

The right to counsel provided in *Gideon v Wainwright* is not just placing a lawyer next to a client in a courtroom and permitting the injustice that flows from overwork, inexperience, high caseloads, and lack of resources. The right to counsel encompasses the right to the effective assistance of counsel. *McMann v Richardson*, 397 US 759, 773, n 14 (1970).

Since 1981, NYSDA's Public Defense Backup Center has been fulfilling the State's backup function – its obligation to help secure the effective assistance of counsel in New York's 62 counties. Our 18 staff members work daily to enhance the delivery of public defense services in the state's 62 counties and thereby reduce the amount those services would otherwise cost localities. Our lawyers and researchers hourly answer questions by phone, e-mail, or fax; maintain and update our website (accessed 30,000 times per month); train statewide in small-, medium-, and large-scale programs; respond to county requests for data; and annually respond to well more than 3000 calls for assistance from the public defense community, including immigration-related requests. We service nearly 6000 lawyers in more than 120 county-based programs and maintain the Public Defense Case Management System (PDCMS) in 44 offices in 33 counties.

**The New York State Defenders Association (NYSDA) needs \$2,211,800 to run the same Backup Center program it delivered last year and to restore its statewide Basic Trial Skills Program.**

#### **WHY IS \$2,211,800 NECESSARY?**

In FY 2011-2012 the Governor placed NYSDA in his budget at \$1,089,000. The Public Protection Table restored a portion of what NYSDA needed to run the Public Defense Backup Center by adding \$250,000. NYSDA's final budget in FY 2011 was therefore \$1,339,000 **but it cost \$1,863,000 to run the Backup Center**. To accomplish this, NYSDA subsidized the State's backup function in the amount of \$524,000, a pattern and practice which has been ongoing (\$2,044,900 since FY 2006). This pattern and practice cannot be sustained because grants and the fund balance are no longer available.

The Governor was asked to fund NYSDA this year at \$2,211,800, the amount needed to carry on the same program it ran last year with the addition of the critically important statewide entry-level training program for new public defenders, a program NYSDA was unable to run in FY 2011. Unfortunately, the Executive Budget for FY 2012-2013 contains only \$1,089,000, **an amount less than NYSDA received in 1997 (\$1,220,000)**.

Attached to this document are appendices which were presented to the Executive Branch to urge its consideration of the appropriate amount for the Executive Appropriation for the Public Defense Backup Center.

NYSDA is not only an advocate for clients; NYSDA also provides mandate relief and is an advocate for counties. We urged the Governor to end the sweeps of the Indigent Legal Services Fund (ILSF) (\$42,498,000 since 2009) and to use all accumulated ILSF funds in a coextensive appropriation to fund county public defense services. **We now urge the Legislature to do the same.**

However, if the Legislature follows the Governor's course – if sweeps of the ILSF continue – we urge you to allow a portion of that swept money to be recouped for mandate relief by annually funding NYSDA's Public Defense Backup Center at \$3 million in the Fund (see the Lentol/Grisanti bill [A.7867A/S.5143B] which would accomplish this).

Thank you.

