



**Public Defense Reform Since *Gideon*:
Improving the Administration of Justice
By Building
On Our Successes and Learning From Our Failures**

A Public Defense Leadership Focus Group

Sponsored by

The U.S. Department of Justice, Bureau of Justice Assistance,

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EXECUTIVE SUMMARY

In *Gideon v. Wainwright*,² the United States Supreme Court established the right to counsel for indigent persons accused of committing felony offenses in violation of state law. That mandate has been consistently extended to any case that may result in a potential loss of liberty, including but not limited to: initial appeals in state appellate court,³ juvenile delinquency proceedings,⁴ and misdemeanor cases punishable by an actual or suspended jail sentence.⁵

Despite the *Gideon* Court holding that the Sixth Amendment right to counsel applied to the states by virtue of the Fourteenth Amendment—not to county or local governments—the majority of states delegate their obligation to provide counsel for the poor to their counties. Though passing state obligations onto local government can lead to innovation, this has not proven to be the case with public defense services. Rather, the states' abdication of their constitutional obligations has produced justice systems in which results are dictated by a person's income level and the jurisdiction in which the crime is alleged to have been committed, rather than the factual merits of the case. State laws will vary, but a defendant's right to counsel must be uninhibited and absolute or justice cannot prevail.

On September 16, 2008, the National Legal Aid & Defender Association (NLADA), in collaboration with American University's Justice Programs Office of the School of Public Affairs, and pursuant to a grant from the U.S. Department of Justice's Bureau of Justice Assistance (BJA), convened a focus group meeting of criminal justice leaders, including state and local public defenders, state and local assigned counsel leadership, prosecutors, judges, social workers, client leaders, academicians, and former directors of NLADA's Defender Legal Services division. During the meeting, the focus group heard presentations from national experts, reviewed the progress and setbacks in our nation's effort to deliver public defense services, assessed the lessons learned through these

¹ See Appendix for List of Focus Group Participants.

² 372 U.S. 335 (1963).

³ *Douglas v. California*, 372 U.S. 353 (1963).

⁴ *In Re Gault*, 387 U.S. 1 (1967).

⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Shelton v. Alabama*, 535 U.S. 654 (2002).

successes and failures, identified best practices, and began “succession planning” from the current generation of indigent defense leadership to the next.

The recommendations that resulted from the focus group discussions, summarized in Part V: “Recommended Action Steps for Change” of this report, are organized in terms the actions needed by all levels of government and private sector leadership, including:

- The United States Government, particularly the U.S. Department of Justice’s Bureau of Justice Assistance;
- The Defense community;
- State policy makers, including state supreme courts, state legislatures, and public defense leadership; and
- National and local advocacy organizations, government agencies and academic institutions.

The recommendations span a broad range of initiatives designed to ensure that:

- public defense is an essential component of all criminal justice improvement and training initiatives and that public defense providers are, through regulation, designated as equal partners in terms of eligibility for federal and state grants;
- the implications for public defense are a significant consideration in the introduction of various “tough on crime” legislative proposals, including the reclassification of offenses as crimes that were formerly infractions;
- special attention is given to the delivery of defender services to juveniles that take into account the mental health, educational, medical and other needs of these clients, including those being tried in the adult system;
- adequate broad based training and technical assistance opportunities are available for public defense and criminal justice systems which promote the development of requisite leadership and management skills, competent and professional representation, and a court system culture that supports and encourages such representation as an indispensable element of a well-run and fair criminal justice system; and
- state legislatures and other funding bodies provide adequate funding for public defense services that meet workload demands, acknowledge the ethical obligation of attorneys to provide competent representation to each client, and allow for parity of resources with those of the prosecutor for attorneys as well as necessary support (investigators, training experts, etc.).

The recommendations also call for (a) a systematic review of case processing in state and local courts to identify the extent to which defendants are convicted in the U.S. without access to counsel in violation of the Sixth Amendment and the different mechanisms that allow this deprivation to take place, and (b) the creation of independent statewide indigent defense commissions with authority to promulgate and enforce uniform standards for defense services at the state and local level.

The following sections of this report provide a summary of the focus group discussions, participant comments, and recommended “next steps”.

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OVERVIEW

THE CONSTITUTIONAL RIGHT TO COUNSEL

In the case of *Gideon v. Wainwright*⁶, the United States Supreme Court concluded 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.” Declaring it an “obvious truth” that “lawyers in criminal courts are necessities, not luxuries,” the Court ruled that states must provide counsel to indigent defendants in felony cases. The Court left it to the states to determine how they would fulfill this mandate.

Since *Gideon*, a patchwork of public defense delivery systems has evolved in state and local jurisdictions reflecting wide differences in structure, scope, and quality. The number of cases handled by these systems has grown as the Court, since *Gideon*, expanded the breadth of its mandate to include juveniles,⁷ misdemeanants, and misdemeanor defendants placed on probation but with exposure to the threat of incarceration.⁸

For more than 40 years, experts, advocates, academicians, and policymakers have struggled to make real the promise of *Gideon* and its “obvious truth.” In 2004, the American Bar Association (ABA) sponsored a series of public hearings to examine “whether *Gideon*’s promise is being kept.” At the conclusion of the year-long project, the ABA summarized its conclusions as follows:

⁶ 372 U.S. 335 (1963).

⁷ *In re Gault*, 387 U.S. 1 (1967).

⁸ *Shelton v. Alabama*, 535 U.S. 654 (2002). Although not expanding on the categories of cases requiring public defense services, the Court’s decision in *Rothgery v. Gillespie County, Tex.*, 128 S. Ct. 2578 (2008), expanded the responsibility of public defense services by clarifying any ambiguity that may have previously existed in restating the Constitutional imperative that the right to counsel attaches following a defendant’s initial appearance before a judicial officer where he learns of the charge against him and does not require formal prosecutorial involvement. Any public defense systems that were withholding services until a later point in the criminal process now need to be able to provide counsel as this earlier stage.

“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 conducted effectively does not exist in practice for countless people across the United States”⁹”

A DAY TO TAKE STOCK

On September 16, 2008, the U.S. Department of Justice’s (DOJ) Bureau of Justice Assistance (BJA) in partnership with the National Legal Aid & Defender Association (NLADA) and American University, convened a one-day meeting of 24 national criminal justice leaders—representing public defenders in state and local and in large and small systems, clients, prosecutors, social workers, judges, academics, court administrators—to take stock of developments since *Gideon*. Specifically, participants were asked to:

- synthesize the highlights of over 40 years of wisdom and experience generated by the desire to improve our nation’s public defense services;
- identify and assess the “lessons learned” through both successes and failures;
- identify best practices and continuing needs; and
- plan for the next generation of public defense leadership.

