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 P. 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
Chairperson
Criminal Justice Section

February, 1991
GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

No. ________________________
(Leave Blank)

Submitting Entity: Criminal Justice Section

Submitted By: Michael L. Bender, Section Chairperson

1. Summary of Recommendation(s).

This recommendation expresses the Association's support for congressional legislation providing that indigent defense programs and systems are eligible for funding under certain federal grant programs. Furthermore, it urges Congress to authorize and appropriate funds to assist State and local governments in providing effective assistance of counsel. In addition, it urges States to increase the level of funding provided for this purpose.

2. Approval by Submitting Entity.

This Report with Recommendations was approved by the Criminal Justice Section Council at its August 4-5, 1990 meeting.

3. Previous submission to the House or relevant Association position.

The Association has a longstanding record of expressing support for indigent defense services and their funding. For example, in the early 1920's the ABA created the Standing Committee on Legal Aid and Indigent Defendants. More recently, in 1973, the House of Delegates adopted a policy 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 who are unable to afford legal representation." Similar funding policies were adopted in 1979 and 1981. In addition, the "Providing Defense Services" Chapter of the ABA Standards for Criminal Justice emphasizes that adequate funding is one of the keys to the provision of effective assistance of counsel.
4. **Need for Action at This Meeting.**

It is important that the House act favorably on this report at the February 1991 meeting in order to bolster Association policy in support of an increase in indigent defense funding. Congressional and State legislative emphasis on "tough" crime measures and an intense "war on drugs" has increased the burden on indigent defense services. Early 1991 will be an opportune time for the Association to bring this to the newly convened 102nd Congress' attention, as well as that of the many State legislatures that will be in session during early 1991.

5. **Status of Legislation.** (If applicable.)

The 101st Congress has adjourned. Therefore, no legislation will be pending until the 102nd Congress convenes. However, it should be noted that in an attempt to remedy the concerns expressed by the first paragraph of this resolution, the 101st Congress enacted an amendment to the Omnibus Crime Control and Safe Streets Act of 1968. (See S. 3266 of the 101st Congress; Title VI, Sec. 601(b)).

6. **Cost to the Association.** (Both direct and indirect costs.)

This Recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying the Recommendation before Congress and State legislative bodies. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

7. **Disclosure of Interest.** (If applicable.)

There is no conflict of interest that is known to exist.

8. **Referrals.**

Concurrently with the submission of this report to the House of Delegates, it is being circulated to the following:

**Standing Committees**

Legal Aid and Indigent Defendants
Special Committees and Commissions
Delivery of Legal Services
Drug Crisis
Funding the Justice System
Lawyers in Government

Sections and Divisions
General Practice
Individual Rights and Responsibilities
Judicial Administration Division:
   Appellate Judges Conference
   Lawyers Conference
   National Conference of Federal Trial Judges
   National Conference of State Trial Judges
Law Student Division
Litigation
Urban, State and Local Government Law
Young Lawyers Division

Affiliated Organizations
The Federal Bar Association
National Association of Attorneys General
National Association of Criminal Defense Lawyers
National Bar Association, Inc.
National District Attorneys Association
National Legal Aid and Defender Association

9. Contact Person. (Prior to meeting.)
Mary Broderick, Director
NLADA Defender Division
1625 K Street, NW
8th Floor
Washington, DC 20006
202/452-0620

10. Contact Person. (Who will present the report to the House.)
Richard H. Kuh, Esq.
Warshaw Burstein Cohen
Schlesinger & Kuh
555 Fifth Avenue
New York, NY 10017
212/984-7030

Terance F. MacCarthy, Esq.
Federal Defender Program for the Northern Dist. of IL
219 S. Dearborn Street
Chicago, IL 60604
312/435-5580