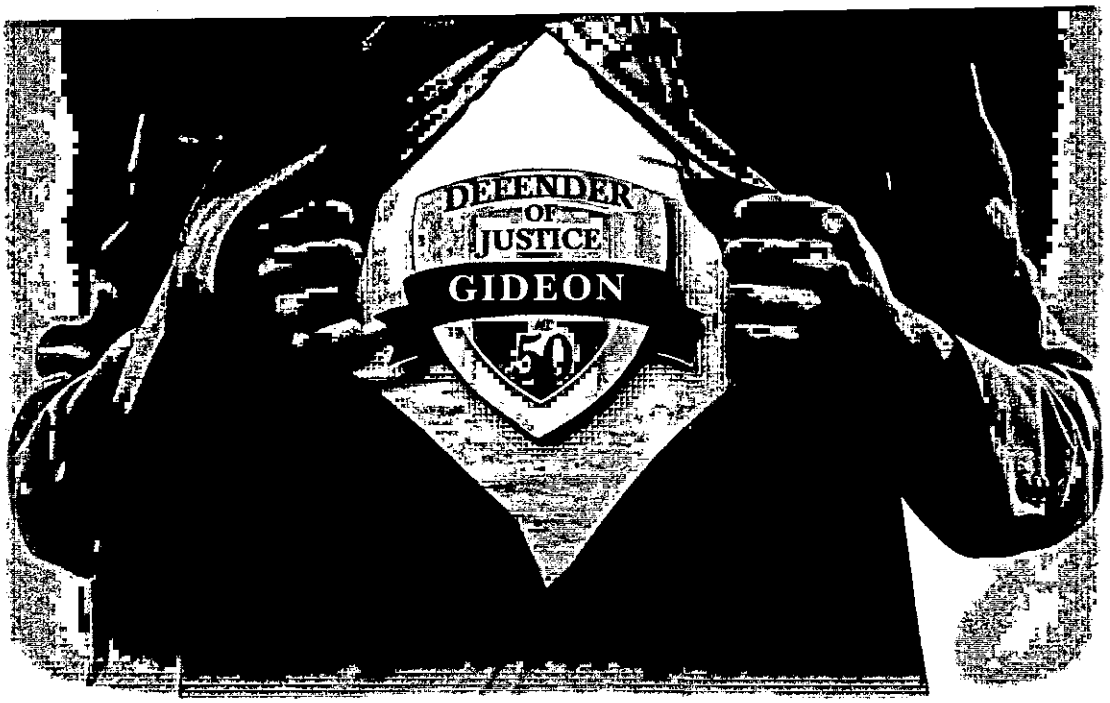
2012

The Role of Defense Counsel in Ensuring a Fair Justice System

Richard Klein
richardk@tourolaw.edu

Recommended Citation
The Champion (Magazine of the National Association of Criminal Defense Lawyers), June 2012, at 38



The Role of Defense Counsel in Ensuring a Fair Justice System

By Richard Klein

Warrior for justice. Maybe this is overly romanticized, but it is how I see the role of the criminal defense attorney. The defense attorney is on the front lines doing, if not God's work, surely something quite close to it. And, as is true with anything that important, the work is anything but easy. Obstacles, barriers, and road blocks are on the path.

Defense counsel may accurately be considered law enforcers. While representing a lone individual against all the power of the state, counsel must "police the police" to determine if there has been an unconstitutional search, a coerced confession, an unlawfully suggestive lineup, or the fabrication of testimony. Defense counsel must attempt to ensure that the prosecutor is adhering to the professional requirement not merely to convict, but to do justice and comply with his obligations to turn over *Brady* material to the defense. Perhaps most challenging of all is the need to remind the judge of the constitutional mandate as well as the professional obligation to protect the rights of the defendant rather than treat him as a docket number to be quickly processed and sent to jail.

> The freedoms enjoyed by everyone would be at risk if we did not (1) challenge the possible coercion of a confession; (2) insist on adherence to the dictates of *Miranda*; and (3) require that a lineup be conducted in such a way that prevents a police officer from identifying the suspect to an eyewitness.

Supreme Court decisions are replete with statements about how crucial it is to have a defense attorney represent the person who is accused of crime. In some respects, the most meaningful were the words that the Court first articulated more than 30 years prior to *Gideon*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He

> requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

The case, of course, was *Powell v. Alabama*.[1] The defendants were referred to as the Scottsboro Boys, nine African-American youths ranging in age from 12 to 19, all but one of whom had been sentenced to death.