#### APPENDICES

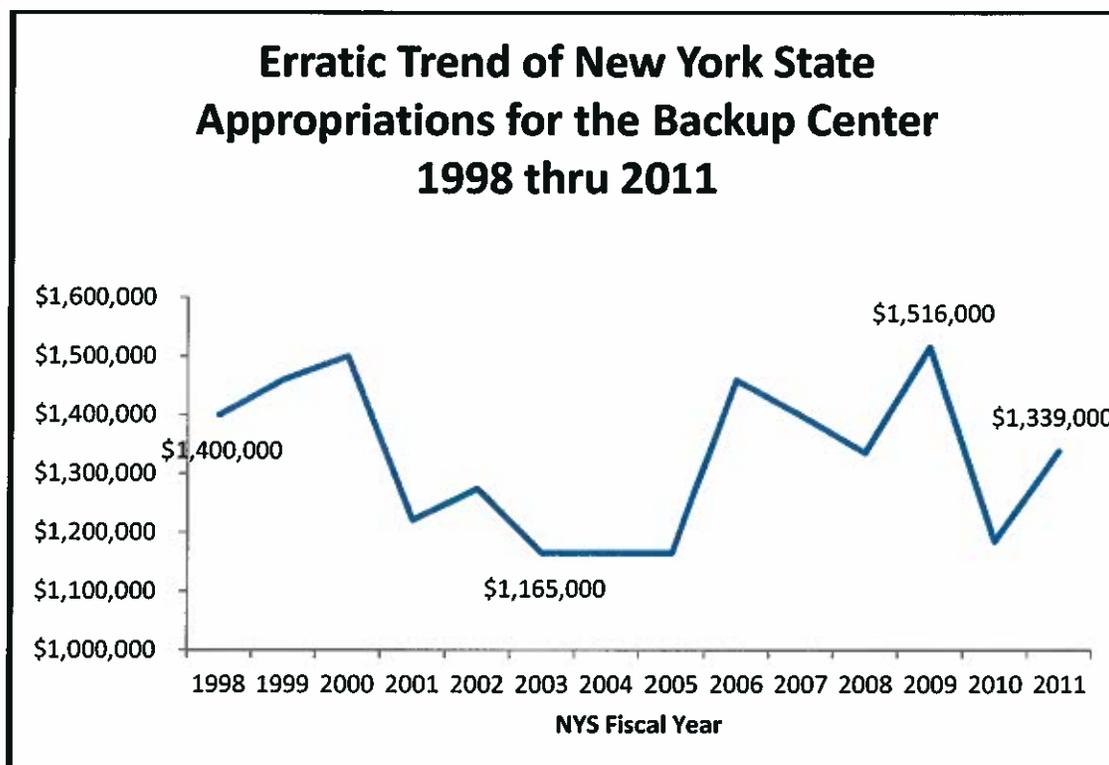
- Appendix A *NYSDA Budget Request for FY 2012-2013*
- Appendix B *NYSDA Public Defense Backup Center Deficit*
- Appendix C *NYSDA Public Defense Backup Center and Mandate Relief*
- Appendix D *NYSDA Public Defense Case Management System*
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- Appendix F *Letter to Governor Andrew M. Cuomo from Chair of the Franklin H. Williams Judicial Commission on Minorities regarding the need for NYSDA's Basic Trial Skills Program*
- Appendix G *An Approach to Funding the New York State Defenders Association*

# NYSDA BUDGET REQUEST FOR FY 2012-2013

- **The New York State Defenders Association (NYSDA) was founded in 1967; NYSDA's Public Defense Backup Center has been state funded since 1981.**
  - The Backup Center's program of legal research and support directly passes along cost savings to counties by providing services for which they otherwise would have to pay.
  - **The Backup Center's program is mandate relief:**
    - Provides overall support and technical assistance to 62 counties and nearly 6000 public defense attorneys;
    - Responds to 2000 criminal/family law requests for assistance per year;
    - Its Criminal Defense Immigration Project (CDIP) provides expert legal advice and training, and handles more than 1000 immigration law matters per year;
    - Publishes and distributes the bi-monthly *Public Defense Backup Center REPORT*;
    - Website accessed 30,000 times per month, providing online access to expert witnesses, case summaries, investigator resource bank, and information clearinghouse;
    - Maintains an electronic library with tens of thousands of holdings;
    - Publishes technical and training manuals;
    - Trains thousands of defenders at regional and statewide programs;
    - Conducts the only statewide entry-level Basic Trial Skills Program;
    - With Appellate Division 3rd and 4th Departments provides specialized appellate training;
    - NYSDA's Public Defense Case Management System (PDCMS) is used by 44 offices in 33 counties.
- **In order to perform our function we need an enhanced appropriation.**
  - Since 1987, NYSDA has annually advanced funds to subsidize the State's Sixth Amendment backup function. NYSDA's subsidy of the State's backup function since FY 2006 alone has been \$2,044,900. Our fund balance cannot sustain further depletion. The current State appropriation is insufficient to sustain the State's Backup Center Program.
    - Our budget request for FY 2012-13, submitted to DCJS on August 17, 2011, is for \$3,073,200. This includes requested increases for a Family Court Initiative, a much-needed Veterans Defense Unit, and enhanced staffing for the Backup Center, its Public Defense Case Management program, and its Criminal Defense Immigration Project.
    - To continue last year's operations and restore the Basic Trial Skills Program, \$2,211,800 is needed.
- **The public defense system of this state is in shambles**, plagued by high caseloads, a lack of investigation, poorly prepared attorneys, minimal client contact, high staff turnover, deficient utilization of expert witnesses, a high plea rate, low trial rates, and invidious political interference in local funding and operations. This state of affairs has its greatest impact on poor people in communities of color.
- **The Governor is in a position to make great strides to improve the State's public defense system by fully supporting the Indigent Legal Services Office and appropriately funding the NYSDA Public Defense Backup Center's critically important complementary services.**

# NYSDA PUBLIC DEFENSE BACKUP CENTER DEFICIT

In 1986 NYSDA was asked to generate resources and subsidize the Backup Center function when necessary. It has done so ever since. This unexpected one way street – where NYSDA's corporate assets and privately generated revenues sustain a Sixth Amendment State function – has permitted an erratic pattern of State funding.



