THE National Association of Criminal Defense Lawyers
CHAMPION
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Gideon's Next Frontier

A Special Message From NACDL's President and Executive Director

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PERSPECTIVES ON GIDEON AT 50

SIXTH AMENDMENT

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

I am counsel for the defense. Let none who oppose me forget that with every fiber of my being I will fight for my clients. My clients are the indigent accused. They are the lonely, the friendless. There is no one to speak for them but me. My voice will be raised in their defense. I will resolve all doubt in their favor. This will be my credo; this and the Golden Rule. I will seek acclaim and approval only from my own conscience. And if upon my death there are a few lonely people who have benefited, my efforts will not have been in vain.[3]

Day in and day out these attorney-warriors toil under difficult circumstances, and they do so not for money or for glory, but because of their commitment to their clients and to justice.

It would be impossible to properly and fully honor each and every individual indigent defender who toils daily in the courtroom. By highlighting the work of some, however, we hope to honor the legacy they represent, the assurance that in the United States the amount of justice a man receives is not dependent on the amount of money in his pocket.

During the next 12 months, each issue of *The Champion* will profile front-line indigent defenders and the work they do to assure each person accused is not powerless and voiceless before the massive machine of the government. As Gideon's Champions, these defenders demonstrate that while there may be diversity of geography, defense delivery system and practice, in the field of indigent defense there is a commonality of passion, drive, and dedication.

Notes

1. The term "indigent defenders" as used in this article includes state and federal public defenders, court-appointed counsel, contract attorneys, and conflict attorneys.

2. *Hightower v. Florida*, 592 So. 2d 689, 692 (Fla. Dist. Ct. App. 1991) (Gersten, J., dissenting).

3. Jim Doherty, Cook County (Illinois) Public Defender.

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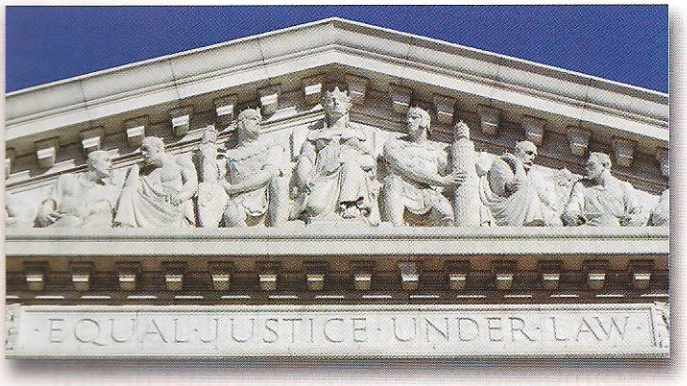

The Promise of Effective Assistance of Counsel: Good Enough Isn't Good Enough

By Andrea D. Lyon

When the U.S. Supreme Court decided *Gideon v. Wainwright*,[1] it declared that everyone, poor or not, has a right to a lawyer. Furthermore, everyone has a right under the U.S. Constitution to *effective* assistance of counsel. What does *effective* mean? Does it mean merely the presence of defense counsel, or something more?

Twenty years later in *Strickland v. Washington*,[2] the Court defined what effectiveness means — not very much when analyzing whether a defendant received that constitutional guarantee. Courts are deferential to the job done by an attorney and rarely disturb convictions on that basis. In order for a convicted person to succeed with an ineffective assistance of counsel claim, a defendant must prove (1) that her counsel's performance fell below an objective standard of reasonableness; and (2) the substandard representation so prejudiced her that there is a reasonable probability that the outcome would have been different.[3] A defendant does not have to show that the outcome more likely than not would have been different, but rather that counsel's errors undermine confidence in the outcome.[4]

The legal effect is that the standard has become a floor below which a lawyer may not fall rather than a standard to which the lawyer should aspire. Worse yet, even if a court finds that a lawyer's performance fell below that floor, to succeed in obtaining a new trial the defendant must show prejudice. Some have commented that effective assistance of counsel is like a "foggy mirror" test — if defense counsel would fog up a mirror held beneath his nose, that's good enough.

There are many examples of how poorly a lawyer may perform and still not fall below the standard of reasonableness. For example, the U.S. Supreme Court denied *certiorari* where the Court of Criminal Appeals of Texas held that counsel's sleeping through parts of a trial could have been a strategic move and held that the presence of counsel at all times during trial, combined with a failure to show prejudice, did not mean the defendant was ineffectively represented.[5] The Illinois Supreme Court held that presenting con-

flicting theories to a jury (he didn't do it, but if he did he was insane) was *not* ineffective assistance of counsel and affirmed the conviction and death sentence.[6] Any person would understand these behaviors to "fall below" ordinary care, but the courts did not.

> There are many examples of how poorly a lawyer may perform and still not fall below the standard of reasonableness. For example, the U.S. Supreme Court denied *certiorari* where a Texas court held that counsel's sleeping through parts of a trial could have been a strategic move.