The day began with opening remarks from now Acting BJA Director, James H. Burch, II, and short presentations by NLADA leaders Jo-Ann Wallace and Richard Goemann and national defender leader Jim Neuhard. The opening presentations and brainstorming plenary laid the foundation for the Public Defense Leadership Focus Group work throughout the day. The Group accomplished that work primarily through facilitated small working group sessions, with “report-out” facilitated plenary gatherings, coming together periodically to share ideas. The balance of this paper reports the give and take generated by the small group plenary dynamic. Ideas are not attributed to individuals but are the product of the ensuing dialogue process, a “free exploration that [brought] to the surface the full depths” of the participants’ experiences and thought and moved “beyond their individual views.”¹⁰

Participants identified progress in fulfilling *Gideon*’s promise:

⁹ *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. American Bar Association Standing Committee on Legal Aid and Indigent Defendants (2004).

¹⁰ Peter M. Senge, *The Fifth Discipline: The Art & Practice of The Learning Organization* at 241 (First Currency Paperback Edition 1994).

- Substantial improvement in funding for the delivery of indigent defense services, with some public defense systems being able to support reasonable caseloads, adequate investigation and sentencing advocacy support, and administrative and technology services;
- States recognizing their Constitutional responsibility to fund indigent defense systems, with 30 states now fully funding indigent defense compared with 13 at the time of Gideon;
- Increasing, though not complete, independence of indigent defense delivery systems from political pressures and judicial branch controls;
- Formulation of caseload and performance standards which, although mandated in only a small number of jurisdictions, have led to improvements in the quality of indigent defense services where they are utilized;
- Emerging efforts at “whole client” representation, drawing on community based resources such as drug programs, youth development services, and other resources from the wider community as part of the case disposition process;
- Development of leadership and mentoring programs which, although still limited in scope, show promise for nurturing a cadre of leaders who can help change the culture of expectations regarding indigent defense services; and
- Critical support provided by DOJ/BJA to promote the quality of public defense services, including support for developing attorney caseload standards; promoting training capabilities; conducting program evaluations; establishing appellate defender offices; and supporting data collection efforts to measure the degree to which recommended standards and reforms have been/are being implemented.

Participants also identified failures, gaps, and deficiencies that combine to perpetuate public defense systems that provide inadequate and unethical representation that leads to failure in confidence in the criminal justice system, and creates both a waste of taxpayer money and a threat to public safety:

- People are being convicted every day without ever talking with an attorney and are frequently dissuaded from requesting an attorney; efforts need to focus on encouraging the judicial branch—judges in particular—to take a leadership role in ensuring that defendants are adequately represented according to the ethical requirements of the legal profession;
- *Strickland* has presented special challenges by establishing an unacceptably low threshold for measuring adequate representation;

- Resource deficits are particularly severe regarding representation of juveniles. Apart from deficiencies in funding, training, and services for juveniles, in some jurisdictions the provision of social services requires a finding of delinquency; where this is true, courts are often willing to bend the requirements of due process to secure services for children in need;
- Our nation’s criminal justice system resources are allocated based on the prevailing assumption that at least 85% of defendants will plead guilty. As a result, courts, prosecutors, and defense counsel labor under intense pressure to plea bargain as many cases as possible, thus avoiding trials in both criminal and juvenile court. In some of those cases, defendants may be innocent, but plead guilty to avoid the much longer sentences that they are threatened with should they be convicted after trial;
- Public defenders who work within a legal culture geared toward processing cases as quickly and cheaply as possible and who must nonetheless adhere to an attorney’s ethical obligation to provide quality defense for individual clients are caught in irreconcilable conflicts that most often result in public defense attorneys failing to uphold their ethical obligations or exiting the public defense field;
- The rapid and continuous criminalization of offenses that had previously been considered infractions, the elevation of misdemeanor offenses to felonies and the enhancing of sentencing sanctions with mandatory minimums and three strike provisions has ballooned public defense workloads without the concomitant addition of the resources; and
- In many jurisdictions, the public defense function is still viewed as a lesser function within the justice system, and struggles to become an equal partner in system planning and decision-making.

AGENDA FOR THE FUTURE

The agenda for the future that emerged from the meeting discussions focused upon improvements simultaneously undertaken on six fronts:

- Immediate initiation of collaborative efforts with judicial leaders and other justice agencies to reinvigorate the “legal culture” by putting a premium on ensuring quality, ethical defense representation rather than expediency and mass plea bargaining as the norms for the criminal case process;
- Immediate documentation regarding the extent of “no counsel” courts in which unrepresented defendants are being pressured to plead guilty, or face additional jail time or other consequences in order to wait for an attorney to be appointed;
- Continued efforts to achieve structural improvements relating to the organization, funding, and operations of indigent defense service delivery

systems, consistent with the American Bar Association's *Ten Principles of a Public Defense Delivery System*;

- Cultivation of a leadership cadre of defenders ("top down") who can promote the adherence among public defense professionals to ethical obligations and standards for quality representation of indigent defendants;
- Improvements developed at the line ("bottom up") level relating to qualifications, training, and supervision of public defender attorneys and assigned counsel; and
- Identification and promotion of the proper role of public defense in the American justice system through partnerships with community organizations, the media, law schools, and other entities.

PROCEEDINGS OF THE SEPTEMBER 16, 2008 NLADA-BJA PUBLIC DEFENSE LEADERSHIP FOCUS GROUP

Opening Remarks: Jo-Ann Wallace, President and CEO, NLADA

Noting that this March marked the 45th anniversary of the Supreme Court's landmark decision in *Gideon v. Wainwright*, we acknowledge that "45" is not one of the most highly celebrated milestones when it comes to anniversaries. But in five short years we will reach the gold—the half-century mark since the Court's pronouncement. The conversations that begin at this meeting, and the course that the Department of Justice chooses to take (or *not* to take) in the next five years, may well determine to what extent 2013 is a year of celebration.

Much remains to be done and one of the strategies that has been critically important to improving indigent defense is the growing extent to which the mainstream media understands *and reports on* the role indigent defense plays in the administration of justice. More often than not, however, headlines are an indictment of the systems that are charged with effectuating the right to counsel rather than cause for jubilation. Far too often the headlines continue to illustrate that attorneys are operating without the time, tools or training to provide competent representation. And although there has yet to be a comprehensive study of this issue, those in the field know that 45 years after *Gideon*, after *Argersinger* and even after *Shelton*, for a variety of complex reasons, people get convicted in our courts *without ever talking to a lawyer*.

Despite that situation, there have been successes. For example, in 1976, only 13 states funded all or a significant part of indigent defense. Today, that number has more than doubled to 30. It has taken enormous efforts to make the progress we made thus far.

Since *Gideon*, the Department of Justice (DOJ) has played a leadership role in shaping indigent defense. Through the Bureau of Justice Assistance (BJA) and the Law Enforcement Assistance Administration (LEAA), BJA's predecessor agency, the DOJ has been a critical force in the development of many of the standards that have become

the foundation upon which effective indigent defense practices have been built. DOJ supported the work of the National Advisory Commission (NAC 1973), credited with establishing the first national caseload standards for public defenders. It made possible the first comprehensive guidelines for indigent defense systems through the work of the National Study Commission (1976). After supporting the development of standards, it funded assessments and used the power of the purse and the influence of the Department to gently, but *persuasively*, encouraged defender programs to adopt them.