The pattern pictured above demonstrates why it is difficult to plan for the backup function and to deliver the services to carry it out. Despite a contractual obligation to annually file a proposed budget outlining the costs of the State's backup center function for the ensuing year, the Backup Center's needs are never fully met. Instead, appropriations have been reduced below the amount necessary to function.

**Consequently, greater borrowing from NYSDA's fund balance or retrieval of private funding to fulfill the State's constitutional function has been required.**

An examination of the last three years alone reveals inadequate and fluctuating appropriations accompanied by substantially larger NYSDA subsidies (total \$1,356,600) required to sustain the State's backup center program.

# NYSDA PUBLIC DEFENSE BACKUP CENTER AND MANDATE RELIEF

The New York State Defenders Association (NYSDA) was founded in 1967, and since 1981 has administered the nation's only state funded not-for-profit Public Defense Backup Center. For these past 30 years, the Public Defense Backup Center has provided support services to county-based defense providers (public defenders, legal aid lawyers, and assigned counsel practitioners). We have been involved in every aspect of the defense system from helping handle murder cases to supporting adequate defender budgets, from writing and filing appellate and amicus briefs to delivering technical assistance to counties, from designing, managing, and supporting a multi-county defender case management system to providing online access to expert and investigative resources, from answering simple questions about the Penal Law to drafting requested legislation on public defense services, from consulting with lawyers mid-trial to running the state's only entry-level trial skills course. We have consistently tried, through the terms of six governors and nearly twice as many legislative leaders, to improve the quality of public defense services in this state, and to do so by remaining client centered in all that we do.

**The Backup Center's program is mandate relief, providing overall support and technical assistance to 62 counties and nearly 6000 public defense attorneys.**

**The Backup Center** has performed full-blown studies in Clinton, Ontario, and Schenectady counties, facilitated assessments of Cattaraugus, Franklin, Jefferson, Lewis, Niagara, Ontario, Schuyler, Sullivan, Tioga, and Washington counties, and has developed a model voucher for use by assigned counsel systems throughout the state. It also designs customized local training, provides management technical assistance, responds to requests for budget information and comparisons, and assists counties in seeking resources and legislative reforms.

**By handling 2000 criminal/family law requests for assistance per year**, the Backup Center saves lawyers time and counties money by having ready answers, prepared memoranda, staff researchers, and time saving automated library assistance. The fruits of a legal memorandum for an assigned counsel lawyer that took 15 hours to prepare by Backup Center lawyers saves counties more than a \$1000 (15 hours x \$75/hour = \$1125) in each case thereafter when one of their lawyers calls the Backup Center.

**NYSDA's Public Defense Case Management System is in 44 offices in 33 counties.** To replicate this system or replace it would cost counties more than \$20 million.

**The Criminal Defense Immigration Project (CDIP) provides expert legal advice and training, and handles more than 1000 immigration law matters per year.**

When the U.S. Supreme Court declared in *Padilla v. Kentucky* that defense counsel has an affirmative constitutional obligation to advise noncitizen clients of the potential immigration consequences resulting from a guilty plea, it opened up a new county need. It is essential that lawyers have access to immigration information prior to a disposition, or convictions can be overturned in every county system that fails to provide that information. The relatively small amount of money required to maintain NYSDA's CDIP is nothing compared to the costs counties would have to bear defending numerous lengthy post conviction applications.

