

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
JUDICIAL ADMINISTRATION DIVISION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association supports Congressional legislation mandating the inclusion of state and local indigent defense programs among those programs eligible for funding under the Anti-Drug Abuse Act of 1988 and similar federal laws, and further mandating the inclusion of research, training and technical assistance programs for state and local indigent defense systems in the Discretionary Grant Programs under the Bureau of Justice Assistance and similar federal agencies; and

BE IT FURTHER RESOLVED, That the American Bar Association urges Congress to authorize and appropriate funding to assist State and local governments in implementing the constitutional obligation to provide effective assistance of counsel for indigent defendants in state and local proceedings; and

BE IT FURTHER RESOLVED, That the American Bar Association urges State legislatures in those States where funding for indigent defense services is primarily provided at the local level to increase the level of State funding.

REPORT

This recommendation is based on the need for meaningful implementation of the Sixth Amendment to the Constitution of the United States. This Amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense.

The constitutional right of an indigent defendant in a criminal case to have counsel appointed by the court has been recognized by the Supreme Court for over fifty-seven years, since the decision in Powell v. Alabama, 287 U.S. 45 (1932). Twenty-seven years ago, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that not only the federal government but State and local governments were required to provide trial counsel for indigent defendants in all serious (felony) cases. Justice Black, writing for the Court, stated:

...in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

In 1972, in Argersinger v. Hamlin, 407 U.S. 25, the Court logically extended this reasoning to all cases where imprisonment is a possibility.

In Douglas v. California, 372 U.S. 353 (1963) the Court held that States must provide appointed counsel to give indigent inmates a meaningful appeal from their convictions. The court stated:

... where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.
(emphasis in original)

ASSOCIATION POLICY

The commitment of the American Bar Association to the meaningful provision of legal services to the indigent at both the trial and appellate levels is longstanding, going back to the early 1920's when the Standing Committee on Legal Aid and Indigent Defendants was established. As early as 1937, the House of Delegates adopted a resolution approving in principle "the establishment in each locality of a system, best adapted to local conditions, as will be adequate and effective to assure competent counsel for needy persons accused of crime."

The Association has also long recognized the need for additional support for indigent defense services. In 1968, the House of Delegates passed a resolution urging:

... state and local bar associations and committees to take more vigorous steps to upgrade the quality and to broaden the scope of the representation of defendants in criminal proceedings who are financially unable to employ counsel....

In 1973, following the decision in Argersinger v. Hamlin, the House of Delegates passed a resolution calling for "federal, State and local governments to take immediate steps to insure the provision of sufficient funds for the assistance of counsel to persons accused of crimes and who are unable to afford legal representation." Congress responded by amending the "Omnibus Crime Control and Safe Streets Act of 1968" to include defense services as one of the areas eligible for federal grant money. Two years later, the President of the American Bar Association, James D. Fellers of Oklahoma, once again called for Association action seeking the improvement of defense services for the poor.

In 1979, recognizing that the majority of defendants in criminal cases required appointed counsel, and that many State and local governments were not providing adequate funding to "assure quality legal representation" for all eligible defendants, the Association adopted a resolution sponsored by the Standing Committee on Legal Aid and Indigent Defendants supporting the establishment of an independent federally funded Center for Defense Services. The proposed Center would assist and strengthen State and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the poor in criminal cases. The report submitted in support of the resolution noted that State and local governments often lack the resources to fund adequate defense services programs. However, the report also pointed out that "[t]oo often lack of political or community support has resulted in only token funding of public defender programs." The proposed Center has never been established, because no federal funds have been authorized for it.

Again in 1981, noting "with concern incidents of insufficient funding for defense of indigent accused," the House of Delegates urged the States "immediately to take the actions necessary to ensure funding adequate to provide effective assistance of counsel to indigents accused of crime."

In addition, through the chapter on Providing Defense Services in its Standards for Criminal Justice (first published in 1968, Second Edition in 1979 and Third Edition being presented to the House of Delegates in August, 1990), the Association has emphasized that adequate funding is one of the keys to the provision of effective assistance of counsel.

Specifically addressing death penalty cases, the House of Delegates adopted a policy at the February 1990 meeting. It states, "...the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation."

THE NEED FOR INCREASED FUNDING FOR DEFENSE SERVICES CONTINUES

Twenty-seven years after Gideon mandated the appointment of effective counsel in all State and local felony cases; eleven years after the ABA took note of the "gross inadequacies of present systems for providing these constitutionally-required services," and two years after a special ABA committee concluded that defense representation "is too often inadequate because of underfunded and overburdened public defender offices," public defense services remain shockingly underfunded and consequently often inadequate.

While the ABA Criminal Justice Section's Special Committee on Criminal Justice in a Free Society (known as the "Dash Committee" for its Chairman Samuel Dash, Professor at Georgetown University Law Center) found that the entire criminal justice system is "starved" for resources, it emphasized that the lack of resources for indigent defense services was especially acute.

