

# ***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

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American Bar Association Standing Committee on Legal Aid and Indigent Defendants



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

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## Executive Summary

During the 40<sup>th</sup> 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.<sup>1</sup>

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.