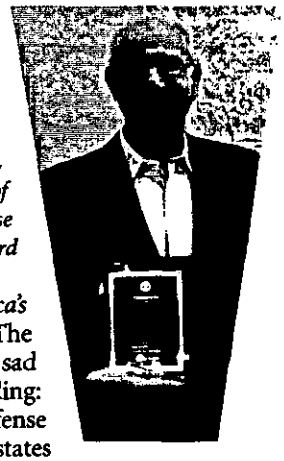
It is somewhat odd to be doing (almost) God's work, yet to have so few people acknowledge the vital import of the work. When we challenge the validity of the search of a home by the police, we are not just representing a single individual. When vigorous advocacy informs the police that they will not be able to "get away with" an illegal, unconstitutional search of a particular person's home, the benefits accrue to and protect us all. If we did not keep them honest, or as honest as we can keep them, there would be nothing to deter the police from entering any of our homes at will. One can succeed, probably, in not *committing* a crime, but may not be as successful in not being *charged with a crime*. The freedoms enjoyed by everyone would be at risk if we did not (1) challenge the possible coercion of a confession; (2) insist on adherence to the dictates of *Miranda*; and (3) require that a lineup be conducted in such a way that prevents a police officer from identifying the suspect to an eyewitness.

It is appropriate to view the role of the criminal defense attorney as, in some ways, that of a constitutional lawyer. We attempt to protect clients from violations of their Fourth Amendment rights by unlawful searches and seizures, their Fifth Amendment rights by coerced confessions, their Sixth Amendment rights by a lawyer who is not totally effective in all respects, and their Eight Amendment right to not be subjected to a sentence that is grossly disproportionate to the crime committed. We attempt to compensate for the severe racial disparities of those arrested and prosecuted by combatting the prosecutorial and judicial abuse of discretion against minorities and to secure the equal protection of the laws. And underlying it all is our commitment to due process and our sometimes desperate struggles to have criminal proceedings that are fundamentally fair.

Resources

These battles are against odds that certainly appear to be overwhelming at times. The discrepancy between the resources available to the prosecutor and those for counsel for the indigent is legendary. The prosecutor has not only the tools of an office that is better funded, but typically has police department investigators and laboratory technicians available as well. Eighty percent of prosecutions nationwide are against indigents who are represented by a public defender's office, a private not-for-profit corporation such as a legal aid society, or court-appointed private attorneys. These prosecutions will be the focus of this article.

Things are certainly not getting easier. The recession has hit the criminal defense bar with full force. As states find themselves with fewer available funds, indigent defense monies are hard hit. Fire departments, police, schools, parks and libraries all have their constituents who fight aggressively against cutbacks. There is virtually no constituency for the indigent defendant charged with crime — none, except the Sixth Amendment. *Duncan v. Michigan*[2] and *Hurrell-Harring v. State of New York*[3] are inspirations and models of the challenges to inadequate funding that must be replicated. There are individual role models as well. For example, Alan Flora, the Chief Public Defender in Luzerne County, Pa., in April of this year joined with the ACLU in a lawsuit against the county, claiming that lack of funding has created overwhelming caseloads.[4] And certainly Bennett Brummer, the recipient of the 2011 NACDL Champion of Indigent Defense Award, who has courageously and persistently fought the battle for increased funding for the Miami Dade County Defender's Office.



The Hon. Bennett Brummer, the recipient of the 2011 NACDL Champion of Indigent Defense Award

A crisis in indigent defense funding, however, is nothing new. I co-authored a report for the ABA way back in 1993 that was succinctly titled, to strongly make the point, *The Indigent Defense Crisis*.[5] Countless studies have been conducted that attempted to shout out that there were very significant threats to the criminal justice system. Most recently, the "blue ribbon" National Right to Counsel Commission titled its 2009 report: *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.[6] The findings of the 1993 report were echoed in the 2009 study, a sad commentary regarding the state of indigent defense funding: "The long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country."[7] That is the 1993 language, and unfortunately it could have been written yesterday.

Problems began to occur shortly after *Gideon* placed the unfunded mandate on the states to provide counsel whenever a defendant was charged with a serious offense. In a trilogy of decisions that same year,[8] the Supreme Court encouraged the use by state prisoners of federal habeas corpus petitions and collateral-type attacks on convictions, thereby further increasing the need for attorneys to serve indigents. In 1972, in *Argersinger v. Hamlin*,[9] the Court proceeded to expand the right to counsel when it held that no defendant could be incarcerated, even for a misdemeanor conviction, unless he had been provided counsel to assist in his defense.

Hence, in the decade from *Gideon* to *Argersinger*, the Court placed substantial new burdens upon the criminal justice system. Justice Powell, in his concurring opinion in *Argersinger*, realized that the "decision could have a seriously adverse impact upon the day-to-day functioning of the criminal justice system." Former Chief Justice Burger's concurring opinion, however, expressed confidence that the legal profession could meet the challenge: "The holding of the Court today may very well add large new burdens to a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it."[10] The chief justice's confidence was misplaced.