As a result, most claims of ineffective assistance of counsel fail. Courts defer to "strategic choices" by defense counsel — even foolish ones. Usually, the only claims that have a chance of being successful are claims alleging failure to investigate, and of course such claims require someone to discover that there has been a failure to investigate in state postconviction proceedings.

Nonetheless, defense counsel's overarching duty is to advocate the defendant's case.[7] Counsel also has a duty to bring to bear such skills and knowledge as will render the trial a reliable adversarial testing process.[8] "[A]n attorney who fails to even interview a … witness [who] may potentially aid the defense, should not be allowed automatically to defend his omission simply by raising the shield of 'trial strategy and tactics.'"[9]

However, as there is no right to a lawyer beyond direct appeal, most postconviction petitions are filed *pro se*, and usually by inmates at correctional institutions who could not conduct an investigation even if they had the skills and resources to do so. In other words if an inmate was poorly represented at the trial level, and is indigent, he cannot likely succeed in state postconviction. And since the advent of the Antiterrorism and Effective Death Penalty Act of 1996,[10] he cannot raise issues for the first time in federal court. The only exception to this bar came in 2012 in *Martinez v. Ryan*,[11] holding that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." This holding does not require the state to provide counsel on collateral review, it simply excuses the default.

So what is the answer? Because "effectiveness" has been so diluted by the courts, and is thus inconsistent with the constitutional obligations defense lawyers have to their clients, defense lawyers must hold themselves to a higher standard of effectiveness at the trial level. Effective representation requires a team; it requires investigation, motions litigation, creative thinking and a nonassembly line mindset.[12] Providing good representation would require expending more of the ever-scarcer resources.[13] Might it not also mean, however, that there would be fewer wrongful convictions and fewer societal and financial costs?

In a study of the costs of wrongful convictions, John Conroy and Rob Warden documented that "[w]rongful convictions of men and women for violent crimes in Illinois have cost taxpayers $214 million and have imprisoned innocent people for 926 years, according to a seven-month investigation by the Better Government Association and the Center on Wrongful Convictions. … The joint investigation, which tracked exonerations from 1989 through 2010, also determined that while 85 people were wrongfully incarcerated, the actual perpetrators were on a collective crime spree that included 14 murders, 11 sexual assaults, 10 kidnappings and at least 62 other felonies. Moreover, the 97 felonies in that crime spree may be just a fraction of the total number of crimes committed by the actual perpetrators. The investigation found that the 85 exonerations left 35 murders, 11 rapes, and two murder-rapes with no identified perpetrators and thus no way to add up their accumulated crimes."[14] Although there are many causes for these wrongful convictions, including prosecutorial, police and forensic misconduct,[15] as the report found, ineffective lawyering had a role as well.

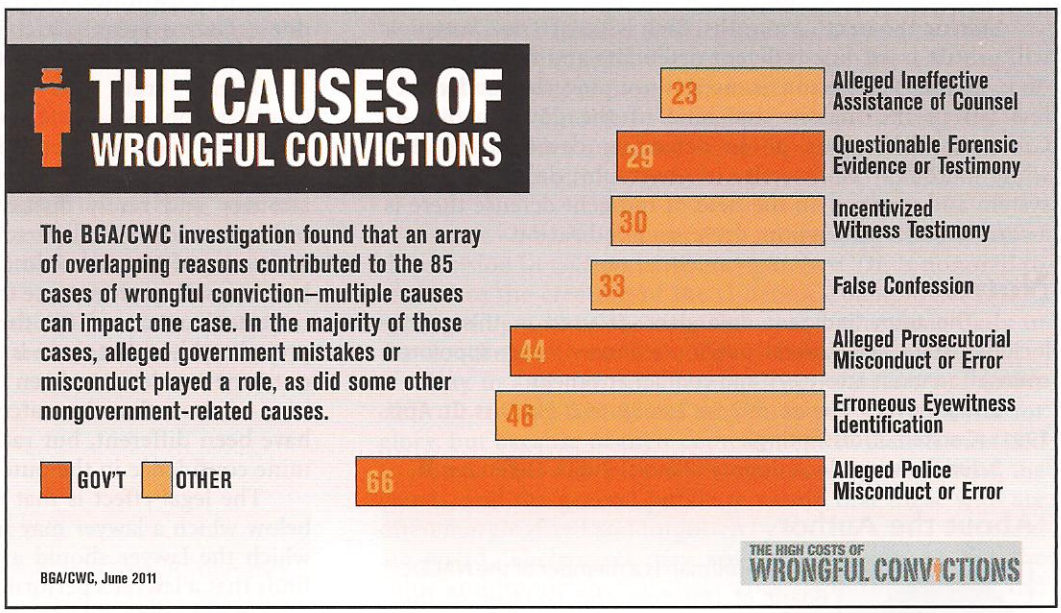

Chart reprinted with permission of John Conroy, Rob Warden, and the Better Government Association.[16]