Many defender systems exist today only because of DOJ funding that resulted in the creation of appellate defender offices and juvenile defender offices and that helped trial offices grow and thrive. LEAA's "Exemplary Project" initiative published comprehensive instructions for setting up a defender office, which set the bar and became the model to which new programs across the country aspired. In collaboration with the Bureau of Justice Statistics (BJS) and the National Institute for Justice (NIJ), BJA supported data collection on indigent defense systems, studied the impact that standards have on effective and efficient indigent defense representation, and gathered national, state and local standards in a comprehensive *Compendium*. DOJ training supported the management and administration of defender offices, provided training to indigent defense practitioners, and provided critical leadership education so that public defense executives could effectively co-lead the administration of justice. The Department has also supported reform and improvement of indigent defense systems through technical assistance, problem-solving bodies, and two national symposiums convened by a former Attorney General.

But perhaps as important as any one tangible outcome, the Department has encouraged and supported leaders to think "outside the box;" to think beyond the realities of today to what is possible tomorrow. In the early days they encouraged smart young advocates to think beyond individual representation to create entirely new systems and paradigms. The Department continued to encourage creative, forward thinking research and analysis through projects such as Harvard University's Kennedy School of Government's Executive Session on Indigent Defense (1999-2001) and NLADA's Blue Ribbon Commission. In short, much of the progress that has been made since *Gideon* rests on a framework that the DOJ has played a major role in building.

NLADA has had the privilege of playing a leading role in partnership with the DOJ in most of these endeavors and many of the meeting attendees were pivotal to that collaboration. NLADA is grateful for BJA's partnership yet again, to help push the field beyond where we are, to where we need to be; as we stop to pause and reflect on what we've accomplished and what remains to be done, to chart the most effective course possible for achieving *Gideon's* promise.

Structure and Culture in Indigent Defense Reform: Richard Goemann, Director, Defender Legal Services, NLADA

Historically, most public defense reform efforts have focused on four “structural” elements of indigent defense service delivery: (1) independence; (2) standards; (3) funding; and (4) workload.

National standards have become a particularly useful tool in gauging the adequacy of a public defense delivery system’s structure. The two most widely accepted sets of standards have been developed by the American Bar Association, the National Legal Aid & Defender Association and the National Juvenile Defender Center.

American Bar Association

The ABA’s *Ten Principles of a Public Defense Delivery System*,¹¹ published in 2002, sets out guidelines addressing the key structural requirements that define a system designed to deliver competent public defense delivery services and criteria against which the quality of an indigent defense systems can be measured. Briefly summarized, the *Ten Principles* are:

- independence of the public defense function, including selection and funding
- mixed systems of a defender office and active bar participation where caseloads warrant
- early appointment of defense counsel
- meeting space that promotes attorney-client confidentiality
- controlled workload to permit quality representation
- attorney training, experience and ability matched to complexity of the case
- continuous representation of a client by the same attorney through the life of a case
- resource parity with the prosecutor and defense counsel included as an equal partner in the justice system
- provision of continuing legal education
- performance supervision in accordance with national and locally adopted standards

The National Juvenile Defender Center

In July 2008, NLADA and the National Juvenile Defender Center published the second edition of “*Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*,”¹² noting that the long-term neglect and underfunding of indigent defense generally has been exacerbated in the juvenile court setting—which has always competed for attention, status, and resources with its adult counterparts. Although deficiencies in providing quality defense services to people of

¹¹ *ABA Ten Principles Of a Public Defense Delivery System*. American Bar Association (February 2002), available at www.indigentdefense.org.

¹² *Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems, 2nd edition*. National Juvenile Defender Center and National Legal Aid & Defender Association (July 2008), available at http://www.nlada.org/DMS/Documents/1218813581.82/Juvenile%2010%20Principles_2nd%20ed.pdf and www.njdc.info.

limited means pervade the entire system, they are particularly pronounced in the juvenile system, where high caseloads and lack of funding are severe. Inadequate funding for indigent defense has particularly long-term consequences for juvenile defense. The *Principles*, designed to provide guidance for implementing public defense delivery systems consistent with the requirements of *In re Gault*,¹³ provide for the following:

- competent and diligent representation throughout the delinquency process
- recognition that representation of juveniles is a specialized area of the law
- adequate personnel and other resources and parity with those of the adult system
- use of experts and ancillary services
- adequate staff supervision and workload monitoring
- management of staff performance according to national, state or local standards
- comprehensive, ongoing training and education for all attorneys and support staff involved in the representation of children
- development and presentation of independent treatment recommendations and dispositional alternatives on behalf of clients
- advocacy for the educational needs of clients
- promotion of fairness and equity for children

Looking at a timeline of change in public defense funding, significant progress has been made in achieving structural reform. As previously noted, in 1976, only 13 systems were entirely/primarily state funded, while today there are 30 systems entirely state funded, with most of the remaining systems consisting of a mix of state and local funding. Only seven states have systems entirely funded at the local level. While state funding is not a panacea and does not alone ensure quality services, it generally provides a far more stable funding structure than local funding.

However, in addition to structural change, advocates of public defense reform need to address the current state of underdeveloped leadership within the public defense community and a severely distorted legal culture within which many public defenders are working. “Culture” refers to the most ingrained, unquestioned assumptions and aspirations that a group shares about how the world is and ought to be and that determine the group members’ perceptions, thoughts, feelings, and behavior.¹⁴ Applied to the public defense arena, the prevailing legal culture puts a premium on efficiency, economy, and simplicity of the criminal case disposition process at the expense of promoting quality and ethically sound representation.

Changing public defense culture poses a particular challenge because it is not simply a question of lowering caseloads but, more significantly, redefining the public defender’s role to fully adhere to a defense counsel’s ethical obligations to provide quality representation. Such role redefinition requires attorneys’ stepping out of the “culture” that has defined for them what constitutes good legal practice—because that is the only

¹³ 387 U.S. 1 (1967).

¹⁴ See Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 Loy. J. Pub. Int. L. 177, 201 (2008) (quoting Edgar H. Schein, *Three Cultures of Management: The Key to Organizational Learning*, MIT Sloan Mgmt. Rev. 11 (Fall 1996)).

culture they have known—and may mean upsetting established scheduling and other case disposition practices and ultimately, if necessary, refusing to represent clients when they are unable to provide competent, conflict-free representation. Later today we will hear about the Southern Public Defender Training Center, one model for engaging the need for cultural change.

While advocates have enjoyed limited success in creating structural change, the future must include building the infrastructure of visionary leadership,¹⁵ leadership that can support a public defense culture that values zealous, comprehensive, and compassionate legal representation for each and every client in need of public defense services.

How We Got From *Gideon* to the Present: Jim Neuhard, Chief, Michigan State Appellate Defender

The right to counsel has its roots in the 10th century ecclesiastic courts. Ironically, these beginnings were in the courts of equity not the criminal courts. Individuals had precious few rights and were themselves the property of the king. But the equity courts resolved disputes between individuals, and these courts felt you should have a lawyer if you felt you needed one.