...there is ample evidence that the quality of representation, particularly for the poor, is not what it should be...we, as a society [are] depriving the system of the funds necessary to ensure adequate defense services....

Criminal Justice In Crisis, page 37.

The Dash Committee recommended that the ABA and other bar associations use their influence to apprise the public and legislatures of the fact that quality criminal justice costs a great deal more than is currently being spent, and

urged legislatures "to adopt a system-wide approach and fund all components of the criminal justice system adequately."

One of the biggest factors contributing to the current crisis in indigent defense is the so-called "war" on drugs. Drug related cases now account for up to 75% of the criminal proceedings in some courts, 70-90% of those arrested on drug-related charges can't afford to hire counsel, and indigent defense caseloads are climbing at rates of 20-40% per year.

Yet, while the federal and state governments have poured hundreds of millions of dollars into arrest and prosecution of persons suspected of drug offenses, resulting in skyrocketing caseloads in criminal courts around the country, there has been virtually no federal money and very little State money to help indigent defense programs handle the cases created by these arrests and prosecutions. A representative example: in Georgia, where indigent defense caseloads and costs have more than doubled in the past five years, prosecution and law enforcement will receive \$10 million in Federal Drug Control and System Improvement funds this year - indigent defense programs won't receive a dime of federal money.

The reason for the imbalance? At the federal level, the Justice Department has consistently taken the position, in correspondence and in official publications, that since Congress has not specifically mentioned criminal defense services as being appropriate for federal funds, those services are excluded.

The Justice Department's position conflicts with the interpretation of Rep. William Hughes, Chairman of the Subcommittee on Crime of the House Judiciary Committee. At a hearing on October 20, 1987, at which the ABA presented testimony on the funding imbalance, Congressman Hughes expressed surprise that there was any confusion about legislative language:

You also suggest that we specifically mention criminal defense concerns. I refer you to the legislation where defender services are within the definition of criminal justice...I thought it was rather clear by our definition of criminal justice that we include it....

However, the Bureau of Justice Assistance, which awards and administers federal grants for the Justice Department, continues to exclude State and local indigent defense services from eligibility for federal funding - most recently from the Drug Control and System Improvement Formula Grant Program (FY 1990 Program Guidance and Application Kit, 11/89), and from the Discretionary Grant Program (Federal Register, Vol. 55, No. 53, 3/19/90). The 101st Congress has attempted to correct this situation by passing remedial legislation (P.L. 101-647 - Title VI, Sec. 601(b)).

The pattern repeats itself at the State level, where prosecutors receive money for special task forces, training, technical assistance and other special programs - but (in most States) indigent defense programs are denied comparable funds to help them handle the resulting increase in workload.

The denial of federal funding for indigent defense services prompted the National Center for State Courts (NCSC) to prepare a special briefing paper for a meeting of the Conference of Chief Justices and the Conference of State Court Administrators that was held in August 1990. The paper describes a crisis in indigent defense representation of "enormous proportions with significant, fundamental constitutional implications," and states that many public defender offices have reached the point where the acceptance of additional cases would result in a denial of effective assistance to current clients. The paper emphasizes that indigent defense services are an "essential" component, without which the criminal justice system cannot function, and warns that increasing

funding of one component of the system without increasing funding for the other components:

...will inevitably lead to a breakdown of the system.... Contrary to popular belief, a well funded indigent defender office staffed by qualified, experienced attorneys will contribute to more expeditious and efficient disposition of cases. Although not politically popular, well funded indigent defender offices will contribute to a more successful and just "war on drugs."

The NCSC's paper echoes the words of Judge Clyde Cahill of the United States District Court for the Eastern District of Missouri: "A chain is no stronger than its weakest link. By increasing the productivity of one link in that chain without commensurate funding for the other links of the criminal justice system is to reap delay, failure, and continued mistrust of the courts and the criminal justice system." Tyler v. U.S. v. Murphy, 737 F. Supp. 531 (E.D. Mo. 1990).

CONCLUSION

The crisis in indigent defense representation created by the "war" on drugs is the latest chapter in an ongoing crisis stemming from chronic underfunding of indigent defense systems.

Indigent defense programs are an essential component of the criminal justice system. Funding them adequately is not only constitutionally correct, it makes good sense. Failure to adequately fund indigent defense systems not only increases the potential for denial of an accused's constitutional right to effective assistance of counsel, but contributes substantially to court delay and jail and prison overcrowding.

Substantial federal funding and increased State funding of State and local indigent defense systems are the only ways to ensure that poor defendants will be accorded their right to effective assistance of counsel at the trial and appellate levels under the Sixth Amendment.

Respectfully submitted,

Michael L. Bender
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Criminal Justice Section

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