The Supreme Court has expanded and specified the various stages of prosecution for which the defendant has the constitutional right to counsel. The Court has extended the Sixth Amendment right to include effective assistance during all critical stages of the proceedings against him, including the process of custodial interrogation,[11] a lineup or other pretrial identification proceeding,[12] a probation revocation hearing,[13] a preliminary hearing,[14] and a parole revocation hearing.[15] *In re Gault*[16] extended the right of counsel to juvenile cases, and although *Douglas v. California*[17] guaranteed the right to counsel during the first appeal of a conviction, it was not until 1985, in *Evitts*

v. Lucey,[18] that the Court held that was a guarantee of *effective* assistance of counsel on the same appeal. Most recently, the Court in *Rothgery v. Gillespie County*[19] extended the right to apply at the initial appearance before a judge.

It is at the first arraignment of the defendant that a vigorous defense counsel is needed for the justice system to be a fair one. Studies have repeatedly demonstrated that the defendant who is released on bail ends up with a better ultimate disposition than one who does not. The freed defendant is at a better bargaining position regarding plea negotiations, is able to enter a rehab program and have counselors report to the court about his progress, is able to locate witnesses, and is available to meet with and assist counsel in preparing the case for a hearing or trial. The defendant who is at liberty can afford to play the "time" game to his advantage. As time passes, the prosecutor may lose track of witnesses, the memory of witnesses fades, and witnesses may lose interest in pursuing the matter. But in many places in this country, either no counsel is present when bail is set or counsel first meets the defendant when the case is called by the court clerk at the arraignment.

A defendant should not have to waive his constitutional right to challenge through motions the legality of a search, the validity of a seizure, the lawfulness of a lineup, or the voluntariness of a confession.

Time must be available for counsel to obtain the information from the defendant that is required to make an informed bail application. It is not only necessary to obtain the data about the defendant that is the focus of a bail application, but counsel must win the trust of the defendant as well. Defendants often live in worlds that are quite disparate from that of counsel, and the cultural differences do not lead to automatic trust. To further complicate matters, why should the defendant trust a lawyer paid for by the state? After all, the state, in the form of the police, arrested the defendant; the individual who will prosecute him works for the state; and the judge works for the state as well. Will counsel's focus really be centered exclusively on the needs of the defendant? The "I am here to fight for you" statement by defense counsel only goes so far.

Watching an arraignment in many of the large urban areas throughout the country can be an embarrassment for anyone concerned with a fair justice system. It can be assembly line justice at its worst. Human being after human being parades in front of the judge. Often, the only information brought before the court is what is in the police report. The prosecutor informs the judge of the accusation, and the judge assumes guilt. The defense counsel often has little or no information to add; there is no presumption of innocence. It is hard for anyone involved in this process to maintain their dignity. But in spite of the reality of all this, if one enters the infamous courthouse in New York City at 100 Centre St. through the north entrance, the language THE ONLY TRUE PRINCIPLE OF HUMANITY IS JUSTICE. JUSTICE IS DENIED NO ONE welcomes you. How utterly ironic: "Justice is denied no one" in the Criminal Court of Manhattan. If the south entrance to be building is used, the language carved into the cement wall is different: WHY SHOULD THERE NOT BE A PATIENT CONFIDENCE IN THE ULTIMATE JUSTICE OF THE PEOPLE.

Well, for one reason, the "people" rarely get to determine how justice would best be served in any particular case. As the Supreme Court noted in explaining its holdings in *Lafler v. Cooper*[20] and *Missouri v. Frye*,[21] 97 percent of cases prosecuted in the federal courts and 94 percent of those in state courts result in plea bargains. In any assessment of how fair the justice system actually is, it is crucial that the plea bargaining process itself be examined.

In the adversarial system, it would be expected, perhaps, that prosecutors would use their powers to attempt to convince a defendant to enter a guilty plea. What would not be expected, however, is for prosecutors to attempt to punish the defendant whose lawyer insists on filing motions. Prosecutor offices typically are confronted with an overwhelming caseload and they, too, are hit by recessionary cutbacks that have led to reductions of staff. The office could not possibly prepare all of the prosecutions for trial; having cases plead out is an understandable survival tactic.

Role of the Judge

What is less understandable, and more bothersome and unjust, is the role of the trial judge in the plea bargaining process. The ABA Model Code of Judicial Conduct requires judges to act honorably, fairly, and with integrity.[22] In recognizing the need to identify ethical standards relating to plea bargaining for defense counsel, prosecutors, and judges, the ABA has adopted *Standards for Criminal Justice*, Chapter 14 — *Pleas of Guilty*. The most recent edition deleted previous provisions that had established procedures for judicial participation in plea bargaining, and instead, added a new section providing that "a judge should *not* ordinarily participate in plea negotiation discussions among the parties."[23] To emphasize the importance of the requirement of judicial detachment, there is a separate mandate: "A judge should not through word or demeanor, *either directly or indirectly*, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." The Commentary to the Standards is explicit: "These standards reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed."[24]

But get involved they do. Judges are under ever-increasing pressure to move their calendars and "dispose" of cases. They are often evaluated by how quickly cases are concluded; the more efficient the judge is, the more likely it will be that he obtains favorable treatment by the court administrators. The quickest "disposition" occurs when the defendant enters a plea of guilty. And that means that the judge will want a lawyer who understands and cooperates, and a defendant who understands that if there is no plea, the sentence after trial may very well be the maximum permissible.