Ineffective lawyering compounds each of the causes of wrongful convictions listed in the chart above. How can this be? Because investigation, thorough motions practice, and zealous advocacy are the greatest checks on our system. If the defense attorney is pushing hard for *Brady* material, insisting on litigating the admissibility of evidence or the right to present a defense, and asking the tough questions both in and out of court, there is a smaller chance that the other causes of wrongful conviction will prevail. Defense lawyers

cannot engage in this kind of advocacy when caseloads are monstrously high, resources such as investigators and experts are in short supply, and the view prevails that if the defendant did not commit *this* crime, he probably did something else. Effective assistance of counsel benefits everyone, not just the accused. A society that cannot trust its criminal justice system fails.

Having a lawyer who merely shows up in court to say something — be it stupid, unsupported factually, or misguided legally — is not the quality of defense anyone would want. A lawyer who does the bare minimum, perhaps between naps, is not providing effective representation. Minimal due process is not good enough. It is time for the criminal justice system to aspire to a higher standard of effectiveness.

Notes

1. 372 U.S. 335 (1963).
2. 466 U.S. 668 (1984).
3. *Id* at 687.
4. *Id.* at 694.
5. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996) (per curiam), *reh'g denied*, 928 S.W.2d 482 (Tex. Crim. App. 1996), *cert. denied sub nom. McFarland v. Texas*, 519 U.S. 1119 (1997).
6. *People v. Whitehead*, 169 Ill. 2d 355, 375 (Ill. 1996).
7. *Strickland,* 466 U.S. at 688.
8. *Id.*
9. *Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984).
10. 28 U.S.C. § 2254.
11. 566 U.S. ____, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012).
12. *See* Jennifer M. Allen, *Free for All a Free for All: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense*, 27 LAW & INEQ. 365 (Summer 2009) (in which the author explains that the courts have abdicated responsibility in this regard by being results-oriented regarding the trial outcome, rather than the constitutional right).
13. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1732 (2005) (in which the author argues that funding is unlikely to arise under the *Strickland* test for evaluating effective assistance of counsel because the test is oriented towards the ends rather than the means).
14. The High Cost of Wrongful Convictions (http://www.bettergov.org/investigations/wrongful_convictions_1.aspx).
15. *Id.*
16. *Id.*

About the Author

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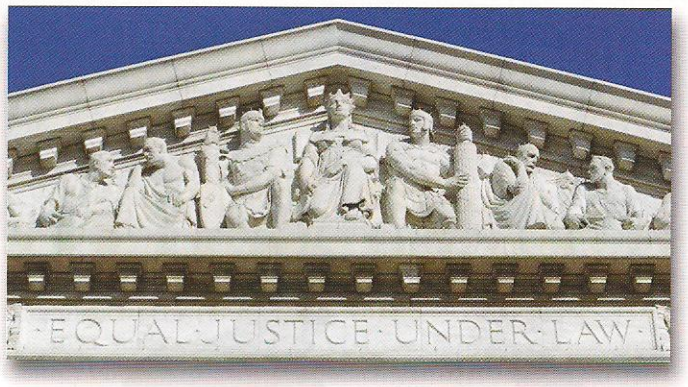

The Significance of *Gideon* to the Guantánamo Detainees

By Joshua L. Dratel

The meaning and language of *Gideon v. Wainwright*[1] resonate loudly in the context of those persons detained since 2002 at the U.S. Naval Base, Guantánamo Bay, Cuba. As in *Gideon*, the right to counsel has been an issue of fundamental importance since Guantánamo was transformed into a detention center — and recognized as such by both the government and those representing, or who seek to represent, the detainees. Yet the importance of *Gideon* is not just with respect to the standards it set for the right to counsel in criminal cases, but also for the standards it set for the legal community's obligation to strive tirelessly, and selflessly, for a fair criminal justice system that delivers accurate and reliable results.

A Right Not Based on Value Judgments

The categorical approach the U.S. Supreme Court adopted in *Gideon*, which overruled the pre-existing contextual standard applied in *Betts v. Brady*,[2] and declared that counsel was required in all criminal prosecutions regardless whether they were capital, or sufficiently "serious" to warrant the assistance of a lawyer, acquires added importance in the Guantánamo context.

As the Court in *Gideon* concluded, its ruling would

> restore constitutional principles established to achieve a fair system of justice. Not only [the Court's pre-*Betts*] precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.[3]

While the detainees at Guantánamo face charges that are indisputably *serious*, *Gideon*'s mandate that *all* defendants are entitled to counsel naturally extends not merely to the indigent, as was the case with *Gideon* specifically, but to the most reviled among defendants, in which category many