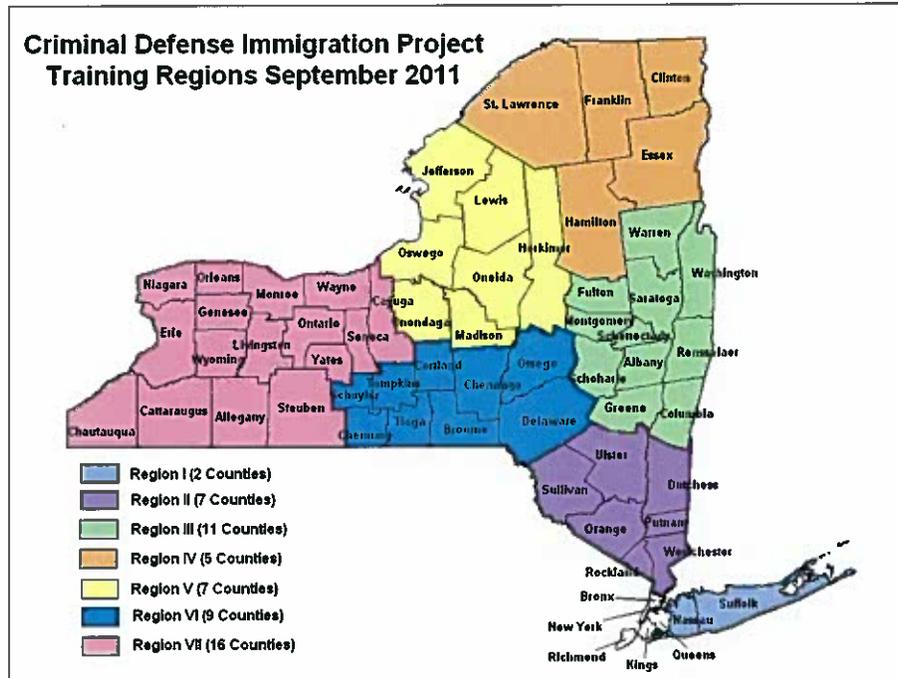
**The Backup Center's website** is accessed 30,000 times per month, providing free online access to expert witnesses, case summaries, investigator resources, and an information clearinghouse with an electronic library containing tens of thousands of holdings.

**NYSDA's low cost training programs** train thousands of defenders at regional and statewide programs, including the only statewide entry-level Basic Trial Skills Program and specialized criminal and family law appellate training in conjunction with the Appellate Division 3rd and 4th Departments. We also publish specialized technical and training manuals and the bi-monthly *Public Defense Backup Center REPORT*, providing overburdened defenders quick and easy access to recent decisions of the U.S. Supreme Court, the Court of Appeals, and the Appellate Division.



# NYSDA CRIMINAL DEFENSE IMMIGRATION PROJECT

NYSDA's Criminal Defense Immigration Project (CDIP) provides expert legal advice, publications, and training on current developments and issues involving immigration law. It staffs a legal assistance hotline and annually handles more than 1000 inquiries from lawyers working at the intersection of criminal and immigration law. In the last year CDIP conducted 21 programs throughout the seven regions pictured below, regions designed to implement comprehensive training for public defense attorneys on the obligations imposed by *Padilla v Kentucky*, 130 S. Ct 1473 (2010) [*criminal defense counsel has an affirmative constitutional obligation to advise noncitizen clients of the potential immigration consequences resulting from a guilty plea*].



## BUDGET REQUEST FOR CDIP

Both our requested budget (\$3,073,200) and our basic continuation budget (\$2,211,800) for FY 2012-13 contain \$108,100 for NYSDA's immigration expert who supports more than 125 defender offices across the state. Our requested budget contains a request for \$146,200 for an additional attorney, an administrative assistant, and travel costs.

## MANDATE RELIEF CONCERN

The United States Supreme Court has now made clear that a foreign national's post conviction application demonstrating a plea taken without the affirmative advice required by *Padilla* can be reopened. The reopening is an unexpected and costly expense for counties. Without an appropriately funded CDIP – which advises lawyers before they advise their clients – counties will routinely incur the extra costs for defense counsel and district attorneys in post conviction matters that could have been avoided.



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**PERSONAL AND UNOFFICIAL**

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July 19, 2011

Governor Andrew M. Cuomo  
Executive Chamber  
State Capitol  
Albany, NY 12224

JUL 28 2011

**Re: Defender Institute Basic Trial Skills Program**

Dear Governor Cuomo:

Nearly twenty years ago, the Franklin H. Williams Judicial Commission on Minorities wholeheartedly endorsed a training program created by the New York State Defenders Association (NYSDA). Designed to sensitize new public defense lawyers to the needs of their clients, many of whom came – and still come – from lower economic communities of color, that program continues today. The Defender Institute Basic Trial Skills Program (BTSP) was recently revamped to reflect contemporary practice; it remains in the vanguard of public defense training. BTSP retains its commitment to helping lawyers productively confront issues of race and poverty, because these issues form the pervasive but too often ignored context in which most public defense cases arise.

