

GIDEON'S BROKEN PROMISE:

AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE



A Report on the American Bar Association's Hearings
on the Right to Counsel in Criminal Proceedings

DECEMBER 2004

American Bar Association Standing Committee on Legal Aid and Indigent Defendants



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Table of Contents

Foreword by Anthony Lewis	i
Preface	ii
Acknowledgments	iii
Executive Summary	iv
I. Introduction	1
The Right to Counsel: <i>Gideon</i> and Beyond	2
Indigent Defense Systems and Standards in State Courts	2
Importance of Providing Adequate Defense Representation	3
ABA SCLAID Hearings on the Right to Counsel	4
II. Problems in Indigent Defense	7
<u>Lack of Adequate Funding</u>	7
Inadequate Attorney Compensation	9
Lack of Essential Resources Including Expert, Investigative, and Support Services	10
Lack of Training	11
State Fiscal Crises	11
Cost-Cutting Measures	11
Use of Contracts Awarded Primarily on the Basis of Cost	11
Unduly Restricting Eligibility for Indigent Defense Services	12
Requiring Payment of Fines/Costs from Indigent Defendants	13
Resource Disparity Between Prosecution and Indigent Defense	13
<u>Inadequate Legal Representation</u>	14
“Meet ‘em and Plead ‘em” Lawyers	16
Incompetent and Inexperienced Lawyers	16
Excessive Caseloads	17
Lack of Contact with Clients & Continuity in Representation	18
Lack of Investigation, Research, and Zealous Advocacy	19
Lack of Conflict-Free Representation	19
Ethical Violations of Defense Lawyers	20
<u>Structural Defects In Indigent Defense Systems</u>	20
No Independence	20
Absence of Oversight to Ensure Uniform, Quality Services	21

Failures to Provide Counsel	22
Detention in Jail Without a Lawyer	23
Encouraging Waivers of Right to Counsel and Subsequent Pleas of Guilty	23
Counsel Provided Too Late or Not at All	26
Inordinate Delays in Process	26
Lack of Full-Time Public Defenders and Private Bar Participation	27
Lack of Data Regarding Indigent Defense Systems	28
 III. Strategies for Reform	29
Creating a Statewide Public Defender System in Georgia	30
Securing State Funding and Oversight in Texas	30
Establishing a Statewide Oversight Commission in Virginia	31
Raising Assigned Counsel Fees in New York	32
Strategies Used in Other States	33
 IV. Model Approaches to Providing Services	36
Oversight and Quality Through Statewide Structures	36
Critical Support from Defender Resource Centers	36
Expansion of the Scope of Public Defense Representation	37
Adequate Funding, Support, and Independence for Public Defender Offices	37
 V. Main Findings	38
 VI. Recommendations	41
 VII. Conclusion	46
 Appendix A: Hearing Witnesses	47
 Appendix B: <i>ABA Ten Principles of a Public Defense Delivery System</i>	48
 Appendix C: Sample of Individuals Exonerated in U.S. in 2003-2004	50
 Endnotes	51

Foreword

"I believe that each era finds a improvement in law, each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward."

So Clarence Earl Gideon wrote when he asked the Supreme Court to decide that he and every other poor criminal defendant was entitled by the Constitution to have a lawyer provided by the state for his defense. The decision in his case when it came, on March 18, 1963, promised much more than a small step. The Court held that the Constitution did guarantee the right to counsel in all serious criminal cases—and before long it extended the right to all criminal cases, however petty. It was, as this report says, "the start of a right to counsel revolution in the United States."

After the decision I wrote that it would be "an enormous social task to bring to life the dream of *Gideon v. Wainwright*—the dream of a vast, diverse country in which every man charged with crime will be capably defended." But despite the size of the challenge, I believed that America would meet it.

In recent years we have all read accounts of criminal proceedings that showed how far we were from realizing the promise of the *Gideon* case. There was the Texas defendant whose lawyer slept through parts of his trial—a trial for his life. A number of convicts on death row, awaiting execution, were belatedly found to be innocent; they had been convicted with lawyers who lacked the skill, determination or resources to defend them adequately.

We knew the stories, the anecdotal evidence. Now we have a systematic exploration of the problem, thanks to the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. Its report, "*Gideon's Broken Promise*," is a challenge to the country: to legislators, state and federal; to judges; and to lawyers. It asks all of us to think of our commitment to the very idea of law.

Ours is a government of laws, not men, John Adams said. American society is founded on the commitment to law, binding the rulers as it does the ruled. Our willingness to assure the least among us the guiding hand of counsel is a test of our American faith.

Anthony Lewis

Renowned former *New York Times* journalist, Pulitzer Prize winner, and author of *GIDEON'S TRUMPET* (1964)
Cambridge, Massachusetts, January 3, 2005

Preface

On behalf of the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) of the American Bar Association (ABA), I am pleased to present **Gideon's Broken Promise: America's Continuing Quest for Equal Justice**. This report is based on testimony submitted during a series of public hearings held in 2003, forty years after the U.S. Supreme Court guaranteed the right to counsel for poor persons accused of crimes in *Gideon v. Wainwright*.

The impetus for convening our hearings derived from a desire to mark the occasion of *Gideon*'s 40th anniversary in a way befitting of ABA SCLAID's commitment to indigent defense services for the poor. The right to counsel is one of the most sacred principles enshrined in our nation's constitution, yet experience has shown that this celebrated right is by no means implemented fully in practice. The many problems in indigent defense have been documented in countless reports since *Gideon* was decided. However, prior to our hearings, no comprehensive examination of the national picture had been undertaken in recent years.

In 1982, ABA SCLAID held its first public hearing on this issue to mark the 20th anniversary of *Gideon*. Witnesses reported the prevalence of indigent defense systems plagued by a variety of ailments, including a severe lack of funding; excessive and rising public defender caseloads coupled with inadequate support personnel; insufficient attorney compensation, leading to increased pressure to plead cases; arbitrary and capricious payments to assigned counsel; failures to inform of the right to counsel; acceptance of improper waivers of counsel in misdemeanor cases; and the increased use of contracts for defense services based primarily on cost, not quality, considerations. Regrettably, twenty years later, we found that not that much has changed. In some respects, as detailed in this report, the picture has become more bleak.

Clearly, America has a long way to go to deliver on *Gideon*'s promise of effective legal representation for the poor. For its part, ABA SCLAID remains committed to the fight for equal justice and takes comfort in the knowledge that we are joined by a dedicated cadre of national and local advocates. It is our sincere hope that the carefully constructed findings and recommendations in this report will prove valuable as we move forward together to build adequate indigent defense systems throughout this country. And then perhaps, twenty years hence, we can devote ourselves to a true celebration of *Gideon*'s anniversary as we look back at just how far we have come.

Bill Whitehurst

Chair, American Bar Association's Standing
Committee on Legal Aid and Indigent Defendants

Acknowledgments

Many persons contributed to the planning of our four public hearings on the implementation of the *Gideon* decision and to the preparation of this report. Without the commitment of numerous volunteers, as well as staff of the ABA and other organizations, neither the hearings nor publication of this report would have been possible.

We are especially indebted to Shubhangi Deoras, our very talented Assistant Committee Counsel of SCLAID, and to Norman Lefstein, Professor of Law and Dean Emeritus of the Indiana University School of Law–Indianapolis, both of whom played leading roles in planning our hearings and in drafting this report. Professor Lefstein, who is a member of SCLAID and chair of our Indigent Defense Advisory Group, devoted an extraordinary amount of volunteer time and effort, and his unmatched leadership and expertise have proven invaluable to this report as well as our other endeavors.

Special recognition is also due Jonathan Ross, former chair of SCLAID, who presided over all four of the hearing panels, and to the persons who served on these panels: Martha Barnett, Jean Faria, Priscilla Forsyth, Cynthia Jones, Virginia Sloan, Neal Sonnett, and Randolph Stone. In addition, Jonathan Ross and Cynthia Jones reviewed the manuscript of this report and offered helpful suggestions. The names of the many witnesses who presented testimony at our hearings appear in Appendix A to this report, and we are deeply grateful to all of them for their time, expertise, and insights.

Others deserving of particular mention for their contributions include the members of ABA SCLAID and our Indigent Defense Advisory Group listed at the front of this report; SCLAID consultants from The Spangenberg Group (Robert Spangenberg and Marea Beeman); former and current staff of the National Association of Criminal Defense Lawyers (Catherine Beane and Kathryn Jones Calone) and the National Legal Aid and Defender Association (David Carroll, Catherine Clarke, H. Scott Wallace, and Jo-Ann Wallace), who helped us to identify witnesses and made it possible for us to hold hearings during meetings of their respective organizations; and staff members of Spitfire Strategies (Beach Codevilla, Michelle Molloy, and Danielle Lewis) who assisted with publicity.

Besides Ms. Deoras, numerous other ABA personnel provided important assistance, including the staff of SCLAID (Terrence Brooks, Beverly Groudine, Janice Jones, and Michaeline Glascott) and the ABA Division for Media Relations and Communication Services.

Finally, we want to pay special thanks to the Wallace Global Fund and its President, H. Scott Wallace, who provided financial support for the publication of this report.

Bill Whitehurst

Chair, American Bar Association's Standing
Committee on Legal Aid and Indigent Defendants

Executive Summary

During the 40th anniversary year of the U.S. Supreme Court's decision in *Gideon v. Wainwright* establishing the right to counsel in state court proceedings for indigents accused of serious crimes, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) held a series of public hearings to examine whether *Gideon's* promise is being kept. Throughout 2003, extensive testimony was received from 32 expert witnesses familiar with the delivery of indigent defense services in their respective jurisdictions. Their comments were recorded in hundreds of pages of transcripts and then meticulously analyzed.¹

The witnesses were from all geographic parts of the U.S. and represented 22 large and small states, as well as the major kinds of indigent defense delivery systems and payment methods. Because of the diversity and location of their jurisdictions, we believe the witnesses' comments accurately captured the widespread difficulties in delivering adequate defense services for the poor not only in the states of the witnesses, but in much of the rest of the country as well.

This report is based upon what we learned during our hearings. Our Main Findings and Recommendations, listed below and discussed in this report, also draw upon the expertise that ABA SCLAID has developed during its many years of advocacy on behalf of effective legal services for both persons in need of civil legal assistance and those accused of criminal and juvenile misconduct.

Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.

As the Introduction to this report explains, *Gideon* was the start of a right to counsel revolution in the United States. Today, consistent with the Sixth Amendment to the U.S. Constitution, persons cannot be deprived of their liberty in state criminal or juvenile courts, even if charged with minor offenses, unless counsel has represented them or they have knowingly and intelligently relinquished their right to legal representation. During the past decade, the flood of defendants wrongfully convicted has underscored the importance of providing effective defense services for the indigent. While there are many reasons why our justice systems far too often convict innocent persons, clearly one of the best bulwarks against mistakes is having effective, well-trained defense lawyers.

Yet, as Part II of this report demonstrates, defense services in the U.S. are not adequately funded, leading to all kinds of problems. These include a lack of funds to attract and compensate defense attorneys; pay for experts, investigative and other support services; cover the cost of training counsel; and reduce excessive caseloads. Too often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent, thereby violating ethical duties to their clients

under rules of professional conduct. Meanwhile, judges sometimes fail to honor the independence of counsel and routinely accept legal representation in their courtrooms that is patently inadequate. This report also identifies significant structural problems with indigent defense services since in most jurisdictions there is an absence of oversight to ensure uniform, quality services; sometimes simply a failure to provide counsel; and improper waivers of counsel and guilty pleas accepted without lawyers.

Part III of this report on Strategies for Reform presents information on recent legislative and other efforts in several states to enhance funding of indigent defense and to establish greater statewide oversight of representation. While these efforts represent important progress, invariably the funding and structures to ensure effective defense services in these jurisdictions are still not adequate. Part IV on Model Approaches to Providing Services discusses notable programs in several states to foster quality and oversight through statewide structures, resource centers, and expansion of the scope of representation.

Part V outlines our nine Main Findings, which are listed below:

- **Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.**
- **Funding for indigent defense services is shamefully inadequate.**
- **Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation.**
- **Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.**
- **Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function.**
- **Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.**
- **Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.**
- **The organized bar too often has failed to provide the requisite leadership in the indigent defense area.**
- **Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.**

Our seven recommendations for repairing *Gideon's* broken promise are discussed in Part VI of the report:

- **To fulfill the constitutional guarantee of effective assistance of counsel, state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense should be in parity with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects.**
- **To fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings.**
- **State governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings.**
- **Attorneys and defense programs should refuse to continue indigent defense representation, or to accept new cases for representation, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations.**
- **Judges should fully respect the independence of defense lawyers who represent the indigent, but judges should also be willing to report to appropriate authorities defense lawyers who violate ethical duties to their clients. Judges also should report prosecutors who seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel. Judges should never attempt to encourage persons to waive their right to counsel, and no waiver should ever be accepted unless it is knowing, voluntary, intelligent, and on the record.**
- **State and local bar associations should be actively involved in evaluating and monitoring criminal and juvenile delinquency proceedings to ensure that defense counsel is provided in all cases to which the right to counsel attaches and that independent and quality representation is furnished. Bar associations should be steadfast in advocating on behalf of such defense services.**
- **In addition to state and local bar associations, many other organizations and individuals should become involved in efforts to reform indigent defense systems.**

Our nation has been in search of *Gideon's* promise for 40 years. As this report shows, we must continue to try harder if we are to deliver on the constitutional guarantee of effective defense services in criminal and juvenile cases. The recommendations in this report, if implemented, will go a long way towards making indigent defense services a meaningful reality for all indigent persons unable to afford counsel.

I. Introduction

In *Gideon v. Wainwright*,² the U.S. Supreme Court in 1963 rendered one of its most important criminal justice decisions, holding that the Sixth and Fourteenth Amendments to the Constitution guarantee the provision of counsel to indigent persons accused of crime in state felony proceedings.³ The rationale for this decision is contained in the following oft-cited passage:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁴

In 2003, to commemorate the 40th anniversary of *Gideon v. Wainwright*, the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) of the American Bar Association (ABA) undertook to examine whether this country has realized the noble ideal articulated in *Gideon*—that all accused persons, even those who are too poor to hire a lawyer, must receive adequate representation to ensure that “every defendant stands equal before the law.” ABA SCLAID convened four public hearings, during which thirty-two witnesses from twenty-two states presented testimony regarding the provision of indigent defense services in their respective state courts.⁵ This report represents the culmination of a painstaking analysis of hundreds of pages of testimony compiled from our hearings. As detailed in the pages that follow, our study has led to the inescapable conclusion that, forty years after the *Gideon* decision, the promise of equal justice for the poor remains unfulfilled in this country.⁶

This introduction contains background information on the right to counsel, systems and standards for providing indigent defense services, the importance of adequate defense representation, and the scope of the ABA SCLAID hearings. Next, Part II details the overwhelming problems in indigent defense reported by witnesses that expose a fundamentally flawed system, lacking in basic fairness, in which innocent persons often face the risk of wrongful conviction. Part III discusses various strategies for reforming indigent defense employed recently in some states, and Part IV highlights efforts at providing effective defense representation identified by witnesses as model approaches. Part V presents the main findings of the report, whereas Part VI offers specific recommendations on how to address the crisis in indigent defense and ultimately ensure a fair and equitable system of justice.

The Right to Counsel: *Gideon* and Beyond

The *Gideon* decision marked the beginning of the Supreme Court's efforts to define the contours of a defendant's federal constitutional right to counsel in state courts. Subsequent decisions by the Court extended the right to counsel to state juvenile delinquency proceedings,⁷ state misdemeanor proceedings in which actual imprisonment is imposed,⁸ state misdemeanor proceedings in which a suspended jail sentence is imposed,⁹ and the first appeal to an appellate court.¹⁰ Additionally, the Court has recognized that the right to counsel attaches at various critical stages occurring prior to trial, including line-up identifications,¹¹ arraignment,¹² preliminary hearings,¹³ plea negotiations,¹⁴ and the entry of a guilty plea.¹⁵

Indigent Defense Systems and Standards in State Courts

State and local governments have responded to the constitutional mandate to provide legal representation through the establishment of a variety of indigent defense delivery systems. The primary models for furnishing counsel include: (1) traditional "public defender" programs, in which salaried attorneys provide representation in indigent cases; (2) court assignments of indigent cases to private attorneys who are compensated on a case-by-case basis; and (3) contracts in which private attorneys agree to provide representation in indigent cases.¹⁶ In many states, a mixture of these systems is used to provide counsel to the indigent accused.¹⁷ Systems may be organized at the state, county, judicial district, or other regional level.¹⁸ Further, funds for defense services may derive from the state, counties, cities, court fees or other assessments, or a combination of these sources.¹⁹

Many years ago the ABA recognized the need for national standards regarding the provision of indigent defense services. In 1967, four years after *Gideon* was decided, the ABA adopted the *ABA Standards for Criminal Justice: Providing Defense Services* (now in its 3rd edition). The *ABA Standards for Criminal Justice: The Defense Function* soon followed in 1971, and the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* were adopted in 1989 and revised in 2003.

Other organizations also have adopted standards in the indigent defense area during the past three decades. The National Legal Aid and Defender Association (NLADA) adopted its *Defender Training and Development Standards* in 1997, *Performance Guidelines for Criminal Defense Representation* in 1995, *Standards for the Administration of Assigned Counsel Systems* in 1989, *Standards for the Appointment of Counsel in Death Penalty Cases* in 1987, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* in 1984, and *Standards and Evaluation Design for Appellate Defender Offices* in 1980. The Institute of Judicial Administration collaborated with the ABA to create the *IJA/ABA Juvenile Justice Standards*, totaling 23 chapters, adopted in 1979-1980. The National Study Commission on Defense Services adopted *Guidelines for Legal Defense Systems in the United States* in 1976, and the President's National Advisory Commission on Criminal Justice Standards and Goals adopted *Chapter 13, Report of the Task Force on the Courts*, in 1973.

In an effort to condense this voluminous body of work into a succinct, easily understandable form for policymakers and the public, the ABA adopted the *ABA Ten Principles of a Public Defense Delivery System* in 2002, reprinted in Appendix B. As noted later in this report, the *ABA Ten Principles* have been used widely in reform efforts throughout the country.²⁰

Importance of Providing Adequate Defense Representation

Recent polling data has revealed that the public strongly supports providing effective defense counsel to people accused of crimes who cannot afford lawyers.²¹ In 2001, the Open Society Institute and NLADA commissioned a public opinion study on indigent defense, including a telephone survey of 1,500 adults and eight focus groups across the country. The researchers found that the majority of Americans believe that, in the interests of fairness, government should guarantee effective indigent defense services.²² According to focus group participants, this belief derives from concerns about disparities in the treatment of rich and poor, as well as the potential for innocent persons being sent to jail simply because they cannot afford adequate legal representation.²³

The mounting evidence of wrongful convictions over the past decade is undeniable proof that the fear voiced in public opinion surveys is indeed a harsh reality.²⁴ Although there undoubtedly are a variety of causes of wrongful convictions—including police and prosecutorial misconduct, coerced false confessions, eyewitness identification errors, lying informants—inadequate representation often is cited as a significant contributing factor.²⁵ It is easy to understand, moreover, how deficient lawyering can result in mistakes or fail to prevent them: criminal defense practice is a complex and ever-changing field, and defense lawyers must be well-trained and prepared to investigate and defend each case to the fullest, challenging the prosecution's evidence at every turn. As former Attorney General Janet Reno stated:

A competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor's case, both to test the basis for the prosecution and to challenge the prosecutor's ability to meet the standard of proof beyond a reasonable doubt. A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence....A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted....In the end, a good lawyer is the best defense against wrongful conviction....²⁶

That effective lawyers can actually protect innocent persons from being wrongfully convicted also was stressed in the Final Report of the 2000 National Symposium on Indigent Defense sponsored by the U.S. Department of Justice: "There are many ways that innocent people may be drawn into the criminal justice system....But there is one overarching way that innocent indigent people can be extricated from the system: by furnishing competent legal representation."²⁷

While it is impossible to know the actual number of innocent persons convicted of crimes in this country, numerous studies in recent years have proven that the phenomenon is much more common than once believed.²⁸ One study estimates that the annual number of wrongful convictions in serious felony cases nationwide may be as high as 10,000,²⁹ yet that number only accounts for persons found innocent following conviction at trial and does not include innocent persons who plead guilty prior to trial.³⁰ As of December 2004, the Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University lists on its website profiles of 154 persons, convicted of both capital and non-capital crimes in 31 different states and the District of Columbia, who collectively served more than 1,800 years in prison for

crimes they did not commit.³¹ These individuals were later exonerated from 1989-2004 due to DNA evidence that conclusively established their innocence. Detailed information on a sample of these exonerations occurring in 2003-2004 appears in Appendix C.

As explained on the website of the Innocence Project, “ineffective or incompetent defense counsel have allowed men and women who might otherwise have been proven innocent at trial to be sent to prison. Failure to investigate, failure to call witnesses, inability to prepare for trial (due to caseload or incompetence), are a few examples of poor lawyering. The shrinking funding and access to resources for public defenders and court appointed attorneys is only exacerbating the problem.”³² The relationship between the quality of counsel and wrongful convictions also has been emphasized by U.S. Senator Patrick Leahy in discussing the recently-enacted federal Innocence Protection Act, which relates to capital cases:

When innocent people are convicted and the guilty are permitted to walk free, any meaningful reform effort must consider the root causes of these wrongful convictions and take steps to address them. That is why subtitle B of [the Innocence Protection Act] addresses what all the statistics and evidence show is the single most frequent cause of wrongful convictions—inadequate defense representation at trial.

Subtitle B was enacted against the backdrop of a shameful record of failure by many states to provide competent lawyers to indigent defendants facing the death penalty. Testimony in both the Senate and House Judiciary Committees revealed that of the 38 states that authorize capital punishment, very few have established effective statewide systems for identifying, appointing and compensating competent lawyers in capital cases.

Too often individuals facing the ultimate punishment are represented by lawyers who are drunk, sleeping, soon-to-be disbarred or just plain ineffective. Even the best lawyers in these systems are hampered by inadequate compensation and insufficient resources to investigate and develop a meaningful defense.³³

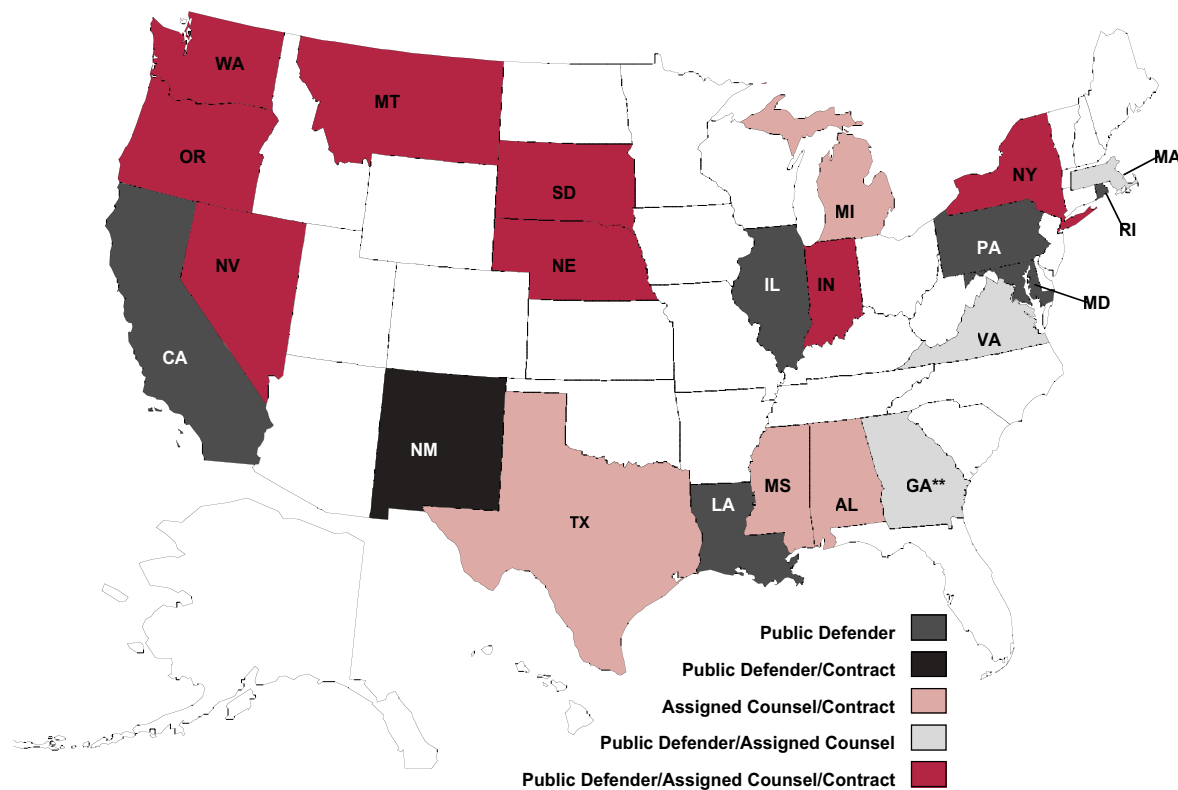
For persons wrongfully convicted, the cost of inadequate defense representation is reflected in countless wasted years spent in prison, the deprivation of cherished rights, adverse immigration consequences, and quite possibly the loss of life. Clearly, there can be no greater justification for ensuring that effective defense services are provided to all of our nation's poor.

ABA SCLAID Hearings on the Right to Counsel

The American Bar Association's commitment to the examination and improvement of indigent defense systems dates back to the early 1920s when the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) was established. During the past twenty years, through its Bar Information Program and the consultant services of The Spangenberg Group, SCLAID has provided expert support and technical assistance to individuals and organizations (including judges, bar associations, state and local governments, legislative bodies, and public defender organizations) in states throughout the country seeking to address their indigent defense problems.³⁴ In addition, SCLAID has commissioned numerous studies of state and local defense systems and research papers on issues relevant to the field, and also has authored indigent defense policy proposals that have been adopted by the ABA House of Delegates.³⁵

The map below (Chart 1) represents the states from which witnesses were invited to present testimony at SCLAID's four public hearings in 2003. These states were chosen because of their geographic and population diversity. In addition, the map reveals the primary delivery system used to provide services in more than fifty percent of trial-level indigent defense cases in each of the states.

CHART 1: Primary Indigent Defense Delivery System* at Trial Level



SOURCE: The Spangenberg Group, 1001 Watertown Street, West Newton, MA 02465

* The term "primary indigent defense delivery system" refers to the program appointed in more than 50% of the state's indigent defense cases at the trial level.

** Beginning January 2005, as the result of legislation, the primary indigent defense system in Georgia will consist of public defender and assigned counsel programs.

