THE CONFERENCE OF CHIEF JUSTICES

TESTIMONY

by

Hon. Mark S. Cady
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on

Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors

Submitted to the

COMMITTEE ON THE JUDICARY
UNITED STATES SENATE

Committee Hearing
Wednesday, May 13, 2015
Room 226, Dirksen Senate Office Building
10:00 AM

Mr. Chairman and Members of the Committee,

The Conference of Chief Justices (CCJ) is pleased to present testimony at today's hearing, "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors," as the committee examines the issue of legal representation of indigent persons charged with a misdemeanor offense.

ABOUT CCJ

Before I begin my remarks, I would like to provide some background on our organization and membership. I submit this testimony as a member of the Board of Directors of the Conference of Chief Justices (CCJ).

CCJ was established in 1949. Its mission is to improve the administration of justice throughout the country. As you may know, state courts handle 97% of all judicial proceedings in the country. Membership in the Conference is limited to the highest judicial official of each state of the United States; the District of Columbia; the Commonwealth of Puerto Rico; the territories of American Samoa, Guam, and the Virgin Islands; and the Commonwealth of the Northern Mariana Islands. Members of the Conference also include the presiding judges of the appeals courts that are the courts of last resort exclusively in criminal matters. At present, Texas and Oklahoma have such members.

The Conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- develop, exchange, and disseminate information and knowledge of value to state judicial systems;
- educate, train and develop leaders to become effective managers of state judicial systems;
- promote the vitality, independence and effectiveness of state judicial systems;
- develop and advance policies in support of common interests and shared values of state judicial systems; and
- support adequate funding and resources for the operations of the state courts.

THE ISSUE

The Conference of Chief Justices recognizes that the Sixth Amendment Right to Counsel and the parallel state constitutional provisions are amongst the most important rights of people brought before the courts on a criminal offense. It is important to note that some states may afford criminal defendants broader protections within their own state constitutions or statutory frameworks. However, it is also important to remember the protections provided by the U.S. Constitution with regard to representation of indigent defendants.

In Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth Amendment's guarantee of the right to state-appointed counsel, firmly established in federal-court proceedings in Johnson v. Zerbst, 304 U.S. 458 (1938), applies to state criminal prosecutions through the Fourteenth Amendment. In 1972, the Court revisited the issue in Argersinger v. Hamlin, 407 U.S. 25. In Argersinger, the Court clarified their previous holding by expressly

stating that defense counsel must be appointed for indigent defendants in any criminal prosecution, "whether classified as petty, misdemeanor, or felony…that actually leads to imprisonment even for a brief period." Five years later, the Court again heard a Sixth Amendment Right to Counsel case, in Scott v. Illinois, 440 U.S. 367 (1979), the Court drew the line at "actual imprisonment," holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment.

In 2002, the United States Supreme Court rendered an opinion in Alabama v. Shelton, 535 U.S. 654. Mr. Shelton representing himself at a bench trial in the District Court of Etowah County, Alabama, Shelton was convicted of third-degree assault. The statutorily authorized sentence was up to one year imprisonment and up to a $2000 fine. The trial judge sentenced Shelton to serve 30 days in the county prison, but the court suspended that sentence and placed Shelton on two years' unsupervised probation. The primary issue on appeal was whether a suspended sentence constitutes a "term of imprisonment" within the meaning of Argersinger and Scott even though incarceration is not immediate or inevitable, and therefore required the Mr. Shelton receive appointed counsel. The U.S. Supreme Court affirmed the opinion of the Alabama Supreme Court and held that a suspended sentence is sufficient to trigger the Sixth Amendment Right to Counsel.

It is important to note that the Right to Counsel provision of the Sixth Amendment to the U.S. Constitution is not triggered merely because a defendant is tried for an offense which the statute or ordinance authorizes incarceration. Rather, this provision is only implicated if the defendant upon conviction is either sentenced to incarceration or receives a sentence that places that defendant at risk of future incarceration. Therefore, defendants that are tried for offenses that are only punishable by a fine, are clearly not entitled to counsel. Additionally, if a defendant that is otherwise eligible for court appointed counsel is tried on an offense for which incarceration is possible, is convicted and sentenced to only a fine, there is no violation of the Right to Counsel provision of the Sixth Amendment to the U.S. Constitution. Although the Conference of Chief Justices would not condone this behavior, it is conceivable this approach could be used to lawfully navigate around the Sixth Amendment Right to Counsel. Additionally, in jurisdictions that use a civil infraction system for minor offenses rather than a misdemeanor system, a Right to Counsel would not attach to those cases as they are neither criminal nor do they have incarceration as a sanction.