New lawyers from across the state have benefited from BTSP annually since 1987, with a few years missed due to budget cutbacks. The program serves as both mandate relief and cost-effective quality improvement. NYSDA waives the tuition for lawyers from public defender offices, legal aid societies, and assigned counsel programs in counties that cannot or will not pay to have these lawyers trained. BTSP's client-centered training serves as a counterweight to the too common practice of lawyers suggesting, overtly or impliedly, that the cases of public defense clients are unwinnable because there is no money or time for investigation. It opens lawyers' eyes to their role in clients unwillingly accepting guilty pleas because they don't believe their lawyers will fight for them. BTSP constitutes a countermeasure to the distrust of the judicial system that such practices produce, in communities of color and generally.

# AN APPROACH TO FUNDING THE NEW YORK STATE DEFENDERS ASSOCIATION

NYSDA urges the Governor to adequately fund the Public Defense Backup Center, to fully support the independence and effectiveness of the Indigent Legal Services Office, and to use all of the Indigent Legal Services Fund (ILSF) for its intended purpose.

The ILSF was designed to increase the quality of public defense representation on the theory that the total amount annually accumulating in the Fund would be made available to county public defense systems for State-driven quality improvements. A corollary of that principle is that it should be exempt from sweeps. Innovative revenue streams should also be created to enhance the amounts flowing to localities. What has happened is that a total of \$42,498,000 has been swept from the Fund since March 2009, the appropriation has been capped at \$77 million through FY 2014, and no new dedicated revenue streams have been added.

We propose the Governor publicly and conspicuously call for an appropriation coextensive with the annual total amount projected to accumulate in the Fund, ban sweeps,<sup>1</sup> and work with the Indigent Legal Services Office and the Legislature to design and promote new revenue measures that can aid the mission of that office and provide needed mandate relief.

**If sweeps continue**, we urge the Governor to amend the State Finance Law to add the New York State Defenders Association to the Indigent Legal Services Fund, including the following language in his proposed budget:

**1 Section 1. Paragraph (a) of subdivision 2 and paragraph (d) of subdi-  
2 vision 3 of section 98-b of the state finance law, paragraph (a) of  
3 subdivision 2 as amended and paragraph (d) of subdivision 3 as added by  
4 section 2 of part E of chapter 56 of the laws of 2010, are amended to  
5 read as follows:**

**6 (a) The purpose of such fund shall be to (i) assist counties and, in  
7 the case of a county wholly contained within a city, such city, in  
8 providing legal representation for persons who are financially unable to  
9 afford counsel pursuant to article eighteen-B of the county law; (ii)  
10 assist the state, in improving the quality of public defense services  
11 and funding representation provided by assigned counsel paid in accord-  
12 ance with section thirty-five of the judiciary law; [and] (iii) provide  
13 support for the operations, duties, responsibilities and expenses of the  
14 office of indigent legal services and the indigent legal services board  
15 established, respectively, pursuant to sections eight hundred thirty-two  
16 and eight hundred thirty-three of the executive law; AND (IV) PROVIDE  
17 FOR SERVICES AND EXPENSES OF THE PUBLIC DEFENSE BACKUP CENTER OF THE NEW  
18 YORK STATE DEFENDERS ASSOCIATION.**

**19 (d) AN ANNUAL AMOUNT OF THREE MILLION DOLLARS<sup>2</sup> SHALL BE MADE AVAILABLE TO  
20 THE NEW YORK STATE DEFENDERS ASSOCIATION FROM SUCH FUND FOR THE SERVICES  
21 AND EXPENSES OF ITS PUBLIC DEFENSE BACKUP CENTER.**

**1 (E) Remaining amounts within such fund, after accounting for annual  
2 payments required in paragraphs (a), (b) [and], (c) AND (D) of this  
3 subdivision and subparagraph (iii) of paragraph (a) of subdivision two  
4 of this section shall be distributed in accordance with sections eight  
5 hundred thirty-two and eight hundred thirty-three of the executive law.**

**6 S 2. This act shall take effect April 1, 2012.**

<sup>1</sup> Proposed language is: Notwithstanding any law to the contrary, and in accordance with section 4 of the state finance law, the comptroller is hereby authorized and directed to transfer, at the request of the director of the budget, up to \$500 million from the unencumbered balance of any special revenue fund or account, or combination of funds and accounts, to the general fund. The amounts transferred pursuant to this authorization shall be in addition to any other transfers expressly authorized in the 2012-13 budget. Transfers from federal funds, debt service funds, capital projects funds, the indigent legal services fund, or the community projects fund are not permitted pursuant to this authorization. The director of the budget shall notify both houses of the legislature in writing prior to initiating transfers pursuant to this authorization.

<sup>2</sup> The Lentol/Grisanti bills (A.7867/S.5143) are both being amended to increase the amount currently in those bills to \$3 million per year.