In organizing the four hearings, every effort was made to obtain witnesses with extensive experience and familiarity with the delivery of indigent defense services in their respective jurisdictions. Hence, we believe the testimony summarized in this report accurately portrays the indigent defense difficulties in the states discussed.³⁶ Since time and resource constraints necessitated limiting the number of states and witnesses involved in the hearings, the report obviously does not contain information (including indigent defense problems, reform strategies, or models) regarding jurisdictions not specifically addressed by witnesses. Further, it should be noted that the witnesses were asked to focus their testimony primarily on indigent defense services in criminal cases generally, as opposed to representation in specific types of cases—such as juvenile delinquency or death penalty cases—that involve unique issues meriting further, comprehensive review beyond the scope of this report. Finally, important improvements in indigent defense have occurred in several states since our hearings (most

notably in Georgia, where legislation was enacted establishing a statewide public defender system effective January 2005³⁷); thus, some of those states' problems cited in this report may now be addressed.

As noted above, at the end of this report we offer specific conclusions and recommendations that we hope will prove useful in the continuing quest to secure equal justice for the poor in America.

II. Problems in Indigent Defense

The testimony presented by witnesses at ABA SCLAID's hearings clearly revealed that *Gideon's* promise of effective legal representation for indigent defendants is not being kept. Far from ensuring that individuals are afforded a meaningful right to counsel, current indigent defense systems often operate at substandard levels and provide woefully inadequate representation. Witnesses described programs bereft of the funding and resources necessary to afford even the most basic tools essential for an effective defense. As a result, literally thousands of accused poor persons who are unable to afford counsel routinely are denied, either entirely or in part, meaningful legal representation.

Too often when attorneys are provided, crushing workloads make it impossible for them to devote sufficient time to their cases, leading to widespread breaches of professional obligations. To make matters worse, exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment. Further, the structure of indigent defense systems often means that judges and/or state and county officials control the attorneys, thereby denying them the professional independence afforded to their prosecution counterparts and to their colleagues retained by paying clients. Taken as whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them.

This section describes specific problems in indigent defense and draws heavily upon experiences related by witnesses.

Lack of Adequate Funding

Quality legal representation cannot be rendered unless indigent defense systems are adequately funded.³⁸ Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all. With fewer attorneys available to accept cases, the lawyers who provide services often are saddled with excessive caseloads, further hampering their ability to represent their clients effectively. Additionally, the lack of funding leads to inadequate support services by decreasing the availability of resources for training, research, and basic technology, as well as the indispensable assistance of investigators, experts, and administrative staff.

In 1983, to mark the 20th anniversary of *Gideon*, SCLAID held a hearing to explore the adequacy of funding for indigent defense. The report issued from that hearing, entitled *Gideon Undone: The Crisis in Indigent Defense Funding*, concluded that in many parts of the nation, "indigent defendants are not being provided competent counsel due to lack of adequate funding." In the ensuing years, numerous other reports and articles have discussed the ongoing crisis in indigent defense funding throughout the country.³⁹

Testimony presented during SCLAID's 2003 hearings—40 years after *Gideon*—confirmed that a significant funding crisis persists today. Throughout the hearings, witnesses from each of the twenty-two states examined reported grave inadequacies in the available funds and resources for indigent defense.⁴⁰ One witness illuminated the extent of the problem for the nation as a whole using international comparison data: “To put this matter in some perspective, I studied this past year what England does in the area of criminal legal aid. The expenditures per capita are \$34 per person in England and Wales. In the United States, the comparable figure is about \$10 per person, and in 29 states the expenditures are less than \$10 per capita. England is outspending the United States by more than three to one.”

National standards for the delivery of indigent defense services recognize that governments must be responsible for funding the full cost of quality legal representation.⁴¹ Further, standards recommend that funding be provided by the state, because the financial obligation is most easily borne by the state and central financing avoids inconsistencies in funding levels among counties or other subdivisions.⁴²

In eight of the states examined during the hearings, states furnish all of the funding for indigent defense. In the other fourteen states, counties provide most or all of the funding. For each of the twenty-two states featured in the hearings, Table 1 indicates the percentages of the total amount of state plus county expenditures in fiscal year 2002 that are attributable to either the state or the counties.⁴³

TABLE 1: Percentages of State Plus County Indigent Defense Expenditures in FY 2002 Attributable to Either State or Counties

State	% Attributable to State	% Attributable to Counties
Pennsylvania	0.0%	100.0%
Nevada	2.6%	97.4%
Nebraska	4.8%	95.2%
Washington	5.5%	94.5%
California	6.1%	93.9%
Texas	6.6%	93.4%
Mississippi	11.2%	88.8%
Georgia ⁴⁴	17.4%	82.6%
New York	17.9%	82.1%
Louisiana	24.6%	75.4%
Illinois	25.3%	74.7%
South Dakota	32.4%	67.6%
Indiana	45.9%	54.1%
Montana ⁴⁵	51.0%	49.0%
Alabama	100.0%	0.0%
Maryland	100.0%	0.0%
Massachusetts	100.0%	0.0%
New Mexico	100.0%	0.0%
Oregon	100.0%	0.0%
Rhode Island	100.0%	0.0%
Virginia	100.0%	0.0%
Michigan	N/A	N/A

SOURCE: The Spangenberg Group (on behalf of ABA SCLAID), *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002 (September 2003)*

Numerous witnesses testified to the chronic inability of budget-stretched counties in their states to provide adequate funding for indigent defense.⁴⁶ For example, a Michigan witness reported that appropriations for indigent defense services in that state's largest county were only half the amount available in similarly populated counties outside of Michigan.⁴⁷

Another witness testified that a Mississippi county was nearly bankrupted by the expense of providing services in a death penalty case and was compelled to file a lawsuit in 1999 in an effort to force the state to establish and fund a statewide public defender system; later, two other cash-strapped Mississippi counties filed similar lawsuits.⁴⁸ A witness from South Dakota testified that the overall budgets of the state's largely rural counties are so limited that counties must often choose between "whether the roads are going to be graveled or the defendants are going to be defended."⁴⁹

In California, Nebraska, Pennsylvania, and Washington, witnesses reported that varying levels of local funding for indigent defense have led to disparities in the quality of representation throughout the state.⁵⁰ Consequently, the measure of justice received by an indigent defendant may depend more upon location than the actual merits of a case. According to a witness from Louisiana, local funding in that state derives from court costs assessed against defendants for criminal violations and varies dramatically depending upon factors as unpredictable as the number of traffic tickets issued by local police each month.⁵¹

In states where some or all of the funding is provided by the state, witnesses revealed that the amount of state funding is grossly insufficient.⁵² For instance, one witness testified that, although New York enacted legislation in 2003 to fund an increase in the rates of compensation paid to private assigned counsel, "that money is classically too little, too late; it is about half of what counties will need to implement the change, and the money is not forthcoming until 2005."⁵³ To avoid paying the higher rates out of their own budgets, the witness said that counties are engaged in a rapid "rush to the bottom" by either eliminating services entirely or replacing assigned counsel programs with lower-cost options, such as contract defender offices, without any guidance or concern for the provision of quality representation.⁵⁴

Inadequate Attorney Compensation

National standards recognize the importance of providing reasonable compensation to defense attorneys, both for reasons of fairness and to encourage vigorous representation.⁵⁶ Public defenders should be paid at a rate sufficient to attract qualified, career personnel;⁵⁷ assigned counsel should be paid a reasonable hourly fee in addition to actual overhead and expenses;⁵⁸ and contracts for indigent defense services should include reasonable compensation levels and a designated method of payment.⁵⁹

However, witnesses confirmed that inadequate compensation for indigent defense attorneys is a national problem, which makes the recruitment and retention of experienced attorneys extraordinarily difficult.⁶⁰ A witness from Illinois described the situation in that state as follows: "Our statute provides that for a misdemeanor case, assigned counsel can be paid a fee of \$150, and for a felony case, \$1,250. That statute has not been changed for twenty-five years. The practical

"Virginia's current maximum rate of compensation for court-appointed counsel is \$90 an hour. It sounds pretty good. However, it is subject to the lowest unwaivable fee cap in the country. For example, in a complicated case involving three or more appearances, a felony delinquency case in juvenile court, private assigned counsel can only receive a total of \$112, or 1.25 hours of pay, for representing the client."

**James Hingeley,
Charlottesville / Albemarle
County Public Defender
(Charlottesville, Virginia)⁵⁵**

result is that, at least with respect to non-death penalty cases, the practice of criminal law by public defenders has pretty much wiped out participation by most of the private bar.”⁶¹ In Rhode Island, until recently, hourly fees ranged from \$30-\$40 for assigned counsel and were too low to attract qualified, competent attorneys.⁶² In Massachusetts, similarly low hourly rates have led to a shortage of private attorneys willing to take cases.⁶³ The harmful effects of inadequate rates of compensation for assigned counsel also were reported in Michigan and Washington.⁶⁴

In addition, starting salaries for public defenders in Massachusetts are \$35,000 and rise to only \$50,000 after ten years.⁶⁵ Low salaries have led to serious recruitment problems for that state's public defender program, as well as for the statewide program in New Mexico.⁶⁶

Attorneys providing indigent defense services through contracts do not appear to fare any better than public defenders or assigned counsel. For example, contract defenders in one Louisiana parish provide for their own office out of the \$34,000 per year they receive in funding.⁶⁷ As one witness remarked, “[t]he only way for these attorneys to make up the shortfall is to take private cases, which results in the representation of the indigent suffering.”⁶⁸ Further, as witnesses from Illinois and Washington noted, the problem of inadequate attorney compensation often is compounded because many attorneys providing indigent defense services have enormous law school debts, yet are unable to obtain loan forgiveness.⁶⁹

Lack of Essential Resources Including Expert, Investigative, and Support Services

The U.S. Supreme Court has recognized that “mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”⁷¹ National standards also have long recognized that indigent defense counsel must be provided with necessary resources such as office equipment, technology, legal research, support staff, paralegals, investigators, forensic services, and experts.⁷² However, witnesses testified that attorneys are denied access to these basic tools essential to mounting an adequate defense.⁷³

For example, witnesses from Washington reported that public defenders historically have operated with grossly inadequate office equipment and technology as well as insufficient support staff and expert witness funding.⁷⁴ A witness from Pennsylvania testified about a widespread lack of investigative and expert services throughout that state: “We heard examples in a number of Pennsylvania counties where they claimed to have an investigator or two on the staff of the local public defender's office, but when we inquired further about what their duties were, we were told that they were screening clients for indigency eligibility. They had no real investigatory function. The lack of resources also prevents defense

“For assigned counsel in Michigan, the rule is you don’t have an expert. You don’t have an investigator. If you want to get one, you get \$150 in Wayne County to hire an investigator to do all the investigation you need. If you want an expert, you will get \$250 to have the expert meet with your client, prepare testimony, and testify. The dollar limits are wholly unreasonable. We really don’t have technology support either. Many lawyers who are providing much of the work don’t even have a secretary, let alone a law library.”

Frank Eaman, Attorney, Bellanca, Beattie & DeLisle (Harper Woods, Michigan)⁷⁰

counsel from hiring experts. For example, in one county, an attorney could recall only one case in which he had an expert witness. A lawyer in another county told us that, as a pharmacist's son, he felt competent to testify and manage the pathology evidence in a case."⁷⁵

A contract defender in a Montana county described her situation as follows: "The contract has been considered to be part-time since its inception and, coupled with no allocation for office expenses, has significantly impacted the amount of time and office resources that I have been able to devote to my criminal clients. It's rare that I'm able to accept collect calls from the jail, since I'm not reimbursed for the calls."⁷⁶

Lack of Training

The practice of criminal law is a complex field necessitating continuous and comprehensive training for all indigent defense service providers. Toward that end, national standards recommend that public funds be used to provide effective training, professional development, and continuing education to all counsel and staff involved in the delivery of indigent defense services.⁷⁷

Witnesses emphasized a complete lack of compliance with these standards in states such as Louisiana, Montana, Nevada, New Mexico, New York, Pennsylvania, and Texas, where there is no provision for formal, systematic training of indigent defense attorneys or support staff at either the state or local levels.⁷⁸

State Fiscal Crises

Many witnesses testified that problems resulting from funding and resource inadequacies were exacerbated in their states during 2003 due to enormous budget deficits.⁷⁹ In Alabama, a witness explained that expenditures for indigent defense increased from fiscal year 2002 to 2003, while at the same time state agency budgets were undergoing reductions of 10-18%.⁸⁰ Accordingly, this constitutes a major impediment to any proposed reforms that might require the appropriation of new funds, such as the creation of a new state agency to oversee indigent defense services.⁸¹ In Oregon, due to drastic cuts in the indigent defense budget, only the most serious and violent crimes were prosecuted during the last three months of fiscal year 2003; all remaining cases were postponed until the next fiscal year.⁸² A witness from Oregon noted that "it's difficult to tell how many cases were so affected, but it is probably between 15,000 to 20,000 individual citizens who were caught in what I will without hesitation call an unconstitutional action on behalf of our state."⁸³

Cost-Cutting Measures

Witnesses provided numerous examples of cost-cutting measures employed by jurisdictions in response to diminishing funds for indigent defense.

- **Use of Contracts Awarded Primarily on the Basis of Cost**

To be consistent with national standards, contracts for indigent defense services should not be awarded primarily on the basis of cost, but should include certain essential elements, including attorney performance requirements; minimum attorney qualification and experience

requirements; the types of cases covered and allowable workloads for attorneys as well as measures to address excessive workloads; policies for addressing cases with conflicts of interest; restrictions on the private practice of law; reasonable compensation levels and a mechanism for obtaining extraordinary compensation in unusually complex cases; funding for sufficient support, expert, and investigative services; the provision of or access to an appropriate library; a system for case management and reporting; and grounds for termination of the contract by the parties.⁸⁴

Notwithstanding this clear guidance, witnesses testified that indigent defense contracts in some states continue to be awarded on a flat fee basis to the lowest bidder without regard to qualifications or any other considerations.⁸⁵ A witness from Washington remarked, “simply awarding defender contracts to the lowest bidder can often serve to remind us of the old adage that ‘you get what you pay for.’ There can be no doubt that the cost of prosecuting a case again several years later is more expensive in many ways: to the defendant, to the alleged victim, and to the justice system as a whole, in terms of money and, perhaps even more significantly, in terms of public confidence.”⁸⁶

Another witness from Washington described how grossly inadequate representation by a law firm awarded a low-bid contract resulted in the wrongful conviction of a client charged with twenty-three counts of child rape. The lawyer did no investigation and did not meet with the jailed client prior to trial, despite the client’s repeated requests.⁸⁷ On the night before trial, the lawyer brought to the jail the client’s wife, who was a co-defendant in the case, and told the client that that the wife’s “only hope” of acquittal at trial was if the client pled guilty to the charges.⁸⁸ The client followed the lawyer’s advice and was sentenced to forty-five years in prison, but his wife nonetheless was found guilty at trial.⁸⁹ An extensive post-conviction investigation uncovered evidence establishing the client’s innocence, resulting in the client’s ultimate release from prison after serving five years of his sentence.⁹⁰

- **Unduly Restricting Eligibility for Indigent Defense Services**

To guide determinations of eligibility for indigent defense services, national standards generally recommend that “counsel should be provided to persons who are financially unable to obtain adequate representation without substantial hardship.”⁹¹

Several witnesses testified that outdated eligibility requirements, as well as concerted efforts to restrict eligibility for defense services, result in the routine denial of counsel to the indigent accused. In South Dakota, for example, the availability of services differs widely among counties because magistrates determine eligibility, not a central, statewide authority.⁹² A witness from New York testified that eligibility for defense services often is restricted unconstitutionally in that state for the sole purpose of containing the costs of local systems.⁹³ And a witness from Pennsylvania explained that a lack of up-to-date and uniform financial eligibility guidelines mean that many defendants in need of representation never receive legal services.⁹⁴

National standards also provide that counsel should not be denied simply because bond has been or can be posted.⁹⁵ One witness reported, however, that in a substantial number of Texas counties, defendants who are released on bond are presumed not to be indigent and either are denied appointed counsel or strenuously pressured to retain counsel, in direct violation of state law.⁹⁶ In some cases, appointed counsel is withdrawn once a defendant posts bond.⁹⁷

- **Requiring Payment of Fines or Costs from Indigent Defendants**

The U.S. Supreme Court has held that a person may not be imprisoned for inability to pay a fine imposed as punishment for a criminal offense.⁹⁸ Yet, a witness testified that in most places in Georgia indigent defendants plead guilty without counsel and are fined substantially at sentencing without any inquiry as to whether they can afford to pay.⁹⁹ The fines usually are required to be paid in installments as a condition of probation, and if a defendant misses a payment, imprisonment for violation of probation can result.¹⁰⁰ Similarly, a witness from Alabama reported that, in some of the judicial circuits in that state, probation is often revoked because it is conditioned on the payment of fines and costs that many indigent defendants are unable to afford.¹⁰¹

In *Fuller v. Orgeon*,¹⁰² the Supreme Court upheld a state statute requiring repayment of counsel costs from convicted indigent defendants because the statute provided adequate procedural safeguards to ensure that the imposition of costs did not chill the exercise of an indigent defendant's right to counsel.¹⁰³ Despite the Court's decision, ABA standards recommend against requiring reimbursement of counsel costs at the termination of court proceedings, except where defendants have made fraudulent representations for the purposes of being found eligible for counsel.¹⁰⁴ Further, ABA standards recommend against requiring persons to contribute to the costs of counsel at the time counsel is appointed or during the course of trial proceedings unless there are "satisfactory procedural safeguards."¹⁰⁵

According to a witness from New York, indigent defendants in that state "are mined for their money through partial payment scenarios, illegal co-pay scenarios, and all kinds of intrusive mechanisms that interfere with the right to counsel."¹⁰⁶ Additionally, a witness from South Dakota indicated that in some locales, indigent defendants are incarcerated for not paying their court-appointed lawyer bill.¹⁰⁷

Resource Disparity Between Prosecution and Indigent Defense

Fairness dictates that there should be a balance in the resources available to both sides in our adversary system of criminal justice.¹⁰⁸ In an effort to ensure this balance, national standards specify that the government should provide equivalent funding and other resources to both the indigent defense and prosecution functions of state criminal justice systems.¹⁰⁹ As former U.S. Attorney General Janet Reno stated, "[m]y experience as a prosecutor and as Attorney General have taught me just how important it is for every leg of the criminal justice system to stand strong. Indigent defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded and operating with effective standards. When the conviction of a defendant is challenged on the basis of inadequate representation, the very legitimacy of the conviction itself is called into question. Our criminal justice system is interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter."¹¹⁰

A report by the U.S. Department of Justice in 2000 conceded that indigent defense funding traditionally "has not kept pace with other components of the criminal justice system."¹¹¹ According to one witness, moreover, "it is astonishing for most American lawyers to learn that England spends twice as much defending criminal cases as they do in prosecuting them. In the United States, the situation is the opposite."¹¹² The witness noted that, whereas recent figures indicate that state and local indigent defense expenditures in fiscal year 2002 were approximately \$2.8 billion, "the U.S. Department of Justice's *Sourcebook of Criminal*

Justice Statistics reports that in 2001, nearly \$5 billion was being spent in prosecuting criminal cases in state and local jurisdictions. And that doesn't include the amounts that are spent by police, forensic labs, and so forth that are not directly part of the prosecutor's office."¹¹³

The disparities are not limited to the direct funding of services, either. State and local prosecutors are eligible for loan forgiveness in the federal Perkins student loan program, whereas public defenders are not.¹¹⁴ Further, since the mid-1990s, Congress has appropriated some \$5 million annually to train state and local prosecutors at the National Advocacy Center in Columbia, South Carolina, but federally-funded training opportunities for state and local indigent defense attorneys are not provided.¹¹⁵

In a majority of the states from which witnesses testified, the compensation and support for indigent defense attorneys lag far behind their prosecution counterparts.¹¹⁶ One witness stated that the salaries of district attorneys throughout Pennsylvania are substantially greater than the salaries of public defenders.¹¹⁷ Further, in Pennsylvania and Michigan, state funds are provided to train prosecutors, whereas defense lawyers do not receive comparable financial support from the state.¹¹⁸ In New York, prosecution services receive funds from both the state and federal governments, yet primarily New York's counties fund indigent defense services.¹¹⁹ Although prosecutors receive full-time salaries in Montana, Georgia, and Mississippi, indigent defense representation is often provided by private attorneys who work part-time pursuant to a flat-fee contract with the county while retaining private practices on the side.¹²⁰ In California, for every \$100 the prosecution receives in funding, indigent defense receives an average of \$60.90. As a consequence, there are disproportionately more prosecutors than public defenders throughout the state.¹²¹

In Virginia and many states, unlike prosecutors, neither public defenders nor assigned counsel have access to expert assistance, except by demonstration of need. However, in Virginia judges usually require such demonstration in open court, unfairly forcing defense counsel to disclose defense strategies to the prosecution.¹²² And throughout Louisiana, district attorneys have more support staff and investigative assistance than public defenders, in addition to the use of police and crime labs. Further, district attorneys in Louisiana receive retirement benefits partially funded by the state, while public defenders generally do not.¹²³

Inadequate Legal Representation

In defining the right to counsel, the U.S. Supreme Court has said that "defendants facing felony charges are entitled to the effective assistance of competent counsel,"¹²⁵ which requires subjecting "the prosecution's case to...meaningful adversarial testing."¹²⁶ In *Strickland v. Washington*,¹²⁷ the Court acknowledged that the obligation of counsel to provide effective assistance imposes "certain basic duties," including: advocating for the defendant's cause; demonstrating loyalty to the client; avoiding conflicts of interest; consulting with the defendant on important decisions; keeping the defendant informed of important developments; conducting reasonable factual and legal investigations or making "a reasonable decision that makes particular investigations unnecessary;" and bringing to bear the necessary skills and knowledge.¹²⁸ The Court further indicated that "prevailing norms of practice, as reflected in American Bar Association Standards and the like, e.g. ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable" with respect to the assistance of counsel.¹²⁹

National standards recognize that the objective in providing counsel is to ensure quality representation for persons unable to afford an attorney.¹³⁰ Standards define the proper role and duties of defense counsel, which include the responsibility to keep abreast of the substantive and procedural criminal law in the jurisdiction;¹³¹ avoid unnecessary delays and control workload to permit the rendering of quality representation;¹³² attempt to secure pretrial release under conditions most favorable to the client;¹³³ prepare for the initial interview with the client;¹³⁴ seek to establish a relationship of confidence and trust with the client and adhere to ethical confidentiality rules;¹³⁵ secure relevant facts and background from the client as soon as possible;¹³⁶ conduct a prompt and thorough investigation of the circumstances of the case and all potentially available legal claims;¹³⁷ avoid conflicts of interest;¹³⁸ undertake prompt action to protect the rights of the accused at all stages of the case;¹³⁹ keep the client informed of developments and progress in the case;¹⁴⁰ advise the client on all aspects of the case;¹⁴¹ consult with the client on decisions relating to control and direction of the case;¹⁴² adequately prepare for trial and develop and continually reassess a theory of the case;¹⁴³ explore disposition without trial;¹⁴⁴ explore sentencing alternatives;¹⁴⁵ and advise the client about the right to appeal.¹⁴⁶

"Former Attorney General Janet Reno said that the best protection against wrongful conviction was to have very effective lawyers. Not only are they necessary to avoid wrongful convictions in their own right, but also to expose the reasons why wrongful convictions occur, whether they be undue pressure brought upon the defendant, false confessions, or a variety of other abuses in the system. One particular case to illustrate the proposition is the case of Jimmy Ray Bromgard, who was convicted in 1987 of a brutal rape of an 8-year-old girl in Billings, Montana, then exonerated and released from prison in 2002 after serving 15 years. He was arrested because a policeman thought he resembled the composite police sketch. The victim was really never certain that Bromgard was her attacker. Bromgard's lawyer was under a contract to provide all of the representation in the county for a flat fee. He failed to challenge the girl's courtroom identification, undertook no investigation, gave no opening statement, did not prepare a closing argument, and failed to file an appeal in the case. The lawyer also failed to object when the state's expert witness testified without any scientific basis that the chances were only 1 in 100,000 that hairs found at the crime scene were not Bromgard's. But for DNA testing, which was finally performed after Bromgard's many years of incarceration, Bromgard would still be in prison today."

**Norman Lefstein, Professor of Law and Dean Emeritus,
Indiana University School of Law (Indianapolis, Indiana)¹²⁴**

Witnesses confirmed that, due to chronic under-funding and a lack of essential resources, coupled with crushing attorney workloads and other factors, many indigent defense systems do not provide even constitutionally adequate representation, much less the type of quality representation recommended by national standards. As one witness explained, the most serious implication of the widespread failure to deliver adequate defense services to the poor is the constant risk and reality of wrongful convictions:

Until the past decade, I suspect that few persons believed that there were many genuinely innocent persons convicted of crimes in this country. Now we know that it happens with some frequency. The evidence of wrongful convictions is well documented and can be found in many sources, including books, law review articles, and websites. This reality underscores the enormous importance and urgency of establishing truly effective systems of defense representation.”¹⁴⁷

“Meet ‘em and Plead ‘em” Lawyers

Witnesses recounted numerous examples of representation so minimal that it amounted to no more than a hurried conversation with the accused moments before entry of a guilty plea and sentencing. One witness reported that in 83% of the cases in Calcasieu Parish, Louisiana, “there is nothing to suggest that a public defender ever met his indigent client out of court. What happens, therefore, is that on the morning of the trial, the public defender will introduce himself to his client, tell him the ‘deal’ that has been negotiated, and ask him to ‘sign here.’”¹⁴⁹ According to another witness, a study of all felony cases over a five-year period in rural Quitman County, Mississippi revealed that 42% of the indigent defense cases were resolved by guilty plea on the day of arraignment, which was the first day the part-time contract defender met the client.¹⁵⁰ A witness from Alabama testified that contract defenders in that state basically do nothing but process defendants to a guilty plea in as expeditious a manner as possible.¹⁵¹ According to another witness, “this sort of meet ‘em and plead ‘em is a pretty prevalent practice throughout the state of Georgia.”¹⁵²

Incompetent and Inexperienced Lawyers

According to several witnesses, indigent defense representation frequently is provided by attorneys who are inexperienced in the practice of criminal law or straight out of law school.¹⁵³ In Georgia, some counties have required all attorneys (except those with conflicts of interest) to participate on a panel from which the court

“I would suggest one thing you might do is go to a place like Crisp County, Georgia. At nine o’clock in the morning, they would be calling the arraignment calendar and no one except people who have paid lawyers would have a lawyer. Everyone else will be appointed a lawyer when his or her case is called. By twelve noon everybody will have pled guilty and been sentenced. That afternoon, court will convene at the jail. Generally, the contract lawyer there has met with the people the day before in jail and they will be paraded out and plead guilty and be sentenced. Sometimes, the judge will just wait and the lawyers will meet and conduct the plea negotiations in open court, and then the judge will come on the bench when everybody is ready to plead guilty and move the calendar along. This is obviously not legal representation. This is processing. High school students could do this.”

**Stephen Bright, Director,
Southern Center for Human Rights
(Atlanta, Georgia)¹⁴⁸**

"In a time of tight budgets, it is easy to be shortsighted and think that a public defender office staffed with less expensive, inexperienced attorneys is a better option. But my experiences as a staff attorney, a supervisor, and a judge tell me that experienced attorneys more than compensate for the expense in what they bring to the justice system. Experienced attorneys encourage prompt resolutions of criminal cases. They are able to evaluate cases and make reasonable plea agreements more quickly. Their experience is recognized by their clients and contributes to good attorney-client relationships. With experienced attorneys, the cases that go to trial are more likely to be the cases that need to be tried and should be tried. Trials are more efficiently done because the lawyers are better prepared and more focused, and any judge will tell you that the best trials are those done with experienced lawyers on both sides. The results are more fair. There are fewer mistrials and fewer reversals on appeal because appropriate motions and objections give the trial court the opportunity to prevent or correct errors in a timely manner. All of these things are advantages to the system that result in substantial financial savings and enhance public confidence in criminal justice."

