Amplifying Gideon's Trumpet, Revitalizing Gideon's Rule: A Prescription for Action

I. Assessing the First Half-Century of *Gideon*: Reconciling Courtroom Reality with Constitutional Mandate

In 1964, the very first year following the *Gideon* decision, Anthony Lewis described the monumental national challenge precisely and prophetically in chapter 13 of *Gideon's Trumpet*:

"It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense."

As every comprehensive national report concerning the right to counsel has declared, the evidence is overwhelming that we have failed as a nation to realize the dream of *Gideon*, at least in our state and local courts where 95% or more of criminal cases arise. We must face the fact that most poor people charged with crime in America are <u>not</u> capably defended; and that most lawyers who provide their representation are <u>not</u> "sure of the support needed to make an adequate defense." We must acknowledge that today, 50 years later, the Supreme Court's proud declaration that "[t]he right to counsel…may not be deemed fundamental and essential to fair trials in some countries, but it is in ours" bespeaks more irony than truth. Today, while the U.S. homicide rate is almost exactly the same as it was in 1963, and the rate of violent crime while higher than in 1963 has been in continuous annual decline for many years, we incarcerate almost seven times the number of people relative to population than we did in 1963. Indeed, we are the undisputed world leader in the frequency of incarceration. If the right to counsel was intended to protect and vindicate the rights of the poor, it is hard to find evidence that *Gideon* has been a success.

If we are to rededicate ourselves to achieving the ideals established in the *Gideon* decision, as we must, our starting point must be to squarely acknowledge this national failure; then to identify its causes, and finally to propose constructive remedies; all with the goal that the chasm between the law as declared and the law in actual operation be bridged, and the dream of *Gideon* be realized at last.

Why have we failed? How can we correct those failures? I suggest three areas of examination: 1) failures by the Federal government; 2) failures by State and local governments; 3) missed opportunities by all participants in our criminal justice systems.

Federal Failures: The federal failures are by far the most significant cause of our national failure. First and foremost is the long-recognized and as long neglected unfunded federal mandate imposed upon the States to implement the federal constitutional right to the assistance of counsel. As the *right* to counsel has been expanded by the Supreme Court in decision after decision, those decisions have come to "constitute an enormous unfunded mandate imposed upon the states." Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 Hastings Law Journal 835, 843 (2004). A Constitutional right proclaimed by our courts as a national treasure, yet ignored every year in the executive and congressional appropriations, is a right that is stillborn. For over thirty years, the American Bar Association has called for the creation of a national Center for Indigent Defense Services, in order to assess and provide support for persistently overburdened and underfunded state and local counsel assignment programs. The beginning of realizing *Gideon's* dream would be for that Center, so long overdue and so essential to the fulfillment of the Constitutional right to counsel, to be created and funded in 2013.

It is important to understand that the federal mistake has not been merely one of neglect. In addition, the federal government has acted consistently to magnify the states' fiscal burden of complying with the right to counsel. Compounding the unfunded federal mandate has been the relentless, four-decade long federal emphasis upon broader criminalization and harsher punishments. This is the reason why it was accurate for the March 10, 2013 *New York Times* assessment of the right to counsel to bear the title "The Right to Counsel: Badly Battered at 50", rather than simply "Neglected at 50". Year upon year, law upon law has been enacted, always in the direction of being "tough on crime", and rarely being smart about crime. The War on Drugs, the war on drunk driving, and the war on accused and former sex offenders, among other actions, have not only produced an explosion of new federal crimes and extended punishments; but they have required that federal "anti-crime" aid to the states be contingent upon the imposition of more punitive state laws and punishments. These enactments have driven up the cost to the states of providing counsel by a significant amount. Furthermore, for decades, federal anti-crime grants administered by the Department of Justice to state police and prosecution agencies have dwarfed the pittance given to defender offices to provide counsel to those who cannot afford it. One remedy for this grievous imbalance would be to require that all federal grants to state and local law enforcement be accompanied by an assessment of the increased costs of providing effective counsel for indigent persons whose arrests or punishments are supported by the federal law enforcement grant, and then to provide funding in an amount sufficient to fully support that representation. A second remedy would be to set aside a significant percentage of all federal criminal justice funding for the purpose of supporting the right to counsel, in order to balance the scales of justice. When I became a public defender, in 1974, the federal Law Enforcement Assistance Administration distributed funds to state public defender programs to create neighborhood offices that served indigent clients and the criminal justice system very well. It is past time to begin a comprehensive evaluation of the damaging role that the federal government plays in driving up the cost to the states of providing counsel, with the aim of providing fiscal relief to states and localities rather than increasing their fiscal burden.