Then in the 15th century, when the governments changed regularly and the courts were gaining independence from the king, lawyers were guaranteed in treason cases, which at the time carried the death penalty. Ordinary crimes and criminals were considered simple matters by the judiciary and the judges felt they could protect the rights of the accused against the king. The driving force in these courts was fundamental fairness.

1800s

After the American revolution, while the Constitution guaranteed the right to an attorney in a criminal case, it was not until the 1850s that Indiana by case law and Michigan by case law and statute guaranteed that the state would pay for an attorney in a criminal case. In the latter part of the century, the German Immigrant Society (later the NY Legal Aid Society) was formed to provide counsel to immigrants.

In California an amazing woman named Clara Shortridge Foltz began writing law review articles and advocating the idea of public defender offices. This advocacy led in the early 1900s to the passage by the California legislature of the Foltz Act and the founding of the nation's first public defender office in Los Angeles. Her advocacy for defender offices occurred decades before Reginald Heber Smith wrote his seminal treatises on organized legal aid offices.

¹⁵ While these efforts have already begun with creation of the National Defender Leadership Institute (NDLI) they must expand to ensure that we can realize the full breadth of change promised by the structural reforms already achieved. For more information on NDLI, see the NDLI website: http://www.nlada.org/Defender/Defender_NDLI/Defender_NDLI_Home.

During this period, the driving force behind movements to implement a right to counsel was fairness and an understanding of efficiently providing the services to larger and larger groups of people in need.

Early 1900s

The first third of this century saw the emergence of Clarence Darrow and the infamous United States Supreme Court case of the Scottsboro Boys.¹⁶ Darrow made clear that an attorney could make a profound difference when confronting the overwhelming force of the press, public opinion or the power of the state. The Scottsboro case brought this sense of need home when the court painted the picture of hysteria surrounding the charging of these young, black defendants on trial for their lives for raping a white woman in the heart of the South. The Court made clear, again in a death penalty case, how essential were the skills of an attorney. For the first time, the need for an attorney appointed by the state for the poor received constitutional support.

By the 1950s two states, Rhodes Island and Delaware, had set up statewide public defender systems and Legal Aid and Defender programs. Similar programs run mostly by bar associations began to emerge in cities across the country.

1950s

The '50s saw McCarthyism, the Civil Rights movement, and the emergence of the Warren Court. At this time the image of public defenders was not good. In a Michigan case, *People v. Losinger*,¹⁷ the Michigan Supreme Court noted, the defendant “evidently did not want an attorney appointed for him” as he was heard to say, “A State attorney is worse than none.”¹⁸

1960s

*Gideon!*¹⁹ The reaction was broad and deep. In Florida, 5,000 inmates were released and a statewide public defense system was started with elected chief defenders. To meet the need, city, county, and statewide systems—of all types—began across the country—70+ fueled by grants from the Ford Foundation. But in several states, such as Michigan where counsel had been provided, little change occurred. Soon, *Gideon*, which had been limited to the right to counsel in felony cases, was extended to appeals, juveniles and misdemeanors.

For the first time, the dissent in the Supreme Court opinions began to raise concerns about costs and the right to counsel was limited to only those misdemeanors where liberty was at stake. It was during this time that the Court issued one of the most negative opinions on quality of counsel that they have ever issued—*Strickland*.²⁰ Essentially *Strickland* required little more than that a poor person charged with a crime have a lawyer

¹⁶ *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁷ 331 Mich. 490, 50 N.W.2d 137 (1951).

¹⁸ *Id.* at 496, 50 N.W.2d at 140.

¹⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁰ *Strickland v. Washington*, 466 U.S. 668 (1984).

present. The only error requiring reversal was a mistake that was outcome determinative—a standard that is almost impossible to meet.

1970s

The '70s saw the President's Crime Commission, chaired by Warren Burger and the first reference to the "three legs of the stool," i.e., the three pillars of the criminal justice system: prosecution, defense, and the judiciary. The Commission called for quality and referred to numbers that defined a maximum caseload for public defenders. Soon thereafter the Law Enforcement Assistance Administration began providing grants that funded evaluations of defender offices, empirical studies of public defense systems, the National Study Commission and standards development in a host of areas—trial, juvenile, appeals, contracts, etc. In addition, the American Bar Association published its Criminal Justice Standards, grounded in ethical requirements.

Also emerging at this time was the emphasis on the unique needs of juveniles, the reemergence of the death penalty and its specialized demands, the idea of community defenders, and the founding of the Legal Services Corporation. Through all of these developments the client began to emerge as a whole person, with a right to dignity and the need to be seen in context. Understanding grew of how clients passed through the system from youth to adult and the needs defender systems if attorneys were to be able to represent their clients fairly and have a positive impact on their lives.

1980s

The '80s saw the rise of the Boomer generation and the surge they brought to the explosion in crime, the fear of crime, and crime in electoral politics. At the same time LEAA ceased and the War on Drugs began. Public defense systems were under stress across the country. With the loss of LEAA funding, the American Bar Association started, by comparison, a modest effort to support systems trying to improve. They recognized that, without standards, public defense delivery systems would be pitted against one another—if a public defender were too expensive, they would use contracts; if fees grew too high for assigned counsel, they would move to a public defender system or low bid contracts. With counties seeking the lowest cost system fees, budgets and contract rates stalled or decreased. Thus began what for many became a downward death spiral for quality.

1990s to today

As costs and caseloads rose and local resources fell, the '90s saw a steady move toward statewide funding and delivery systems. Increasingly, litigation has been a catalyst for reform efforts. Standards emerged as the measure of a functioning system. As a county commissioner remarked: "It's not my job to determine what is or is not a good lawyer—that's the Bar's job. If I build a bridge, I expect it to be built according to industry standards. My job is to then get the lowest cost possible for the tax payers." In response, the American Bar Association promulgated the *Ten Principles of a Public Defense Delivery System* that set out the "fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."

The end of the decade saw the emergence of efforts to lower criminal justice system costs, remove cases from the system and impact the lives of defendants to keep them from returning to the system. These efforts included “problem-solving courts,” such as drug courts, mental health courts, and drunk driving courts, and other creative programs and processes for impacting clients’ lives, such as diversion programs, community defender programs, prisoner reentry programs, and a growing awareness of the collateral consequences of criminal convictions.

So, where is public defense today? Public defense services today are provided in a dizzying array of delivery models and financing structures.

- We have statewide systems, county systems, city systems, clinics, and pro bono programs;
- We are providing representation in cases involving juveniles, misdemeanors, felonies, appeals, and mental health services;
- We are working through vertical, horizontal, zone, and whole client systems where the attorneys are either appointed, work through individual contracts, work through group contracts, are staff of a public defender office, and/or staff of a not-for-profit defender group, and where the chief defender is chosen by governors, chief judges, commissions, county boards, mayors, county executives, and the electorate; and
- Systems are funded by the state, by the county, by a municipality, by law schools, through fees, through grants, and out of the pockets of individual lawyers.