The requirement to provide an indigent defendant with counsel is not met when the assignment occurs under circumstances precluding counsel from providing effective assistance. The Supreme Court was absolutely clear in *Von Moltke v. Gillies*: "An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings, and laws involved and *then* to offer his informed opinion as to what plea should be entered."[25] The reason the appointment of counsel for indigents is mandatory before there can be any loss of liberty is because the Supreme Court was concerned that without such a mandate, the

heavy volume of cases may create an obsession for speedy dispositions, regardless of the fairness of the result. The Court in *Argersinger v. Hamlin* explained that

> [b]eyond the problem of trials and appeals, is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.[26]

The U.S. Supreme Court should have added that counsel is needed to ensure that defendants are treated fairly *by the judge.*

Certainly a required aspect of the role of any defense attorney dedicated to fairness is to inform his client of the collateral consequences of any plea. Even though only some courts have extended the ruling in *Padilla v. Kentucky*[27] to areas beyond immigration status, the defense counsel has the professional and ethical obligation to explain to his client all significant consequences of a guilty plea. Judges' attempts to obtain a guilty plea by offering a shorter prison sentence than what would be imposed after trial ignore the substantial collateral consequences that may impact a defendant who accepts the plea bargain. Judges very rarely inform a defendant that accepting the "one-time offer" (1) might affect his livelihood; (2) might make the imposition of civil damages more likely; (3) might require the defendant to register as a sex offender; (4) might subject the defendant to mandatory substance abuse testing; (5) could result in the defendant and his family being denied access to governmental benefits such as public assistance funds; (6) could result in defendant no longer being eligible to live in public housing; and (7) might result in loss of the right to vote. Defense counsel must understand the threat that these consequences pose to the individual's capacity for re-entry into the society. Denying an ex-inmate the possibilities of employment and acceptance by the community is nonsensical and counterproductive.

Defense attorneys know, but judges may have to be reminded, that defendants are not fungible; they are not just cogs in the criminal court assembly line. *Unique* issues and *particular* concerns of *specific* defendants must be understood by both the court and defense counsel; such awareness requires time. Judges, all too typically, not only refuse to devote sufficient time for themselves to obtain the required information about the defendant, but also refuse to permit counsel to conduct the investigation required to obtain the data. The proper determination of an appropriate sentence, whether imposed after a plea or after a trial, requires consideration of factors such as any record of drug addiction that might lead to the recommendation of a drug rehabilitation program, the defendant's psychiatric history, employment record, prior involvement with the victim, family responsibilities, and numerous other matters that properly bear on the determination of the most appropriate sanction.

Prosecutors' offices increasingly use statistics to measure the success of the office as well as to assess the performance of individual assistant district attorneys. The focus is on conviction rates; a guilty plea *is* a conviction. The defense counsel must make the judge alert to situations in which, because the prosecutor's case is too weak to survive a challenge at trial, the prosecutor is all the more determined to get a plea of guilty. In such circumstances, the prosecutor may attempt to have his case *seem* to be far stronger than it is. The judge cannot be a party to pressuring a defendant to plead guilty to a charge that the prosecutor is simply not able to prove beyond a reasonable doubt. This certainly includes situations in which the prosecutor's case is dependent upon illegally

obtained evidence that would not be admissible at trial.

Defense attorneys need to struggle against judges who may, especially in misdemeanor cases, set bail at a level they expect is too great for the defendant to make, and then indicate to the defendant that if he pleads guilty, the sentence will be "time served" and he will be released from custody. At arraignment, defendants may be at a loss to understand what is occurring. Fairness demands, for example, that defendants understand precisely what is meant by a lawyer "waiving" defendant's rights. What rights, and why? The defendant who has pled guilty cannot (1) claim an illegal search; (2) claim that his confession was coerced;[28] (3) challenge the composition of the grand jury that indicted him; (4) challenge the legal or factual sufficiency of the indictment on which he is charged;[29] or (5) claim that his right to a speedy trial was violated.[30] A defendant who enters a guilty plea *unaware* of what rights he is giving up[31] is certainly not acting with the knowledge that due process requires.[32] And if it is expected that there may be a plea, the defendant needs to understand and be prepared for the allocution.