Judge Michael Spearman, Chief Criminal Judge, King County Superior Court (Seattle, Washington)¹⁵⁴

appoints counsel to represent indigent defendants, regardless of the attorneys' prior experience, training, or interest in criminal matters.¹⁵⁵ According to a witness from Georgia, when a real estate lawyer with no criminal law experience sued to be removed from the mandatory panel in one county, the judge reacted by saying: "Well, if you didn't handle criminal cases like everybody else, you would have a financial advantage over the other lawyers here in town."¹⁵⁶ Further, witnesses from Montana and Alabama reported that young attorneys with little or no experience are just as likely as others to receive court assignments, sometimes even for homicide cases.¹⁵⁷

Excessive Caseloads

According to national standards, defense attorneys "should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."¹⁵⁹ Affirmative steps, including the refusal of further appointments, should be taken to reduce pending or projected caseloads where necessary, and courts should not require individuals or indigent defense programs to accept caseloads under these circumstances.¹⁶⁰ ABA Model Rules of Professional Conduct also require lawyers to withdraw from the representation of a client if continued representation will violate any professional duties, such as the duty to render competent legal representation.¹⁶¹ In recognition of the unique and rigorous demands of capital litigation, national standards state that "special consideration" should be given to the workload created by representation in cases involving the death penalty.¹⁶²

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that defense caseloads should not exceed the following numerical limits: 150 felonies per attorney per year; or 400 misdemeanors (excluding traffic) per attorney per year; or 200

"Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases."

Jonathan Gradess, Executive Director, New York State Defenders Association (Albany, New York)¹⁵⁸

juvenile court cases per attorney per year; or 200 mental commitment cases per attorney per year; or 25 appeals per attorney per year.¹⁶³ Other national organizations, including the ABA, have recognized the value of these numerical limits as a rough benchmark for determining excessive caseloads.¹⁶⁴

However, testimony during the hearings revealed that oftentimes caseloads far exceed national standards, making it impossible for even the most industrious of attorneys to deliver effective representation in all cases.¹⁶⁵ In Rhode Island, public defender felony caseloads surpass national standards by 35-40% and misdemeanor caseloads exceed national standards by 150%.¹⁶⁶ A witness from Pennsylvania indicated that rapidly increasing caseloads over the years have not been accompanied by a corresponding increase in staff or resources.¹⁶⁷ In one county, for example, the caseload of the public defender's office was 4,172 cases in 1980, while the same number of attorneys handled an estimated 8,000 cases in 2000.¹⁶⁸

According to a witness from Maryland, during 2002 public defenders in Baltimore were handling 80-100 pending serious felony cases at any given time, leading the state's chief public defender to announce that attorneys in that office would not accept any new cases.¹⁶⁹ Within two weeks, the state public defender agency through emergency measures was provided ten new attorneys and three new support staff for the Baltimore office. But this was described as a temporary solution at best.¹⁷⁰

A witness from Nebraska described a similar situation in a county where the elected chief public defender and deputy public defender handled 1,200 cases during the year, including felonies, misdemeanors, child support contempt cases, and juvenile cases of all types.¹⁷¹ After being assigned to a capital case, the chief defender asked the county board five times for additional lawyers and funding, yet was refused each time.¹⁷² Ultimately, the chief defender and his deputy began filing motions to withdraw from all new cases in which the office was being appointed.¹⁷³ Although judges were supportive and began assigning cases to private attorneys, the chief defender was threatened with a recall election, as well as criminal charges for malfeasance in office.¹⁷⁴

Lack of Contact with Clients and Continuity in Representation

Many witnesses reported that indigent defense attorneys frequently do not maintain regular contact with their clients.¹⁷⁵ A witness testified that, although Louisiana by statute requires the appointment of public defenders at a hearing to be held within seventy-two hours of arrest, in Calcasieu Parish public defenders rarely meet with clients in felony cases prior to arraignment, which occurs an average of 315 days after arrest.¹⁷⁶ According to another witness, lawyers who provide services pursuant to low-bid contracts in Nevada "need the money to make their office function and have no time for their indigent clients; they get their money every month, but the clients never see their lawyers."¹⁷⁷ In Virginia, some lawyers meet their clients at the last minute in court, and since many courthouses have no private place for these meetings, the last-minute contact is not a confidential conversation between attorney and client.¹⁷⁸

In order to establish close and confidential attorney client relationships and emulate the way in which law is practiced on behalf of retained clients, national standards have long recommended the practice of "vertical representation," whereby the same attorney initially assigned to a case provides continuous representation throughout the court proceedings.¹⁷⁹ Witnesses testified, however, that horizontal representation (i.e., the appointment of different lawyers for different stages of a case) is still common in a number of states.¹⁸⁰ In some

California counties, for example, insufficient resources prevent public defenders from providing vertical representation, whereas vertical prosecution is common because the prosecutor's office has more funding.¹⁸¹ Further, in the larger public defender offices in Illinois, with the exception of homicide cases, initial appearances are frequently handled by different attorneys than those who provide representation during the remainder of the case.¹⁸²

Lack of Investigation, Research, and Zealous Advocacy

Witnesses from a number of states indicated that, in many cases, indigent defense attorneys fail to fully conduct investigations, prepare their cases, or advocate vigorously for their clients at trial and sentencing.¹⁸³ To illustrate, a witness from Virginia testified that high caseloads discourage both assigned counsel and public defenders from spending sufficient time investigating and preparing cases and meeting with their clients.¹⁸⁴ A witness from Montana explained that clients are often detained pretrial for unnecessarily long periods of time because defense lawyers fail to argue adequately against detention.¹⁸⁵ Another Montana witness told of a lawyer with an indigent defense contract since 1980, who once bragged to the chief prosecutor in his county that "he got out of the 1990s without a trial."¹⁸⁶

Witness testimony also revealed that the public defender office in Clark County, Nevada, the largest county in the state, employs seventy attorneys, thirty-three support staff, and fourteen investigators, yet maintains a trial rate of less than 0.6%.¹⁸⁷ And a recent survey of 1,867 felony case files from contract defenders in four Alabama judicial circuits revealed that no motions were filed for funds for experts or investigators in 99.4% of the cases.¹⁸⁸

Witnesses also provided vivid illustrations of inferior preparation and advocacy in death penalty cases. An example from Georgia includes a case in which defense lawyers did not make a single objection and filed three boilerplate motions of one page each during a capital trial that lasted one and a half days.¹⁸⁹ The jury sentenced the forty-five year-old defendant to death after a twenty-seven minute penalty hearing during which the defendant's lawyers failed to offer any mitigating evidence, despite the fact that the defendant had never been in trouble before, was a parent and volunteer firefighter, served during the Vietnam War, and was considered to be a good neighbor.¹⁹⁰

Lack of Conflict-Free Representation

Some witnesses told of attorneys providing contract services who frequently represent multiple defendants in the same criminal case,¹⁹² in violation of court decisions and rules of professional conduct relating to conflicts of interest.¹⁹³ For example, a witness reported that a law firm holding the indigent defense contract in a Washington county considered its employees to be "independent contractors," allowing one lawyer to represent a defendant in a criminal case while another lawyer from the same firm represented the state's material witness.¹⁹⁴ Another witness revealed that in some of the rural areas of New Mexico where there are no statewide public defender trial units, separate lawyers are not provided for conflict cases.¹⁹⁵

"Lawyers in smaller, more rural counties in Montana are neither inclined nor trained to take cases when there are co-defendants or there is a conflict with the contract public defender. One contract defender advised me that the rural nature of his practice seems to encourage conflicts."

Deirdre Caughlan, Contract Public Defender, Silver Bow County (Butte, Montana) ¹⁹¹

Ethical Violations of Defense Lawyers

As one witness noted, in addition to violations of constitutional rights and possible wrongful convictions, the provision of inadequate representation also results in frequent violations of professional rules of ethics. Yet, courts and disciplinary authorities routinely overlook this inevitable consequence of an over-burdened and under-funded system.¹⁹⁶

State rules of professional conduct, in conformity with ABA Model Rules of Professional Conduct, normally require lawyers to be “competent,” defined as employing “the legal knowledge, skill, thoroughness, and preparation that is reasonably necessary for the representation.”¹⁹⁷ Additionally, lawyers must “act with reasonable diligence and promptness in representing a client”¹⁹⁸ and must reasonably communicate with clients on matters relating to representation.¹⁹⁹ Further, lawyers must refrain from providing representation in cases involving conflicts of interest.²⁰⁰ As already noted, ethical rules and national standards indicate that indigent defense attorneys and public defender programs have a responsibility to reduce excessive caseloads if continued representation would lead to the breach of these or other professional obligations.²⁰¹ Nevertheless, as detailed in the preceding sections, defense lawyers throughout the country are violating these ethical rules by failing to provide competent, diligent, continuous, and conflict-free representation.²⁰²

Structural Defects in Indigent Defense Systems

Besides problems relating to funding for and the quality of indigent defense services, witnesses identified a number of common deficiencies relating to the design and operation of the systems that have been established to deliver these services.

No Independence

National standards recognize that the defense function must be independent from undue political and judicial influence to ensure the delivery of quality legal representation.²⁰⁴ Specifically, counsel should be subject to judicial supervision only in the same manner and to the same extent as are attorneys in private practice and should be assigned to specific cases by administrators of indigent defense programs, not by judges or elected officials.²⁰⁵ Further, an independent board of trustees, not including prosecutors or judges, should be established to oversee defender, assigned counsel, or contract programs.²⁰⁶ Indigent defense should be funded at a level designed to ensure independent, quality legal representation, and the funding power should not interfere with or retaliate against professional judgments made in rendering defense services.²⁰⁷ Chief public defenders and staff should not be selected by judges, but should be selected on the basis of merit and without regard to political party affiliations or contributions.²⁰⁸

Nevertheless, witnesses described indigent defense systems that fall far short of these national standards.²⁰⁹ For example, one witness reported that almost none of the indigent defense systems in Texas use an independent authority or agency to qualify, appoint, and compensate counsel.²¹⁰ Although recent reform legislation has required counties to adopt neutral rotation systems for appointing counsel, several judges have retained unregulated discretion to appoint any attorney they choose, and some judges depart regularly from the rotation system without good cause.²¹¹ As in much of the United States, defense counsel is

normally dependent upon the judge who heard the case to approve the services of expert witnesses and investigators, as well as approve attorney compensation, and the judge's discretion is not subject to effective review.²¹²

A witness from Michigan explained that "the elected judges still pass out the assignments for indigent defense cases to help their political fundraising as much as anything else."²¹³ Moreover, pay for assigned counsel and public defender offices is part of the trial court's budget in each county, and in some counties, the judges have discretion to set the fees for assigned counsel.²¹⁴ Attorneys who apply for higher than normal fees due to the amount of time spent on a case seldom receive the additional payments, and those that do may be removed from the court-appointed list if they continue to apply because "they are costing the county too much money."²¹⁵ Another witness reported that, in one Nevada county, judges punish attorneys who request funds to hire experts or "raise ugly issues that make judges unhappy."²¹⁶

Witnesses also complained that state and local government officials regularly threaten defense counsel's independence. A witness from New Mexico noted that the appointment of that state's chief public defender by the governor "undermines the validity of the Public Defender Department and takes away the power and role it should play in the entire political process for that statewide system."²¹⁷ Another witness reported that county officials in Clark County, Washington "closed the contract office down when the attorneys asked for too many resources."²¹⁸ A witness from one Montana county testified that each time modifications of the current flat-fee indigent defense contract have been requested, county officials have threatened to terminate the contract and award a new contract based solely on the lowest bid.²¹⁹ The witness also told of a prosecutor who had asked another county to solicit new bids because the current contractor was requesting too many psychological evaluations in his cases.²²⁰

"Recently, in my home state of Indiana I learned of an incident that provides a vivid illustration of what sometimes happens when judges control the defense function. A part-time defender advised the Indiana Public Defender Commission that the trial judge in his county was refusing to assign cases to him. When interviewed, the judge readily explained that he regarded the defense attorney as a problem because his frequent visits to his jailed clients led to complaints from other defendants whose court-appointed lawyers visited them much less frequently. The judge also stated that this same defense lawyer filed too many motions, and as a result prosecutors were less willing to plea bargain the cases of his clients. Finally, the judge noted that the defense lawyer's reimbursement claims were higher than those submitted by other defenders, which meant that his representation was costing the county too much money."

Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law (Indianapolis, Indiana)²⁰³

Absence of Oversight to Ensure Uniform, Quality Services

National standards have long acknowledged the need for a statewide structure to oversee indigent defense services, ensure uniformity in the quality of services, and provide system accountability.²²² Yet, a number of witnesses testified that a lack of statewide oversight and structure results in a hodgepodge of local indigent defense systems that are unsupervised and vary greatly in their effectiveness.²²³ The result is a system in which justice for the poor is unpredictable and subject to local political and budget pressures.

A witness from New York explained that, since each of the state's counties are authorized by statute to establish methods for providing indigent defense services within their communities, the result is more than 95 different plans for providing representation.²²⁴ Moreover, the plans differ in almost every respect, including scope of service, staffing procedures, support services, investigation capacity, training requirements, appointment practices, attorney skill level, and eligibility standards.²²⁵ Understandably, this witness has recommended that New York form an independent oversight agency to establish standards for the many county defense programs and to provide state funding for the programs based on compliance with standards.²²⁶

Failures to Provide Counsel

As previously discussed in this report, the U.S. Supreme Court's landmark 1963 decision in *Gideon v. Wainwright* first established the federal constitutional right to counsel for indigent defendants in state felony proceedings. Later decisions by the Court extended the right to counsel to state juvenile delinquency proceedings,²²⁷ state misdemeanor proceedings in which actual imprisonment is imposed,²²⁸ state misdemeanor proceedings in which a suspended jail sentence is imposed,²²⁹ and the first appeal to an appellate court.²³⁰ In addition, the Court has recognized that the right to counsel attaches at various critical stages occurring prior to trial, including line-up identifications,²³¹ arraignment,²³² preliminary hearings,²³³ plea negotiations,²³⁴ and the entry of a guilty plea.²³⁵

National standards recommend that counsel be provided in situations beyond those in which, according to Supreme Court decisions, a constitutional right to counsel applies. In particular, standards recommend that publicly-financed counsel be provided to the indigent accused not only when the charged offenses are punishable by death or incarceration,²³⁶ but also in collateral actions such as extradition, probation, and parole revocation.²³⁷ Additionally, standards specify that counsel should be provided as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.²³⁸ Counsel also should be provided upon request to persons who have not been charged or taken into custody, but are in need of legal representation arising from criminal proceedings.²³⁹ Further, standards recommend that counsel be provided at every stage of the proceedings, including sentencing, appeal, certiorari, and post-conviction review.²⁴⁰

Despite the clear mandate imposed by relevant Supreme Court decisions and additional guidance provided by national standards, the hearings confirmed that many poor persons accused of crime either do not receive counsel early enough in the process or, in some cases, at all.

"In Alabama, we have a very fragmented, mixed, and uneven system that is not, I believe, by and large, giving quality representation to the majority of indigent defendants. There is no state level organization that oversees the delivery of the services. What Alabama needs is an institutional sort of setup for indigent defense. We need a state commission that will oversee the process, provide oversight for the systems in the counties, and set and promulgate standards for training, education, caseloads, and the like."

**John Pickens, Executive Director,
Alabama Appleseed (Montgomery,
Alabama)²²¹**

- **Detention in Jail Without a Lawyer**

Several witnesses reported that, in some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer.²⁴²

According to a witness from Georgia, indigent defendants in that state often languish in jail without representation.²⁴³ As an example, the witness cited a defendant who was arrested for loitering and spent thirteen months in jail without seeing a lawyer or judge—or even being formally charged—before local civil rights advocates ultimately secured his release.²⁴⁴ In Mississippi, a woman arrested for stealing \$200 from a casino slot machine spent eight months in jail because she was unable to afford bail. Eventually, without receiving any effective legal representation, the woman pled guilty to time served simply to get out of jail.²⁴⁵

"There's a story of a woman in Gulfport, Mississippi who was in jail eleven months before a lawyer was appointed, was in jail two more months before the lawyer came to see her, and was in jail one more month before they went to court and pled guilty to time served, all for shoplifting merchandise worth \$72. She was in jail a total of fourteen months."

**Robert McDuff, Attorney
(Jackson, Mississippi)²⁴¹**

The problem is not limited to southern states, either. For example, one witness testified that indigent clients all across Montana remain in pretrial detention for up to five or six months without a single contact from an attorney.²⁴⁶

- **Encouraging Waivers of Right to Counsel and Subsequent Pleas of Guilty**

The U.S. Supreme Court has held that, although an accused has a constitutional right to proceed without legal representation,²⁴⁹ a waiver of the right to counsel must not be accepted unless the trial judge first determines that the waiver is entered knowingly, voluntarily, and intelligently.²⁵⁰ According to the Court, "[t]he information a defendant must possess in order to make an intelligent election...will depend upon a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceedings."²⁵¹ For instance, before accepting a waiver from a defendant who wishes to proceed *pro se* to trial, the judge must inform the defendant of "the dangers and disadvantages of self-representation."²⁵² However, "at earlier stages of the criminal process, a less searching or formal colloquy may suffice."²⁵³

National standards expand upon the requirement of an intelligent, voluntary, and knowing waiver of the right to counsel, urging that persons taken into custody or otherwise deprived of their liberty be informed, in easily understandable language, of the right to an attorney.²⁵⁴ Further, the standards specify that waivers of counsel should not be accepted until the entire process of offering counsel has been completed before a judge and a thorough inquiry into the accused's comprehension of the offer has been made.²⁵⁵ A failure to request counsel or an announced intention to plead guilty should not alone be construed to constitute a waiver of counsel in court.²⁵⁶ A court should not accept a waiver of counsel unless it is in writing and of record.²⁵⁷ In proceedings involving the possibility of incarceration, whenever an accused who has not seen a lawyer indicates an intention to waive the assistance of counsel, a lawyer should be provided, and the accused should confer at least once with the lawyer, before any in-court waiver is accepted.²⁵⁸

"It seems to me that, of all of the concerns we have about the implementation of Gideon (and there are many), one we have not talked a lot about is the proper role of the prosecution. I went to a courthouse in the middle of the country and observed that defendants, as they came in for their first appearance, were told by a court officer to go and see the prosecutor. Inside the courtroom were three prosecutors sitting at two tables, with a long line of defendants in front of them. I nonchalantly weaved around until I found a place where I could hear, and what I heard was remarkable. I heard offers of pleas without any factual questions asked at all of the defendants. And this went on routinely for an hour and a half while I was there."

Robert L. Spangenberg, President, The Spangenberg Group (West Newton, Massachusetts)²⁴⁸

Also, state ethics rules, based upon the ABA Model Rules of Professional Conduct, typically prohibit any lawyer who is acting on behalf of a client from giving legal advice to an unrepresented person whose interests may be adverse to those of the client, apart from the advice to obtain counsel.²⁵⁹ The rules require prosecutors in particular to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."²⁶⁰ Further, the rules prohibit prosecutors from seeking to obtain waivers of important pretrial rights from unrepresented accused persons.²⁶¹ In addition, ABA criminal justice standards preclude prosecutors from communicating with accused persons at first judicial appearances unless a waiver of counsel already has been entered or the prosecutor is aiding in obtaining counsel for the accused or arranging for pretrial release.²⁶² Finally, national standards provide that indigent defendants should not be called upon to plead guilty until counsel has been appointed or properly waived.²⁶³

"In dealing with large calendars and pro se defendants inexperienced with the law and legal process, it's easy for judges to let their frustration get the best of them and look for ways to move the calendar along. There has been more than one documented case in Washington where judges have not fully advised defendants of their right to counsel and to trial by jury or have explicitly encouraged defendants to waive those rights in the name of efficiency."

Judge Michael Spearman, Chief Criminal Judge, King County Superior Court (Seattle, Washington)²⁴⁷

Despite the foregoing rules and recommendations, witnesses testified that prosecutors sometimes improperly seek waivers of counsel, and subsequent pleas of guilty, from unrepresented indigent defendants,²⁶⁴ while judges either ignore or openly encourage such practices.²⁶⁵ Some judges make no attempt to determine whether an accused's waiver is knowing, voluntary, and intelligent before accepting it, as required by Supreme Court decisions, and many judges do not follow the additional guidance contained in national standards.²⁶⁶

In Georgia, for example, a witness described observing a mass arraignment of defendants charged with jailable misdemeanors during which the judge informed defendants of their rights and then left the bench. Afterwards, three prosecutors told defendants to line up and follow them one by one into a private room.²⁶⁷ When the judge reentered the courtroom, each defendant approached with the prosecutor, who informed the judge that the defendant

intended to waive counsel and plead guilty to the charges.²⁶⁸

Another witness testified that in many Georgia courts, the clerk provides defendants with a complicated form that, if signed, serves as a waiver of counsel and plea of guilty.²⁶⁹ Defendants are told their case will not be called unless they sign the form.²⁷⁰ Often, judges accept signed forms from defendants who are illiterate or who only speak Spanish and cannot read the English in which the form is printed.²⁷¹ In Coweta County, Georgia, where a lawsuit was brought to challenge inadequate indigent defense representation, a witness reported that about half of the felony defendants were not provided with lawyers and described the following courtroom routine: "The judge typically would call a defendant forward, ask the prosecutor what the offer was, and then tell the defendant he would follow the prosecutor's recommendation. There was no mention of counsel. The defendant would have no idea what to do, being thoroughly intimidated by the courtroom, judge, etc., and often turned to the prosecutor, who was always happy to discuss the offer. The defendant would then enter the plea. He/she would not be asked about the right to counsel until halfway through the plea colloquy, when the judge was going over all of the rights waived with a guilty plea. Defendants were assigned counsel only if they affirmatively asked for a lawyer."²⁷²

Another witness indicated that in a number of Texas counties, judges direct misdemeanor defendants to confer with the prosecutor about a possible plea before the defendants have a meaningful opportunity to request appointed counsel.²⁷³

In Rhode Island, a witness filed a disciplinary complaint against a judge who not only offered a defendant a deal of six months in jail for pleading guilty on the spot without a lawyer, but told the defendant that by requesting a lawyer, the defendant likely would receive three years of jail time instead.²⁷⁴ And a witness from California reported the following occurrence in Riverside County: "I went into municipal court to watch an arraignment. The judges told the defendants, 'If you plead guilty today, you'll go home. If you want an attorney, you'll stay in jail for two more days and then your case will be set for trial and, if you can meet the bail amount, you'll be released.' Almost everybody in the room pled guilty. And of course the system is not opposed to that because the court moves on."²⁷⁵

The problem is especially acute with respect to juveniles, according to several witnesses.²⁷⁶ For example, one witness reported that a recent study found that judges in Maryland habitually suggest to juveniles that they waive their right to an attorney.²⁷⁷

The foregoing stories illustrate how innocent defendants without legal knowledge or the assistance of counsel easily can be coerced by judges or prosecutors into believing they will receive jail time unless they plead guilty. But aside from an obvious risk of wrongful conviction, uncounseled guilty pleas are also deeply troubling in light of the potentially harsh, collateral consequences of criminal convictions, which vary from state to state but can include deportation in the case of an immigrant as well as loss of licenses, voting rights, and welfare benefits.²⁷⁸

- **Counsel Provided Too Late or Not at All**

Witnesses from several states reported that counsel frequently is not provided to indigent defendants in violation of federal constitutional rights, state law, or national standards.²⁸¹

According to one witness, there are at least 150,000 misdemeanor cases per year in Washington courts of limited jurisdiction.²⁸²

Despite court rules that establish the right to counsel in these types of cases “as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest,” the witness reported that counsel is not appointed for first appearance hearings in most courts, and in some cases, counsel is never appointed; this occurs either because counsel is not offered or waivers of counsel that take less than one minute of court time and do not meet constitutional standards are accepted.²⁸³ A New Mexico witness reported that, in certain magistrate courts located in remote areas of the state where there is no public defender office, lawyers are not provided at initial appearances and waivers of counsel are accepted from some indigents accused of offenses carrying mandatory jail sentences who were not first afforded the opportunity to confer with a lawyer, in violation of national standards.²⁸⁴

“The scope of the problem in misdemeanor cases is huge. There are at least 150,000 misdemeanor cases a year in Washington, and my guess is well over half of those don’t really have any meaningful access to counsel.”

Robert Boruchowitz, Director, The Defender Association (Seattle, Washington)²⁸⁰

“Our court admitted in 2002 that 12,711 people pled guilty in Riverside County, California to misdemeanor charges without ever speaking to a lawyer. That’s because in 1986, because of some budget problems at that time, the public defender was removed from municipal court arraignments. Every year since I’ve been in the County of Riverside, four years now, I’ve requested funding to get back into misdemeanor courts and have been denied that funding on each occasion. And as a result of the monies we have—we handle about 38,000 cases per year, my office alone—we don’t have the resources to put people in misdemeanor courtrooms.”

Gary Windom, Riverside County Public Defender (Riverside, California)²⁷⁹

Inordinate Delays in Process

The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial....”²⁸⁶ Yet, some witnesses reported inordinate delays between various critical stages of the criminal justice process.²⁸⁷ The average

“According to a study that was recently published, from the time a person is arrested in Calcasieu Parish, Louisiana, there is an average of 186 days that elapse until that person is charged. From the time a person is charged, there is an additional 129 days to arraignment, and from the time of arraignment, there is an additional 186 days to disposition. That is a total of 501 days, which is more than twice the national average of 214 days.”