Providing indigent defendants with representation is fiscally challenging for many states. In 2014, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution *In Support of Establishment of the National Center for the Right to Counsel* as identified in H.R. 3407 (113th Congress) sponsored by Representative Theodore Deutch[1]. The resolution noted that "state and local governments continue to struggle to adequately fund legal representation for indigent criminal defendants." The creation of a National Center for the Right to Counsel would provide: (1) financial support to supplement, but not supplant, state and local funding for public defense systems; and (2) financial and substantive support for training programs and technical assistance to improve the delivery of legal assistance to indigent criminal defendants. A copy of the resolution is attached to this testimony.

[1] Representative Deutch re-introduced his legislation (H.R. 2063) in the 114th Congress.

OVERVIEW OF STATE PRACTICE

At present, the mechanism used to deliver indigent defense services nationally can best be described as a patchwork of programs rather than a comprehensive system. For example, in some states indigent defense is the responsibility of the judiciary while in other states it is the responsibility of the executive branch[2]. Additionally, in some states indigent defense services are funded at the state level, while others funding is provided from the local level.[3] To make matters more complex, city and municipal courts may or may not utilize the same indigent defense system used by the state courts. Also, there is substantial variance by state in terms of the oversight and quality assurance that are incorporated into indigent defense systems.

There is some commonality between many of the states in regard to the eligibility determination for indigent defense services. Many use a percentage of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services. A common threshold is 125% of the poverty income guidelines. Individuals with incomes under that threshold are presumptively eligible. Alabama, Iowa, North Dakota, Texas and West Virginia are examples of states with this 125% threshold in their statute. Other states set this threshold substantially higher or lower. For example, Maryland sets it's at 100%, Maine at 110%, Idaho at 187% and Florida at 200%. Most states have additional mechanisms to ensure that people who may be mathematically outside the percentage calculation, but are nonetheless indigent at a practical level, can receive indigent representation. For example, the Michigan Indigent Defense Commission Act states, "Substantial financial hardship shall be rebuttably presumed if the defendant receives personal public assistance, including under the food assistance program, temporary assistance for needy families, medicaid, or disability insurance, resides in public housing…" [MCLS § 780.991(3)(b)]. This type of provision, which ties eligibility to receipt of some type of federal financial assistance, is very common in state indigency determination statutes.

Additionally, many states offer an even more personalized determination to people who do not fit any of the other criteria but feel that they are unable to afford the costs associated with hiring retained counsel. For example, the Michigan Indigent Defense Commission Act further states, "A defendant not falling below the presumptive thresholds described in subdivision (b) shall be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the charges being faced, his or her monthly expenses, and local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel [MCLS § 780.991(3)(c)].

Attached to this testimony is a spreadsheet with the statutory provisions for the indigency determination for most of the states. A review of the statutory constructions demonstrates that states have gone to considerable lengths to ensure that anyone with a bona fide need for representation can qualify in some way, while conserving this precious resource by eliminating access for persons who can afford to hire counsel.

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[2] Indigent Defense Services in the United States, FY 2008–2012, Bureau of Justice Statistics, (July, 2014).

[3] State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008, Spangenberg Project, (2010).

FUNDEMENTAL CHALLENGES TO STATE INDIGENT DEFENSE DELIVERY SYSTEMS

Indigent defense delivery systems in every state are underfunded, in many states severely underfunded. The funding issue manifests itself in a variety of different ways. In public defender offices, a significant percentage of new employees are hired directly out of law school. New public defenders will typically be tasked with misdemeanor and/or juvenile representation, leaving felony representation to more experienced attorneys. The typical new public defender will only stay on the job a year or so before moving on to a more lucrative job. As a result, many are leaving public defender offices just as their knowledge of the law and advocacy skills have reached a point where they are effective. A very similar sequence of events is common with court appointed counsel, whether they are in a private law firm or a contracted counsel office. Just as those attorneys are beginning to gain skill handling misdemeanor cases, the firm that employs them gets misdemeanor appointments diverted to their next new hire. This situation is particularly disturbing because there usually is not financial parity with the corresponding prosecutors in a given jurisdiction. In fact, it is all too common for defense counsel to see prosecuting as a financial advancement. The net effect is the skill level of lawyers handling misdemeanor indigent defense cases is all too frequently inadequate and inferior to their counterparts prosecuting.