Whereas defense counsel may find themselves becoming hardened to the realities of our criminal courts, they must nevertheless take concerted action to improve matters. The Association of Legal Aid Attorneys, the largest union of lawyers in the country, went on strike in New York City in order to achieve what should be a goal of any defender agency — vertical representation, the same lawyer handling the case as it progresses through the system. Lawyers united may be able to accomplish significant change that the heads of defenders offices may not be able to without risking their jobs by alienating the funding source. Concerted action was also undertaken by the Legal Aid union to obtain what should be an absolute given: a private space to interview one's client before arraignment.

There has been a startling increase in the number of problem-solving courts across the country. As of the spring of 2012, there were throughout New York State alone, 179 drug treatment, 21 mental health, 83 domestic violence and integrated domestic violence courts (which consolidate criminal and family domestic matters), seven sex offense, and three youthful offender domestic violence courts.[33] There has been uncertainty and controversy amongst the criminal defense bar regarding these new courts; there seems to be greater acceptance of mental health courts than there is of the drug courts.[34]

What is the proper response for the defender who is most concerned with a fair justice system? Should this new role for counsel be embraced? For defense attorneys who view their role as a strictly adversarial one, there are problems. Are they really to be expected to collaborate with the prosecutor and to cede even more power to the judge than is typically required? Should they waive motions when they believe there is a strong likelihood that a motion to suppress the contraband will succeed? Should they forgo a trial when they know (1) there will be great difficulty in showing the chain of custody and (2) the police lab is infamous for contamination in its testing procedures? Should they expose a client to a more severe punishment if he messes up than he would have received had he not subjected himself to the jurisdiction of the problem-solving court?

To be sure, the answers to these questions depend on the type of problem-solving court and the jurisdiction in which the attorney practices. In NACDL's outstanding assessment of these courts,[35] there is the recognition that these courts are here to stay and that, therefore, the defense bar needs to have input into the policies that govern them. First and foremost, a defendant should not have to waive his constitutional right to challenge through motions the legality of a search, the validity of a seizure, the lawfulness of a lineup, or the voluntariness of a confession. Neither should a plea of guilty be required as the price of admission; if the defendant successfully completes the treatment regimen, the charges against him ought to be dismissed.

Defense counsel should strive to ensure that there is an awareness that these courts need to be concerned with preserving the due process protections of the Constitution. After all, if they are "courts," then they need to function as such. Discovery should be mandated to make sure the prosecutor is not simply dumping an unwinnable case. Who will "qualify" to have his case diverted? What rules will the defendant have to obey? What will occur if the defendant relapses and is referred back to court? These issues need the input of the defense bar. It may be a challenge for a counsel assigned to a problem-solving court to remember that his primary obligation is to his client and not to the judge and prosecutor with whom he works every day.

A strong, unified voice for the defense is needed on the state level. If the Supreme Court finds that a sentence of

50 years to life did not constitute cruel and unusual punishment for Leandro Andrade for the theft of $155 worth of videotapes, then, as Justice Souter wrote in his dissent in this case, the concept of a grossly disproportionate sentence simply "has no meaning to this Court."[36] And if such be the case, the battle must return to the legislatures, however disheartening that might seem.

Legislatures can surprise us. A concerted effort by many supporters of increased funding of indigent defense led to a tremendous victory when the New York State Legislature voted funds to ensure that defenders in New York City would not have a caseload that exceeded the nationally accepted numbers.[37] Yes, those numbers are too high — 150 felonies or 400 misdemeanors — and the requirement does not take full effect until 2014, but this is still a huge victory. Hopefully this legislation can serve as a model for other states.

The recent launching of a National Registry of Exonerations, which has a data base of 900 for the years 1989-2012, is another hopeful sign.[38] *Brady* violations by prosecutors are very significant factors leading to wrongful convictions, and the defense bar must shine light on this intolerable situation. The excellent work done by the leaders of the Criminal Justice Section of the ABA has led to the recent adoption of Criminal Justice Standards 3.8(g) and (h) that instruct prosecutors about their obligations when they learn, *postconviction*, of exculpatory evidence.

The Justice Department reported in 2011 that Blacks are incarcerated in the United States at a rate of over seven times that of Whites.[39] When we talk about the inequities in the justice system, we must realize the often devastating impact on minority communities that results. Racial profiling is alive and well today. A recent comprehensive analysis of whom New York City police officers stop and frisk as part of their policies to reduce crime revealed that 84 percent of all those stopped in the year 2010 were Black or Hispanic.[40] Such policies may not only be unconstitutional,[41] but also contribute to the mistrust and fear of the police that exist in minority communities. Criminal defense lawyers need to speak out loudly about those practices that are responsible for such a significant percentage of Black teenagers being snarled into our criminal justice system.