Thomas Lorenzi, Attorney, Lorenzi, Sanchez & Palay, LLP (Lake Charles, Louisiana)²⁸⁵

delays in Calcasieu Parish, Louisiana described in the quotation box—a total of 501 days from arrest to disposition—is a startling example. Aside from the potential violations of the right to a speedy trial, these delays disproportionately harm poor persons who, because they are unable to post bond, endure repeated delays while they remain locked up in jail. As a witness from Mississippi observed, delays result in serious inefficiencies for the system as a whole: “Judges are unable to move dockets. Sheriffs have overcrowded jails that are filled with people who haven’t gone to trial, who either are innocent, are guilty of such minor crimes that they shouldn’t be there or have been detained well beyond the time they would serve if convicted, or are guilty of serious crimes and should be moved to state correctional facilities.”²⁸⁸

Lack of Full-Time Public Defenders and Private Bar Participation

National standards recommend that jurisdictions establish full-time public defender offices to provide indigent defense representation wherever the population and caseload are sufficient to support such organizations.²⁸⁹ In order to develop expertise and avoid the temptation to accept retained work, the standards also require that public defender offices employ full-time attorneys who are restricted from engaging in private law practice.²⁹⁰ “[A]ctive and substantial participation of the private bar” through a coordinated assigned counsel system or the use of contracts for services is also recommended.²⁹¹

However, witnesses from numerous states testified that public defender offices either do not exist or are staffed with attorneys who provide services on a part-time basis while accepting private cases from paying clients.²⁹² According to a Pennsylvania witness, many of the state’s public defender offices hire part-time public defenders, and in rural counties, part-time defenders retained pursuant to contracts do not have a formal office or secretary and devote most of their time to paying clients.²⁹³ A witness from Mississippi noted the problem with that state’s part-time defenders: “Of course, their economic incentive is to spend as little time as possible on their criminal cases because they have private practices on the side. The result of this system, as you can imagine, is the same as in other states—it’s really atrocious representation.”²⁹⁴

In many areas of Massachusetts, a witness reported an almost complete reliance on private assigned counsel, especially in misdemeanor and juvenile delinquency cases.²⁹⁵ Assigned counsel provide most of the indigent defense services in Michigan as well. In Oakland and McComb counties, both of which are heavily populated, there is no public defender office at all.²⁹⁶ Currently, only seven of the 254 counties in Texas have either a partial or full-time public defender office to provide counsel for indigent defendants.²⁹⁷ Virtually all of the other counties rely upon an assigned counsel system.²⁹⁸ The witness from Texas explained why public defenders are not used: “We have to overcome judicial fear about their loss of control over attorneys, we have to overcome the private defense lawyer’s fear that a public defender office will result in a loss of business, and we have to overcome a widespread set of myths among judges and defense lawyers about what they have heard are the weaknesses of public defender programs.”²⁹⁹

As noted earlier, low rates of compensation in several states have led to a shortage of private attorneys willing to accept indigent defense cases.³⁰⁰

Lack of Data Regarding Indigent Defense Systems

In some of the hearing states, witnesses complained that a lack of current and reliable data on indigent defense systems acts as a significant barrier to identifying, evaluating, and addressing structural deficiencies.³⁰² The Bureau of Justice Statistics of the U.S. Department of Justice, which conducted the last nationwide survey of criminal defense systems in 1986, recognized the importance of systematic data collection on funding sources, costs, and caseloads: "Such information is of use not only to indigent defense practitioners in fulfilling their responsibilities, but also to policymakers who must initiate and adapt to change in all components of the criminal justice system."³⁰³

"The state of indigent defense in Alabama is not good. It needs substantial attention to bring to light the failures that are going on in the particular circuits, so that we can have some compelling evidence to present to the policymakers. I think that is something that is lacking in Alabama and is needed to get us to the point where there will be meaningful reform."

John Pickens, Executive Director, Alabama Appleseed (Montgomery, Alabama)³⁰¹

Accordingly, a Montana witness testified that the universal failure of counties to collect uniform indigent defense caseload and expenditure data in that state makes it impossible to determine whether services are being provided in a cost-effective way.³⁰⁴ In addition, counties have no way of determining annual indigent defense caseloads or identifying the lawyers who provide services, thus precluding workload limits to ensure adequate representation.³⁰⁵ Similarly, a witness from Pennsylvania testified about the lack of systematic methods for reporting, collecting, and maintaining data on indigent defense systems in that state.³⁰⁶ Information on caseloads is particularly inadequate; many smaller counties do not even estimate public defender caseloads, and other counties are not able to categorize the data that is gathered according to the type of case.³⁰⁷

III. Strategies for Reform

As the preceding section illustrates, witnesses documented deep-rooted problems in the delivery of indigent defense services, establishing a clear and pressing need for reform. The challenges to realizing reform are significant, however. Poor persons accused of crimes lack the political clout necessary to effect change, and witnesses testified that state legislators and local politicians often are reluctant to champion what is perceived to be an unpopular and expensive cause,³⁰⁸ despite polling data suggesting that the public supports strong and effective indigent defense systems.³⁰⁹ As a witness from Michigan related, “I once addressed the Michigan Association of Counties meeting, and a county commissioner raised his hand in the back and said: ‘Is there any way we could get defendants from the jail to the prison without going to court? Because you would save a lot of money.’ And that kind of sums up the attitude, especially in the rural counties.”³¹⁰

Witnesses also reported that judges frequently do not lend sufficient support to reform efforts and sometimes impede progress in order to preserve their own interests.³¹¹ A Georgia witness testified that strong opposition to indigent defense reform in that state traditionally has come from superior court judges seeking to retain control over court appointments.³¹² Similarly, a witness from Alabama cited the attitude of the judiciary as a significant impediment to indigent defense reform in that state.³¹³

ABA standards place upon the organized bar the responsibility both to educate the public regarding the importance of quality indigent defense representation and to support the provision of government funding for this purpose.³¹⁴ But witnesses testified that many bar groups in this country are indifferent at best, and sometimes even hostile, towards improving indigent defense systems.³¹⁵ For example, in discussing a lawsuit challenging inadequate indigent defense representation provided in the Cordele Judicial Circuit, a Georgia witness noted the following: “One of the things that I think has been most disappointing about this lawsuit is that none of the county’s attorneys, unlike other places we have sued, seem to be the least bit bothered by the fact that the system there is a complete farce. You would think they would be embarrassed, that some of them would have thought that we, the local bar, should have done something about this years ago.”³¹⁶

Despite these considerable challenges, witnesses described a variety of approaches that have been used in some states to initiate reform. For example, experts have conducted formal assessments of indigent defense systems, resulting in comprehensive reports used to educate the public and policymakers about deficiencies. Broad-based coalitions—including representatives from community organizations, civil rights and public interest groups, and the criminal justice system—have directed grassroots public education and media campaigns in a number of states. Top government officials—such as chief justices, governors, and key legislators—have been recruited to assume leadership roles in reform efforts. Sometimes state task forces, with support from all three branches of government, have been established to study the system and offer recommendations for legislative or other government action. A growing minority of state and local bar associations have made reform a priority, and national organizations have furnished policy statements, research, funding, and other aid. Litigation to compel systemic improvements has been pursued with *pro bono* assistance from prominent law firms. Most often, a multi-faceted strategy combining several of these approaches has led to the most favorable results.

This section discusses recent reform efforts identified by witnesses in order to present models potentially suitable for replication. While strategies resulting in statewide indigent defense improvements are emphasized, other innovative efforts—some of which have not yet yielded results—also are noted.

Creating a Statewide Public Defender System in Georgia

In 2003, Georgia enacted legislation to overhaul its indigent defense system, effective January 2005, by establishing defender offices within each judicial circuit to provide representation in felonies and juvenile court cases.³¹⁷ Local governments are authorized by statute to contract separately with the offices for representation in lower level courts.³¹⁸ The legislation also established a state oversight commission responsible for creating standards and supervising the new public defender system.³¹⁹ Legislation to provide state funding for the system was enacted during a 2004 special legislative session.³²⁰

According to witnesses and numerous reports, sustained efforts by a variety of parties over a period of many years contributed to the ultimate passage of the legislation. Members of the Congressional Black Caucus provided key support for the reform bill.³²¹ Chief Justice Norman Fletcher and former Chief Justice Robert Benham of the Georgia Supreme Court also lent important leadership to the reform effort during their tenures.³²²

In 2000, the Georgia State Bar adopted a resolution calling for state government officials to create a blue-ribbon commission to investigate the current indigent defense system and recommend changes.³²³ At the urging of state bar leaders and others, former Chief Justice Benham appointed a commission with broad membership, including judges, prosecutors, business people, legislators, academics, and attorneys, “to study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation.”³²⁴

In April 2002, the Georgia State Bar adopted a set of six principles to guide reform of indigent defense in the state.³²⁵ Then, in December, the Chief Justice’s Commission on Indigent Defense issued its final report based on extensive public hearings, courtroom observations, and the findings of a statewide study conducted for the commission by The Spangenberg Group.³²⁶ The reform legislation enacted in 2003 closely mirrored the recommendations of the commission, which in turn incorporated the six reform principles adopted by the Georgia State Bar.³²⁷

Witnesses also acknowledged that local advocacy groups, including the Southern Center for Human Rights and local chapters of the NAACP, played significant roles in Georgia’s long-term struggle for reform by pursuing lawsuits to improve the system.³²⁸ The tireless efforts of the *Atlanta Journal-Constitution*, which repeatedly published articles and editorials about indigent defense problems in Georgia, were recognized as well.³²⁹

Securing State Funding and Oversight in Texas

In 2001, Texas enacted landmark legislation, known as the Texas Fair Defense Act, providing for statewide standards and oversight of defense services through a new Texas Task Force on Indigent Defense.³³⁰ The Fair Defense Act also provides partial state funding of

indigent defense services, for the first time ever.³³¹ A witness from Texas reported that this enactment was the product of a unique collaboration among political, community, bar, and advocacy groups following the veto of a reform bill in 1999 by then Governor George W. Bush.³³² During the same week as the veto, Governor Bush announced his candidacy for President, which witnesses claimed focused national media attention on deficient indigent defense practices in Texas and contributed to an atmosphere ripe for change.³³³

After the first reform bill was vetoed, the Fair Defense Coalition, which included public interest and civil rights organizations, faith-based social justice organizations, and bar associations, was formed to plan for the next legislative session.³³⁴ The coalition was led by Texas Appleseed, with assistance from The Spangenberg Group, ABA SCLAIID, and other national organizations. In 2000, following a year of study, the Fair Defense Coalition issued a comprehensive report about indigent defense in Texas containing 48 recommendations for change.³³⁵

Also in 2000, the State Bar of Texas added its considerable support to the growing momentum for change by accepting a report from its Committee on Legal Services to the Poor in Criminal Matters, which was based on surveys of defense lawyers, judges and prosecutors throughout the state.³³⁶ The report concluded that the state's system for providing indigent defense services was "in serious need of reform."³³⁷ In addition, the State Bar of Texas convened a statewide conference of judges, lawyers, and criminal justice policymakers to discuss indigent defense reform.³³⁸ Shortly thereafter, the Fair Defense Coalition worked with allies in the state legislature to draft a bill that would eventually become the Fair Defense Act of 2001.³³⁹ Over the past few years, the Fair Defense Coalition, led by the Equal Justice Center and in cooperation with the Texas Task Force on Indigent Defense, has sought to monitor county compliance with the requirements of the Fair Defense Act.³⁴⁰

Establishing a Statewide Oversight Commission in Virginia

In the summer of 2004, Virginia enacted legislation establishing a new Virginia Indigent Defense Commission, which will oversee both assigned counsel and public defender programs throughout the state beginning in July 2005.³⁴¹ Prior to this legislation, although public defender offices served 48 of 134 judicial districts and assigned counsel provided representation throughout the state, Virginia maintained a regulatory agency that supervised and supported only public defenders.³⁴² Among its other duties, the Virginia Indigent Defense Commission is charged with setting caseload limits and establishing and enforcing qualification and performance standards for indigent defense representation.³⁴³

Bills to establish the Virginia Indigent Defense Commission resulted from recommendations made by the Virginia State Crime Commission following a two-year study.³⁴⁴ The legislation also closely adhered to one of the main recommendations of an ABA report released in February 2004, which documented severe deficiencies in Virginia's indigent defense system.³⁴⁵ The comprehensive study was conducted on behalf of ABA SCLAIID by The Spangenberg Group and supported by contributions from the Open Society Institute, the National Association of Criminal Defense Lawyers, and the law firm of Covington & Burling. The report concluded that "Virginia's indigent defense system fails to adequately protect the rights of poor persons who are accused of committing crimes"³⁴⁶ and recommended the creation of a statewide commission with oversight of both assigned counsel and public defenders.³⁴⁷ The release of this report garnered significant national and local media attention, which in all likelihood aided in passing the reform legislation.³⁴⁸ Following its release, the Bar Council of

the Virginia State Bar adopted the *ABA Ten Principles of a Public Defense Delivery System* and established a task force to recommend further indigent defense improvements for consideration by the newly-created Virginia Indigent Defense Commission and the General Assembly.³⁴⁹ In August 2004, the Virginia Bar Association weighed in on the issue with a series of articles in its official publication, including an article by the bar association's president critiquing the current system and calling upon all Virginia lawyers to join in the fight for reform.³⁵⁰

During the past several years, the Virginia Indigent Defense Coalition (VIDC) also has played an important role in achieving indigent defense reform in Virginia.³⁵¹ Aided by the National Association of Criminal Defense Lawyers and a grant from ABA SCLAID's *Gideon Initiative*,³⁵² the VIDC was formed in 2001 by a group of Virginia defense lawyers who realized that the success of any reform effort would depend upon support from the entire community.³⁵³ Thus, citizen groups and community organizations were recruited to form a broad-based coalition in order to raise public awareness of Virginia's indigent defense crisis.³⁵⁴ VIDC public and media education projects have included a report card grading Virginia's indigent defense system based on the *ABA Ten Principles of a Public Defense Delivery System*.³⁵⁵ Since its inception, the VIDC also has met with state policymakers and judges, submitted a report to the Virginia Crime Commission, and drafted and secured passage of a legislative joint resolution establishing a study committee to examine whether Virginia should have a statewide indigent defense commission.³⁵⁶

Virginia's 2004 legislation is by no means a panacea for all that ails that state's indigent defense system, but it is an important step on the road to real improvements.³⁵⁷ Among its deficiencies, the legislation provides no additional funding for indigent defense services, although the inadequacy of state funding has been well documented. For example, Virginia has the distinction of having the lowest, non-waivable statutory fee caps in the nation on the amount that can be paid to assigned counsel.³⁵⁸

Raising Assigned Counsel Fees in New York

In 2003, New York enacted legislation that increased the rates of compensation for assigned counsel to \$60 per hour for misdemeanors (with a per-case maximum of \$2,400) and \$75 per hour for all other cases (with a per-case maximum of \$4,400).³⁵⁹ All per-case maximums are waiveable, however, upon a showing of extraordinary circumstances.³⁶⁰ Prior to the legislation, the New York statutory rates of compensation were \$25 per hour for out-of-court work and \$40 per hour for in-court work, with per-case maximums of \$800 for misdemeanors and \$1,200 for felonies.³⁶¹ While the fee increase is effective January 2004, state funding for the increase is uncertain and may not be available until 2005.³⁶² The legislation also created a task force to review the adequacy of the new rates.³⁶³

These statutory fee increases stemmed from a lawsuit instituted by the New York County Lawyers Association (NYCLA) against New York State and New York City, challenging the constitutionality of the statutory rates of compensation paid to private attorneys appointed to represent indigents in criminal and family court.³⁶⁴ NYCLA was represented *pro bono* in this litigation by the law firm of Davis, Polk & Wardwell. In February 2003, a New York State Supreme Court judge ruled in favor of NYCLA and ordered the state and city to pay assigned counsel \$90 per hour until the state legislature modified the rates.³⁶⁵ Although the decision was appealed by the state and city, NYCLA settled the lawsuit in November 2003 after enactment of New York's legislation increasing the assigned counsel fee rates.³⁶⁶

In 2004, New York Chief Judge Judith Kaye established the Commission on the Future of Indigent Defense Services to examine the effectiveness of the state's system and to develop a blueprint for reform.³⁶⁷ The commission is comprised of members from the bench and bar, law enforcement, criminal justice agencies, and academia. In addition, efforts are underway in New York to establish a permanent statewide indigent defense agency to promulgate uniform performance standards for county indigent defense programs and to provide supplemental state funds to programs that comply with those standards.³⁶⁸ A bill to create such an agency has been introduced in the state legislature during each of the last few years and has been endorsed by a wide range of groups.³⁶⁹ The proposal also has been endorsed publicly by several state and local newspapers, including the *The New York Times*.³⁷⁰

Strategies Used in Other States

Witnesses discussed a variety of attempts to achieve reform in other states that have not yet yielded tangible results. For example, in Louisiana, Mississippi, Nevada, and Pennsylvania, studies of indigent defense systems have documented serious deficiencies and recommended improvements.³⁷¹ In Michigan, a broad-based citizens' coalition known as the Michigan Public Defense Task Force developed a model plan for that state's indigent defense services and is working to implement the plan through public education and advocacy programs.³⁷²

In Louisiana, efforts to build a reform coalition involving public defenders, contract lawyers, private attorneys, and community leaders are underway.³⁷³ And in 2004, the Louisiana legislature created a task force to study the indigent defense system and to present findings and recommendations for statutory improvements. The task force includes representatives from all three branches of state government, as well as business leaders, the deans of the state's four law schools, religious leaders, and individuals from the social services and legal services communities.³⁷⁴ The Louisiana State Bar Association supported the creation of this task force through a resolution adopted in 2003.³⁷⁵

A number of other state bars have supported reform as well. For example, the State Bar of Michigan in 2002 adopted eleven principles for the delivery of indigent defense in that state, modeled on the *ABA Ten Principles of a Public Defense Delivery System*.³⁷⁶ And in 2003, the State Bar of Michigan's Executive Committee adopted a resolution in support of the state legislature establishing a commission to study indigent defense and recommend improvements.³⁷⁷ In 2004, The Alabama State Bar convened a symposium to focus attention on the need for indigent defense reform.³⁷⁸ Also, in 2004, the Washington State Bar Association approved recommendations of a study panel calling for additional state funding, monitoring of trial level indigent defense services, implementation of indigent defense standards, and the creation of a permanent state bar committee to advocate for legislation or court rules to address indigent defense shortcomings.³⁷⁹

In Pennsylvania and Nevada, the supreme courts appointed committees to conduct statewide studies of bias in the justice system in which racial, gender, and economic factors were examined. Reports with recommendations were issued by two Nevada committees in 1997 and 2000 and by a Pennsylvania committee in 2003. All of these reports included in-depth examinations of indigent defense problems.³⁸⁰

In several states, national organizations interested in improving indigent defense have contributed resources toward reform efforts. In Louisiana, the National Legal Aid and Defender

Association and the National Association of Criminal Defense Lawyers have helped to build coalitions committed to reform and conducted assessments of indigent defense at both the parish and statewide levels. Further, ABA SCLAID contributed grant funds through its *ABA Gideon Initiative* to study the criminal justice system in one Louisiana parish and the juvenile justice system statewide.³⁸¹ *ABA Gideon Initiative* grants also were awarded to support the Michigan Public Defense Task Force, as well as efforts in Mississippi led by the NAACP Legal Defense and Educational Fund, Inc. to educate the public about the need for reform.³⁸²

In 2000, ABA SCLAID, in partnership with the U.S. Department of Justice's Bureau of Justice Assistance, sponsored a statewide study of indigent defense services for the Nevada Supreme Court committee charged with implementing recommendations for eliminating racial, ethnic, and economic bias in the justice system.³⁸³ Also in Nevada, in 2003, the National Legal Aid and Defender Association issued a report about public defense in Clark County.³⁸⁴ In addition, the National Association of Criminal Defense Lawyers and the American Civil Liberties Union jointly sponsored a study of indigent defense practices in Venango County, Pennsylvania in 2001.³⁸⁵ And in Montana, the American Civil Liberties Union filed a class action in 2002 on behalf of indigent defendants against the state and seven counties, seeking to force the state to assume greater responsibility for the delivery of indigent defense services.³⁸⁶

Systemic litigation to compel indigent defense improvements has been pursued in other states as well. For example, with *pro bono* assistance from the law firm of Kirkland & Ellis LLP, in 2002, the Criminal Defense Attorneys of Michigan and the Wayne County Criminal Defense Bar Association filed an unsuccessful lawsuit in the Michigan Supreme Court seeking an increase in assigned counsel fees in Wayne County.³⁸⁷

In Oregon, a highly unusual federal lawsuit was filed jointly by the Lane County public defender and district attorney in response to the Chief Justice's decision to curtail the appointment of indigent defense lawyers in certain cases from March through June 2003 due to drastic budget cuts by the state legislature.³⁸⁸ The district attorney became an ally of the public defender in this litigation because the deferral of cases for three months meant an enormous backlog for the prosecutor's office.³⁸⁹ The lawsuit eventually was dismissed as moot by the U.S. Ninth Circuit Court of Appeals after the budget was restored and lawyers once again were appointed for all cases.³⁹⁰

In Massachusetts, lawsuits were filed in 2004 by the Committee on Public Counsel Services and the American Civil Liberties Union of Massachusetts on behalf of indigent defendants in Hampden County, alleging that the state's chronic under-funding of the assigned counsel system had led to a shortage of attorneys willing to accept assignments in the defendants' cases.³⁹¹ The Massachusetts Supreme Judicial Court ruled that criminal cases must be dismissed against those indigent defendants for whom no attorney had filed an appearance within 45 days of arraignment and that indigent defendants cannot be held in jail more than seven days without counsel.³⁹² Shortly after the two lawsuits challenging the constitutionality of Hampden County's indigent defense system were filed, the law firm of Holland & Knight filed an original petition in the Massachusetts Supreme Judicial Court challenging the assigned counsel system in all of Massachusetts.³⁹³

In September 2004, a class action lawsuit was filed against the State of Louisiana, the Governor of Louisiana, and the Louisiana State Legislature alleging that inadequate funding and other deficiencies in Calcasieu Parish's indigent defense system result in the effective denial of the constitutional right to counsel for indigent defendants.³⁹⁴ The lawsuit was filed *pro bono* by

Sutherland, Asbill & Brennan LLP and Baker Botts LLP, with the support of the National Association of Criminal Defense Lawyers.

In Mississippi, with *pro bono* help from the law firm of Arnold & Porter LLP, a lawsuit was filed in 1999 on behalf of Quitman County challenging the state's county-based indigent defense funding system and the use of part-time public defenders.³⁹⁵ The lawsuit alleges that the county is unable to fund constitutionally adequate indigent defense services and calls on the state to assume the obligation by creating a state-funded, statewide full-time public defender system, equivalent to the state's system for prosecution services.³⁹⁶ A witness from Mississippi testified that using a county as a plaintiff has enabled the issue to be reframed as one of "good government" because taxpayers bear the cost of imprisoning indigent accused persons who are forced to endure lengthy delays in jail without seeing a lawyer.³⁹⁷ The trial court ruled against Quitman County in November of 2003;³⁹⁸ however, as of the writing of this report, the case is on appeal before the Mississippi Supreme Court.³⁹⁹ The lawsuit has attracted a number of unlikely allies who have filed amicus briefs in support of the litigation, including the Mississippi Association of Supervisors (the equivalent of county commissioners), the Quitman County Chamber of Commerce, a well-known former district attorney, and eleven sheriffs.⁴⁰⁰

IV. Model Approaches to Providing Services

In addition to discussing significant problems in indigent defense and attempts to remedy deficiencies, witnesses offered examples of model approaches to the delivery of defense services. The examples discussed below illustrate some of the commendable efforts that are being made around the country to provide effective defense representation. Unfortunately, in the instances mentioned, while the structures and other efforts to provide quality defense services are laudable, the overall level of funding is still very inadequate.

Oversight and Quality through Statewide Structures

The statewide system in Massachusetts provides effective training and oversight of private assigned counsel.⁴⁰¹ A single, independent organization, known as the Committee for Public Counsel Services, oversees both public defenders and approximately 2,000 private attorneys statewide and has adopted training and performance standards as well as caseload limits.⁴⁰²

The Office of the Public Defender in Maryland manages that state's public defender system, resulting in centralized administration of district offices that provide trial level services throughout the state.⁴⁰³ In addition, the agency recently established a new forensics division and maintains other specialty divisions to handle appeals, death penalty cases, mental health cases, post-conviction/collateral review, and dependency/termination of parental rights cases.⁴⁰⁴

The New Mexico Public Defender Department maintains trial public defender units across the state equipped with updated technology (including e-mail, internet, case tracking, and case management systems) and supported by paralegals, investigators, social workers, alternative sentencing advocates, and technology and administrative staff.⁴⁰⁵ The agency also operates specialty units (dealing with appeals, death penalty, post-conviction, and mental health cases) and oversees contracts with private attorneys to provide services in conflict cases throughout the state. Contract counsel, moreover, are required to comply with state performance standards.⁴⁰⁶

Indiana has a state commission, known as the Indiana Public Defender Commission, which is authorized by statute to reimburse counties 40% of their expenditures in felony and juvenile cases, provided the counties create an independent board to oversee defense services and comply with the commission's caseload, qualification, and other standards for representation.⁴⁰⁷ Currently, 53 of the state's 92 counties have adopted the commission's standards and established independent boards.⁴⁰⁸ The Indiana legislation was cited in an ABA resolution as an effective means for enforcing indigent defense standards.⁴⁰⁹

Critical Support from Defender Resource Centers

Witnesses identified two states in which organizations have been established to provide key resources and support to indigent defense attorneys statewide. The New York State Defenders Association, a non-profit membership organization of criminal defense lawyers, has administered its Public Defense Backup Center with state funding since 1981.⁴¹⁰ The Center provides technical assistance to indigent defense attorneys throughout the state in the form of legal research, publications, training, and consultation.⁴¹¹ Further, the Center is charged with reviewing the indigent defense system and making recommendations to the

legislative, judicial, and executive branches of state government.⁴¹² Technical assistance is also provided to state and local governments in New York to improve the delivery of indigent defense services while reducing costs.⁴¹³

The Washington Defender Association (WDA), funded primarily through membership dues, was founded in 1983 to provide technical assistance and training for public defender offices, assigned counsel, and private firms providing indigent defense services.⁴¹⁴ WDA created statewide standards for public defense services (endorsed by the Washington State Bar Association)⁴¹⁵ and established a full-time immigration attorney position to advise defenders on issues affecting non-citizen clients.⁴¹⁶ In addition, WDA files *amicus curiae* briefs in cases where local defenders challenge defense system inadequacies⁴¹⁷ and engages in state legislative advocacy on behalf of defense service providers on issues such as alternative sentencing programs and post-prison offender rehabilitation.⁴¹⁸ WDA also has worked with the ABA Juvenile Justice Center and other organizations on an assessment of juvenile justice in Washington, which included a statewide survey and site visits in seven counties.⁴¹⁹

Expansion of the Scope of Public Defense Representation

In recent years, a new model of public defense representation has evolved—sometimes referred to as “holistic,” “problem-solving,” or “whole-client” advocacy—that endeavors to address underlying problems in clients’ lives that may lead to repeat criminal offenses. Public defender offices in various parts of the country have embraced this expanded role, often conducting extensive community outreach efforts on behalf of their clients.⁴²⁰ For example, witnesses described a new program, known as the Defender Community Advocacy Project and instituted in Providence County by the Rhode Island Public Defender’s Office, in which two attorneys meet each client at arraignment and seek to determine whether the client has mental health, substance abuse, or housing issues. These attorneys then collaborate with social workers and community contacts to formulate a plan and/or disposition to address the client’s issues.⁴²¹ On the juvenile front, the TeamChild program in Washington was cited for helping public defenders, judges, and court personnel identify underlying causes of delinquency and advocating for community-based services for juvenile clients, such as those addressing educational, mental or medical health, or housing needs.⁴²²

Adequate Funding, Support, and Independence for Public Defender Offices

Throughout the hearings, witnesses underscored how sufficient funding and independence is necessary to ensure the provision of meaningful defense representation. For example, the Defender Association of Seattle-King County was identified as an office that succeeds in fulfilling these important objectives, although it is obviously not the only public defender office in the country to do so.⁴²³ Established in 1969, The Defender Association is a non-profit corporation with an independent board of directors that contracts with King County to provide trial and appellate representation in felony, misdemeanor, juvenile, family advocacy, and civil commitment cases.⁴²⁴ The office is relatively well-funded, enjoys access to investigation and expert witnesses in all types of cases, and offers starting base salaries close to those of prosecutors, although inadequate benefits remain a problem.⁴²⁵ The office also has the support of the local bar and community, which were instrumental in securing the office’s establishment.⁴²⁶ Due to this support and its independent status, the office is well insulated from judicial interference in its day-to-day operations and decision-making.⁴²⁷ Further, local prosecutors publicly have demonstrated their support for the office, attesting to its effectiveness in advancing the fair administration of justice.⁴²⁸

V. Main Findings

The findings presented below are based upon an analysis of the testimony presented during our four hearings, as well as the long-term experience of ABA SCLAID in examining this nation's efforts to provide indigent defense services in state criminal and juvenile delinquency proceedings.