Often one can find two or more of these variations existing side-by-side within the same courthouse at the same time. While a few jurisdictions have managed to pull together the political will to ensure quality public defense services for those in need, the vast majority treat public defense as a governmental afterthought, failing to meet this Constitutional mandate in any meaningful way.

With this look back as a foundation, I hope to work with everyone here to extract lessons from our past advocacy successes and failures. With those lessons learned and some creative, bold thinking, we can develop new insights and direction that will finally allow the right to counsel to emerge from its chaotic history and into its rightful place as a full partner in the criminal justice system’s quest for equal justice.

Part I: What Are the Challenges to Quality Public Defense That Have Not Been Met?

The morning continued with the facilitator, Cait Clarke, asking the question: “What are the challenges to quality public defense that have not been met?” The question implicitly recognized that there has been progress over the last 45 years. In response, the group brainstormed and helped to identify areas for fuller discussion.

Professor Monroe Freedman commented that the discussion of “culture” called to mind the military attorneys in Guantanamo Bay, Cuba, who are representing clients accused of terrorism against the United States. Although they had never previously provided formal defense services, they exercised independent judgment. They had a sense of their ethical obligations, so as not to violate their professional responsibility even when it went against their orders.

Prof. Freedman observed that the legal profession should instill in each public defense attorney the importance of exercising independent, professional judgment, as did the lawyers in Guantanamo. Lawyers need to assume a world view—not to be concerned so much about the independence of a public defender office as an *office*, but to be concerned about what is communicated to each attorney regarding his/her professional responsibility.

Prof. Freedman urged that when the caseload is excessive—that is, when attorneys cannot provide all the services needed to properly prepare within the adversarial system—then attorneys must understand their professional responsibility to clearly communicate to their supervisor, the judge, and the court on the record that they cannot competently represent these clients. Currently, the opposite happens. Lawyers who don’t encourage guilty pleas, but who instead complain about caseloads or file appropriate motions and request hearings and trials, are often subtly—or not so subtly—intimidated and clients are often penalized.

In fact, Prof. Freedman observed, caseload standards, judicial assignments, case disposition expectations, and courthouse design are all based on the expectation that there will be guilty pleas in 85–90% of cases rather than each case being given the attention needed, including potential litigation needs. Excessive caseloads support this expectation by virtually requiring that attorneys plead the vast majority of their cases guilty in order to survive.

Participants discussed the need to develop a leadership among public defenders that supports a culture of quality defense. This new culture needs to prize quality representation for each individual client as well as need to provide more than an *attorney*. Proper representation needs investigative, social service, and other resources, as well as ongoing training.

Expanding on the “culture” theme, Professor Jonathan Rapping explained that judges are part of the same culture as the public defense systems. They complain that public defenders want to present a “Cadillac” defense when the lawyers are really just exercising their professional responsibility. Richard Goemann agreed that the culture of the legal profession needed to change as much as the public defender culture itself.

Scott Wallace said that efforts need to be made to involve the judicial branch to assert leadership to change public defense culture. He encouraged BJA and other funders to support systemic changes within the judicial branch to help to change the culture. Mr.

Wallace encouraged the group to think about how the judicial branch could take a leadership role to ensure the provision of an adequate defense.

Regarding Prof. Freedman's observation that the system assumes that most cases end with clients entering a plea of guilty, Yvonne Smith Segars noted that the fact that many cases end in guilty pleas doesn't necessarily indicate that attorneys are providing poor quality representation. Often it is the dictates of the criminal justice system that require lawyers to seek guilty pleas.

Divine Pryor agreed that, when counseling their clients, lawyers should take into account the penalty that our criminal justice system imposes on those who go to trial. Dr. Pryor also noted that unrealistically high caseloads force public defense attorneys to counsel clients to plead guilty as a means of managing their workload. Sadly, workloads can be so high that public defenders feel forced to give this advice even if they know they can win the case. John Stuart said that his public defense system's caseloads are twice the national standards and he has had to layoff 23 public defenders and has lost a total of 72 lawyer positions out of 440. The current state of public defense funding is the worst he has seen in his 19 years of service as state public defender.

Mr. Wallace identified the low ineffective assistance standard of *Strickland v. Washington*²¹ as a significant impediment to public defense change. So long as convictions are virtually immune to challenge because the courts accept almost any justification of poor performance proffered by a defense lawyer as "strategy," it will be difficult to get legislatures to pay for improvements.

Jose Villarreal noted that public defense systems are often woefully unprepared to represent clients from cultures other than the dominate culture of the office. Training is urgently needed. Similarly, defense counsel are generally unaware of the serious immigration consequences that clients can suffer as a result of a poorly structured plea agreement. Attorneys need training, even though many of them consider collateral consequences to be "civil" and not their responsibility. In fact, attorneys should be trained to understand immigration consequences as being core sentencing outcomes rather than mere "collateral consequences."

As a chief public defender, Lisa Schreibersdorf sees new, young attorneys entering her office and experiencing the real criminal justice system for the first time. The attorneys are shocked by what they see. Over time, though, they learn to accommodate. She further observed that because they are also thrown into stories of violence and poverty, they may suffer trauma. Lori James-Townes has seen the numbing PTSD-like effect brought on by what lawyers, social workers, and investigators see every day as part of their work. She suggested that public defense professionals need training on vicarious trauma.

Mary Broderick highlighted the challenges faced by juvenile defense systems where the deficiencies of public defense are exacerbated. Participants agreed that the juvenile

²¹ 466 U.S. 668 (1984).

defense system is in dire need of social service, mental health, education, and substance abuse resources. Defenders also need to be specially trained to deal with the practice of juvenile transfers and waivers to adult court. Communities often lack alternative means for children to access various services, to the point where children need to be adjudicated “delinquent” in order to secure the necessary services.

Professor Norm Lefstein advocated the need to take a long view. “We need to look at the last 45 years.” There has been enormous emphasis on building public defense programs, he said. Statutes in the United States commonly require that cases be represented by public defenders, but no thought is given about whether the PD can handle the caseload. They get all the cases, and nothing in the statutes provide a procedure for the public defender when the office is faced with too many cases. Assigned counsel and contract attorney programs present their own challenges. Attorneys in those systems are almost always unsupervised and in many cases they have done a terrible job.

Prof. Lefstein suggested that our country’s policymakers could benefit from a study of the system in the United Kingdom, where there is a different public defense orientation. He also supported the idea of developing model public defense legislation that would improve upon old efforts, taking into account what advocates have learned in recent years.

Legislatures are not only imposing financial challenges on public defense systems, Jim Neuhard observed, but also on the clients themselves. He described an emerging trend for jurisdictions to charge defendants fees to cover the costs of representation.

The plenary brainstorming session concluded with Jo-Ann Wallace’s observations that our communities’ two most significant challenges are: (1) finding all of the jurisdictions where the indigent accused, in certain classes of cases, are not provided with counsel at all, along with the need to craft proactive solutions; and (2) securing for public defense leaders a meaningful seat at the table when criminal justice policy is being set and stopping the view of public defenders as the “stepchildren of the system.”