Courts handling misdemeanor cases almost always have caseloads that are so high that they necessitate "processing" cases in an almost assembly line fashion. The caseloads for attorneys handling indigent defense cases, and for prosecutors for that matter, are normally correspondingly high. This leads to a high percentage of cases resulting in guilty pleas to get the benefit of receiving a fine and court costs as a sole sanction. Although this looks attractive to criminal defendants at the time and may induce them to waive legitimate defenses, they expose themselves to a plethora of collateral consequences. These consequences make quality representation more and more essential for misdemeanor crimes. The conviction itself can result in significant hurdles to future employment, education, housing and other important opportunities to achieving a productive life, and can often be used later as an enhancement under recidivism sentencing statutes. For example, a young defendant who is convicted of a "domestic" offense, even if the facts suggest that the conduct did not result in injury, will be barred by federal law from firearm possession. This would preclude that defendant from military service, which for many indigent defendants is a means to obtain skills and escape poverty. A fine can also lead to future contempt of court charges and incarceration if not paid.

The Sixth Amendment to the U.S. Constitution and many of the corresponding state constitutional provisions are only triggered by a sentence that places a defendant at risk of incarceration. Many states are now using a civil infraction system for traffic offenses and other minor offenses which were traditionally misdemeanors. As a sentence of incarceration is not a possible sanction, defendants "charged" with a civil infraction are not entitled to court appointed counsel. However, they remain exposed to some serious collateral consequences.

It is also problematic for states to provide appropriate training, oversight and support for their indigent defense systems. In 2002, the American Bar Association using concepts that were generally accepted nationally created the "Ten Principles of a Public Defense Delivery System." States should have both the financial resources and technical assistance available for an oversight

group within each state to monitor their indigent defense system to make sure it is providing constitutionally effective representation and doing so in accordance with the ten principles. States also need the resources provide appropriate training and technical support for indigent defense attorneys handling misdemeanor cases. Although some training on substantive law would be state specific, there is a significant amount of training on constitutional law, forensic science, and advocacy skills, which could be developed on a national level.

EXAMPLES OF EFFORTS BY STATE EFFORTS TO ADDRESS THE CHALLENGES

States have made efforts to ensure that they are in complete compliance with their requirements under the Sixth Amendment to the U.S. Constitution to provide representation to indigent defendants. For example, several states commissioned studies of their indigent defense systems. The Nevada Supreme Indigent Defense Commission Rural Subcommittee issued a report in 2008. The report recommends that the "State of Nevada accept its constitutional responsibility to totally fund all aspects of the delivery of indigent defense services in all counties of Nevada." Additionally, "That the State of Nevada create and totally fund an independent, statewide oversight board to oversee the delivery of indigent defense services in Nevada." Pennsylvania[4] also conducted an evaluation of their indigent defense system. Their report contained twelve recommendations that collectively cover everything from constitutional compliance to workload. These states are both trying to implement the recommendations from their respective reports.

Other states have chosen to limit the number of charges that have the possibility of incarceration as a sanction as a method of utilizing existing resources more effectively. For example, in 2013, the North Carolina General Assembly reclassified a number of Class 1 and 2 misdemeanors to Class 3 misdemeanors and created a new category of "fine only" Class 3 misdemeanors for defendants with three or fewer prior convictions.[5] However, there are states have chosen to expand the interpretation of their own state constitution to provide protections that are broader that those afforded under the Sixth Amendment. For example, the Court of Appeals in Maryland held that "under the Due Process component of Article 24 of the Maryland Declaration of Rights, an indigent defendant has a right to state-furnished counsel at an initial appearance before a District Court Commissioner."

Washington's Supreme Court recently adopted mandatory misdemeanor caseload limits, as well as other representation improvements. The Standards implement mandatory training and investigation requirements for public defense attorneys as well. The Standards brought new attention to misdemeanor public defense and have resulted in public defense upgrades in hundreds of local courts.

CCJ RECOMMENDATION

The public would greatly benefit by the establishment of a National Center for the Right to Counsel, with adequate funding to fund innovations, support research on indigent defense delivery

[4] A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania (December, 2011), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20Defense.pdf

[5] Report of the Commission on Indigent Defense Services, submitted to the General Assembly (2/1/15) http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2015.pdf

systems, support training and technical assistance programing, and serve as a clearinghouse for information. This Center could help identify the best practices currently employed nationally, which over time may help bring some uniformity to the indigent defense systems. It could also help improve the public's trust and confidence in the criminal justice system by creating parity between the defense in indigent cases and the prosecution.[6]

CONCLUSION

Thank you for asking for our input on this important matter. The Conference Chief Justices stands ready to work collaboratively and cooperatively to craft solutions to this important issue. I will be happy to answer any questions you may have.

ATTACHMENTS

http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/07232014-Establishment-of-National-Center-for-Right-to-Counsel.ashx

Spreadsheet: State Indigency Determinations

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

[6] Ten Principles of Public Defense Delivery System, ABA (2002)