

Wednesday, October 8, 2008

When indigent criminal defense funding dries up, shrink the criminal justice system.

Clarence Gideon. Two weeks before I was born, the United States Supreme Court mandated that the states provide lawyers to indigent criminal defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). (Listen to the later-to-be, short-lived Justice Abe Fortas -- when he was a name partner at one of Washington's still most highly-regarded huge corporate law firms -- arguing for inmate Clarence Gideon who beat all odds by obtaining the rare right to Supreme Court review after having filed a pro se petition for writ of certiorari. It is remarkable to hear the justices barely interrupt Mr. Fortas for a very long time, while still handing him a unanimous victory.) The National Legal Aid and Defender Association asserts that: "The right to counsel is the most fundamental procedural safeguard to assure a fair trial in which the government and the accused stand equal before the law. Unfortunately, there is pervasive evidence that Gideon's constitutional promise is not being fulfilled in many states and counties around the country. Some fail to provide adequate funds, standards, training and staffing for public defender offices. Other areas do not have public defender offices and instead contract with the lowest bidder to provide representation for defendants who cannot afford lawyers. There are even jurisdictions where some defendants are not provided with lawyers, even though the Constitution requires it." Two weeks ago, Maryland Public Defender Nancy Forster announced that her office will no longer provide funding for private lawyers to represent indigent defendants whom the Public Defender's Office cannot represent due to conflicts of interest arising from the office's representation of their co-defendants. This move follows a request from the state's budget office for the Public Defender's Office to find a way to cut \$1.3 million from its already underfunded budget. (Of course, the legal system should insulate public defender offices from such pressure from the same executive branch that is involved in prosecuting public defender clients. Moreover, I am dumbfounded why the Maryland Public Defender's Office (and others around the country) have letterheads and, with Maryland, a website that prominently list the governor, no differently than any state agency. Of course, there is an entirely different issue about jurisdictions where chief public defenders run for their office (campaigning under the slogan "Vote for me, and I will save taxpayer money by underfunding my office"?).) Beforehand in Maryland, all indigent defense funding flowed through the Public Defender's Office, where I worked from 1991 to 1996. I understand that one or more previous chief Maryland Public Defenders took the same approach of ceasing funding for private conflict attorneys due to underfunding, only to have the state government cough up more money, which is not to say that the new funding was always sufficient to effectively defend Maryland's indigent criminal defendants. I have previously handled a few such conflict cases, not for the money (which is low even at the now-increased \$50 hourly rate, ordinarily with a low maximum fee cap), but because of the deep importance of continuing to help level the playing field for indigent criminal defendants versus those who can afford lawyers (but still leaving plenty of criminal defendants who do not qualify under the public defender guidelines but who are too poor to hire qualified private counsel.) Last Friday, Robert M. Bell, who is the chief judge of Maryland's highest court, expressed his concern about this indigent funding crisis, in this letter to Maryland's governor and the heads of both chambers of its legislature. A Judge Bell and everyone else, I have an additional proposal for solving this indigent defense funding crisis: As I have said again and again, we will have a much less expensive and higher quality criminal justice system -- including on the indigent and non-indigent criminal defense side -- once we radically shrink and reform the criminal justice system into one that legalizes marijuana, prostitution, and gambling; that heavily decriminalizes all other drugs; and that sharpens the teeth of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. Until such radical reform takes place, we will continue to have a criminal justice system that is grossly unjust, antithetical to a free and democratic society, broken down, overly expensive, and overly socialistic. Jon Katz.

Posted by Jon Katz in Criminal Defense at 00:00