Finding #1

Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction. The specific problems discussed in Part II of this report, the most important of which are emphasized in these findings, all point to one inescapable, overriding conclusion: When we fail to deliver on the promise of *Gideon* and the Supreme Court's other right to counsel decisions—when we fail to provide proper defense to the most vulnerable citizens in our society—the integrity of the criminal justice system is eroded and the legitimacy of criminal convictions is called into question.

Finding #2

Funding for indigent defense services is shamefully inadequate. The lack of funding impacts on virtually every aspect of indigent defense systems:

- ❖ Lawyers frequently are burdened by overwhelming caseloads and essentially coerced into furnishing representation in defense systems that fail to provide the bare necessities for an adequate defense (e.g., sufficient time to prepare, experts, investigators, and other paralegals), resulting in routine violations of the Sixth Amendment obligation to provide effective assistance of counsel. In this environment, too many attorneys fail to establish early and continuous contact with their indigent clients. And some attorneys—both assigned counsel and part-time public defenders—retain private law practices, often devoting greater attention to their paying clients. The financial disincentives of defense systems make it difficult to attract and retain experienced, competent attorneys.
- ❖ There is often little or no formal, systematic training of indigent defense attorneys or support staff, contrary to national standards.
- ❖ Jurisdictions sometimes employ cost-cutting measures—including low-bid contracts for services, undue restrictions on eligibility for services, and the imposition of fees and fines for services—that interfere with the exercise of the right to counsel and the provision of constitutionally adequate representation.
- ❖ Prosecution services receive substantially greater resources than indigent defense services, creating an overt imbalance in the scales of justice when the liberty interests of the poor are at stake.

Finding #3

Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation. In addition to providing constitutionally adequate representation, lawyers who defend the indigent also are required to provide representation that is “competent,” as required by rules of professional conduct. The ABA Model Rules of Professional Conduct, like state ethics rules everywhere, require that lawyers represent clients with “the legal knowledge, skill, thoroughness and preparation necessary for the representation.”⁴²⁹ Yet, defense lawyers for the indigent sometimes are unable to or do not comply with this and other requirements, and as a nation we tolerate substandard representation in indigent defense that is not acceptable practice on behalf of paying clients. However, ethical violations routinely are ignored not only by the lawyers themselves, but also by judges and disciplinary authorities.

Finding #4

Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record. Throughout the country, indigent defendants who have not knowingly, voluntarily, and intelligently waived their right to counsel are denied representation at critical stages of the criminal process, in violation of constitutional requirements.⁴³⁰ To make matters worse, prosecutors and judges sometimes improperly encourage waivers of the right to counsel and subsequent pleas of guilty from unrepresented indigent defendants, in violation of disciplinary rules and national standards.⁴³¹

Finding #5

Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function. In many localities, the selection and payment of counsel is still under the control of judges or other elected officials instead of an independent authority as recommended by national standards. Accordingly, lawyers must depend on judges to approve their compensation claims, as well as requests for expert or investigative services. Attorneys may be removed from court-appointed lists if they apply for fees considered by judges to be too high, creating a disincentive to spend adequate time on a case. In some places, elected judges award court appointments as favors to attorneys who support their campaigns for re-election. Sometimes, county officials respond to requests for modifications in contracts for indigent defense by threatening to terminate the current contract and award a new one to the lowest bidder.

Finding #6

Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services. The absence of oversight structures to supervise and monitor attorney performance results in disparate systems of defense that vary markedly in terms of quality of services, resulting in unequal justice for the poor even within the same state.

Finding #7

Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests. Reform strategies involving a combination of expert assessments, public education, legislative advocacy, and litigation have produced significant systemic improvements. Further, the sustained involvement of a wide variety of allies—including top-level government officials, bar leaders, national organizations, law firms, criminal justice system participants, community organizations, business leaders, and other interested parties—has proven critical to the success of many reform efforts.

Finding #8

The organized bar too often has failed to provide the requisite leadership in the indigent defense area. The example set by a few bar associations in a handful of states underscores the instrumental role bar leadership can and should play in successful indigent defense reform efforts. Nevertheless, the organized bar generally does not lead or join the fight to implement fully the right to counsel in this country, as envisioned by national standards.⁴³²

Finding #9

Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support. Among the models identified by witnesses are: statewide oversight structures; defender resource centers; holistic advocacy programs; and independent public defender offices.⁴³³

VI. Recommendations

Our four hearings on the right to counsel confirmed that there is much to be done to address the national crisis that continues to afflict indigent defense systems in this country. To assist in this important work, ABA SCLAID offers the recommendations below and urges their implementation.

Recommendation #1

To fulfill the constitutional guarantee of effective assistance of counsel, state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense should be in parity with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects.

As documented in Part II of this report, as well as in numerous studies,⁴³⁴ indigent defense systems in the United States are chronically under-funded, often resulting in woefully inadequate representation and even sometimes a complete failure to provide counsel. In states in which funding is primarily furnished by counties or other local subdivisions, the financing is typically unpredictable, insufficient, and lacks statewide uniformity. For this reason, national standards recommend that state governments should assume responsibility for providing indigent defense services in criminal and juvenile proceedings.⁴³⁵ Today, in about half of the country all indigent defense services are funded at the state level,⁴³⁶ but the extent of the financing is insufficient. Not only must state governments provide additional funds, they also must resist the urge to employ cost-cutting measures that interfere with the right to counsel and quality representation. In addition, state governments need to ensure far greater parity in the resources provided to both prosecution and defense, since there is often significant inequality in the funding of these two functions of the criminal justice system.⁴³⁷

At a time when most states are experiencing severe budget constraints, the difficulty in convincing government officials to appropriate increased funds for indigent defense will continue to be a significant hurdle, particularly in states in which the majority of funding is provided at the local level. Yet, as this report shows, the nation's indigent defense problems are largely attributable to a critical lack of resources. Hence, the importance of sustained advocacy for increased financing cannot be underestimated. By providing the necessary resources for an effective defense and extending alternative sentencing and treatment options, states can experience savings by reducing the number of re-trials due to ineffective assistance of counsel, wrongful convictions, overcrowded prisons, and recidivism.

Recommendation #2

To fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings.

The ABA has long maintained that it is not sufficient to rely solely on state and local governments to fund defense services for the poor,⁴³⁸ especially since the right to counsel in state courts derives from the federal Constitution's Sixth Amendment guarantee of effective counsel. At present, however, virtually no federal funds are allocated for defense services in the fifty states. On the other hand, federal grants support the services of state and local prosecutors and police.⁴³⁹ While the federal government annually funds a national training center for state and local prosecutors, no similar organization exists for indigent defense attorneys.⁴⁴⁰

Twenty-five years ago, the ABA recommended that the federal government establish and fund an independent, non-profit Center for Defense Services to administer matching grants and other programs to strengthen the services of public defenders, private assigned counsel, and contract defenders.⁴⁴¹ As envisioned by the ABA, the proposed Center would receive funds directly from Congress and be governed by an independent Board of Directors appointed by the President. The establishment of such a federal program continues to be ABA policy.

Short of a national Center for Defense Services, there are other steps that Congress should take. It would be enormously helpful, for example, if federal student loan forgiveness were available to attorneys who provide indigent defense services. However, during the past four years, efforts in Congress to extend loan forgiveness to public defenders have been unsuccessful.⁴⁴² Although prosecutors currently are eligible to receive forgiveness under the federal Perkins Loan Program, public defenders do not qualify.⁴⁴³ In 2004, the ABA Board of Governors selected as one of its legislative priorities the establishment of federal and state government loan assistance repayment, loan forgiveness, and income-sharing programs for law school graduates who accept low-paying, public interest employment.⁴⁴⁴

In addition, the U.S. Department of Justice should continue to sponsor national indigent defense symposia.⁴⁴⁵ At the last symposium in 2000, the Department of Justice invited teams of criminal justice participants from local jurisdictions—including judges, prosecutors, and defense attorneys—to participate in discussions about needed improvements in their indigent defense systems. Witnesses agreed that the program was extremely valuable in establishing important local collaborations while demonstrating the federal government's commitment to indigent defense reform.⁴⁴⁶

Recommendation #3

State governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings.

Across the country, indigent defense systems routinely operate with virtually no accountability, despite providing substandard representation. Too often judges and politicians interfere with defense counsel's professional independence. In many instances, moreover, counsel is unavailable for appointment even though the law mandates representation.

When defense systems are funded and organized at the local level with no statewide oversight, the quality of representation varies among the local jurisdictions. As recommended by national standards, one way to ensure uniform quality in the delivery of indigent defense is to establish oversight organizations,⁴⁴⁷ which can adopt and enforce standards for the delivery of

services on subjects such as client eligibility; attorney qualifications and performance; appointment and independence of counsel; compensation, workload, supervision, evaluation, training, and continuing education of counsel; and case management and tracking. The statewide organization should also ensure that adequate investigative, expert, and support services are available. Finally, the organization should ensure that defense attorneys are provided office space and equipment, access to technology, legal materials, and other necessary resources, or are adequately compensated in order to cover the cost of these expenses.

Compliance with this recommendation can be achieved if states establish an indigent defense commission, governed by an independent board of trustees, to oversee the delivery of all services within the state.⁴⁴⁸ This oversight authority should be comprised of persons dedicated to excellence in defense services, but consistent with national standards should not include either judges or prosecutors. Preferably, the commission should administer directly all funds for indigent defense services in the state or, alternatively, provide payments of state funds in order to augment local indigent defense programs. However a state organizes its services for indigent defense, the commission should monitor and enforce compliance with statewide standards. Further, the oversight commission should collect and maintain data on the state's indigent defense system, including, for example, expenditures and caseloads. Models for the kind of oversight commission envisioned in this recommendation exist in the United States today.⁴⁴⁹

Recommendation #4

Attorneys and defense programs should refuse to continue indigent defense representation, or to accept new cases for representation, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations.

This recommendation is not new. It is based on Standard 5-5.3 of the *ABA Standards for Criminal Justice: Providing Defense Services*, and similar national proposals. But unfortunately it bears repeating and deserves a prominent place in the recommendations of this report since caseloads of indigent defense attorneys throughout much of the country are too high. The most capable lawyers, even if they are well-trained and conscientious, cannot provide effective representation to their clients when there are simply too many clients.

Obviously, funding increases can help to alleviate excessive workloads by enabling additional, qualified attorneys to be hired at competitive rates that ensure their retention. However, until such relief is available, individual attorneys and those in charge of indigent defense programs have a clear duty to refuse to provide representation whenever it is determined that continued service will lead to the violation of professional obligations mandated by state ethics rules or the failure to furnish effective assistance of counsel as required by the Sixth Amendment.⁴⁵⁰

Recommendation #5

Judges should fully respect the independence of defense lawyers who represent the indigent, but judges should also be willing to report to appropriate authorities defense lawyers who violate ethical duties to their clients. Judges also should report prosecutors who seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, or who

otherwise give legal advice to such persons, other than the advice to secure counsel. Judges should never attempt to encourage persons to waive their right to counsel, and no waiver should ever be accepted unless it is knowing, voluntary, intelligent, and on the record.

Consistent with national standards, defense lawyers for the indigent should be as independent as private lawyers whose clients can pay for their legal services. As this report demonstrates, however, defense lawyers for the indigent do not always enjoy the kind of independence that their private attorney counterparts take for granted. Regrettably, judges sometimes retaliate against defense counsel by refusing to reappoint them when they are deemed too aggressive in their representation, and judges also arbitrarily deny payments to lawyers for services rendered. Instead, judges should be at the forefront in urging that neither the appointment nor compensation of counsel be under judicial control.

While judges should naturally be concerned about the fair administration of justice in their courtrooms, they also must respect the attorney-client relationship. Accordingly, the ABA has recommended for many years that defense attorneys not be removed from cases in which they are providing representation over the objection of the attorney and client.⁴⁵¹ But if an attorney clearly fails to provide adequate representation in violation of ethical obligations, a judge should report the matter to the appropriate disciplinary authority. Such action would be in complete accord with a judge's obligation under the Model Code of Judicial Conduct.⁴⁵² Similarly, judges should not hesitate to report prosecutors who violate ethics rules by communicating with unrepresented indigent defendants to obtain waivers of counsel and guilty pleas.⁴⁵³ And finally, judges should refrain from pressuring indigents to waive counsel and from accepting waivers that are not entered knowingly, voluntarily, and intelligently, as required by the Constitution and outlined in Supreme Court decisions.⁴⁵⁴ As the Supreme Court has emphasized, before a defendant waives the right to counsel, "he should be made aware of the dangers and disadvantages of self-representation."⁴⁵⁵

Recommendation #6

State and local bar associations should be actively involved in evaluating and monitoring criminal and juvenile delinquency proceedings to ensure that defense counsel is provided in all cases to which the right to counsel attaches and that independent and quality representation is furnished. Bar associations should be steadfast in advocating on behalf of such defense services.

Throughout the country, the treatment of indigent defendants and the performance of defense counsel should be monitored on an ongoing basis through active court observation programs. Too often what happens in America's criminal and juvenile courts, especially in the lower courts, occurs outside of public view. Particular attention should be paid to determine if indigent defendants are pleading guilty in misdemeanor cases punishable by incarceration without the assistance of counsel, in violation of *Argersinger v. Hamlin*⁴⁵⁶ or *Alabama v. Shelton*.⁴⁵⁷ Organized state and/or local bar associations uniquely are situated to fulfill this monitoring function within their jurisdictions. To assist in this endeavor, they should enlist the help of law firms and public interest groups. Egregious misconduct, whether by judges, prosecutors, or defense attorneys, should be publicly exposed and ethical violations reported to appropriate authorities.

Whereas local bar associations may be positioned best to monitor day-to-day operations of indigent defense programs, state bar associations are better able to evaluate defense

services statewide and to formulate reform recommendations. As discussed in Part III of this report, many indigent defense improvements in recent years are due in large part to the active involvement of state bar leaders who worked tirelessly to address systemic deficiencies.⁴⁵⁸

Because the job of securing effective defense services will never truly be finished, every state bar should consider establishing a permanent, special committee (if none currently exists) dedicated to the ongoing review of indigent defense in the state and comprised of a diverse cross-section of members, including persons not primarily involved in the indigent defense field. Using as a guide the *ABA Ten Principles of a Public Defense Delivery System* and other national standards, these committees should consider conducting periodic assessments of the state's indigent defense system and convening statewide meetings and/or hearings, partnering with other groups as necessary, to evaluate the effectiveness of the state's system. These committees also should consider organizing state bar-sponsored indigent defense symposia and inviting judges, prosecutors, and government officials to attend, in an effort to foster collaboration and obtain key support for indigent defense improvements.

Following recent examples in several states,⁴⁵⁹ state bar committees can propose resolutions for adoption by the state's bar that detail the problems in the jurisdiction's indigent defense system; recommend improvements; and call for the state government to establish a blue-ribbon study commission to recommend reforms to state officials. When appropriate, the committee can also call for a careful and extensive evaluation of the state's indigent defense system. Finally, state bar committees, together with the leadership of bar associations, can play significant roles by supporting government proposals that address the needs of the state's defense system.

Recommendation #7

In addition to state and local bar associations, many other organizations and individuals should become involved in efforts to reform indigent defense systems.

Part III of this report describes how the participation of top-level government officials, bar associations, national organizations, law firms, community and public interest groups, and other interested parties have contributed to important progress in several states. As Finding #7 contained in Part V of this report concludes, it is clear that “[e]fforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.”

Toward that end, state government officials should consider appointing, as necessary, blue-ribbon commissions to study the state's indigent defense system and recommend improvements. Each state's Chief Justice, Governor, and House and Senate leadership should take an active role in guiding the work of the study commission and appointing its members. The commission should include a broad-based, diverse membership drawn from all sectors of the criminal justice system and the community at large. Further, national organizations should continue to assist indigent defense reforms in a variety of ways, such as supporting on-site assessments of indigent defense systems; developing policy statements for use by state and local bar associations and others; and aiding nascent reform coalitions. Also, private law firms should devote *pro bono* resources in support of systemic litigation if that appears necessary in order to address indigent defense deficiencies. Lastly, all interested parties should work together to educate the public, media, and policymakers about the need for indigent defense reform.

VII. Conclusion

"A journey of a thousand miles must begin with a single step."

Lao Tzu, Chinese Taoist Philosopher, 6th century B.C.

Gideon's 40th anniversary presented an ideal opportunity to assess the state of indigent defense in America. While the results of our evaluation are alarming, they nevertheless remind us of the need to redouble efforts to ensure that effective representation is provided in all areas of the country. We are confident that the recommendations contained in this report, if implemented, will serve as important steps in the long and continuing quest to achieve true equality in our system of justice.

Appendix A: Hearing Witnesses

Jeffrey Adachi, Chief Public Defender, Office of the San Francisco Public Defender, San Francisco, California

Simmie Baer, Attorney Supervisor, Juvenile Division, The Defender Association, Seattle, Washington

Grace Bauer, Program Coordinator, Families Helping Families of SW Louisiana, Sulphur, Louisiana

Bill Beardall, Executive Director, Equal Justice Center, Austin, Texas

Robert Boruchowitz, Director, The Defender Association, Seattle, Washington

Stephen Bright, Director, Southern Center for Human Rights, Atlanta, Georgia

Deirdre Caughlan, Silver Bow County Public Defender, Butte, Montana

Frank Eaman, Attorney, Bellanca, Beattie & DeLisle, Harper Woods, Michigan

Nancy Forster, Chief Public Defender, Office of Maryland Public Defender, Baltimore, Maryland

Theodore Gottfried, Chief Appellate Defender, Office of the State Appellate Defender, Springfield, Illinois

Jonathan Gradess, Executive Director, New York State Defenders Association, Albany, New York

John Hardiman, Chief Public Defender, Office of the Rhode Island Public Defender, Providence, Rhode Island

Christie Hedman, Executive Director, Washington Defender Association, Seattle, Washington

James Hingeley, Chief Public Defender, Charlottesville/Albemarle County Public Defender's Office, Charlottesville, Virginia

Dennis Keefe, Chief Public Defender, Lancaster County Public Defender's Office, Lincoln, Nebraska

Jeff Larson, Chief Public Defender, Minnehaha County Public Defender Office, Sioux Falls, South Dakota

William Leahy, Chief Counsel, Committee for Public Counsel Services, Boston, Massachusetts

Anne Lee, Director, TeamChild, Seattle, Washington

Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis, Indiana

Thomas Lorenzi, Attorney, Lorenzi, Sanchez & Palay, LLP, Lake Charles, Louisiana

Lisette McCormick, Executive Director, Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Pittsburgh, Pennsylvania

Robert McDuff, Attorney, Jackson, Mississippi

Jacqueline McMurtrie, Assistant Professor and Director, Innocence Project NW Clinic, University of Washington School of Law, Seattle, Washington

John Pickens, Executive Director, Alabama Appleseed, Montgomery, Alabama

Ross Shepard, Former Director, Lane County Public Defender Services, Eugene, Oregon; Director, Defender Legal Services, National Legal Aid and Defender Association, Washington, D.C.

Elgin Simpson, Community Activist, Las Vegas, Nevada

Robert Spangenberg, President, The Spangenberg Group, West Newton, Massachusetts

Michael Spearman, Chief Criminal Judge, King County Superior Court, Seattle, Washington

Phyllis Subin, Former Director, New Mexico Public Defender Department; Justice Systems Consultant & Trainer, Albuquerque, New Mexico

David Utter, Director, Juvenile Justice Project of Louisiana, New Orleans, Louisiana

Vincent Warren, Staff Attorney, American Civil Liberties Union, New York, New York

Gary Windom, Chief Public Defender, Riverside County Public Defender Office, Riverside County, California

Chad Wright, Chief Appellate Defender, Montana Appellate Defender Office, Helena, Montana

Appendix B: *ABA Ten Principles of a Public Defense Delivery System**

1. **The public defense function, including the selection, funding, and payment of defense counsel, is independent.** The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.
2. **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.** The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.
3. **Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.** Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter.
4. **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.** Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.
5. **Defense counsel's workload is controlled to permit the rendering of quality representation.** Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

- 6. Defense counsel's ability, training, and experience match the complexity of the case.**
Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.
- 7. The same attorney continuously represents the client until completion of the case.**
Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.
- 8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.
- 9. Defense counsel is provided with and required to attend continuing legal education.**
Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.
- 10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.

* Footnotes omitted. To view footnotes, see full booklet available at:

<http://www.abanet.org/legal services/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.

Appendix C: Sample of Individuals Exonerated in U.S. in 2003-2004

Name	State	Convicted of:	Exonerated in:	Prison Time Served:
Brandon Moon	Texas	Aggravated Sexual Assault	2004	16 years
Bruce Dallas Goodman	Utah	Second Degree Murder	2004	19 years
David Allen Jones	California	Murder, Rape	2004	9 years
Clarence Harrison	Georgia	Rape, Robbery	2004	17 years
Barry Laughman	Pennsylvania	Murder, Rape, Robbery, Burglary	2004	16 years
Arthur Lee Whitfield	Virginia	Rape, Sodomy, Robbery	2004	22 years
Wilton Dedge	Florida	Sexual Battery, Agg. Battery, Burglary	2004	22 years
Ryan Matthews	Louisiana	First Degree Murder	2004	5 years (death row)
Lafonso Rollins	Illinois	Rape	2004	11 years
Josiah Sutton	Texas	Rape	2004	4.5 years
Anthony Powell	Massachusetts	Rape, Kidnapping	2004	12 years
Darryl Hunt	North Carolina	First Degree Murder	2004	18 years (aggregate)
Stephen Cowans	Massachusetts	Armed Assault w/ Intent to Murder, Home Invasion, Assault & Battery By Means of Dangerous Weapon, Armed Robbery, Assault & Battery on a Police Officer, Assault By Means of a Dangerous Weapon, Unlicensed Possession of a Firearm	2004	6.5 years
Calvin Lee Scott	Oklahoma	Rape	2003	20 years
Nicholas Yarris	Pennsylvania	Murder, Rape, Abduction	2003	21 years
Calvin Willis	Louisiana	Rape	2003	22 years
Steven Avery	Wisconsin	First Degree Sexual Assault, Attempted Murder, False Imprisonment	2003	18 years
Lonnie Erby	Missouri	Kidnapping, Armed Criminal Action, Forcible Rape, Forcible Sodomy, Stealing	2003	17 years
Paul Terry	Illinois	Murder, Agg. Kidnapping, Rape, Deviate Sexual Assault, Indecent Liberties w/ a Child	2003	27 years
Michael Evans	Illinois	Murder, Agg. Kidnapping, Rape, Deviate Sexual Assault, Indecent Liberties with a Child	2003	27 years
Mark Reid	Connecticut	Sexual Assault in First Degree, Kidnapping in First Degree	2003	6 years
Kenneth Wyniemko	Michigan	Criminal Sexual Conduct, Armed Robbery, Breaking & Entering	2003	9 years
Dana Holland	Illinois	Aggravated Criminal Sexual Assault	2003	10 years
Ulysses Rodriguez Charles	Massachusetts	Agg. Rape, Robbery, Unlawful Confinement, Entering Armed w/ Intent to Commit a Felony	2003	18 years
Michael Mercer	New York	Rape, Sodomy, Robbery	2003	12 years
Dennis Maher	Massachusetts	Rape, Assault w/ Intent to Rape, Assault & Battery, Agg. Rape	2003	19 years
Eddie James Lowery	Kansas	Rape, Agg. Battery, Agg. Burglary	2003	11 years
Gene Bibbins	Louisiana	Agg. Rape, Agg. Burglary	2003	16 years
Julius Ruffin	Virginia	Rape, Sodomy	2003	21 years

SOURCE: The Innocence Project at the Benjamin N. Cardozo School of Law
100 Fifth Avenue, 3rd Floor, New York, NY, 10011
website: <http://www.innocenceproject.org>

Endnotes

Executive Summary

¹ See Appendix A for a complete listing of the witnesses who participated in the hearings and their affiliations.

I. Introduction

² 372 U.S. 335 (1963).

³ *Id.* at 341-345.

⁴ *Id.* at 344.

⁵ For a complete list of witnesses participating in the hearings, see Appendix A. The states featured in these hearings include: Alabama, California, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, and Washington. The full testimony provided by witnesses is available in the form of four separate transcripts. See *Are We Keeping the Promise? ABA SCLAIID Hearing on the Right to Counsel 40 Years after Gideon v. Wainwright* (February 7, 2003) [hereinafter *February Hearing*], available at <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/> (on file with ABA SCLAIID); *Are We Keeping the Promise? ABA SCLAIID Hearing on the Right to Counsel 40 Years after Gideon v. Wainwright* (August 8, 2003) [hereinafter *August Hearing*], available at <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/> (on file with ABA SCLAIID); *Are We Keeping the Promise? ABA SCLAIID Hearing on the Right to Counsel 40 Years after Gideon v. Wainwright* (October 31, 2003) [hereinafter *October Hearing*], available at <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/> (on file with ABA SCLAIID); *Are We Keeping the Promise? ABA SCLAIID Hearing on the Right to Counsel 40 Years after Gideon v. Wainwright* (November 13, 2003) [hereinafter *November Hearing*], available at <http://www.abanet.org/legal/services/sclaid/defender/brokenpromise/> (on file with ABA SCLAIID).

⁶ ABA SCLAIID's hearings and this report focus solely on state indigent defense systems, as opposed to the federal indigent defense system, because the federal system is considerably better funded and supported than are state systems and it is widely acknowledged that the most serious systemic problems occur in the states.

⁷ *In re Gault*, 387 U.S. 1, 41 (1967).

⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

⁹ *Alabama v. Shelton*, 535 U.S. 654, 662, 674 (2002).

¹⁰ *Douglas v. California*, 372 U.S. 353, 355-357 (1963).

¹¹ *United States v. Wade*, 388 U.S. 218, 224 (1967).

¹² *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

¹³ *United States v. Ash*, 413 U.S. 300, 311 (1973); *Coleman v. Alabama*, 399 U.S. 1 (1970).

¹⁴ *White v. Maryland*, 373 U.S. 59, 60 (1961).

¹⁵ *Iowa v. Tovar*, 124 S.Ct. 1379, 1383 (2004); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972); *White v. Maryland*, 373 U.S. 59 (1963).

¹⁶ Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW AND CONTEMP. PROBS. 31, 32 (1995).

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 37.

¹⁹ *Id.* at 41.

