

Wm. T. (Bill) Robinson III
President

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January 31, 2012

Honorable Eric H. Holder, Jr.
Attorney General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Attorney General Holder:

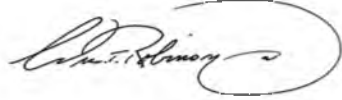
It is my pleasure to present to you a report on the key findings of the National Focus Group on Indigent Defense Reform, held on January 9, 2012, pursuant to a grant from the Bureau of Justice Assistance. The purpose of the Focus Group was to identify concrete strategies for reforming and strengthening indigent defense services throughout the United States.

The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID), worked closely with its collaborator and subgrantee, the National Association of Criminal Defense Lawyers (NACDL) and the project Co-Chairs to convene the Focus Group and to summarize the key findings. The Co-Chairs include: Norman Reimer, Executive Director of NACDL; Adele Bernhard, Professor at Pace University Law; and Bob Boruchowitz, Professor at Seattle University Law.

The Focus Group brought together a unique and unlikely set of allies who share the common goal of improving indigent defense; the Group included eighteen successful and courageous reformers from across the nation, representing all branches of state government, prosecutors, defenders and leaders of NGOs dedicated to improving indigent defense systems. The Focus Group identified five core principles, whose adoption, the Group believes, would demonstrably improve the prospects for indigent defense reform. The attached document sets out key findings that the Focus Group concluded could have an immediate and beneficial impact on indigent defense. Four of the 5 principles, with the exception of number 3 (relating to authorizing the Justice Department by statute to bring lawsuits to require states to better protect indigents' rights to counsel), reflect existing policies of the American Bar Association. While a recommendation on this subject may be brought to the House of Delegates at a later date, as of now principle 3

does not represent the views of the House of Delegates or Board of Governors and should not be construed as representing ABA policy. A full report of the Focus Group's conclusions will follow at a later date.

Sincerely,

A handwritten signature in black ink, appearing to read "Wm. T. Robinson III", enclosed within a large, loopy circular flourish.

Wm. T. (Bill) Robinson III

cc Mark B. Childress
Senior Counselor for Access to Justice
US Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

National Focus Group on Indigent Defense Reform
National Indigent Defense Reform: The Solution is Multifaceted

Preliminary Report on Focus Group Findings
Presented to the Department of Justice

January 9, 2012

Pursuant to a grant from the Bureau of Justice Assistance, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID), as the principal grantee, and the National Association of Criminal Defense Lawyers (NACDL), as the sub-grantee, have completed an 18-month indigent defense improvement project. As a major component of the project, a focus group was convened this month to identify concrete strategies for reforming and strengthening indigent defense services throughout the United States.

The focus group, which was entitled *National Indigent Defense Reform: The Solution is Multifaceted*, brought together 18 seasoned and accomplished reformers from across the nation, representing all branches of state government, prosecutors, defenders and leaders of NGOs dedicated to improving indigent defense systems. The focus group was convened by and report conclusions were made by the three project Co-Chairs along with ABA staff. The Co-Chairs include: Norman Reimer, Executive Director of NACDL; Adele Bernhard, Professor at Pace Law; and Bob Boruchowitz, Professor at Seattle University Law. Harvard Professor Christopher Stone facilitated the discussion, and Indiana University Law Professor Joel Schumm will produce a comprehensive report. Additionally, four DOJ staff people joined the meeting for all or part of the day.

The object was to draw on the experience of an array of innovative national reformers to produce a comprehensive menu of steps that may be undertaken by the Department of Justice. In recognition that funds are scarce, we deliberately sought to identify strategies that do not necessarily rely upon funding. And where reform strategies do require funding, those projects that can produce maximum impact through the targeted application of limited funds were identified.

Some of the specific proposals that emerged from the discussion will be submitted to the Assistant Attorney General for Justice Programs, as they are projects that will require support from agencies within the purview of that office. The Focus Group agreed, however, that more far reaching reform will only be possible with the leadership from the Attorney General and the Department of Justice as a whole.

