



# TIM GRIFFIN

## ATTORNEY GENERAL OF ARKANSAS

April 10, 2023

The Honorable Kevin McCarthy  
Speaker  
United States House of Representatives  
2468 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Chuck Schumer  
Majority Leader  
United States Senate  
322 Hart Senate Office Building  
Washington, DC 20510

The Honorable Hakeem S. Jeffries  
Minority Leader  
United States House of Representatives  
2433 Rayburn House Office Building  
Washington, DC 20515

The Honorable Mitch McConnell  
Minority Leader  
United States Senate  
317 Russell Senate Office Building  
Washington, DC 20510

RE: Criminal Justice Act of 1964

Dear Congressional Leaders:

The undersigned attorneys general write to urge you to address ongoing federal interference in State criminal-justice systems. As explained below, various federal public defender organizations have used and continue to use taxpayer resources to wage an ideological war against the death penalty and prevent our States from carrying out just and lawful sentences. Indeed, those organizations routinely pair with outside law firms to engage in abusive, serial civil litigation in state and lower federal district courts, with the sole goal of preventing our States from carrying out lawful sentences. We implore you to pass legislation to rein in those tactics and return federal defenders to their important mission of providing legal services to indigent federal criminal defendants and State prisoners in federal *habeas corpus* proceedings.

Congress enacted the Criminal Justice Act of 1964 with the laudable goal of providing adequate legal representation for federal criminal defendants and those otherwise in federal custody.<sup>1</sup> The Act also allows for the provision of representation for State prisoners seeking *habeas corpus* relief in federal court.<sup>2</sup> The CJA authorizes the establishment of a federal public defender organization or community defender organization to carry out that mission.<sup>3</sup>

But the involvement of federal counsel in State proceedings is circumscribed. Importantly, where federal defender organizations are appointed under the CJA to provide representation to a State prisoner, it is limited to federal habeas proceedings and “ancillary matters appropriate to those proceedings.”<sup>4</sup> The Supreme Court has held that the Anti-Drug Abuse Act of 1988 separately

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<sup>1</sup> 18 U.S.C. 3006A(a)(1).

<sup>2</sup> 18 U.S.C. 3006A(a)(2)(B); *see also* 18 U.S.C. 3599(a)(2) (providing for representation for State prisoners in capital *habeas corpus* proceedings).

<sup>3</sup> 18 U.S.C. 3006A(g).

<sup>4</sup> 18 U.S.C. 3006A(c).

provides for representation for State death-row prisoners in “competency proceedings and proceedings for executive or other clemency as may be available,”<sup>5</sup> and that districts courts “may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust [in state court] a claim in the course of her federal habeas representation.”<sup>6</sup>

Despite the federal defender organizations’ narrow mandate, their presence in litigation on behalf of State death-row prisoners has become ubiquitous. Federal defender organizations have represented State capital prisoners in direct review proceedings, well before federal *habeas corpus* may be initiated,<sup>7</sup> as well as State post-conviction proceedings prior to the filing of a federal *habeas* petition,<sup>8</sup> in some cases completely supplanting State-appointed counsel as the primary representative of State capital prisoners.<sup>9</sup> At least one federal defender organization has gone so far as to found a “Post Conviction Relief Project . . . to provide support and resources for state court postconviction litigation on behalf of Death Row prisoners.”<sup>10</sup> In that vein, at an Alabama post-conviction evidentiary hearing, an assistant federal defender sat at a prisoner’s counsel’s table claiming she was merely serving, “essentially, as a paralegal” before proceeding to pass notes throughout the hearing to the prisoner’s other counsel, who had actually appeared in the case.<sup>11</sup> In Arkansas and other States, federal public defenders have even inserted themselves into the defense of death-row inmates over the objections of their purported clients.<sup>12</sup> Indeed, reflecting those facts, then-Chief Justice Ronald Castille of the Pennsylvania Supreme Court painstakingly documented the “extensive and abusive litigation activities” of the Capital Habeas Unit of the Federal Community Defender in Pennsylvania, including in cases where it appeared that federal funds were misspent on representations not authorized by federal law and others where private funding sources were apparently utilized to support the “private agenda” of the federal defender organization.<sup>13</sup>

Just as troubling is the increasing appearance of federally financed defender organizations in initiating civil lawsuits against States and State officials in furtherance of the federal defenders’

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<sup>5</sup> 18 U.S.C. 3599(e).

<sup>6</sup> *Harbison v. Bell*, 556 U.S. 180, 190 n.7 (2009). As Justice Scalia’s dissenting opinion explains, the Court’s holding in *Harbison* is questionable given that “Section 3599 was enacted as part of a bill that created a new federal capital offense” and does not explicitly address State proceedings. *Id.* at 202 (Scalia, J., dissenting).

<sup>7</sup> See, e.g., *Com. v. Spatz*, 18 A.3d 244, 331 (Pa. 2011) (Castille, C.J., concurring).

<sup>8</sup> See, e.g., *Decay v. State*, Case No. CR-08-1259 (Ark.) (federal public defender filing to recall mandate in direct appeal prior to the initiation of federal *habeas* proceedings).

<sup>9</sup> See *Com. v. Spatz*, 99 A.3d 866, 874 (Pa. 2014) (Castille, C.J., single-justice opinion) (noting that the federal defenders organization in Pennsylvania had “managed to insinuate [itself] into virtually every Pennsylvania capital case where [it] could manage the intrusion”).