State Failures: All states share the enormous fiscal burden of providing effective representation to clients who are entitled to the assistance of counsel but who cannot afford to hire a lawyer. Some states have done a much better job than others in providing the funding necessary to provide high quality representation within their borders, and the oversight necessary to assure uniform quality of services within different geographical regions or political subdivisions. At last count, twenty-eight states provided 100% or very close to it of the cost of providing counsel within their jurisdiction, and twenty-two states did not. (New York, the state in which I work, provides less than twenty percent of the cost, a disturbingly low contribution). Similarly, many states have created a statewide entity which is responsible for and has the tools to enforce a uniform quality of representation throughout the state. (New York took a beginning step in this direction in 2010 when it created the Office of Indigent Legal Services, but it has yet to enact the scope of enforcement authority that many states have established).

In recent years, some progress has been made toward a greater exercise of state responsibility for the quality of the representation provided at the local court level. However, inadequate funding continues to undermine reform efforts. This progress toward state oversight must accelerate, and adequate funding must be found, if the goal of uniformly effective representation for all eligible clients within the state is to be achieved.

A second area of state failure has been the decades-long tendency of state legislatures, just as their congressional counterparts, to enact broader criminal laws and harsher punishments. Here, New York has recently done a good job of beginning to reduce its reliance on incarceration. And earlier this year, South Dakota enacted legislation intended to avoid previously planned prison capacity, and divert the funding into recidivism reduction strategies and substance abuse and mental health assistance. But there is a long, long way to go if we are to reverse four decades of reckless law-making. One promising course is to reclassify minor offenses that almost never result in incarceration from criminal to civil status, as recommended in the 2009 Report of the National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.

Participants in the Criminal Justice System Must Re-Evaluate Its Fairness, Efficiency and Cost: At times I reflect on my long career promoting equal justice for poor persons charged with crime and feel that I have been involved, too often unsuccessfully, in a futile fiscal arms race in which costs constantly rise in every part of the criminal justice system, and yet the goal of equal justice suffers. U. S. Attorney General Eric Holder has identified the indigent defense crisis as requiring the involvement not only of the federal, state and local governments, but also of service providers, bar associations and judges. Holder has also stated that additional funding may not always be the answer; that finding smarter and cheaper ways than incarceration to respond to crime should be a priority as well. I would add that streamlining the criminal discovery process and diverting many more cases away from the criminal justice system entirely would increase justice and decrease costs as well.

It is time for a critical and comprehensive reexamination of every component of our criminal justice system. Increasingly, the unchecked growth of prosecutable crimes, the injustices of mandatory sentencing schemes and excessive prosecutorial sentencing discretion, and our inhumane, costly and ineffective addiction to incarceration have drawn fire from informed observers across the political spectrum. For too long, our political process has catered to mindless slogans such as "you can't put a price on public safety", rather than applying intelligence and restraint in the exercise of government power at public expense. The creation of a White House Commission on the Fair Administration of Justice for the Indigent Accused and the ABA-endorsed national Center for Indigent Defense Services, with participation from participants in and students of the criminal justice system, can help make our criminal justice systems more fair, more equal, and more efficient. Let us establish as our national goal the forfeiture by the United States of America of our embarrassing title as the undisputed world leader of incarceration. Now *that* would be cause for celebration.

Global Perspective: With the adoption by the United Nations General Assembly in December, 2012 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,* and the convening of the first International Conference on Criminal Legal Aid Systems in Beijing, China, also in December, it becomes ever more apparent that the governments of virtually all developed or developing countries are seeking to expand the rule of law and the protection of individuals against unlawful government intrusion. The United States is no longer a pioneer, but a partner in this effort. Every country can learn from the experience of others, just as American states learn from each other's experiences. That the United States was constructively involved in each of the watershed events described above is a good beginning for our active and appropriately humble involvement in the continued development of international rule of law and right to counsel standards.

