

The Shameful State of Indigent Defense

By C.C. Simmons, JD Correspondent

In April 2005, relying on the state constitution's provision that defense lawyers must be provided to defendants who were too poor to pay for counsel, the Louisiana Supreme Court ruled that judges can halt the prosecution of defendants until money is available to pay for their defense.¹

In a similar action, the Supreme Judicial Court of Massachusetts ruled in 2004 that an indigent criminal defendant must be released from custody within 7 days and the charges dismissed within 45 days if an attorney is not available to represent the defendant.²

These recent actions by the Louisiana and Massachusetts high courts illuminate the shameful and deteriorating state of our nation's indigent defense system. Today, thousands of persons charged with a criminal offense are processed through our state and federal courts with no lawyer at all or with a lawyer who lacks the time, resources, and/or inclination to provide effective criminal defense counsel.

Forty years ago, the U.S. Supreme Court handed down its landmark decision in *Gideon v. Wainwright*,³ a ruling which established the right to counsel in state court proceedings for indigent defendants accused of any crime. The high court explained that persons cannot be deprived of their liberty in state criminal or juvenile courts unless counsel has represented them or unless they have knowingly and intelligently waived their right to legal representation. The lower courts that have interpreted *Gideon* have held that if a person charged with a crime lacked the resources to retain counsel, it was incumbent upon the charging jurisdiction to appoint and pay for defense counsel. Alas, if only it were so.

Last year, the American Bar Association (ABA)⁴ held a series of public hearings to determine if the right embodied in *Gideon* was being evenly and fairly applied among indigent defendants who were caught up in our criminal justice system. The ABA heard extensive testimony from thirty-two expert witnesses, analyzed data from twenty-two large and small states, and compiled hundreds of pages of transcripts which described the delivery (or lack) of indigent defense services in multiple jurisdictions across this nation. The ABA concluded that our nation's indigent defense system is in shambles and in need of immediate and extensive repair.

The flood of wrongfully convicted defendants over the past decade stands as damning evidence of the failure of our indigent defense system, said the ABA. There is little doubt that one of the most effective barriers against wrongful convictions is the availability of effective, experienced, and well-trained defense attorneys who will vigorously represent their clients without regard for their ability to pay.

The ABA found that barrier is in tatters. The indigent defense system in almost all U.S. jurisdictions is hampered by a lack of funds. Those funds are necessary to attract and compensate attorneys, to pay for training of counsel, to hire and pay for experts, to pay for investigators and other support services, to increase attorney-client contact, and to reduce increasingly burdensome caseloads. Specifically the ABA found:

- Funding for indigent defense services is woefully inadequate.
- Some lawyers who represent indigent defendants violate their professional duties by failing to provide competent representation.
- Prosecutors too often seek waivers of counsel and guilty pleas from unrepresented defendants.
- Judges knowingly accept and sometimes encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.
- State and county bar associations often fail to provide leadership of indigent defense services.
- The uneven availability of effective indigent defense programs across our nation yields a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.
- Judges, politicians, and elected officials often exercise undue influence over indigent defense attorneys.

There is no "quick fix" for the shameful state of our country's indigent defense system. While the ABA put forth numerous recommendations for improvement, each and every recommendation will cost money to implement, and it failed to identify the source of funds needed to make the improvements. Nevertheless, among the most critical and urgently needed repairs are:

- Funding for indigent systems should be at par with funding for the prosecution systems in the same jurisdiction.
- State and local bar associations should become vigorously involved with efforts to ensure an effective indigent system exists in their community.
- Indigent defense programs should refuse to accept new cases when, to do so, would

create a workload so excessive that effective representation would be impaired.

- State governments should establish oversight organizations to ensure a high quality of indigent defense services.
- Judges should be encouraged to report defense lawyers who violate their ethical duties to their clients.
- Judges should also be encouraged to report prosecutors who encourage unrepresented defendants to waive their right to counsel and to enter uncounseled guilty pleas.

While noble in spirit, and virtuous in intent, the ABA's recommendations ring hollow without a source and continuing supply of money and independent oversight to ensure they are being faithfully implemented. Until adequate funding is available, the shameful state of our indigent defense system will only worsen until it becomes an indelible blot on the legacy of *Gideon* and a mockery to the Constitution's guarantee to legal counsel.

Endnotes:

1. *Louisiana v. Adrian Citizen*, 2004-KA-1841.
2. *Lavalee v. Justices of the Hampden Superior Court*, 812 NE2d 895 (Mass 2004).
3. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963).
4. The American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 321 North Clark Street, Chicago, Illinois 60610; 312 988 5765. www.indigentdefense.org

JD Note: The full ABA report is available on Justice Denied's website at http://justicedenied.org/legal/aba_indigent.htm



Indigent Defense in the Land of Compassionate Conservatism

By C.C. Simmons, JD Correspondent

Texas - home of the nation's busiest death chamber - scores embarrassingly low on the national raking of indigent defense systems.

During its public hearings in 2004, the American Bar Association (ABA) heard testimony from witnesses who described the indigent defense system in the Lone Star state. Some excerpts:

- There is no provision for formal, systematic training of indigent defense attorneys or their support staff.
- Only seven of the 254 counties in Texas have either a partial or a full-time public defender office. The other counties rely on an

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