²⁰ See *infra* text accompanying notes 349, 355, 376.

²¹ BELDON RUSSONELLO & STEWART, OPEN SOCIETY INSTITUTE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION (2002), available at <http://www.nlada.org/DMS/Documents/1075394127.32/Belden%20Russonello%20Polling%20short%20report.pdf> (on file with ABA SCLAIID).

²² *Id.* at 3.

²³ *Id.* at 1.

²⁴ See C. RONALD HUFF & ARYE RATNER, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 858 (2004); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839, 1844 (2000).

²⁵ See Lefstein, *supra* note 24, at 868; SCHECK ET AL., *supra* note 24, at 183-192; HUFF & RATNER, *supra* note 24, at 76-77.

²⁶ OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE, at vi-vii (2000) [hereinafter 2000 NAT'L SYMPOSIUM ON INDIGENT DEFENSE].

²⁷ *Id.* at 75.

²⁸ See Lefstein, *supra* note 24, at 858-860.

²⁹ See RADELET ET AL., *supra* note 24, at 54-62.

³⁰ See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343 (1997).

³¹ See The Innocence Project, at <http://www.innocenceproject.org>.

³² *Id.*

³³ 150 Cong. Rec. S11612-13 (2004).

³⁴ The Spangenberg Group is a nationally recognized research and consulting firm specializing in improving justice programs, located in West Newton, Massachusetts.

³⁵ See <http://www.indigentdefense.org> for the complete library of research and policy materials commissioned or authored by ABA SCLAIID.

³⁶ See Appendix A for a complete list of hearing witnesses. All witnesses provided signed releases permitting ABA SCLAIID to use and edit their transcribed testimony as necessary in the production and publication of this report.

³⁷ See Georgia Indigent Defense Act, 2003 Ga. Laws 32 (codified as amended in scattered sections of Titles 15-17 and 35-36 of GA. CODE ANN.) The legislation establishes a public defender office in each of Georgia's 49 judicial circuits to provide representation in the following types of proceedings: (a) superior court proceedings in which there is a possibility that a sentence of imprisonment or probation or a suspended sentence of imprisonment may be imposed; (b) probation revocation hearings in superior court; (c) any juvenile court case in which the juvenile may face a disposition of confinement, commitment, or probation; and (d) any direct appeal of any of the above proceedings. GA. CODE ANN. § 17-12-23 (a) (West, WESTLAW through 2004 First Special Session). Circuit public defenders will not provide representation in state (misdemeanor) courts, magistrate

courts, municipal courts, and probate (traffic) courts, unless the local government contracts with the circuit public defender to provide such representation. See *id.* § 17-12-23 (d). Any local government that does not contract with the circuit public defender office will be subject to the standards adopted by the Georgia Public Defender Standards Council (newly created by the legislation) for providing representation in these types of lower court cases. *Id.* § 17-12-23 (d). As of January 2005, the Georgia Public Defender Standards Council reported that local governments in 39 of the 45 judicial circuits in which public defender offices have been established have contracted with the offices to provide such representation. E-mail from Michael Mears, Director, Georgia Public Defender Standards Council, to Shubhangi Deoras, Assistant Counsel, ABA SCLAIID (Jan. 14, 2005; 7:04 AM CST) (on file with ABA SCLAIID).

II. Problems in Indigent Defense

³⁸ For a discussion of the extensive literature on the need for adequate indigent defense funding to ensure the provision of quality legal representation, see Lefstein, *supra* note 24, at 846 nn.53-54.

³⁹ See, e.g., NORMAN LEFSTEIN, ABA SCLAIID, CRIMINAL DEFENSE SERVICES FOR THE POOR 56-57 (1982); RICHARD KLEIN & ROBERT SPANGENBERG, ABA, INDIGENT DEFENSE CRISIS 25 (1993); SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, ABA, CRIMINAL JUSTICE IN CRISIS 41 (1988); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Richard Klein, *The Eleventh Amendment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993); Lefstein, *supra* note 24, at 846; Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U.L. REV. 1808 (2000); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13 (1994).

⁴⁰ See *infra* text accompanying notes 46-123.

⁴¹ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES Guideline 9.1 (2003) [hereinafter ABA, DEATH PENALTY]; ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 (3d ed. 1992) [hereinafter ABA, PROVIDING DEFENSE SERVICES].

⁴² ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM Principle 2 (2002) [hereinafter ABA, TEN PRINCIPLES]; NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS Standard 13.6 (1973) [hereinafter NAT'L ADVISORY COMM'N.]; NAT'L STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SERVICES Guidelines 2.17, 2.18 (1976) [hereinafter NAT'L STUDY COMM'N].

⁴³ For a full explanation and data on all fifty states and the District of Columbia, see THE SPANGENBERG GROUP, ABA, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002 Table (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> (on file with ABA SCLAIID). For certain states, FY 2002 data was unavailable, so either FY 2000 data (for Pennsylvania) or FY 2001 data (for Virginia) was used to compute the percentages appearing in Table 1. For Illinois, Pennsylvania, Nevada, Mississippi, and Montana, the percentages are based on estimates of expenditures due to a lack of reliable data. See *id.* for a full explanation of the methodology used to calculate these estimates. The only hearing state not included in Table 1 is Michigan, because updated data on county expenditures in Michigan were not provided at the time of data collection. See *id.*

⁴⁴ In 2004, Georgia enacted legislation to fund its new statewide public defender system that will become effective in January 2005. Act of June 15, 2004, 2004 Ga. Laws 1 EX 4 (codified as amended in scattered sections of Titles 15, 17,

35, and 26 of GA. CODE ANN.) (West, WESTLAW through 2004 First Special Session). The legislation raises court fees and costs and is projected to generate approximately \$57 million per year. Michael Finn, *Special session ends after funding OK'd*, CHATTANOOGA FREE TIMES PRESS, May 8, 2004, at B2.

⁴⁵ The state of Montana assumed 100% of the costs of indigent defense effective July 1, 2003. See THE SPANGENBERG GROUP, *supra* note 43, at 16-17. Counties pay for public defender offices and receive 100% reimbursement from the state, whereas the state directly pays compensation for contract or assigned counsel. *Id.*

⁴⁶ This problem was reported by witnesses as occurring in the following states: Nevada and Washington, see *February Hearing*, *supra* note 5, at 44, 55, 96 (testimony of Elgin Simpson, Robert Boruchowitz, and Michael Spearman); California, Michigan, and Pennsylvania, see *August Hearing*, *supra* note 5, at 15-16, 43, 51-54 (testimony of Jeffrey Adachi, Frank Eaman, and Lisette McCormick); Mississippi, see *October Hearing*, *supra* note 5, at 144 (testimony of Robert McDuff); Nebraska and South Dakota, see *November Hearing*, *supra* note 5, at 30, 73-76 (testimony of Dennis Keefe and Jeff Larson).

⁴⁷ *August Hearing*, *supra* note 5, at 43 (testimony of Frank Eaman).

⁴⁸ *October Hearing*, *supra* note 5, at 144 (testimony of Robert McDuff). See also NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 17 (2003) (the specific counties are Quitman, Jefferson, and Noxubee). Quitman county lawsuit was filed after the costs of providing defense services in a capital trial almost led to financial ruin for the county. *Id.* at 17.

⁴⁹ *November Hearing*, *supra* note 5, at 30 (testimony of Jeff Larson).

⁵⁰ See *February Hearing*, *supra* note 5, at 55 (testimony of Robert Boruchowitz); *August Hearing*, *supra* note 5, at 17, 52 (testimony of Jeffrey Adachi and Lisette McCormick); *November Hearing*, *supra* note 5, at 73 (testimony of Dennis Keefe).

⁵¹ *October Hearing*, *supra* note 5, at 83 (testimony of Thomas Lorenzi). See also NAT'L LEGAL AID AND DEFENDER ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER GIDEON 22 (2003).

⁵² This problem was reported by witnesses as occurring in the following states: Montana, see *February Hearing*, *supra* note 5, at 17, 25-26 (testimony of Chad Wright); Virginia, see *August Hearing*, *supra* note 5, at 68 (testimony of James Hingeley); Texas, see *October Hearing*, *supra* note 5, at 178-180 (testimony of Bill Beardall); New York and Rhode Island, see *November Hearing*, *supra* note 5, at 7-11, 64.

⁵³ *November Hearing*, *supra* note 5, at 7 (testimony of Jonathan Gradess).

⁵⁴ *November Hearing*, *supra* note 5, at 7-11 (testimony of Jonathan Gradess). See also Yancey Roy, *Court-appointed Lawyers' pay hike hurting counties*, ROCHESTER DEMOCRAT AND CHRONICLE, March 17, 2004, at http://www.democratandchronicle.com/news/0317L93KFNS_news.shtml.

⁵⁵ *August Hearing*, *supra* note 5, at 68 (testimony of James Hingeley).

⁵⁶ ABA, DEATH PENALTY, *supra* note 41, Guideline 9.1; ABA, TEN PRINCIPLES, *supra* note 42, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standards 5-2.4, 5-3.3(b)(ix), 5-4.1; NAT'L LEGAL AID AND DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.3 (1989) [hereinafter NLADA, ASSIGNED COUNSEL]; NAT'L LEGAL AID AND DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOV'TAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Guideline III-10 (1984) [hereinafter NLADA, CONTRACTS]; NAT'L STUDY COMM'N, *supra* note 42, Guideline 3.2.

⁵⁷ ABA, TEN PRINCIPLES, *supra* note 42, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-4.1.

⁵⁸ ABA, TEN PRINCIPLES, *supra* note 42, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-2.4; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 4.7.3.

⁵⁹ ABA, TEN PRINCIPLES, *supra* note 42, Principle 8; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-3.3(b)(ix); NLADA, CONTRACTS, *supra* note 56, Guideline III-10.

⁶⁰ This problem was reported by witnesses as occurring in the following states: Montana, *see February Hearing, supra* note 5, at 10 (testimony of Deirdre Caughlan); Illinois, Michigan, Pennsylvania, and Virginia, *see August Hearing, supra* note 5, at 27, 35, 42, 56, 68 (testimony of Theodore Gottfried, Frank Eaman, Lisette McCormick, and James Hingeley); Massachusetts, New Mexico, and Rhode Island, *see November Hearing, supra* note 5, at 18, 25-26, 64 (testimony of William Leahy, Phyllis Subin, and John Hardiman); Louisiana, *see Thomas Lorenzi, Written Summary of Proposed Testimony for ABA SCLAIID Hearing, 4, Oct. 2003 [hereinafter Lorenzi, Written Summary] (on file with ABA SCLAIID);* Washington, *see Robert Boruchowitz, Written Summary of Proposed Testimony for ABA SCLAIID Hearing, 5, 8, Jan. 2003 [hereinafter Boruchowitz, Written Summary] (on file with ABA SCLAIID).*

⁶¹ *August Hearing, supra* note 5, at 27 (testimony of Theodore Gottfried).

⁶² *November Hearing, supra* note 5, at 64 (testimony of John Hardiman). By executive order of the Rhode Island Supreme Court, the increased rates for 2004 range from \$50-100. *See Rhode Island Supreme Court Exec. Order No. 2004-04 (Sept. 14, 2004), at* <http://www.courts.state.ri.us/supreme/pdf-files/04-04executive.pdf> (on file with ABA SCLAIID).

⁶³ *November Hearing, supra* note 5, at 18 (testimony of William Leahy).

⁶⁴ *August Hearing, supra* note 5, at 42 (testimony of Frank Eaman); Boruchowitz, Written Summary, *supra* note 60, at 5, 8.

⁶⁵ William Leahy, Written Summary of Proposed Testimony for ABA SCLAIID Hearing, 1, Nov. 2003 [hereinafter Leahy, Written Summary] (on file with ABA SCLAIID).

⁶⁶ *November Hearing, supra* note 5, at 25-26, 64 (testimony of Phyllis Subin and John Hardiman).

⁶⁷ Lorenzi, Written Summary, *supra* note 60, at 4.

⁶⁸ *Id.*

⁶⁹ *August Hearing, supra* note 5, at 35 (testimony of Theodore Gottfried); Boruchowitz, Written Summary, *supra* note 60, at 8. *See also* COMM'N ON LOAN REPAYMENT AND FORGIVENESS, ABA, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE, 10-11, 14, 27-28 (2003) (finding that low salaries and educational debt lead to serious recruitment and retention problems in government and public service agencies, including public defender offices).

⁷⁰ *August Hearing, supra* note 5, at 44 (testimony of Frank Eaman).

⁷¹ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (defendant in capital trial must be provided with funds to hire expert psychiatrist where sanity is only material issue). *See also* *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("defendants facing felony charges are entitled to the effective assistance of competent counsel").

⁷² ABA, DEATH PENALTY, *supra* note 41, Guideline 4.1; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.4; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 4.6; NLADA, CONTRACTS, *supra* note 56, Guideline III-8; NAT'L STUDY COMM'N, *supra* note 42, Guideline 3.4; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.14.

⁷³ This problem was reported by witnesses as occurring in the following states: Montana and Washington, *see February Hearing, supra* note 5, at 9, 13 (testimony of Deirdre Caughlan

and Michael Spearman) and Boruchowitz, Written Summary, *supra* note 60, at 1; California, Michigan, and Pennsylvania, *see August Hearing, supra* note 5, at 17, 44, 54-55 (testimony of Jeffrey Adachi, Frank Eaman, Lisette McCormick); Louisiana, *see October Hearing, supra* note 5, at 95, 97 (testimony of Thomas Lorenzi) and Lorenzi, Written Summary, *supra* note 60, at 2-3; New York and New Mexico, *see November Hearing, supra* note 5, at 6, 25 (testimony of Johathan Gradess and Phyllis Subin) and Jonathan Gradess, Written Summary of Proposed Testimony for ABA SCLAIID Hearing, 1, Nov. 2003 [hereinafter Gradess, Written Summary] (on file with ABA SCLAIID).

⁷⁴ *February Hearing, supra* note 5, at 13 (testimony of Michael Spearman); Boruchowitz, Written Summary, *supra* note 60, at 1.

⁷⁵ *August Hearing, supra* note 5, at 54-55 (testimony of Lisette McCormick).

⁷⁶ *February Hearing, supra* note 5, at 9 (testimony of Deirdre Caughlan).

⁷⁷ ABA, DEATH PENALTY, *supra* note 41, Guideline 8.1; ABA, TEN PRINCIPLES, *supra* note 42, Principle 9; NAT'L LEGAL AID AND DEFENDER ASS'N, DEFENDER TRAINING AND DEV. STANDARDS (1997); ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.5; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 4.3; NLADA, CONTRACTS, *supra* note 56, Guideline III-17; NAT'L STUDY COMM'N, *supra* note 42, Guidelines 5.7, 5.8; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.16.

⁷⁸ *February Hearing, supra* note 5, at 10, 23, 32, 53 (testimony of Deirdre Caughlan, Chad Wright, Vince Warren, and Elgin Simpson); *August Hearing, supra* note 5, at 52, 56 (testimony of Lisette McCormick); *October Hearing, supra* note 5, at 118, 121, 174 (testimony of David Utter and Bill Beardall); *November Hearing, supra* note 5, at 27 (testimony of Phyllis Subin); Gradess, Written Summary, *supra* note 73, at 1.

⁷⁹ This problem was reported by witnesses as occurring in: Montana, *see February Hearing, supra* note 5, at 25-26 (testimony of Chad Wright); Oregon and Virginia, *see August Hearing, supra* note 5, at 19-20, 70 (testimony of Ross Shepard and James Hingeley); Alabama, *see October Hearing, supra* note 5, at 14, 30 (testimony of John Pickens); Indiana, *see Norman Lefstein, Written Summary of Proposed Testimony for ABA SCLAIID Hearing, 9, Nov. 2003 [hereinafter Lefstein, Written Summary] (on file with ABA SCLAIID);* Washington, *see Boruchowitz, Written Summary, supra* note 60, at 1.

⁸⁰ *October Hearing, supra* note 5, at 14, 30 (testimony of John Pickens); Telephone Interview with John Pickens, Executive Director, Alabama Appleseed (Jan. 10, 2005) (expenditures were approximately \$37.6 million in 2002, \$40.5 million in 2003, and \$45.1 million in 2004).

⁸¹ *October Hearing, supra* note 5, at 14, 30 (testimony of John Pickens); Telephone Interview with John Pickens, Executive Director, Alabama Appleseed (Jan. 10, 2005).

⁸² *August Hearing, supra* note 5, at 19-20 (testimony of Ross Shepard).

⁸³ *Id.*

⁸⁴ ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standards 5-3.1, 5-3.2, 5-3.3. *See also* ABA, TEN PRINCIPLES, *supra* note 42, Principle 8; NLADA, CONTRACTS, *supra* note 56, Guidelines III-2 through III-23; NAT'L STUDY COMM'N, *supra* note 42, Guideline 2.6.

⁸⁵ This problem was reported by witnesses as occurring in: Montana and Washington, *see February Hearing, supra* note 5, at 12, 20, 67, 76-81, 99 (testimony of Deirdre Caughlan, Chad Wright, Christie Hedman, Jacqueline McMurtrie, and Michael Spearman) and Boruchowitz, Written Summary, *supra* note 60, at 2; Michigan, *see August Hearing, supra* note 5, at 42 (testimony of Frank Eaman); Alabama and Georgia, *see October Hearing, supra* note 5, at 20, 53 (testimony of John Pickens

and Stephen Bright); South Dakota, *see November Hearing*, *supra* note 5, at 30 (testimony of Jeff Larson).

⁸⁶ *February Hearing*, *supra* note 5, at 99 (testimony of Michael Spearman).

⁸⁷ *Id.* at 80 (testimony of Jacqueline McMurtrie).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 81 (testimony of Jacqueline McMurtrie).

⁹¹ ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-7.1. *See also* NLADA, CONTRACTS, *supra* note 56, Guideline III-3; NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.5; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.2.

⁹² *November Hearing*, *supra* note 5, at 32 (testimony of Jeff Larson).

⁹³ *November Hearing*, *supra* note 5, at 6-7 (testimony of Jonathan Gradess); Gradess, Written Summary, *supra* note 73, at 2.

⁹⁴ *August Hearing*, *supra* note 5, at 57 (testimony of Lisette McCormick).

⁹⁵ ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-7.1; NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.5; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.2.

⁹⁶ *October Hearing*, *supra* note 5, at 170 (testimony of Bill Beardall). The Texas Fair Defense Act, enacted in 2001, requires that counsel be appointed to indigent defendants who request counsel regardless of whether they are in custody or released on bond. *See* TEX. CODE CRIM. PROC. ANN. art. 26.04 (West, WESTLAW through end of 2004 Fourth Called Session).

⁹⁷ *October Hearing*, *supra* note 5, at 170 (testimony of Bill Beardall).

⁹⁸ *Bearden v. Georgia*, 461 U.S. 660, 672-673 (1983).

⁹⁹ *October Hearing*, *supra* note 5, at 55-56 (testimony of Stephen Bright).

¹⁰⁰ *Id.* at 57 (testimony of Stephen Bright).

¹⁰¹ *Id.* at 24 (testimony of John Pickens).

¹⁰² 417 U.S. 40 (1974).

¹⁰³ *Id.* at 53.

¹⁰⁴ ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-7.2(a).

¹⁰⁵ ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-7.2(b)-(c). Recently adopted ABA policy clarifies that procedural safeguards should be in place when requiring contributions for the costs of counsel to ensure that such fees do not impose substantial financial hardships or chill exercise of the right to counsel. Among the satisfactory procedural safeguards recommended by the ABA are: (1) providing written and oral notice that that a contribution fee may be required prior to an offer of counsel or upon request for counsel; (2) ensuring that an accused person is not ordered to pay a fee that the person is financially unable to afford; (3) providing the opportunity to be heard and present information regarding whether the fee can be afforded; (4) providing the opportunity for review of an order to pay a fee; (5) requiring collection of fees by the court or its designee, not counsel; (6) ensuring that failure to pay a fee does not result in either imprisonment or the denial of counsel at any stage of proceedings; and (7) providing the right to petition the court to waive a fee in the event of future inability to pay. *See* STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 110, (Aug. 2004) (urging the adoption of "Guidelines on Contribution Fees for Costs of Counsel in Criminal Cases"), *available at* <http://www.abanet.org/legalservices/sclaid/defender/> (on file with ABA SCLAIID).

¹⁰⁶ *November Hearing*, *supra* note 5, at 7 (testimony of Jonathan Gradess).

¹⁰⁷ *November Hearing*, *supra* note 5, at 33 (testimony of Jeff

Larson).

¹⁰⁸ *See* SCOTT WALLACE, *Parity, the Fail-Safe Standard*, in Bureau of Justice Assistance, U.S. Dep't of Justice, Compendium of Standards for Indigent Defense Systems (2000), at <http://www.ojp.usdoj.gov/indigentdefense/compendium/standards/v1intro.htm#Parity> (on file with ABA SCLAIID); LOS ANGELES COUNTY BAR ASSOCIATION, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 101 (Aug. 1991) (urging balanced funding to all components of the justice system), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/101.pdf> (on file with ABA SCLAIID).

¹⁰⁹ ABA, DEATH PENALTY, *supra* note 41, Guideline 9.1; ABA, TEN PRINCIPLES, *supra* note 42, Principle 8 (2002); ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-4.1 (3d ed. 1992); NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 4.7.1; NLADA, CONTRACTS, *supra* note 56, Guideline III-10; INSTITUTE FOR JUDICIAL ADMINISTRATION/ABA, JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES Standard 2.1(B)(iv) (1979) [hereinafter IJA/ABA, JUVENILE JUSTICE]; NAT'L STUDY COMM'N, *supra* note 42, Guidelines 3.2, 3.4.

¹¹⁰ OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, 1999 NAT'L SYMPOSIUM ON INDIGENT DEFENSE: IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS, at xiii-xiv (2000) [hereinafter 1999 NAT'L SYMPOSIUM ON INDIGENT DEFENSE].

¹¹¹ *Id.* at ix.

¹¹² *November Hearing*, *supra* note 5, at 38 (testimony of Norman Lefstein).

¹¹³ *Id.* *See also* THE SPANGENBERG GROUP, *supra* note 43, at Table. The \$2.8 billion figure cited by the witness excludes the amount spent by the federal government to provide indigent defense services in federal courts. Further, for some states, FY 2002 data was unavailable; thus, FY 2000 or 2001 expenditures were used to compute the \$2.8 billion figure. Lastly, for some states, expenditures were estimated due to a lack of reliable data. For a full explanation of the methodology used to calculate these estimates, *see* THE SPANGENBERG GROUP, *supra* note 43, at Table.

¹¹⁴ *See* 34 CFR § 674.51 (2005). *See also* WALLACE, *supra* note 108.

¹¹⁵ WALLACE, *supra* note 108; *November Hearing*, *supra* note 5, at 27-28 (testimony of Phyllis Subin).

¹¹⁶ This problem was reported by witnesses as occurring in the following states: Montana, *see February Hearing*, *supra* note 5, at 8-11 (testimony of Deirdre Caughlan); Illinois, Michigan, Oregon, Pennsylvania, and Virginia, *see August Hearing*, *supra* note 5, at 21, 32, 45, 56, 61, 68-69 (testimony of Theodore Gottfried, Frank Eaman, Ross Shepard, Lisette McCormick, and James Hingeley); Georgia and Mississippi, *see October Hearing*, *supra* note 5, at 70-71, 154-155 (testimony of Stephen Bright and Robert McDuff); New York, California, and Maryland, *see November Hearing*, *supra* note 5, at 5, 54-55, 58-59 (testimony of Jonathan Gradess, Gary Windom, and Nancy Forster); Louisiana, *see Lorenzi*, Written Summary, *supra* note 60, at 3; Washington, *see Boruchowitz*, Written Summary, *supra* note 60, at 1.

¹¹⁷ *August Hearing*, *supra* note 5, at 56 (testimony of Lisette McCormick).

¹¹⁸ *August Hearing*, *supra* note 5, at 45, 61 (testimony of Frank Eaman and Lisette McCormick).

¹¹⁹ *November Hearing*, *supra* note 5, at 5 (testimony of Jonathan Gradess); THE SPANGENBERG GROUP, *supra* note 43, at 19.

¹²⁰ *February Hearing*, *supra* note 5, at 8-9 (testimony of Deirdre Caughlan); *October Hearing*, *supra* note 5, at 70-71, 154-155 (testimony of Stephen Bright and Robert McDuff).

¹²¹ *November Hearing*, *supra* note 5, at 54-55 (testimony of Gary Windom).

122 *August Hearing*, *supra* note 5, at 68-69 (testimony of James Hingeley).

123 Lorenzi, Written Summary, *supra* note 60, at 3; NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 51, at 53; Telephone Interview with Thomas Lorenzi, Attorney, Lorenzi, Sanchez & Palay, LLP (Lake Charles, Louisiana) (Jan.27, 2005).

124 *November Hearing*, *supra* note 5, at 41-42 (testimony of Norman Lefstein); Lefstein, Written Summary, *supra* note 79, at 6.

125 *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

126 *United States v. Chronic*, 466 U.S. 648, 656 (1984).

127 *Id.* at 668.

128 *Strickland v. Washington*, 466 U.S. at 688-91.

129 *Id.* at 688.

130 ABA, DEATH PENALTY, *supra* note 41, Guideline 1.1; ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(b) (3d ed. 1993) [hereinafter ABA, DEFENSE FUNCTION]; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.1; NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.1; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.13(3).

131 NAT'L LEGAL AID AND DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION GUIDELINE 1.2 (1995) [hereinafter NLADA, PERFORMANCE GUIDELINES]; ABA, DEATH PENALTY, *supra* note 41, Guideline 5.1.

132 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-1.3; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 1.3; ABA, DEATH PENALTY, *supra* note 41, Guideline 10.3.

133 NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 2.1.

134 NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 2.2.

135 ABA, TEN PRINCIPLES, *supra* note 42, Principle 4; ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.1; NAT'L STUDY COMM'N, *supra* note 42, Guideline 5.10.

136 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 2.2; ABA, DEATH PENALTY, *supra* note 41, Guideline 10.5.

137 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-4.1; ABA, DEATH PENALTY, *supra* note 41, Guidelines 10-7, 10-8; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 4.1. See also *Wiggins v. Smith*, 539 U.S. 510 (2003).

138 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.5; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 1.3.

139 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.6; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guidelines 5.1, 5.2, 5.3.

140 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.8, 4-6.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 6.3.

141 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-5.1; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 6.4.

142 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-5.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guidelines 6.1, 6.3.

143 NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guidelines 4.3, 7.1; ABA, DEATH PENALTY, *supra* note 41, Guideline 10.10.1.

144 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-6.1; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guidelines 6.1, 6.2.

145 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-8.1; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guidelines 8.1-8.7; ABA, DEATH PENALTY, *supra* note 41, Guidelines 10.11-10.12.

146 ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-8.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 9.2; ABA, DEATH PENALTY, *supra* note 41, Guideline 10.14.

147 *November Hearing*, *supra* note 5, at 40 (testimony of Norman Lefstein); Lefstein, Written Summary, *supra* note 79, at 5.

148 *October Hearing*, *supra* note 5, at 41-42 (testimony of Stephen Bright).