<sup>10</sup> See Federal Defenders for the Middle District of Alabama, *Alabama Post Conviction Relief Project*, available at <https://alm.fd.org/alabama-post-conviction-relief-project>.

<sup>11</sup> See Transcript of Feb. 14, 2022 Hearing at 6-7, 119, *Belisle v. Alabama*, Case No. CC-1999-200075.60 (Marshall Cnty. Ala. Cir. Ct.).

<sup>12</sup> See, e.g., *Newman v. State*, 311 S.W.3d 543, 546 (Ark. 2005) (Glaze, J. concurring) (“[F]ederally-appointed counsel have no standing in this matter, nor can they force Newman to accept their representation after Newman duly and properly rejected it.”); see also Appl. for Stay of Execution, *Eggers v. Alabama*, No. 17-8105 (U.S. Mar. 12, 2018) (application for stay of execution by federal defenders on behalf of prisoner who had discharged his counsel and withdrawn his notice of appeal and who had been deemed competent to do so by the district court); *Tabler v. Lumpkin*, No. 22-70001 (5th Cir.) (Pennsylvania FPD Capital Habeas Unit filing over the objections of their client).

<sup>13</sup> *Spatz*, 99 A.3d at 877.

anti-death-penalty agenda.<sup>14</sup> Collateral lawsuits are not limited to federal courts.<sup>15</sup> These cases are often staffed by attorneys in capital units of various federal defender offices across the country as part of an apparent nationwide anti-death-penalty crusade that is entirely unmoored from the aims of the CJA.<sup>16</sup> Indeed, the various federal defender organizations have become foot soldiers in what Justice Alito has rightly described as “a guerilla war against the death penalty.”<sup>17</sup>

The Supreme Court has recognized States’ “powerful and legitimate interest in punishing the guilty.”<sup>18</sup> Collateral attacks on State convictions “intrude[] on state sovereignty to a degree matched by few exercises of federal judicial authority.”<sup>19</sup> The breadth and depth of efforts by federal defender organizations to undermine State criminal justice systems, particularly capital punishment, significantly undermines States’ ability to administer justice and protect their citizens from the worst offenders. Unfortunately, federal courts have been generally unwilling to limit the representation of federal defender organizations in accordance with federal law.<sup>20</sup> States have been left without recourse to combat the extensive and abusive litigation practices of federal defender organizations straying outside their lawful mission.

It therefore falls upon Congress to address this pressing problem. We strongly urge you to use all available means to clarify that federal funds may not be used to further the anti-death-penalty litigation machine that has waged a decades-long war against States with capital punishment. We further call on you to bar these federal organizations from accepting outside funds to further their abusive litigation activities against States.<sup>21</sup>

The ability of States to seek justice on behalf of their citizens ought not be thwarted by the unlawful commandeering of their citizens’ tax dollars. You can, and must, put a stop to this.

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<sup>14</sup> See, e.g., *McGehee v. Hutchinson*, Case No. 4:17-cv-00179-KGB (E.D. Ark.) (Section 1983 suit challenging constitutionality of Arkansas’s Method of Execution Act); *Glossip v. Chandler*, Case No. 5:14-cv-00665-F (W.D. Okla.) (similar challenge in Oklahoma).

<sup>15</sup> See, e.g., *Jones v. Hobbs*, Case No. 60CV-10-1118 (Pulaski Cnty. Cir. Ct.) (state-court litigation in Arkansas collaterally challenging Arkansas’s Method of Execution Act); *Ruiz, et al. v. TDCJ*, No. D-1-GN-22-7149 (419th Dist. Ct., Travis County, Tex.) (state-court method-of-execution challenge).

<sup>16</sup> The Capital Habeas Unit of the Federal Community Defender for the Eastern District of Pennsylvania appeared in the *McGehee* litigation in Arkansas, and the Federal Public Defender for the District of Arizona appeared in the *Glossip* litigation in Oklahoma. See also *Garcia v. Collier*, No. 4:18-CV-4521 (S.D. Tex.), and *Garcia v. Jones*, No. 4:18-CV-4503 (S.D. Tex.) (Arizona FPD filing two lawsuits challenging Texas’s lethal-injection protocol and clemency process).

<sup>17</sup> Transcript of Oral Argument at 14:20-25, *Glossip v. Gross*, No. 14-7955 (U.S.).


<sup>18</sup> *Calderon v. Thompson*, 523 U. S. 538, 556 (1998) (internal quotation marks omitted).

<sup>19</sup> *Harrington v. Richter*, 562 U. S. 86, 103 (2011) (internal quotation marks omitted).


<sup>20</sup> See, e.g., *In re Commonwealth’s Motion to Appoint Couns. Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 477 (3d Cir. 2015) (holding that challenges to federal defender involvement in state-court proceedings was preempted).

<sup>21</sup> See *Spotz*, 627 Pa. at 880-81 (describing troubling details of the federal defender organization’s claimed use of outside private funding to finance its activities).


Sincerely,




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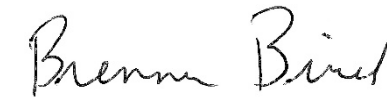
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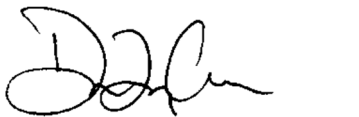
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