Part II: What Roadblocks Have Prevented The Promise of *Gideon* From Being Fully Realized?

Despite the *Gideon* Court holding that the Sixth Amendment right to counsel applies to the states by virtue of the Fourteenth Amendment—not to county or local governments—the majority of states have delegated their obligation to provide counsel for the poor to their counties. As a result, state and local jurisdictions have developed various models for providing representation including: (1) state and/or local public defender offices staffed by full-time or part-time attorneys; (2) private attorneys who are appointed by judges to provide representation and receive compensation on a case-by-case basis; and (3) private attorneys who are under contract with state or local government to provide representation.

Of course, these public defense systems developed and grew, not in isolation, but within existing state and local criminal justice systems and, to a great extent, reflect the pre-existing needs, expectations, and attitudes—that is, the “culture”—that had developed for

years before *Gideon* and continued for years thereafter. Culture is notoriously difficult to change and therefore can present a powerful barrier to reform.

The culture of criminal justice processes in many jurisdictions throughout the country places a premium on expediency and guilty pleas regardless of the factors presented in individual cases, appearing to equate the concept of “justice” primarily to efficiency. Thus, courts are under administrative pressure to move cases and to meet time limits for pending cases. Public defense offices, meanwhile, are growing and operating within legal cultures that promote economy, efficiency, and simplicity because resources and caseload pressures preclude many of the necessities of quality defense, including adequate investigations and a robust motions practice. Public defense leadership, having been “raised” within these cultures, often see no need to change. Based on the values of the criminal justice system in which they practice, they believe that their offices are delivering quality services.

In some jurisdictions, the criminal justice culture in practice denies meaningful access to lawyers for persons accused of crimes who qualify under law for legal assistance. Courts and prosecutors actively dissuade indigent defendants from availing themselves of legal counsel by offering them quick guilty pleas if they agree to go forward before an attorney is appointed and/or by imposing a charge for applying for and/or using a public defender.

In addition to culture, a state’s criminal justice policy decisions, often crafted without input from public defense leadership, will act to block improvements in public defense systems. State legislatures year after year increase the number of criminal offenses, re-designating acts as crimes that previously were considered infractions. Similarly, misdemeanors are often upgraded to felonies. Even if crimes are not reclassified, the sentences are often increased, including the addition of mandatory minimums and three strikes provisions. The caseloads rise and the risks attendant with trials increase markedly. All of these legislative actions create huge increases in public defense workload, usually without any concomitant increase in resources. Even where cases result in guilty pleas, the defense must adequately prepare each case in order to negotiate a plea in what might have earlier been a relatively minor offense but now carries significant potential sentencing exposure and other collateral consequences.

An “original sin” in the creation of many public defense systems and a major impediment to change is that their establishing statutes simply state that “all persons accused of a crime who qualify for appointed counsel shall be represented by the public defender office.” Without building caseload standards into the statute and without a process for a public defender office to control its own caseloads and to secure additional resources or to stop the flow of new cases when workloads reach their maximum, the public defense office is constantly running on a case processing treadmill, without time or resources to plan, strategize, and institute large-scale change.

Similarly, although inadequate funding for indigent defense services has been a chronic problem, the funding shortages now are more acute than ever. Public defender offices lack adequate staff and many of the tools of a modern law practice, including information

technology, access to online legal research services, case management and data-gathering software.

Part III: What Lessons Have We Learned **From the Failure to Fully Implement *Gideon*?**

A major theme that arose from the “lessons learned” discussions is that public defense system advocates cannot create large-scale change alone. Public defense advocates should be building bridges and learning to work with state and local policymakers, criminal justice system partners, community and client leadership, and newspaper and other media professionals.

Judges in particular are criminal justice leaders who need to be brought into discussions regarding the criminal justice process and practice, especially as they affect the ensuring of constitutionally mandated representation of defendants. Judicial practices are critical to ensuring defendants receive appropriate publicly-provided defense services and that attorneys have the opportunity to properly litigate their cases.

Public defenders and their allies need to educate all segments of the public, including the media, regarding the role of the public defender, its importance, and what constitutes constitutionally required legal services. The experience since *Gideon*, and particularly during the last several years, has demonstrated that the public doesn’t understand—or appreciate—the role of the public defender. There is a perception that all accused defendants are guilty and that it is a waste of public funds to provide anymore than a minimal defense. This attitude needs to be addressed through a multi-pronged educational effort involving the media, law schools, bar associations, and other community groups.

Public defenders are often isolated within the criminal justice systems and communities they serve, a paradigm that limits their ability to influence the direction of the criminal justice system in which they operate. They need to seek out—and be given—a meaningful seat at the table to address indigent defense needs systematically with other criminal justice partners. Public defenders need to reach out to the larger criminal justice community and collaborate with other agencies and organizations, including prosecutor offices, to participate meaningfully in policy development and to work to address the current problems facing the justice system.

In addition, it is very important that public defenders become involved with the organized bar and join in bar efforts to reform legal culture generally and quality of public defender services specifically. They need to build alliances with community organizations and partnerships with foundations and other organizations that provide litigation services. Citizens groups, including court watchers, should be involved in these efforts.

Public defense agencies can and should be working with the rest of the criminal justice community to define “justice” and to ensure that it extends beyond the values of speed and parsimony. As co-administrators of the criminal justice system, public defense

leaders should focus with other criminal justice stakeholders on the big picture, for example: the costs of the prison industry and over-incarceration; the damage caused by racial disparities in sentencing, incarceration, arrest rates, and practices; and the different ways that the juvenile and criminal systems treat juveniles from different communities.

Finally, the advocacy community has learned the importance of attaching value to our work in ways that policymakers understand and appreciate. Given the current fiscal crises in communities throughout the country, it is more important than ever to keep and track data that shows the actual cost of criminal justice practices. For too long, the costs of policy changes have not included the cost of public defense. Costs need to be measured in a variety of ways, including costs for prosecuting previous infractions as crimes and the costs resulting from the lack of adequate support services for persons with underlying challenges and illnesses (employment, housing, drugs, mental health, etc.) which, if not addressed, perpetuate criminal activity.

The focus on delivering competent services should dovetail with ways that quality public defense services can support the community's need for public safety, including reducing recidivism.

Changing Public Defense Culture—A Model Program: The Southern Public Defender Training Center

A consistent theme throughout the day has been that while structural and financial reform is critical, meaningful indigent defense reform also requires transformation of the existing public defense culture. One model for changing that culture is the Southern Public Defender Training Center (SPDTC), founded and operated by Professor Jonathan Rapping. The SPDTC recruits committed young lawyers to public defender offices across the southeast, trains these lawyers to provide excellent representation, and provides mentorship and supervision to help these lawyers develop into the region's future indigent defense leaders.

Prof. Rapping explained how the current culture in many public defense systems values the speedy processing of cases with the least possible investment, and elevates the desires of the judge above the duties to the client, promoting ineffective advocacy and practice. Public defense lawyers who learn their trade in these systems come to view sub-par representation as the standard to which their clients are entitled. As a result, many indigent defenders are guided by the low expectations of the systems within which they practice, rather than by their obligations as defined by the Constitution, the applicable Rules of Professional Conduct, and prevailing criminal defense standards that set the bar for lawyers who represent more affluent clients.