149 Lorenzi, Written Summary, *supra* note 60, at 4. See also MICHAEL M. KURTH AND DARYL V. BURCKEL, DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA 32-33 (2003).

150 *October Hearing*, *supra* note 5, at 147 (testimony of Robert McDuff).

151 *October Hearing*, *supra* note 5, at 20, 28 (testimony of John Pickens).

152 *October Hearing*, *supra* note 5, at 45 (testimony of Stephen Bright).

153 This problem was reported by witnesses as occurring in the following states: Montana and Washington, see *February Hearing*, *supra* note 5, at 7, 79-80, 101-102 (testimony of Deirdre Caughlan, Jacqueline McMurtrie, and Michael Spearman); Pennsylvania and Virginia, see *August Hearing*, *supra* note 5, at 58, 68 (testimony of Lisette McCormick and James Hingeley); Alabama and Georgia, see *October Hearing*, *supra* note 5, at 20, 48-49 (testimony of John Pickens and Stephen Bright); Rhode Island, see *November Hearing*, *supra* note 5, at 67 (testimony of John Hardiman).

154 *February Hearing*, *supra* note 5, at 101-102 (testimony of Michael Spearman).

155 *October Hearing*, *supra* note 5, at 48 (testimony of Stephen Bright). Under Georgia's new public defender system, this may change, since the Georgia Public Defender Standards Council is required by statute to establish procedures for the appointment of counsel in cases where the circuit public defender has a conflict of interest as well as qualification standards for appointed counsel. See GA. CODE ANN. § 17-12-22 (West, WESTLAW through 2004 First Special Session).

156 *October Hearing*, *supra* note 5, at 49 (testimony of Stephen Bright).

157 *February Hearing*, *supra* note 5, at 7 (testimony of Deirdre Caughlan); *October Hearing*, *supra* note 5, at 20 (testimony of John Pickens).

158 *November Hearing*, *supra* note 5, at 6 (testimony of Jonathan Gradess).

159 ABA, DEATH PENALTY, *supra* note 41, Guidelines 6.1, 10.3; ABA, TEN PRINCIPLES, *supra* note 42, Principle 5; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 4-1.3(e), 5-5.3; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 4.1; NLADA, CONTRACTS, *supra* note 56, Guidelines III-6, III-12; IJA/ABA, JUVENILE JUSTICE, *supra* note 109, Standard 2.2(B)(iv); NAT'L STUDY COMM'N, *supra* note 42, Guideline 5.1; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.12.

160 ABA, DEATH PENALTY, *supra* note 41, Guidelines 6.1, 10.3; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-5.3; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 4.1.2; NLADA, CONTRACTS, *supra* note 56, Guideline III-12; IJA/ABA, JUVENILE JUSTICE, *supra* note 109, Standard 2.2(B)(iv); NAT'L STUDY COMM'N, *supra* note 42, Guideline 5.3; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.12.

161 See MODEL RULES OF PROF'L CONDUCT RR. 1.1, 1.16(a), 6.2 (2004). See also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-399 (1996); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981); Nat'l Legal Aid and Defender Ass'n, Am. Council of Chief Defenders, Ethics Op. 03-01 (2001).

162 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-5.3 and cmt. at 72. See also ABA, DEATH PENALTY, *supra* note 41, Guideline 6.1 and cmt.; ABA, TEN PRINCIPLES, *supra* note 42, Principle 5, n.19; NLADA, CONTRACTS, *supra* note 56, Guideline III-6; NAT'L STUDY COMM'N, *supra* note 42, Guideline 5.1.

163 NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.12.

ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-5.3 cmt.

164 See ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-5.3 and cmt. at 72.

165 This problem was reported by witnesses as occurring in the following states: Montana and Washington, see *February Hearing*, *supra* note 5, at 10, 56, 99 (testimony of Deirdre Caughlan, Robert Boruchowitz, and Michael Spearman) and Boruchowitz, Written Summary, *supra* note 60, at 7; Illinois, Oregon, and Virginia, see *August Hearing*, *supra* note 5, at 25, 31, 66 (testimony of Theodore Gottfried, Ross Shepard, and James Hingeley); Louisiana, see *October Hearing*, *supra* note 5, at 86, 88, 94, 98, 118 (testimony of Thomas Lorenzi and David Utter) and Lorenzi, Written Summary, *supra* note 60, at 1-2; New York, Maryland, Rhode Island, and Nebraska, see *November Hearing*, *supra* note 5, at 6, 60, 69, 74-75 (testimony of Jonathan Gradess, Nancy Forster, John Hardiman, and Dennis Keefe).

166 *November Hearing*, *supra* note 5, at 69 (testimony of John Hardiman).

167 *August Hearing*, *supra* note 5, at 54 (testimony of Lisette McCormick).

168 *Id.* at 57 (testimony of Lisette McCormick).

169 *November Hearing*, *supra* note 5, at 60 (testimony of Nancy Forster).

170 *Id.*

171 *November Hearing*, *supra* note 5, at 74-76 (testimony of Dennis Keefe).

172 *Id.*

173 *Id.*

174 *Id.*

175 This problem was reported by witnesses as occurring in the following states: Nevada and Washington, see *February Hearing*, *supra* note 5, at 53, 57, 98 (testimony of Elgin Simpson, Robert Boruchowitz, and Michael Spearman) and Boruchowitz, Written Summary, *supra* note 60, at 4; Virginia, see *August Hearing*, *supra* note 5, at 67 (testimony of James Hingeley); Louisiana, see *October Hearing*, *supra* note 5, at 108-109 (testimony of Thomas Lorenzi) and Lorenzi, Written Summary, *supra* note 60, at 2-3; *November Hearing*, *supra* note 5, at 8 (testimony of Jonathan Gradess).

176 *October Hearing*, *supra* note 5, at 108-109 (testimony of Thomas Lorenzi); Lorenzi, Written Summary, *supra* note 60, at 2-3; KURTH & BURCKEL, *supra* note 149, at 26-29.

177 *February Hearing*, *supra* note 5, at 53 (testimony of Elgin Simpson).

178 *August Hearing*, *supra* note 5, at 67 (testimony of Hingeley). See ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.2; NLADA, PERFORMANCE GUIDELINES, *supra* note 131, Guideline 2.2; NAT'L STUDY COMM'N, *supra* note 42, Guidelines 5.10.

179 ABA, TEN PRINCIPLES, *supra* note 42, Principle 7; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-6.2; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 2.6; NLADA, CONTRACTS, *supra* note 56, Guidelines III-12, III-23; IJA/ABA, JUVENILE JUSTICE, *supra* note 109, Standard 2.4(B)(i); NAT'L STUDY COMM'N, *supra* note 42, Guidelines 5.11, 5.12; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.1.

180 This problem was reported by witnesses as occurring in the following states: Illinois and Pennsylvania, see *August Hearing*, *supra* note 5, at 32, 55-57 (testimony of Theodore Gottfried and Lisette McCormick); California, see *November Hearing*, *supra* note 5, at 55 (testimony of Gary Windom); Louisiana, see Lorenzi, Written Summary, *supra* note 60, at 3.

181 *November Hearing*, *supra* note 5, at 55 (testimony of Gary Windom).

182 *August Hearing*, *supra* note 5, at 32 (testimony of Theodore

Gottfried).

183 This problem was reported by witnesses as occurring in the following states: Montana, Nevada, and Washington, see *February Hearing*, *supra* note 5, at 10, 36-37, 44-45, and 76-81 (testimony of Deirdre Caughlan, Vincent Warren, Elgin Simpson, and Jacqueline McMurtrie) and Boruchowitz, Written Summary, *supra* note 60, at 6; Pennsylvania and Virginia, see *August Hearing*, *supra* note 5, at 58, 67 (testimony of Lisette McCormick and James Hingeley); Alabama and Georgia, see *October Hearing*, *supra* note 5, at 22, 47-48 (testimony of John Pickens and Stephen Bright); Louisiana, see Lorenzi, Written Summary, *supra* note 60, at 1, 3.

184 *August Hearing*, *supra* note 5, at 67 (testimony of James Hingeley).

185 *February Hearing*, *supra* note 5, at 36-37 (testimony of Vincent Warren).

186 *Id.* at 10 (testimony of Deirdre Caughlan).

187 *Id.* at 44-45 (testimony of Elgin Simpson).

188 *October Hearing*, *supra* note 5, at 22 (testimony of John Pickens).

189 *Id.* at 47-48 (testimony of Stephen Bright).

190 *Id.*

191 *February Hearing*, *supra* note 5, at 12-13 (testimony of Deirdre Caughlan).

192 This problem was reported by witnesses as occurring in the following states: Montana and Washington, see *February Hearing*, *supra* note 5, at 12-13, 79 (testimony of Deirdre Caughlan and Jacqueline McMurtrie); New Mexico, see *November Hearing*, *supra* note 5, at 24-25 (testimony of Phyllis Subin).

193 See, e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); MODEL RULES OF PROF'L CONDUCT R. 1.7 (2004). See also ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-3.5.

194 *February Hearing*, *supra* note 5, at 79 (testimony of Jacqueline McMurtrie).

195 *November Hearing*, *supra* note 5, at 24-25 (testimony of Phyllis Subin).

196 Lefstein, Written Summary, *supra* note 79, at 4-5.

197 MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004). For a sample of state rules echoing the ABA model rule, see FLA. RULES OF PROF'L CONDUCT R. 4-1.1; ILL. RULES OF PROF'L CONDUCT R. 1.1(a); OKLA. RULES OF PROF'L CONDUCT R. 1.1; OR. RULES OF PROF'L CONDUCT R. 1.1; N. C. RULES OF PROF'L CONDUCT R. 1.1(a).

198 MODEL RULES OF PROF'L CONDUCT R. 1.3 (2004).

199 MODEL RULES OF PROF'L CONDUCT R. 1.4 (2004).

200 MODEL RULES OF PROF'L CONDUCT RR. 1.7, 1.8, 1.10, 1.11 (2004).

201 See *supra* notes (138-140.) See also MODEL RULES OF PROF'L CONDUCT RR. 1.16(a) and 6.2 (2004).

202 See *supra* text accompanying notes (149-195).

203 Lefstein, Written Summary, *supra* note 79, at 7.

204 See, e.g., ABA, TEN PRINCIPLES, *supra* note 42, Principle 1; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standards 5-1.3, 5-1.6, 5-4.1 (3d ed. 1992); NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 2.2; NLADA, CONTRACTS, *supra* note 56, Guidelines II-1, II-2 (1984); IJA/ABA, JUVENILE JUSTICE, *supra* note 109, Standard 2.1(D); NAT'L STUDY COMM'N, *supra* note 42, Guidelines 2.8, 2.18, 5.13; NAT'L ADVISORY COMM'N, *supra* note 42, Standards 13.8, 13.9; MODEL PUBLIC DEFENDER ACT § 10(d) (1970).

205 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.3(a).

206 *Id.* Standard 5-1.3(b).

207 *Id.* Standard 5-1.6.

208 *Id.* Standard 5-4.1.

- 209 This problem was reported by witnesses as occurring in the following states: Montana, Nevada, and Washington, see *February Hearing*, *supra* note 5, at 7-8, 12, 53, 61 (testimony of Deirdre Caughlan, Elgin Simpson, and Robert Boruchowitz); Illinois, Michigan, and Pennsylvania, see *August Hearing*, *supra* note 5, at 30, 39, 42, 48, 57 (testimony of Theodore Gottfried, Frank Eaman, and Lisette McCormick); Alabama, Louisiana, and Texas, see *October Hearing*, *supra* note 5, at 26, 90-91, 173-174 (testimony of John Pickens, Thomas Lorenzi, and Bill Beardall) and Bill Beardall, Written Summary of Proposed Testimony for ABA SCLAID Hearing, 2, Oct. 2003 [hereinafter Beardall, Written Summary] (on file with ABA SCLAID); New Mexico, see *November Hearing*, *supra* note 5, at 26-27 (testimony of Phyllis Subin).
- 210 Beardall, Written Summary, *supra* note 209, at 2.
- 211 *October Hearing*, *supra* note 5, at 173-174 (testimony of Bill Beardall).
- 212 *Id.*
- 213 *August Hearing*, *supra* note 5, at 39 (testimony of Frank Eaman).
- 214 *Id.* at 48 (testimony of Frank Eaman).
- 215 *Id.* at 42 (testimony of Frank Eaman).
- 216 *February Hearing*, *supra* note 5, at 53 (testimony of Elgin Simpson).
- 217 *November Hearing*, *supra* note 5, at 26-27 (testimony of Phyllis Subin).
- 218 *February Hearing*, *supra* note 5, at 61 (testimony of Robert Boruchowitz).
- 219 *Id.* at 12 (testimony of Deirdre Caughlan).
- 220 *Id.*
- 221 *October Hearing*, *supra* note 5, at 12, 30 (testimony of John Pickens).
- 222 ABA, TEN PRINCIPLES, *supra* note 42, Principle 2; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.2(c); NAT'L STUDY COMM'N, *supra* note 42, Guideline 2.4; MODEL PUBLIC DEFENDER ACT § 10 (1970).
- 223 This problem was reported by witnesses as occurring in the following states: Montana, Nevada, and Washington, see *February Hearing*, *supra* note 5, at 13-15, 20-21, 35-36, 39-40, 46, 55, 66-68, 73, 98 (testimony of Deirdre Caughlan, Chad Wright, Vincent Warren, Elgin Simpson, Robert Boruchowitz, Christie Hedman, and Michael Spearman) and Boruchowitz, Written Summary, *supra* note 60, at 2; Illinois, Michigan, Pennsylvania, and Virginia, see *August Hearing*, *supra* note 5, at 32, 42, 53, 56, 69 (testimony of Theodore Gottfried, Frank Eaman, Lisette McCormick, and James Hingeley); Alabama, Georgia, Louisiana, Mississippi, and Texas, see *October Hearing*, *supra* note 5, at 12, 30, 48, 118, 141, 165-166, 174-178, 180-181 (testimony of John Pickens, Stephen Bright, David Utter, Robert McDuff, and Bill Beardall) and Lorenzi, Written Summary, *supra* note 60, at 3; New York, South Dakota, Indiana, and Nebraska, see *November Hearing*, *supra* note 5, at 6, 8-9, 30-31, 46, 73-74 (testimony of Jonathan Gradess, Jeff Larson, Norman Lefstein, and Dennis Keefe).
- 224 *November Hearing*, *supra* note 5, at 6 (testimony of Jonathan Gradess).
- 225 *Id.*
- 226 *Id.* at 8-9 (testimony of Jonathan Gradess).
- 227 *In re Gault*, 387 U.S. 1, 41 (1967).
- 228 *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).
- 229 *Alabama v. Shelton*, 535 U.S. 654, 662, 674 (2002).
- 230 *Douglas v. California*, 372 U.S. 353, 355-357 (1963).
- 231 *United States v. Wade*, 388 U.S. 218, 224 (1967).
- 232 *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).
- 233 *United States v. Ash*, 413 U.S. 300, 311 (1973); *Coleman v. Alabama*, 399 U.S. 1 (1970).
- 234 *White v. Maryland*, 373 U.S. 59, 60 (1961).
- 235 *Iowa v. Tovar*, 124 S.Ct. 1379, 1383 (2004); *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972); *White v. Maryland*, 373 U.S. 59 (1963).
- 236 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-5.1. See also ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-1.2; NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.1; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.1.
- 237 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-5.2. See also ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-8.5; NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.1.
- 238 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-6.1. See also ABA, TEN PRINCIPLES, *supra* note 42, Principle 3; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 2.5; NLADA, CONTRACTS, *supra* note 56, Guideline III-18; IJA/ABA, JUVENILE JUSTICE, *supra* note 109, Standard 2.4 (A); NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.2-1.4; NAT'L ADVISORY COMM'N, *supra* note 42, Standards 13.1, 13.3; MODEL PUBLIC DEFENDER ACT § 3 (1970).
- 239 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-6.1. See also ABA, TEN PRINCIPLES, *supra* note 42, Principle 3; NLADA, ASSIGNED COUNSEL, *supra* note 56, Standard 2.5; NLADA, CONTRACTS, *supra* note 56, Guideline III-18; NAT'L STUDY COMM'N, *supra* note 42, Guideline 1.2-1.4; NAT'L ADVISORY COMM'N, *supra* note 42, Standards 13.1, 13.3; MODEL PUBLIC DEFENDER ACT § 3 (1970).
- 240 ABA STANDARDS FOR CRIMINAL JUSTICE: CRIMINAL APPEALS Standard 21-3.2(a) (2d ed. 1980 & Supp. 1986); ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-6.2.
- 241 *October Hearing*, *supra* note 5, at 138-139 (testimony of Robert McDuff).
- 242 This problem was reported by witnesses as occurring in the following states: Montana, see *February Hearing*, *supra* note 5, at 36 (testimony of Vincent Warren); Alabama, Georgia, Louisiana, Mississippi, and Texas, see *October Hearing*, *supra* note 5, at 25, 44-45, 99, 138-139, 169 (testimony of John Pickens, Stephen Bright, Thomas Lorenzi, Robert McDuff, and Bill Beardall).
- 243 *October Hearing*, *supra* note 5, at 45 (testimony of Stephen Bright).
- 244 *Id.* at 44 (testimony of Stephen Bright). For additional examples, see also SOUTHERN CENTER FOR HUMAN RIGHTS, IF YOU CANNOT AFFORD A LAWYER...A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM 20-23 (2003).
- 245 *October Hearing*, *supra* note 5, at 138-139 (testimony of Robert McDuff). For additional examples, see also NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *supra* note 48, at 7-9.
- 246 *February Hearing*, *supra* note 5, at 36 (testimony of Vincent Warren).
- 247 *February Hearing*, *supra* note 5, at 97 (testimony of Michael Spearman).
- 248 *August Hearing*, *supra* note 5, at 83 (testimony of Robert Spangenberg). See also ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-3.10(a) (3d ed. 1993) [hereinafter ABA, PROSECUTION FUNCTION] ("A prosecutor who is present at the first appearance (however denominated) of the accused before a judicial officer should not communicate with the accused unless a waiver of counsel has been entered, except for the purpose of aiding in obtaining counsel or in arranging for the pretrial release of the accused.")
- 249 *Faretta v. California*, 422 U.S. 806, 835 (1975).
- 250 See *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938).
- 251 *Iowa v. Tovar*, 124 S.Ct. 1379, 1387 (2004).
- 252 *Faretta*, 422 U.S. at 835. See also *Tovar*, 124 S.Ct. at 1388.
- 253 *Tovar*, 124 S.Ct. at 1388.

254 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-8.1. See also ABA, DEFENSE FUNCTION, *supra* note 130, Standards 4-2.1, 4-2.2, 4-2.3; NAT'L STUDY COMM'N, *supra* note 42, Guidelines 1.2, 1.3, 1.4; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.3.

255 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-8.2(a). See also ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-3.6 (3d ed. 2000); ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.3 (3d ed. 1999) [hereinafter ABA, PLEAS OF GUILTY]; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.3.

256 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-8.2(a).

257 *Id.*

258 *Id.* Standard 5-8.2(b).

259 MODEL RULES OF PROF'L CONDUCT R. 4.3 (2004).

260 *Id.* R. 3.8(b) (2004).

261 *Id.* R. 3.8(c) (2004).

262 ABA, PROSECUTION FUNCTION, *supra* note 248, Standard 3-3.10(a).

263 ABA, PLEAS OF GUILTY, *supra* note 255, Standard 14-1.3(a); NAT'L ADVISORY COMM'N, *supra* note 42, Standard 3.5.

264 This problem was reported by witnesses as occurring in Georgia and Texas, see *October Hearing*, *supra* note 5, at 50, 171 (testimony of Stephen Bright and Bill Beardall) and *November Hearing*, *supra* note 5, at 93 (testimony of Robert Spangenberg).

265 This problem was reported by witnesses as occurring in Georgia and Texas, see *November Hearing*, *supra* note 5, at 93 (testimony of Robert Spangenberg) and *October Hearing*, *supra* note 5, at 171 (testimony of Bill Beardall).

266 This problem was reported by witnesses as occurring in the following states: Washington, see *February Hearing*, *supra* note 5, at 56-57, 59 (testimony of Robert Boruchowitz) and Boruchowitz, Written Summary, *supra* note 60, at 3-9; Georgia and Texas, see *October Hearing*, *supra* note 5, at 50, 77-78, 171 (testimony of Stephen Bright and Bill Beardall); California, Maryland, Rhode Island, and Georgia, see *November Hearing*, *supra* note 5, at 53-54, 62-63, 65-66, 93 (testimony of Gary Windom, Nancy Forster, John Hardiman, and Robert Spangenberg).

267 *November Hearing*, *supra* note 5, at 93 (testimony of Robert Spangenberg).

268 *Id.*

269 *October Hearing*, *supra* note 5, at 77-78 (testimony at Stephen Bright).

270 *Id.*

271 *Id.*

272 *Id.* at 50 (testimony of Stephen Bright); E-mail from Stephen Bright, Director, Southern Center for Human Rights, to Shubhangi Deoras, Assistant Counsel, ABA SCLAID (Nov. 21, 2004, 7:53 PM CST).

273 *October Hearing*, *supra* note 5, at 171 (testimony of Bill Beardall).

274 *November Hearing*, *supra* note 5, at 65-66 (testimony of John Hardiman).

275 *November Hearing*, *supra* note 5, at 53-54 (testimony of Gary Windom).

276 *February Hearing*, *supra* note 5, at 59 (testimony of Robert Boruchowitz); *November Hearing*, *supra* note 5, at 61-62, 81-82 (testimony of Nancy Forster and Simmie Baer). See generally ABA JUVENILE JUSTICE CENTER & MID-ATLANTIC JUVENILE DEFENDER CENTER, MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003); ABA JUVENILE JUSTICE CENTER, NATIONAL JUVENILE DEFENDER CENTER, ALBIN LAW FIRM, AND CASCADE COUNTY LAW CLINIC, MONTANA: AN ASSESSMENT

OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003); ABA JUVENILE JUSTICE CENTER AND JUVENILE LAW CENTER, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003); ABA JUVENILE JUSTICE CENTER, NATIONAL JUVENILE DEFENDER CENTER, AND NORTHWEST JUVENILE DEFENDER CENTER, AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003).

277 *November Hearing*, *supra* note 5, at 62-63 (testimony of Nancy Forster).

278 See Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32 (2001).

279 *November Hearing*, *supra* note 5, at 53-54 (testimony of Gary Windom).

280 *February Hearing*, *supra* note 5, at 57 (testimony of Robert Boruchowitz).

281 This problem was reported by witnesses as occurring in the following states: Washington, see *February Hearing*, *supra* note 5, at 57, 71, 73 (testimony of Robert Boruchowitz and Christie Hedman) and Boruchowitz, Written Summary, *supra* note 60, at 4; Michigan, see *August Hearing*, *supra* note 5, at 41 (testimony of Frank Eaman); Georgia and Texas, see *October Hearing*, *supra* note 5, at 54-55, 172 (testimony of Stephen Bright and Bill Beardall); New Mexico and California, see *November Hearing*, *supra* note 5, at 28-29, 53-54 (testimony of Phyllis Subin and Gary Windom).

282 *February Hearing*, *supra* note 5, at 57 (testimony of Robert Boruchowitz).

283 Boruchowitz, Written Summary, *supra* note 60, at 4; E-mail from Robert Boruchowitz, Director, The Defender Association, to Shubhangi Deoras, Assistant Counsel, ABA SCLAID (Nov. 18, 2004; 1:00 PM CST).

284 *November Hearing*, *supra* note 5, at 28-29 (testimony of Phyllis Subin); Telephone Interview with Phyllis Subin, Former Director, New Mexico Public Defender Department (Jul. 22, 2004).

285 *October Hearing*, *supra* note 5, at 93-94 (testimony of Thomas Lorenzi). See also KURTH & BURCKEL, *supra* note 149, at 26-31.

286 U.S. CONST. amend. VI. In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court held that the right to a speedy trial first attaches at the time of arrest or formal charge, whichever comes first. *Id.* at 320 ("[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.") In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court established a balancing test to be used for determinations of whether a defendant's right to a speedy trial has been violated, which requires the court to weigh the conduct of both the prosecution and defendant and assess the following factors on an ad-hoc basis: (1) the length of the delay; (2) the reason for the delay; (3) whether and when the defendant asserted his speedy trial right; and (4) whether the defendant was prejudiced by the delay. *Id.* at 529-30.

287 This problem was reported by witnesses as occurring in the following states: Oregon, see *August Hearing*, *supra* note 5, at 19-20 (testimony of Ross Shepard); Louisiana and Mississippi, see *October Hearing*, *supra* note 5, at 93-94, 150 (testimony of Thomas Lorenzi and Robert McDuff).

288 *October Hearing*, *supra* note 5, at 150 (testimony of Robert McDuff).

289 ABA, TEN PRINCIPLES, *supra* note 42, Principle 2; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.2; IJA/ABA, JUVENILE JUSTICE, *supra* note 109, Standard 2.2; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.5.

290 See ABA, PROVIDING DEFENSE SERVICES, *supra* note 41,

Standard 5-4.2 (defender offices should be staffed with full-time attorneys who should be prohibited from engaging in the private practice of law); NAT'L STUDY COMM'N, *supra* note 42, Guideline 2.9; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.7.

291 ABA, TEN PRINCIPLES, *supra* note 42, Principle 2; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.2; NAT'L STUDY COMM'N, *supra* note 42, Guidelines 2.1, 2.2; NAT'L ADVISORY COMM'N, *supra* note 42, Standard 13.5.

292 This problem was reported by witnesses as occurring in the following states: Michigan and Pennsylvania, see *August Hearing*, *supra* note 5, at 39, 43, 52, 57 (testimony of Frank Eaman and Lisette McCormick); Mississippi and Texas, see *October Hearing*, *supra* note 5, at 138, 167-168 (testimony of Robert McDuff and Bill Beardall) and Beardall, Written Summary, *supra* note 209, at 2; Massachusetts and South Dakota, see *November Hearing*, *supra* note 5, at 16-17, 30-31 (testimony of William Leahy and Jeff Larson).

293 *August Hearing*, *supra* note 5, at 52, 57 (testimony of Lisette McCormick).

294 *October Hearing*, *supra* note 5, at 138 (testimony of Robert McDuff).

295 *November Hearing*, *supra* note 5, at 16-17 (testimony of William Leahy).

296 *August Hearing*, *supra* note 5, at 39, 43 (testimony of Frank Eaman).

297 See Texas Task Force on Indigent Defense, at <http://www.courts.state.tx.us/oca/tfid/pdoffices.htm>.

298 Beardall, Written Summary, *supra* note 209, at 2.

299 *October Hearing*, *supra* note 5, at 167-168 (testimony of Bill Beardall).

300 See *supra* text accompanying notes 60-69.

301 *October Hearing*, *supra* note 5, at 30-31 (testimony of John Pickens).

302 This problem was reported by witnesses as occurring in the following states: Montana, see *February Hearing*, *supra* note 5, at 33, 36 (testimony of Vincent Warren); Pennsylvania, see *August Hearing*, *supra* note 5, at 53 (testimony of Lisette McCormick); Alabama, see *October Hearing*, *supra* note 5, at 30-31 (testimony of John Pickens).