The Focus Group identified five core principles that with swift and visible support by the Department of Justice will demonstrably improve the prospects for indigent defense reform. Set forth below are the key findings of that group and suggested measures that the Department of Justice (DOJ) can take that will have an immediate and

beneficial impact on indigent defense. A full report of the Focus Group's conclusions will follow at a later date. The key findings of the Focus Group are:

1. Any solution to the indigent defense crisis in America must focus on the front end of the system, as much as the back end. There are simply too many cases coming into the indigent defense system. Overreliance upon criminal prosecution for petty, non-violent offenses, for which people seldom receive jail sentences, drives defender caseloads to unmanageable extremes, to the detriment of all accused persons and at enormous costs to the public. Many jurisdictions have begun to experiment with reclassification of offenses to relieve the pressure.¹ The Focus Group believes that the Attorney General can support this movement by highlighting those success stories and by leading a national effort to stem the tide of over-criminalization. Leadership from the DOJ can help to reverse America's reliance upon the criminal justice system as the tool of first choice to influence social behavior that is not inherently criminal. No system of indigent defense can provide quality representation with ever burgeoning caseloads.

2. There is an urgent need for the Department of Justice to support programs that assure that counsel is provided at the initial appearance in every situation where a person is criminally charged and their liberty is at stake.² It is especially crucial that counsel be provided in any proceedings when release decisions are made. The costs to communities for detaining unrepresented persons charged with minor offenses are better invested in providing for the early appearance of counsel, whose representation can facilitate better, quicker and less costly outcomes. The Department of Justice can exert leadership for adoption of policies and positions, supporting early intervention of counsel in all jurisdictions and for all criminal charges.

3. The Department of Justice should act and/or seek the tools necessary to assertively support full realization of the Sixth Amendment right to counsel. Access to effective assistance of counsel is a fundamental right. As the Attorney General has on several occasions eloquently stated, nearly 50 years after the landmark *Gideon* decision, its promise remains unfulfilled. The Department can take several important steps that can significantly alter this reality; as one participant at the focus group observed, even a hint of federal interest will prompt states and localities to act. Where there is clear evidence of systemic denial of the right to counsel, the Department can, through filing of amicus briefs, support systemic litigation that seeks to reform state or local indigent defense systems. This kind of reform litigation is undertaken only in the direst circumstances.

Additionally, the Department could seek the enactment of legislation conferring upon it federal jurisdiction to bring actions to remedy systemic violations of the Sixth Amendment. While litigation instituted by private and organizational entities can be a catalyst for reform, this litigation is extremely costly and time consuming. Further, the abstention doctrine and other legal hurdles generally foreclose federal relief. With proper enabling legislation, the federal government would be far better situated to bring these cases, and can provide the necessary catalyst for reform. The ABA House of Delegates

¹ ABA Policy MY10-102C supports reclassification of low-level offenses.

² ABA Policy AM98-112D supports providing counsel at initial appearance.

has not yet considered this issue, but ABA policy proposals to this effect are in development.

4. When new law enforcement initiatives are launched, the impact upon the defense bar, especially upon indigent defense providers, is seldom considered. However, when a particular kind of offense or a particular region is targeted for increased prosecution, or when a new strategy such as a specialty court, is implemented, that change inevitably imposes increased demand upon the indigent defense system. The Department of Justice could exert leadership through policies and ongoing communications to ensure that the defense bar is consulted prior to the adoption of any new law enforcement strategies that will impact case processing or caseloads.³

5. The Department of Justice should fully recognize that public defense requires the active involvement of the private bar as well as public defenders. It is still the case that much of the representation of the indigent is shouldered by small firm and solo practitioners who represent the poor via contracts or court assignment. Additionally, for the many accused who do not quite qualify for government-appointed counsel, small firm and solo practitioners represent them for the most minimal fees. These private defenders are truly the backbone of the nation's indigent defense system, but they seldom operate with the structure and support necessary to provide robust and effective representation. Indeed, even where public defender systems have been established, the active participation and support of the private bar is essential in order to maintain manageable caseloads and broad support for indigent defense services.⁴

