucky case. The government’s motion and memo in the Kentucky Supreme Court should be withdrawn or substantially amended. In addition, no further motions or requests for review in other states with similar ethics opinions should be authorized by DOJ.

The concerns of the ABA in this matter are serious ones and I am hopeful that you will intervene in these cases to square the government’s position in these cases with your own clearly stated views about the true state of indigent defense in this nation.

Sincerely,

A handwritten signature in black ink that reads "James R. Silkenat". The signature is written in a cursive, slightly slanted style.

James R. Silkenat