Through the SPDTC's intensive, three-year model, the SPDTC instills in its lawyers the value system and set of attitudes necessary to resist the cultural forces that promote sub-standard representation. These lawyers work to incrementally shift the culture in their respective jurisdictions by promoting these lessons in their daily practices. The SPDTC partners with existing public defender leaders in the region, as well as national

organizations that share its vision, in its effort to groom the next generation of public defender leaders who will usher in cultural transformation.

Prof. Rapping presented the SPDTC model to the group accompanied by Janelle Layne, a member of the first class of the program, who served as a public defender in Bartow County, Georgia. Ms. Layne described the incredible challenges she confronted as the only female African American lawyer in her jurisdiction. She discussed the resistance she met when she tried to provide the client-centered representation that she learned at SPDTC. She shared anecdotes of how the SPDTC community provided the support and guidance necessary to allow her to overcome these obstacles and eventually provide the representation she knew her clients deserved. Ms. Layne served as an inspiring example of how one lawyer can impact the attitudes of others in the criminal justice system and incrementally change the culture.

Part IV: Looking Toward the Future **Priorities and Promising Strategies and Trends**

Many participants found promise in recent strategic initiatives that had been launched by individual defender offices, including:

- Development of brief banks and databases;
- Using references to national standards in legislative advocacy and in setting caseloads; and
- Creation of bridge units for juveniles in the adult system and particularly those with mental health problems.

In recent years, there has been movement toward states fulfilling their Constitutional duty by overseeing and financing public defense systems, removing this burden from counties and cities. While not a cure-all, the switch to state funding and oversight generally brings significant improvement and more consistency of service throughout the state. Another positive trend is the expansion of clinical law school training programs and the increase in the availability of trial skills training for lawyers.

Those who support public defense reform should focus more on developing new communications strategies. We need to learn how to work with legislators, including how to frame our issues in terms that they will find persuasive, such as talking about quality public defense as a tool for reducing the number of offenders in the system without increasing the risk to public safety (this strategy illustrates the need for gathering accurate data to be persuasive). Messaging strategies should address the need for reasonable caseloads and promote oversight of the private bar involved in providing indigent defense services.

Often public defense leaders put their jobs in jeopardy when they assert their need to comply with their ethical obligations and refuse to represent clients when they are unable to provide competent, conflict-free representation. To encourage defenders to incur these risks where ethically required, the private advocacy community should work together to

develop resources that will provide defenders with financial and litigation support should their principled actions result in attacks on their jobs.

One priority for gathering data is to study the frequency and nature of “no counsel” convictions; that is, courts where defendants are routinely deprived of the right to counsel. Aside from exposing flagrant violations of *Gideon*, attention to no-counsel courts could promote significant criminal justice policy reform. If systems generate data on the true costs required to meet the constitutional mandate for providing all indigent defendants with legal services, the results may force a re-examination of policies that have, in recent years, expanded the criminalization of previously non-criminal conduct. In addition to statutory and rule-generated barriers, studies should examine the procedures to determine eligibility for public defense services and the subtle ways used to dissuade defendants to assert their right to counsel, for example, practices such as “plead now and go home or wait two weeks in jail for a hearing,” and collecting posted signs and other indicia that illustrate how defendants are discouraged from requesting a public defender, for examples signs that indicate that “a request for an attorney costs \$XXX.”

While there has been some documentation of racial inequities in terms of disproportionate minority contact with law enforcement and minority over-incarceration, anecdotal evidence suggests that significant disparities exist in the way our criminal justice systems treat defendants of different races at all stages of the process. Participants voiced support for the Justice Integrity Act currently pending in Congress that would require data collection on race in the federal criminal justice system. Indeed, there was strong support for encouraging states to follow the federal leadership and begin similar examinations of their state and local systems.

Public defense systems across the country are in desperate need of training and technical assistance. Continuing legal education and training, on par with prosecutors, should be promoted at all levels, including entire teams, new lawyers, and leadership training for agency supervisors, managers, and executives.

Similarly, public defense requires a wide range of technical assistance to maximize available resources through improved technology, office operations, and networking, including promotion of online resources, performance management and measurement evaluation capabilities, training, and promotion of system-wide strategic planning and collaborations.

There was support for exploring the idea of a national accreditation process for defender programs, using other professional accreditation programs as models. An “accredited” public defense system would satisfy certain national systemic and performance standards. Such a process could act as an incentive for states to improve their systems by creating a concrete goal that policymakers could use to justify the need to spend taxpayer funds to support indigent defense. Once attained, the accreditation would show that taxpayer money is being used wisely to provide a quality government service.

Throughout the day it became clear that much of what was being discussed could not be achieved without public defense leadership becoming full partners in the administration of justice. Therefore, the group identified the need for a “defender’s seat at the table” as a separate priority, albeit one that is intertwined with supporting all others. Criminal justice systems should create “community criminal justice boards” that consist of the leaders of the various criminal justice agencies, including public defenders. Such boards provide a forum for these leaders to discuss, plan, and tackle challenges co-operatively as co-administrators of the criminal justice system.

In addition, public defense leaders need to take the initiative in developing collaborations with other criminal justice agencies, particularly prosecutors and the judiciary. On a national level, public defense advocacy groups should reach out to organizations such as the Conference of Chief Judges, the National District Attorneys Association, the Council of State Governments, the Center for Court Innovation, and the National Association of Counties to develop joint responses to critical problems facing the nation’s justice systems.

National organizations can also take the lead by educating the public defense community on the importance of being involved in a wide range of community outreach, including the need to seek out partnerships with faith-based groups, chambers of commerce, schools, local client groups and community activists, and the local bar and other justice-oriented organizations.

Part V: Recommended Action Steps for Change

- I. *The United States government should provide ongoing support and oversight to ensure that states fully realize the federal constitutional right to counsel for criminally accused persons who cannot afford to hire counsel.*
 - The Department of Justice’s Bureau of Justice Assistance should:
 - Ensure that public defense is represented at all BJA meetings that involve planning for criminal justice needs;
 - Develop training on prosecutorial discretion and implications of overcharging on the criminal justice system generally and public defense services in particular;
 - Promote creative public defense demonstration projects which, if successful, can be replicated (modeled after the approach to community prosecution and problem solving courts);
 - Provide funding opportunities for technical assistance and training for state public defense and criminal justice systems, including: (i) comprehensive, accessible leadership and management training and mentoring for public defense leaders, managers, and supervisors; (ii) assemblies of state and local criminal justice system leaders to support the integration of public defense leadership into active roles as co-administrators of criminal justice systems; and (iii) programs that encourage and support a public defense culture that emphasizes and ensures competent, professional representation and a court