303 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 1 (1986).

304 *February Hearing*, *supra* note 5, at 32 (testimony of Vincent Warren).

305 *Id.* at 36 (testimony of Vincent Warren).

306 *August Hearing*, *supra* note 5, at 53 (testimony of Lisette McCormick).

307 *Id.*

III. Strategies for Reform

308 *August Hearing*, *supra* note 5, at 41-42, 59, 74, 78 (testimony of Frank Eaman, Lisette McCormick, and James Hingeley).

309 BELDON RUSSONELLO & STEWART, *supra* note 21, at 3.

310 *August Hearing*, *supra* note 5, at 41-42 (testimony of Frank Eaman).

311 *February Hearing*, *supra* note 5, at 51-52 (testimony of Elgin Simpson); *October Hearing*, *supra* note 5, at 30, 66 (testimony of Stephen Bright and John Pickens).

312 *October Hearing*, *supra* note 5, at 70-71 (testimony of Stephen Bright).

313 *October Hearing*, *supra* note 5, at 30 (testimony of John Pickens).

314 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standards 5-1.1, 5-1.6; ABA, DEFENSE FUNCTION, *supra* note 130, Standard

4-1.2(d).

315 *February Hearing*, *supra* note 5, at 38, 51-52 (testimony of Vincent Warren and Elgin Simpson); *August Hearing*, *supra* note 5, at 43-44 (testimony of Frank Eaman); *October Hearing*, *supra* note 5, at 66 (testimony of Stephen Bright); and *November Hearing*, *supra* note 5, at 31-32, 34 (testimony of Jeff Larson).

316 *October Hearing*, *supra* note 5, at 66 (testimony of Stephen Bright).

317 Georgia Indigent Defense Act, 2003 Ga. Laws 32 (codified as amended in scattered sections of Titles 15-17 and 35-36 of GA. CODE ANN.).

318 Ga. Code Ann. § 17-12-23 (d) (West, WESTLAW through 2004 First Special Session).

319 *Id.* § 17-12-3.

320 Act of June 15, 2004, 2004 Ga. Laws 1 EX 4 (codified as amended in scattered sections of Titles 15, 17, 35, and 26 of GA. CODE ANN.) (West, WESTLAW through 2004 First Special Session). The legislation raises court fees and costs and is projected to generate about \$57 million per year. Finn, *supra* note 44, at B2.

321 *October Hearing*, *supra* note 5, at 72 (testimony of Stephen Bright); *August Hearing*, *supra* note 5, at 90 (testimony of Robert Spangenberg). See also Rachel Tobin Ramos, *Indigent Bill Beat Long Odds*, FULTON COUNTY DAILY REPORT, Dec. 3, 2003, at

<http://www.nacdl.org/public.nsf/defenseupdates/03news07?o=pendocument> (on file with ABA SCLAD); Bill Rankin, *Indigent defense bill beats the odds*, ATLANTA JOURNAL CONSTITUTION, Apr. 27, 2003, at C9; Mike Morris, *Lawyers Group wants state to overhaul indigent defense*, ATLANTA JOURNAL-CONSTITUTION, Jan. 13, 2003, at http://www.schr.org/indigentdefense/Newspapers/news_barurg.es.htm (on file with ABA SCLAD).

322 *October Hearing*, *supra* note 5, at 71 (testimony of Stephen Bright); *August Hearing*, *supra* note 5, at 90 (testimony of Robert Spangenberg); Ramos, *supra* note 321; Bill Rankin, *Aim: Restoring 'confidence' in the system*, ATLANTA JOURNAL CONSTITUTION, Dec. 12, 2002, at A16.

323 David J. Carroll, U.S. Department of Justice, Bureau of Justice Assistance and American Bar Association, Bar Information Program State Commissions Project: *The Year in Review*, THE SPANGENBERG REPORT (The Spangenberg Group), Feb. 2001, at 9.

324 *Id.* See also REPORT OF CHIEF JUSTICE'S COMM'N ON INDIGENT DEFENSE 8 (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc>.

325 Ramos, *supra* note 321.

326 See REPORT OF CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, *supra* note 324, at 9-10. See also THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I (2002), at <http://www.georgiacourts.org/aoc/press/idc/idchearings/spanenberg.doc>.

327 See, e.g., Ramos, *supra* note 321; Rankin, *supra* note 321; *Landmark Indigent Defense Reform Signed Into Law in Georgia*, THE SPANGENBERG REPORT (The Spangenberg Group), Nov. 2003, at 11.

328 *October Hearing*, *supra* note 5, at 50, 64, 74 (testimony of Stephen Bright). See also Trisha Renaud, *Newsmaker of the Year: Stephen B. Bright, Angry Man of Indigent Defense*, FULTON COUNTY DAILY REPORT, Dec. 3, 2003, at 4.

329 *August Hearing*, *supra* note 5, at 91 (testimony of Robert Spangenberg). See, e.g., Morris, *supra* note 321; Rankin, *supra* note 321, at C9; Bill Rankin, *Right to a lawyer still not given for poor defendants*, ATLANTA JOURNAL-CONSTITUTION, Mar. 24, 2003, at

<http://www.schr.org/indigentdefense/Newspapers/news.html>; Henry Weinstein, *Georgia Fails Its Poor Defendants, Report Says*, LOS ANGELES TIMES, Dec. 13, 2002, at <http://www.schr.org/indigentdefense/Newspapers/news.html>.

330 *October Hearing*, *supra* note 5, at 162 (testimony of Bill Beardall). See Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 1697 (codified as amended in scattered articles in chapters 1, 14, 15, 17, 26, & 38 of TEX. CODE CRIM. PROC. ANN.; at § 51.102 of TEX. FAM. CODE ANN.; at §§ 71.001, 71.0351, and 71.051-63 of TEX. GOV'T CODE ANN.; and at § 133.102 of TEX. LOC. GOV'T CODE ANN.).

331 *October Hearing*, *supra* note 5, at 162 (testimony of Bill Beardall).

332 *Id.* at 183-187 (testimony of Bill Beardall).

333 *Id.*; *August Hearing*, *supra* note 5, at 91 (testimony of Robert Spangenberg). See also Jessica Reaves, *Texas's Bruised Public Defense Program Gets an Overhaul*, TIME, Apr. 6, 2001, at <http://www.time.com/time/nation/article/0,8599,105516,00.html>.

334 *October Hearing*, *supra* note 5, at 183-187 (testimony of Bill Beardall).

335 *Id.* at 179, 183-187 (testimony of Bill Beardall).

336 *Id.* at 164 (testimony of Bill Beardall).

337 COMMITTEE ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, STATE BAR OF TEXAS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS (2000).

338 Terry Brooks & Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 CRIM. JUST. 56 (2001).

339 *October Hearing*, *supra* note 5, at 183-187 (testimony of Bill Beardall); Brooks & Deoras, *supra* note 338, at 57.

340 *October Hearing*, *supra* note 5, at 160, 172-173, 181 (testimony of Bill Beardall).

341 VA. CODE ANN. § 19.2-163.01-02 (MICHIE 2004).

342 THE SPANGENBERG GROUP, ABA SCLAIID, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 20, 23-25 (2004).

343 See VA. CODE ANN. § 19.2-163.01 (MICHIE 2004).

344 See FIRST ANNUAL REPORT OF VIRGINIA INDIGENT DEFENSE COMMISSION 1 (2004) (on file with ABA SCLAIID).

345 See THE SPANGENBERG GROUP, *supra* note 342, at 88.

346 *Id.* at 82.

347 *Id.* at 88.

348 See Alan Cooper, *Va. Cited for weak counsel*, RICHMOND TIMES-DISPATCH, Feb. 2, 2004 (on file with ABA SCLAIID); *Indigent Defense*, RICHMOND TIMES-DISPATCH, Feb. 9, 2004 (on file with ABA SCLAIID); *Injustice Unchallenged*, WASHINGTON POST, Feb. 22, 2004, at B06; Tom Jackman, *Indigent Defense Panel is Approved*, WASHINGTON POST, Mar. 16, 2004, at B05; Tom Jackman, *Va. Defense of Indigent Denounced*, WASHINGTON POST, Feb. 4, 2004, at B01; *Justice Denied in Virginia*, WASHINGTON POST, Feb. 10, 2004, at A22; Lauren Kirchner, *New Report Fault State's Indigent Defense*, VIRGINIA LAWYERS WEEKLY, Feb. 9, 2004 (on file with ABA SCLAIID).

349 See BAR COUNCIL, VIRGINIA STATE BAR, RESOLUTION FOR THE ADOPTION OF THE ABA'S TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2004) (on file with ABA SCLAIID); Letter from Jeannie Dahnk, President, Virginia State Bar, to Richard C. Goemann, Director, Virginia Public Defender Commission 1 (May 17, 2004) (on file with ABA SCLAIID).

350 See E. Tazewell Ellett, *Justice Denied; Innocence Ignored; Innocents Imprisoned: The Consequences of "the Presumption of Guilt" in Virginia's Indigent Defense System*, VBA NEWS JOURNAL, Aug. 2004, at 4-6, available at <http://www.vba.org/aug04.htm#prespage>.

351 *August Hearing*, *supra* note 5, at 65, 73-78 (testimony of James Hingeley).

352 The ABA Gideon Initiative was supported by funds from the Open Society Institute.

353 *August Hearing*, *supra* note 5, at 75-76 (testimony of James Hingeley).

354 *Id.* at 65, 73-74 (testimony of James Hingeley).

355 See VIRGINIA INDIGENT DEFENSE COALITION, PROGRESS REPORT: VIRGINIA'S PUBLIC DEFENSE SYSTEM (2003), available at http://www.vidcoalition.org/pdf/vidc_ReportFINAL.pdf (on file with ABA SCLAIID).

356 See *id.* at 78 (testimony of James Hingeley); Virginia Indigent Defense Coalition, at <http://www.vidcoalition.org/history.html>.

357 See *Discount justice is inadequate justice*, VIRGINIAN-PILOT, Jul. 12, 2004 (on file with ABA SCLAIID); *Fixing a System That Denies Justice to the Poor*, WASHINGTON POST, Jul. 18, 2004, at B08; *Fixing Virginia's System*, WASHINGTON POST, Jul. 7, 2004, at A18.

358 THE SPANGENBERG GROUP, *supra* note 342, at 1.

359 2003 N.Y. Laws Ch. 62, Part J. See also *November Hearing*, *supra* note 5, at 7 (testimony of Jonathan Gradess); THE SPANGENBERG GROUP, *supra* note 43, at 20.

360 *November Hearing*, *supra* note 5, at 7 (testimony of Jonathan Gradess); THE SPANGENBERG GROUP, *supra* note 43, at 20.

361 THE SPANGENBERG GROUP, *supra* note 43, at 19.

362 See Fund for Modern Courts, at <http://www.moderncourts.org/Advocacy/counsel.html>.

363 Press Release, New York County Lawyers' Association, NYCLA Settles Lawsuit Against N.Y. State and City Challenging Constitutionality of Compensation Rates for Assigned Counsel (Nov. 12, 2003) (on file with ABA SCLAIID).

364 *Id.*

365 N.Y. County Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 418 (N.Y. Sup. Ct. 2003).

366 New York County Lawyers' Association, *supra* note 363.

367 Press Release, New York State Unified Court System, The Future of Indigent Defense Services in New York: Topic of New Commission's Inquiry (May 17, 2004), at http://www.courts.state.ny.us/press/pr2004_09.shtml (on file with ABA SCLAIID).

368 *November Hearing*, *supra* note 5, at 8-9 (testimony of Jonathan Gradess).

369 Among the groups endorsing the proposal are: the New York State Defenders Association; League of Women Voters of New York State; Fund for Modern Courts; County Judges Association of the State of New York; New York State Community of Churches; New York State Catholic Conference; New York State Defenders Association; New York State Association of Criminal Defense Lawyers; Criminal Advocacy Committee of the Association of the Bar of the City of New York; entities within the New York State Bar Association (Criminal Justice Section and President's Committee on Access to Justice); and the client community. See *November Hearing*, *supra* note 5, at 9 (testimony of Jonathan Gradess); Gradess, Written Summary, *supra* note 73.

370 *November Hearing*, *supra* note 5, at 10 (testimony of Jonathan Gradess). See, e.g., *Drive-by Legal Defense*, NEW YORK TIMES, Apr. 12, 2001, at A28; *Shortchanging justice*, ALBANY TIMES UNION, May 8, 2002, at A10; and *Parity, not parody*, DAILY NEWS, May 2, 2002, at A-4.

371 See, e.g., NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 51; ABA JUVENILE JUSTICE CENTER & JUVENILE JUSTICE PROJECT OF LOUISIANA, THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA (2001), available at http://www.jjpl.org/PDF/Children_Left_Behind.pdf (on file with ABA SCLAIID); ABA JUVENILE JUSTICE CENTER & JUVENILE JUSTICE

PROJECT OF LOUISIANA, THE CHILDREN LEFT BEHIND 2002 ANNUAL UPDATE: A REVIEW OF THE STATUS OF DEFENSE FOR LOUISIANA'S CHILDREN AND YOUTH IN DELINQUENCY PROCEEDINGS (2002) [hereinafter THE CHILDREN LEFT BEHIND 2002 ANNUAL UPDATE], available at http://www.jjpl.org/PDF/Annual_Update_For_Webview.pdf (on file with ABA SCLAIID); KURTH & BURCKEL, *supra* note 149; BERNADETTE JONES PALOMBO & JEFF SADOW, THE PROVISION OF THE RIGHT TO COUNSEL IN CADDO PARISH, LOUISIANA (2004) (on file with ABA SCLAIID); NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *supra* note 48; CARL BROOKING & BLAKELY FOX, ECONOMIC LOSSES AND THE PUBLIC SYSTEM OF INDIGENT DEFENSE: EMPIRICAL EVIDENCE ON PRE-SENTENCING BEHAVIOR IN MISSISSIPPI (2004) (on file with ABA SCLAIID); THE SPANGENBERG GROUP, ABA & DEP'T OF JUSTICE, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA: FINDINGS & RECOMMENDATIONS (2000) [hereinafter INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA] (on file with ABA SCLAIID); NAT'L LEGAL AID AND DEFENDER ASS'N, EVALUATION OF THE PUBLIC DEFENDER OFFICE: CLARK COUNTY, NEVADA (2003) [hereinafter CLARK COUNTY EVALUATION], available at <http://www.nlada.org/DMS/Documents/1051974411.43/Executive%20Summary%2C%20Table%20of%20Contents%20and%20Report%20%28without%20appendices%29.pdf> (on file with ABA SCLAIID); THE SPANGENBERG GROUP, A STATEWIDE EVALUATION OF PUBLIC DEFENDER SERVICES IN PENNSYLVANIA (2002) [hereinafter STATEWIDE EVALUATION OF PUBLIC DEFENDER SERVICES IN PENNSYLVANIA], available at .

372 *August Hearing*, *supra* note 5, at 45-46 (testimony of Frank Eaman).

373 *October Hearing*, *supra* note 5, at 99-100 (testimony of Thomas Lorenzi).

374 *Id.* at 99 (testimony of Thomas Lorenzi); NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 51, at 73, 77.

375 *October Hearing*, *supra* note 5, at 100 (testimony of Thomas Lorenzi); NAT'L LEGAL AID AND DEFENDER ASS'N, *supra* note 51, at 69.

376 *August Hearing*, *supra* note 5, at 45-46 (testimony of Frank Eaman); REPORT WITH RECOMMENDATION OF STATE BAR OF MICHIGAN REPRESENTATIVE ASSEMBLY (Apr. 2002) (on file with ABA SCLAIID).

377 EXECUTIVE COMMITTEE, STATE BAR OF MICHIGAN, RECOMMENDATION OF STATE BAR OF MICHIGAN AD HOC TASK FORCE ON THE PROVISION OF INDIGENT DEFENSE SERVICES IN MICHIGAN (Oct. 2003) (on file with ABA SCLAIID).

378 *October Hearing*, *supra* note 5, at 19 (testimony of John Pickens).

379 Press Release, Washington State Bar Association, WSBA Board of Governors Supports Recommendations for Reforms in Washington's Indigent Defense System and State Funding of Indigent Defense (May 19, 2004), at <http://wsba.org/media/releases/2004/recindddef.htm> (on file with ABA SCLAIID); Ken Armstrong, *State bar-association panel urges public defense reform*, THE SEATTLE TIMES, May 11, 2004 (on file with ABA SCLAIID); BLUE RIBBON PANEL ON CRIMINAL DEFENSE, WASHINGTON STATE BAR ASS'N, REPORT OF THE WSBA BLUE RIBBON PANEL ON CRIMINAL DEFENSE (2004) at <http://www.wsba.org/blueribbonreport.t.pdf>.

380 *February Hearing*, *supra* note 5, at 43 (testimony of Elgin Simpson); *August Hearing*, *supra* note 5, at 50 (testimony of Lisette McCormick). See *supra* text accompanying notes 323-327 for a discussion of the extensive involvement of the Georgia Supreme Court in indigent defense reform in that state. After the conclusion of SCLAIID's hearings, the New Mexico Supreme Court also created a task force on the criminal justice system that is charged with examining the adequacy of funding for public defender services in that state.

381 See THE CHILDREN LEFT BEHIND 2002 ANNUAL UPDATE, *supra* note 371; Kurth & Burckel, *supra* note 149.

382 *October Hearing*, *supra* note 5, at 153, 158 (testimony of Robert McDuff). See also NAACP LEGAL DEFENSE AND EDUCATIONAL

FUND, INC., *supra* note 48.

383 See INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA, *supra* note 371.

384 See CLARK COUNTY EVALUATION, *supra* note 371.

385 See National Association of Criminal Defense Lawyers, Justice in Crisis: Venango County, PA's Indigent Defense System, Fact Sheet and Report Synopsis, at <http://www.nacdl.org/public.nsf/DefenseUpdates/031News01?OpenDocument>.

386 *February Hearing*, *supra* note 5, at 31, 38 (testimony of Vincent Warren); Amended Compl. at 49, White v. Martz (filed Feb. 14, 2002) (No. C-DV-2002-133), available at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=11351&c=48>. The lawsuit is still pending as of the writing of this report.

387 *August Hearing*, *supra* note 5, at 43 (testimony of Frank Eaman); Wayne County Criminal Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court, 663 N.W.2d 471 (Mich. 2003).

388 *August Hearing*, *supra* note 5, at 21 (testimony of Ross Shepard).

389 *Id.*

390 Foster v. Carson, 347 F.3d 742 (9th Cir. 2003); Telephone Interview with Ross Shepard, Former Director, Lane County Public Defender Services (Eugene, Oregon) (Aug. 26, 2004).

391 Lavalley v. Justices in the Hampden Superior Court, No. SJC-09268 (Mass. Jul. 28, 2004).

392 *Id.* at 9-10. As of the writing of this report, the decision has resulted in the release from jail of at least three persons accused of crime. See Adam Gorlick, *Without access to lawyers, three accused drug dealers released from jail*, BOSTON GLOBE, Aug. 9, 2004 (on file with ABA SCLAIID).

393 Telephone Interview with Marea Beeman, Vice President, The Spangenberg Group (Nov. 19, 2004). The lawsuit, which relies extensively on factual information prepared by The Spangenberg Group, is a statewide systemic suit that encompasses not only indigent criminal cases, but also child welfare, juvenile delinquency, and mental health cases.

394 Compl. at 1, Anderson v. State (filed Sept. 23, 2004) (No. 2004-005405) (on file with ABA SCLAIID). See also Laura Maggi, *Public defenders swamped, suit says: Prisoners, poor face long wait for lawyers*, TIMES-PICAYUNE, Friday, September 24, 2004.

395 *October Hearing*, *supra* note 5, at 145 (testimony of Robert McDuff).

396 *October Hearing*, *supra* note 5, at 136-137 (testimony of Robert McDuff).

397 *Id.* at 149-151 (testimony of Robert McDuff).

398 Quitman County v. State, No. 99-0126 at 37-28 (Miss. Cir. Ct. 11th Jud. Dist. Nov. 7, 2003).

399 See NAACP Legal Defense and Educational Fund, Inc., LDF Files an Amicus Brief in Support of Efforts to Bring About a Statewide, State-Funded Indigent Defense System in Mississippi, at <http://www.naacpldf.org/content.aspx?article=329> (last visited Jan. 18, 2005).

400 *Id.* at 157 (testimony of Robert McDuff).

IV. Model Approaches to Providing Services

401 *November Hearing*, *supra* note 5, at 12 (testimony of William Leahy); Leahy, Written Summary, *supra* note 65, at 1.

402 *November Hearing*, *supra* note 5, at 12, 17-18 (testimony of William Leahy at 12, 17-18); Leahy, Written Summary, *supra* note 65, at 1.

403 *November Hearing*, *supra* note 5, at 58 (testimony of Nancy Forster).

404 *Id.*

405 *Id.* at 23 (testimony of Phyllis Subin).

406 *Id.* at 21, 25 (testimony of Phyllis Subin).

407 *Id.* at 43-44 (testimony of Norman Lefstein); Lefstein, Written Summary, *supra* note 79, at 7-8.

408 *November Hearing*, *supra* note 5, at 43-44 (testimony of Norman Lefstein); Lefstein, Written Summary, *supra* note 79, at 7-8.

409 STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, ABA, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 115 (Aug. 1998) (urging the establishment of minimum standards for indigent defense systems), available at <http://www.abanet.org/legalservices/sclaid/defender/policy.html> (on file with ABA SCLAIID).

410 *November Hearing*, *supra* note 5, at 5 (testimony of Jonathan Gradess).

411 See New York State Defenders Association, at http://www.nysda.org/NYSDA_Resources/nysda_resources.html#PDBC.

412 *Id.*

413 *Id.*

414 *February Hearing*, *supra* note 5, at 58 (testimony of Robert Boruchowitz).

415 Section 10.101.030 of the Revised Code of Washington requires each city or county to adopt statewide standards for the delivery of indigent defense services and references the standards adopted by the Washington State Bar Association as guidelines. WASH. REV. CODE § 10.101.030 (2004). However, no state funding currently exists to aid local governments in enforcing the standards. E-mail from Robert Boruchowitz, Director, The Defender Association, to Shubhangi Deoras, Assistant Counsel, ABA SCLAIID (Dec. 5, 2004, 10:12 AM CST) (on file with ABA SCLAIID). The standards also are referenced in recent opinions of the Washington Court of Appeals, see *Mt. Vernon v. Weston*, 844 P. 2d 438 (Wash. Ct. App. 1992), and the Washington Supreme Court, see *In re Michels*, 75 P.3d 950, 957-958 (Wash. 2003).

416 Boruchowitz, Written Summary, *supra* note 60, at 1.

417 *February Hearing*, *supra* note 5, at 58 (testimony of Robert Boruchowitz).

418 *Id.* at 74-75 (testimony of Christie Hedman).

419 *Id.* at 70 (testimony of Christie Hedman).

420 See, e.g., Terry Brooks & Shubhangi Deoras, *New Frontiers in Public Defense*, 17 CRIM. JUST. 51 (2002) (profiling the Bronx Defenders, Georgia Justice Project, and Neighborhood Defender Service of Harlem); Cait Clarke, *Problem Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001).

421 *November Hearing*, *supra* note 5, at 64-65 (testimony of John Hardiman).

422 *February Hearing*, *supra* note 5, at 88-89 (testimony of Anne Lee).

423 *February Hearing*, *supra* note 5, at 55, 59, 63-64 (testimony of Robert Boruchowitz and Jacqueline McMurtrie).

424 *Id.* at 63 (testimony of Robert Boruchowitz). See also The Defender Association, at <http://www.defender.org/resume.html>.

425 *February Hearing*, *supra* note 5, at 55 (testimony of Robert Boruchowitz).

426 *Id.* at 63 (testimony of Robert Boruchowitz).

427 *Id.* at 63-64 (testimony of Robert Boruchowitz).

428 *Id.*

V. Main Findings

MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004).

430 See *supra* text accompanying notes 242-284.

431 See *supra* text accompanying notes 264-278.

432 See ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standards 5-1.1, 5-1.6; ABA, DEFENSE FUNCTION, *supra* note 130, Standard 4-1.2(d).

433 See *supra* text accompanying notes 401-428.

VI. Recommendations

434 See *supra* note 39 for examples of articles and reports documenting the chronic under-funding of indigent defense systems in this country.

435 ABA, TEN PRINCIPLES, *supra* note 42, Principle 2.

436 See THE SPANGENBERG GROUP, *supra* note 43, at Table.

437 See *supra* text accompanying notes 110-123.

438 STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, ABA, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 103 (Feb. 1991) (urging inclusion of indigent defense programs in federal grant funding), available at <http://www.abanet.org/legalservices/sclaid/defender/policy.html> (on file with ABA SCLAIID); STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, ABA, REPORT WITH RECOMMENDATION TO THE ABA HOUSE OF DELEGATES 121 (Feb. 1979) [hereinafter ABA REPORT WITH RECOMMENDATION 121] (urging the creation of a federal Center for Defense Services), available at <http://www.abanet.org/legalservices/sclaid/defender/policy.html> (on file with ABA SCLAIID).

439 See *February Hearing*, *supra* note 5, at 68 (testimony of Christie Hedman).

440 See WALLACE, *supra* note 108.

441 See ABA REPORT WITH RECOMMENDATION 121, *supra* note 438.

442 See, e.g., S. 2358, 108th Cong. (2004); S. 2396, 108th Cong. (2004); H.R. 2198, 108th Cong. (2004).

443 34 CFR § 674.51 (2005).

444 See American Bar Association, at <http://www.abanet.org/poladv/priorities/home.html>.

445 The U.S. Department of Justice held two indigent defense symposia in 1999 and 2000 and produced final reports for each. See 2000 NAT'L SYMPOSIUM ON INDIGENT DEFENSE, *supra* note 26; 1999 NAT'L SYMPOSIUM ON INDIGENT DEFENSE, *supra* note 110.

446 *February Hearing*, *supra* note 5, at 107-109 (testimony of Robert Spangenberg, Neal Sonnett, and Robert Boruchowitz).

447 ABA, TEN PRINCIPLES, *supra* note 42, Principle 2; ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.2(c); NAT'L STUDY COMM'N, *supra* note 42, Guideline 2.4; MODEL PUBLIC DEFENDER ACT § 10 (1970).

448 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-1.3(b).

449 See *supra* text accompanying notes 401-409.

450 See *supra* text accompanying notes 159-161, 197-202.

451 ABA, PROVIDING DEFENSE SERVICES, *supra* note 41, Standard 5-6.3.

452 MODEL CODE OF JUDICIAL CONDUCT § 2.18 and cmt. (1999).

453 See *supra* text accompanying notes 259-261.

454 See *supra* text accompanying notes 249-253.

455 *Faretta v. California*, 422 U.S. 806, 835 (1975). See also *Iowa v. Tovar*, 422 U.S. 806 (2004); *Patterson v. Illinois*, 487 U.S. 285 (1988).

456 407 U.S. 25 (1972).

457 535 U.S. 654 (2002).

458 See *supra* text accompanying notes 323-327, 336-338, 349, 364-366, 375-379.

459 See *supra* text accompanying notes 323-327, 349, 375-377, 379.



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