Defense lawyers are uniquely aware that the prison conditions that clients face upon conviction are, in most states, nothing short of abominable. Litigation demonstrating the unsafe and unhealthy and inhumane living quarters is occurring from the east (Nassau County, Long Island)[42] to the west (California).[43] The Supreme Court ruled in 2011 in *Brown v. Plata* that the overcrowding in California's prison system was of such a nature as to violate the Eighth Amendment's ban on cruel and unusual punishment and to cause "needless suffering and death."[44] Recently, judges cited overcrowded prison conditions as a reason for refusing to sentence a defendant to prison. Alternatives to incarceration proposals may be found to be more desirable than was true in the past as judges realize how severe it is for a human being to be caged in our prisons. Defense lawyers ought to "blow the whistle" about the conditions in prisons and jails that confront clients who are awaiting trial, as well as those who have been sentenced.

In addition to problems involving prison conditions and errant judges, defense attorneys need to speak out when police officers may have beaten up a client who is noticeably bruised when first seen in arraignments. Lawyers can take pictures of the injuries and put an accounting of the counsel's observations on the record. But the counsel's response ought not stop there. Most large scale police departments have Internal Affairs Bureaus, and some cities may have civilian complaint review boards. Defense lawyers have an obligation to explore the filing of Section 1983 claims against the police for violating the client's civil rights. If the attorneys are not able to litigate such a case on their own, whether due to lack of time, unfamiliarity with civil litigation, or policies of the defender office for which they work prohibiting such action, they should refer the matter to attorneys who specialize in these claims. Such litigation, perhaps, may cause individual police officers as well as police departments to think twice about how they treat those they arrest.

A Fair Justice System?

The 50th anniversary of the *Gideon* decision is surely a time for celebration ... and reflection. The holding clearly was a tremendously important and necessary one. However, we must recognize the problems that continue to exist, acknowledge the severity of the issues, and strive to take measures needed for reform.

> Disciplinary action against a judge could send shock waves to the complacent judiciary who might then be deterred from engaging in conduct that may subject them to public sanction and humiliation.

The title of this article assumes that there *is* a fair justice system in America, but it is hard to claim that justice is fair for many of our clients. The lack of adequate funding for indigent defense services is sorely lacking and, therefore, many defenders have such extensive caseloads as to bring into doubt whether the mandate of *Gideon* has been met. The academic literature has taken note of this crisis and is filled with titles of articles such as *Gideon's Muted Trumpet*,[45] *Gideon's Promise Unfulfilled*,[46] *Gideon at 40: Facing the Crisis, Fulfilling the Promise*,[47] *The Silence of Gideon's Trumpet*,[48] *Keeping Gideon from Being Blown Away*,[49] and *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*.[50] Defense counsel must engage in efforts to make the civil courts our ally. Systemic litigation has successfully prompted some courts to take steps to relieve the financial crises that confront defender offices. Nowhere in the *Gideon* holding does it state that there is a right to effective counsel "*as long as* the state provides adequate funds." The right to counsel is not conditional, it exists as a mandate. And the Constitution is violated when that mandate is not met. The language in *Gideon* is unambiguous: "Assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty."[51] How can legislatures and courts disregard this language?

No defender can provide effective assistance to his clients if he simply has too many of them. Attorneys find themselves in situations where they may well be violating their professional obligations, thereby subjecting themselves to possible discipline for neglect of a client's case. The Code of Professional Responsibility and the Model Rules of Professional Conduct do not provide for exceptions for public defenders. Neglect of a client's case has traditionally been among the most common causes of complaints against attorneys; it matters not whether a state has disciplinary rules based on the Code or on

the Model Rules, neglect violates both. As well it should. The lack of time available to investigate, communicate with a client, or become familiar with recent developments in the law that relate to the charges against the client is no defense. Nor should it be.

Whereas public defenders are not subject to claims under Section 1983 of the Civil Rights Act for allegations that counsel violated their clients' constitutional right to effective assistance of counsel,[52] there is no such immunity regarding malpractice suits. The overburdened attorney may simply not be able to comply with any number of the ABA Defense Function Standards; such Standards could well form the basis for a claim that attorney non-compliance indicates negligence. A doctor does not obtain protection from a malpractice suit by claiming, "Sorry, I botched the surgery. But please understand that I have so many patients that I could not really prepare adequately and analyze the test results, so I amputated the wrong leg."

Trial judges fail as well. The purpose of appointing a private counsel or a defender to represent an indigent is so that the state will comply with *Gideon*. In many of our urban courts where counsel are so overburdened, it is clear that the attorneys that the court appoints will not be able to provide the effective assistance that is required. The intolerable situation has gone on for so long that it becomes the normal way of doing business. It is for those of us who are not there in the trenches to step back and say something must be done.

To try to ensure a more just system, lobbying for additional funding comes first. Establishing the political connections, getting the community support, forming local bar association committees of criminal lawyers and educating legislatures of the need for more money is a start. Coalition-building is mandatory. Alliances with prosecutors' offices have occurred in some locales; district attorneys share the defenders' interest in obtaining more funding for criminal justice. But this type of coalition-building will only go so far, more aggressive tactics may well be required.