- system culture that supports and encourages such representation as an indispensable element of a well-run and fair criminal justice system;
- Promote opportunities for criminal justice teams that include public defense representation to attend national training and policy meetings in order to build relationships for the future that will transcend the particular topic of the training or meeting;
 - Host follow-up meetings to build on the recommendations developed by the Public Defense Leadership Focus Group; and
 - Convene discussions among policymakers and criminal justice system stakeholders to develop a new 21st Century vision for criminal justice in America.
- The Department of Justice should consider the following issues:
- The costs of “tough on crime” legislation, including the reclassification of offenses that were formerly infractions as crimes, “three strike” provisions, and felony enhancement of misdemeanor statutes: Historically when states increase the severity of classification and punishment of crime, they fail to engage in a comprehensive analysis of the costs associated with these decisions, including the costs of increased public defense services. A study of this issue would provide policymakers with the data necessary to understand the full direct economic costs to taxpayers of these legislative “tough on crime” initiatives;
 - The state and federal collateral consequences of criminal convictions: The data for this possible study would be gathered and presented in a way that allows defendants to understand the full consequences of their decisions, especially the decision to waive the right to a trial and enter a guilty plea;
 - “No counsel” courts convictions: A study would investigate the extent to which defendants are convicted in the United States without access to counsel in violation of the Sixth Amendment and the different mechanisms that allow this deprivation to take place. Data collected should include the number, frequency, and nature of criminal convictions of persons without defense representation and the fiscal impact of such convictions versus the cost of providing legal services to these defendants;
 - The criteria and procedures for determining a defendant’s eligibility for the appointment of counsel; and
 - The delivery of defender services in the juvenile justice system, including the need to provide defense counsel with greater social work, medical, mental health, and educational resources and access to their client’s records and history. Studies should also examine the desirability of creating “bridge units” to defend juveniles being tried in the adult system, alternative strategies for diverting and resolving juvenile delinquency cases, and the need to allow children to access necessary medical, mental health, educational, and other services so that judges feel no need to adjudicate a child delinquent solely for the purpose of providing the child with otherwise unattainable services.

- Defense community should educate Congress on:
 - The need to provide training and funding for state public defense systems and promulgate national public defense standards, and the need for a repository of indigent defense data and support the establishment of an accreditation/certification process for defense programs; and
 - Reasons why criminal justice grant programs (e.g., BJA’s Justice Assistance grant (JAG) Program) include language that allows and encourages state grant administrating agencies to consider indigent defense programs as potential grantees and require that the Department of Justice, through regulation, ensure that indigent defense providers are included as equal partners in each state’s process for deciding grant fund recipients.

II. *State policymakers should fulfill their Constitutional responsibility to ensure adequate funding and oversight for public defense services.*

- State supreme courts should take a leadership role in the reform of state and local right to counsel services by adopting standards by Court Rules on: independence of the defense function, attorney performance (consistent with the ABA *Death Penalty Guidelines* and NLADA’s *Performance Guidelines*), training, supervision, client financial eligibility for services, and attorney workload. (*See, for example, The Supreme Court of Nevada ADKT No. 411 issued January 4, 2008*).
- State legislatures should ensure the independence of the right to counsel system through the creation of independent statewide indigent defense commissions with authority to promulgate and enforce uniform standards at the state and county level. These standards should include workload and performance standards for attorneys, investigators, and social workers that ensure that each client’s case will receive the time, attention, and resources needed for competent and diligent representation at each stage of the court process. Standards should apply uniformly to primary and conflict systems, including assigned counsel and contract systems.
- State legislatures should fund public defense systems to allow for the following:
 - To meet the workload demands of every attorney’s ethical obligation to provide competent representation to each and every client;
 - To allow for parity of resources for prosecutors and public defense attorneys, including money for support staff, experts, technology, training, and comparable compensation for personnel holding similar positions;
 - To create the infrastructure for determining and tracking the true public defense costs associated with prosecuting and defending various types of offenses and how costs are affected when legislatures make changes to the penal code; and
 - To provide training to all staff on issues of diversity and cultural competence.

III. *Public defense leaders should fully embrace their leadership role in the criminal justice system and actively engage with policymakers, court system leadership, the community, and their own staff and management to fulfill their responsibility to provide constitutionally mandated and ethically required services for clients. Public defense system leadership should:*

- Ensure that their offices provide to each client criminal defense representation that satisfies ethical and professional requirements as defined by state ethical rules and national standards, such as ABA and NLADA performance guidelines;
- Actively participate as a full partner in administering the criminal justice system in which their offices operate;
- Build alliances with community organizations and citizen groups to generate support for their clients and offices;
- Instill in each public defense attorney the value of exercising independent professional judgment when representing clients;
- Engage the need to change the culture of public defense delivery systems where the deeply entrenched beliefs about lawyering and the ancillary services that are required to provide competent and diligent representation fall below national standards;
- Support staff members who raise issues of bias within the public defense and criminal justice systems, and encourage attorneys to litigate issues of bias in the courts;
- Lead efforts to develop public education campaigns about the role and value of an adequately funded, staffed, and trained public defense system;
- Recognize that legal representation of children is a specialized area of the law and supports quality juvenile delinquency representation through personnel and resource parity;
- Seek out opportunities for training and growth as leaders and managers; and
- Lead litigation efforts or partner with others, when appropriate, to ensure the public defense system's ability to provide competent and diligent representation for each client consistent with the requirements of attorney ethics rules.

IV. National and local advocacy organizations, government agencies, and academic institutions should explore partnerships and collaborations to develop support for adequate nationwide public defense services by:

- Working together to shape a national strategy, whether through litigation or legislation, to seek modification of the ineffective assistance standard enunciated in *Strickland* that would allow clients a meaningful opportunity to receive relief when represented by counsel who fall below ethical requirements of competence and diligence;
- Supporting the expansion of clinical training for law students that instills in new lawyers a deep appreciation for the ethical requirements of the criminal defense profession and basic advocacy skills; and

- Expanding the availability of intensive training in the skills and culture of quality public defense services, such as currently provided by the D.C. Public Defender Service and the Southern Public Defender Training Center.

CONCLUSION

This focus group led by BJA brought to the forefront, once again, the issues faced by the indigent defense community, recognizing that the fair administration of justice includes the indigent's right to counsel. BJA plans to continue to address this issue by holding future meetings and fostering opportunities for public defense leaders.

While there has been progress by the states in providing indigent defense services since *Gideon*, significant system-wide deficiencies still exist, including a public defense culture in many offices and systems that fails to support quality services, a lack of participation by indigent defense providers as partners in the administration of criminal justice systems, the need for greater resources for the public defense function, the lack of coordination and collaboration among criminal justice stakeholders, the need for public defense leadership, and the need for enforceable practice and caseload standards. The Public Defense Leadership Focus Group examined the lessons of the successful and failed reform efforts in the years since *Gideon* and generated recommendations which, if implemented, would ensure that those who are accused of crime and cannot afford to hire an attorney receive quality representation by well-trained, committed, and competent attorneys.



Public Defense Leadership Focus Group
Improving the Administration of Justice by
Building on our Successes and Learning from our Failures

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