Many participants at the focus group spoke to this issue, and some have launched innovative public-private partnerships that help expand access to the resources essential to a high quality indigent defense system. The Focus Group concluded that the Department can significantly contribute to reform efforts by publicly recognizing the role of the private bar and urging collaboration throughout the bar. The Department can also provide critical support by funding programs that bring training and resources to regions that are most in need. Targeting funding of established training entities and resource centers can bring immediate relief to the public and private defenders who are on the front lines of defending the nation's indigent accused.

The Focus Group concluded that swift and visible support by the Department of Justice for these five core principles will demonstrably improve the prospects for indigent defense reform. Members of the Group expressed strong gratitude to the Attorney General and the Department of Justice for the opportunity to convene and discuss these issues, and all involved indicated their willingness to assist in any way possible in achieving these important changes.

³ ABA policy AM05-107 supports whole system collaboration to achieve reform and federal government support of indigent defense services.

⁴ ABA policy MY02-107 supports the active participation of the private bar in the indigent defense delivery system.

Project Co-Chairs

Norman Reimer, Executive Director, National Association of Criminal Defense Lawyers

Adele Bernhard, Professor, Pace University Law School

Robert Boruchowitz, Professor from Practice, Seattle University School of Law

Focus Group Participants

Senator Rodney Ellis, Texas State Legislature, TX

Justice Michael A. Cherry, Supreme Court of Nevada, NV

Vanita Gupta, Deputy Legal Director & Director, Center for Justice ACLU National

Fern M. Laethem, Executive Director, Conflict Criminal Defenders, Sacramento, CA

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

William M. Ward, Chief Public Defender 4th Judicial District, Hennepin County, MN

Mary Muramatsu, City Prosecutor Spokane City Prosecutor's Office, WA

Anthony Benedetti, Chief Counsel Commission for Public Counsel Services, MA

William J. Leahy, Director Office of Indigent Legal Services, NY

Amy Bach, Executive Director Measures for Justice, NY

Tamar M. Meekins, Professor, Howard University Law School, DC

Cait Clarke, Director of Strategic Initiatives

National Legal Aid & Defender Association, DC

Michael Pinard, Professor & Director, Clinical Law Program Maryland School of Law, MD

Corey Stoughton, Senior Staff Attorney and Upstate Litigation Coordinator NYCLU, NY

James R. Neuhard, Former Michigan Appellate Defender, MI

Jeff Adachi, San Francisco Public Defender, CA

Robert M. A. Johnson, Former District Attorney, Anoka County, MN

Robert C. Boruchowitz, Professor from Practice and Director of The Defender Initiative Seattle University School of Law, WA

Focus Group Facilitator:

Christopher Stone, Professor, Harvard Kennedy School of Government, MA

Focus Group Reporter

Joel Schumm, Professor, Indiana University School of Law, IN

American Bar Association - Standing Committee on Legal Aid & Indigent Defendants (ABA SCLAID)

Robert E. Stein, Chair ABA SCLAID

Terry Brooks, Director, Division for Legal Services & Committee Counsel, ABA SCLAID

Georgia Vagenas, Assistant Counsel & BJA Grant Project Manager, ABA SCLAID

National Association of Criminal Defense Lawyers (NACDL)

Lisa Monet Wayne, President NACDL

Jon Gross, Indigent Defense Counsel NACDL

U.S. Department of Justice (Present at Focus Group Meeting)

Laurie O. Robinson, Assistant Attorney General U.S. Department of Justice Office of Justice Programs

Kim Ball, Senior Policy Advisor for Adjudication, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice

Pam Cammarata, Associate Deputy Director for Policy, Bureau of Justice Assistance, Office of Justice Programs

Melanca D. Clark, Senior Counsel for Access to Justice, U.S. Department of Justice