When a judge's threat of jail is clearly designed to persuade the defendant to plead guilty, the judge is acting unprofessionally and ought to be sanctioned. Why does the sanctioning so rarely occur? I think there is a malicious sentiment that we who play in the same sandbox must stick together. You don't tell on one another, it's just asking for trouble. It is an old boys' club where the allegiance to one another may be greater than it is to our clients. But our courtroom buddies are not always our pals. The judge can do great harm and when that happens, however much the judge might have just been adhering to accepted practice, we must respond. In some locations, Commissions on Judicial Conduct are hurting for business. Disciplinary action against a judge could send shock waves to the complacent judiciary who might then be deterred from engaging in conduct that may subject them to public sanction and humiliation. The whistle needs to be blown on those police, prosecutors and judges who engage in practices that are tantamount to breaking the law.

But what can be done about the Supreme Court, whose decisions often have critical impact on our clients? The powerful nature of the Writ of Habeas Corpus as a guarantor of individual freedom has been threatened in recent years by a number of Court decisions interpreting the Anti-Terrorism and Effective Death Penalty Act. Cases decided in 2011 were particularly disturbing; the message of the Court was that federal courts should, with rare exceptions, defer to state court determinations regarding possible violations of the U.S Constitution. In *Harrington v. Richter*[53] the Court emphasized that even when the state court decision denying the defendant's constitutional claim is limited to a single sentence, deference must be given to the state court holding. In *Cullen v. Pinholster*,[54] the Court held that any review of a state court conviction is to be strictly limited to the evidence and record that was made at the state court level, even though exculpatory material has been subsequently revealed. One response to the Court's holdings is to make an appeal to Congress to change and clarify the ATEDP; that is precisely what a Resolution of the Defense Function Committee of the ABA Criminal Justice Section is attempting to achieve. The committee's Resolution illustrates the need for defense counsel to get involved in and support those institutional groups that are fighting for our clients' basic freedoms.

NACDL plays an enormously vital role in uniting private defense counsel with public defenders to create a strong voice on our issues. There are numerous NACDL amicus briefs filed on matters that are critical for our attempt to ensure a fairer justice system. Briefs were filed, often in conjunction with other organizations, in the *Lafler* and *Frye* cases cited earlier; the *Florida v. Adkins* case challenging Florida's strict labiality drug law; *Public Defender, Eleventh Judicial Circuit of Florida v. State* (claiming that excessive caseloads deprive indigents of the effective assistance of counsel); *DeWolfe v. Richmond* (maintaining that the right to counsel exists before bail is to be set); *Connick v. Thompson*; *Duncan v. Michigan*; and *Hurrell-Harring v. New York*, discussed previously in this article. On the legislative front, NACDL is involved with organizing support for proposed legislation that would broaden the discovery obligations of prosecutors.[55]

Court-appointed attorneys are reimbursed at scandalously low hourly rates, and typically there are totally inadequate caps on the maximum amount that will be reimbursed per case. The continued existence of those caps, even in death penalty cases, is destructive and serves as disincentives for quality lawyering. We must all join in the legislative and judicial battles to increase the monies given to private counsel representing the indigent.

There is always so much to do, and there is never enough time, but it all must be done. It can surely be all-consuming. Whereas large defender offices may have weekly mailings concerning important court rulings, other counsel do not have that luxury. Staying on top of recent legal decisions that may impact a client's case is critical.

Our work is so extraordinarily crucial. We struggle against all odds to bring truth to "Equal Justice Under the Law," when we see the reality of the treatment of the minorities and the poor by the criminal justice system. We fight for "Liberty and Justice for All," when we know that some of our clients have no liberty and are incarcerated in overcrowded jails simply because they have no funds for bail and, therefore, cannot afford liberty. The Sixth Amendment right to counsel, so honored by the momentous decision in *Gideon*, does not serve merely to supplement other constitutional rights. It is the basic right that serves to enable an individual to exercise his other constitutional rights. Counsel is there to ensure that the procedural protections, which exist on paper, are actually applied. This is no easy task. The best of us, the most passionate of us, the most committed of us, go beyond just perceiving the job as one that "the adversary system and our constitution requires to be done;" we add, "by me."

Notes

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

2. *Duncan v. Michigan*, 284 Mich. App. 246 (2009).

3. *Hurrell-Harring v. State of New York*, 15 NY.3d 8904 (2010).

4. Michael R. Sisak, *Chief Public Defender Files Class-Action Suit Against County*, Citizen's Voice, Apr. 11, 2012.

5. Richard Klein & Robert L. Spangenberg,

THE INDIGENT DEFENSE CRISIS (1993).

6. NATIONAL RIGHT TO COUNSEL COMMISSION, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

7. Klein & Spangenberg, *supra* note 5, at 25.

8. *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963).

9. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court made it clear that the right to counsel applied only when there is actual imprisonment imposed.

10. *Id.* at 44.

11. *Miranda v. Arizona*, 384 U.S. 436 (1966).

12. *United States v. Wade*, 388 U.S. 218 (1967).

13. *Mempa v. Rhay*, 389 U.S. 128 (1967).

14. *Coleman v. Alabama*, 399 U.S. 1 (1970).

15. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

16. *In re Gault*, 287 U.S. 1 (1967).

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

18. *Evitts v. Lucey*, 469 U.S. 387 (1985).

19. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).

20. *Lafler v. Cooper*, 131 S. Ct. 856 (2011).

21. *Missouri v. Frye*, 132 S. Ct. 1399 (2011).

22. See ABA Model Code of Judicial Conduct, In 2003, the Model Code of Judicial Conduct's Canon 1, Commentary, was amended to explain what was meant by "integrity": "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character." *Id.* (Any resemblance to the Boy Scout Pledge, is, I'm sure, completely unintended.).

23. See ABA Standards for Criminal Justice, Chapter 14- Pleas of Guilty, at Standard 14-3.3(d) (2d ed. 1986).

24. *Id.* at Standard 14-3.3 cmt.

25. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (emphasis added).

26. *Argersinger*, at 34.

27. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

28. *See Parker v. North Carolina*, 397 U.S. 790 (1970); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

29. *Russell v. United States*, 369 U.S. 749 (1962).

30. *Tiemens v. United States*, 724 F.2d 928, 929 (per curiam), *cert. denied*, 469 U.S. 837 (1984).

31. It may in fact often be required to first explain to a defendant the principle that evidence obtained in violation of his constitutional rights cannot be used against him at trial. The ever-increasing complexities of the exclusionary rule may escape the common knowledge even of most practicing attorneys.

32. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973) for an explanation by the Supreme Court as to what is required for a guilty plea to be "knowingly" entered.

33. Keith Roberts, *Focus on Problem-Solving Courts*, Judges' Journal (Spring 2012). In Texas it was reported that there are 124 problem-solving courts including drug courts, mental health courts, veterans' court, and a juvenile drug court.

34. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 51 (2009).

35. *Id.*

36. *Lockyer v. Andrade*, 538 U.S. 63, 83 (2003).

37. John Eligon, *State Law to Cap Public Defender's Caseloads, but Only in the City*, N.Y. TIMES, Apr. 5, 2009.

38. http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

39. U.S. DEPT. OF JUSTICE, PRISONERS IN 2010 (2011); http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2230.

40. CENTER OF CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOP-AND-FRISKS (2012).

41. In *Floyd et al. v. City of New York et al.*, class action status was granted, finding the stop and frisk policy demonstrates "deeply troubling apathy towards New Yorkers' fundamental constitutional rights."

42. The New York Civil Liberties Union filed a lawsuit alleging weak oversight and poor conditions in Nassau County Correctional Center; Reuters, *NY Jail Sued after Five Suicides in Two Years*, Mar 21, 2012.

43. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

44. *Id.* at 1923. The Court affirmed the lower court's ruling requiring the release of 138,000 inmates in order to relieve the overcrowding.

45. Victoria Nourse, *Gideon's Muted Trumpet*, 58 MO. L. REV. 1417 (1999).

46. Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000).

47. Ellen S. Podgor, *Gideon at 40: Facing the Crisis, Fulfilling the Promise* 41 AM. CRIM. L. REV. 131 (2004).

48. Jordan Glaser, Note, *The Silence of Gideon's Trumpet: The Courts Inattention to Systemic Inequities Causing Violations of Speedy Trial Rights in* Vermont v. Brillon 129 S. Ct. 1283 (2009). 89 NEB. L. REV. 396 (2010).

49. Stephen B. Bright, Stephen O. Kinnard & David A. Webster, *Keeping Gideon From Being Blown Away: Prospective Challenges to Inadequate Representation May Be Our Best Hope*, 4 CRIM. JUST. 10 (1990).

50. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTING CONST. I.Q. 625 (1986).

51. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1962).

52. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981).

53. *Harrington v. Richter*, 131 S.Ct. 770 (2011).

54. *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).

55. *See* Assembly Bill A. 6907 pending before the N.Y.S. Legislature. *See also* Assembly Bill A. 8080 which broadens the powers of the judge to order discovery when a "reasonable" request is made for "material" information. ■

About the Author

Richard Klein is the Bruce K. Gould Distinguished Professor of Law at Touro College Jacob D. Fuchsberg Law Center. He worked for 10 years as a senior trial attorney with the Criminal Defense Division of the Legal Aid Society. His scholarly publications have focused on the constitutional right to effective assistance of counsel and constitutional challenges to the death penalty.

Professor Richard Klein
Touro College Jacob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722
631-761-7126
E-MAIL rklein@tourolaw.edu