Defender Perspective: In laying out my critical assessment of the right to counsel at fifty, I could fairly be accused of ignoring many signs of progress, and much organizational activity at local, state and national levels. Many dedicated and highly capable public servants are providing high quality representation in their local jurisdictions, as I have witnessed at first hand during my two years in New York. National organizations of serious purpose and keen determination such as the American Council of Chief Defenders, the ABA Standing Committee on Legal Aid and Indigent Defendants, the American Civil Liberties Union, the Constitution Project, the Sixth Amendment Center, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers, among others, are active and purposeful. Gideon's Army is marching, with purpose and resolve. In Massachusetts, where the Committee for Public Counsel Services was shaken in March, 2013, by the death of its legendary chief appellate attorney Brownlow Speer, the watchword has been passed instantly along the web: "We all carry the Speer." Kentucky has been extremely well served by the creative and dedicated leaders of its Department of Public Advocacy and the Louisville-Jefferson County Public Defender Office. Ernie Lewis, Ed Monahan and Dan Goyette have fostered *esprit de corps*, first-rate training, and a quality of representation that far exceeds what one would anticipate from the seriously inadequate level of funding allocated to their offices.

But the inescapable reality is that political support for a meaningful right to counsel has been starkly lacking throughout the United States in the fifty years since the right to counsel was so proudly proclaimed by the Court in *Gideon*. We must insist that every client who is represented by a public defender or assigned private counsel receives the same quality of representation that Fred Turner provided to Clarence Earl Gideon at his retrial. Turner had experience, he had local knowledge, he had confidence, he had the time to conduct a meaningful investigation, and he knew how to formulate a defense strategy that turned the tables on the prosecution and its lead witness, and led to his client's acquittal. (The story is vividly recounted in the final chapter of *Gideon's Trumpet*).

Until we can say, in each of our programs, that every client can and does receive this level of representation, neither our clients nor our Constitution will have been served, and our task will remain unfinished.

II. The *Gideon* Decision: Constitutional Mandate or Empty Promise? Does the 50th Anniversary of the U.S. Supreme Court Decision Deserve a Celebration?

These questions that introduced the *Gideon* anniversary program on June 19, 2013 at this convention of the Kentucky Bar Association remind me of the question asked by Attorney General Eric Holder of Supreme Court Justice Elena Kagan at the Department of Justice's commemoration of the anniversary several months ago. What kind of defense does *Gideon* require, asked Holder: the proverbial Cadillac, or a Chevy Nova? Justice Kagan answered that what the law requires is a lawyer who has the competence and the resources to investigate the case, advise the client properly, and lead a good trial effort. (See the entire program at http://www.justice.gov/atj/gideon/events.html). My own answer, not dissimilar to hers, is that *Gideon* requires representation by an attorney of sufficient experience, skill and confidence, who has the time and the resources to investigate the facts and the law, the ability to develop a coherent and credible theory of defense, and the skill to represent the defendant's interests effectively at trial and, if need be, at sentencing. In short, *Gideon* requires at least the kind of representation that Clarence Earl Gideon himself received at his second trial, as told above.

Does the anniversary of the *Gideon* decision deserve a celebration? Surely it is a high-water mark in our nation's uneven progress toward fair and equal justice; and yet the yawning gap between proclamation and performance over fifty years cautions against celebration, which would imply satisfaction. What the anniversary requires is a serious rededication to the fundamental Constitutional and societal principles that are the bedrock of the decision; it calls for our best effort to understand what has gone wrong, and our most creative, energetic effort to fix those flaws. The anniversary calls not for celebration but for renewed resolve. While it is appropriate and useful to reflect upon the history and to incorporate its lessons, our focus must be forward. Celebration is neither adequate nor appropriate when positive action is so urgently required.

In the first portion of this article I identified the unfunded federal mandate, coupled with the federal policies that have sharply increased the states' cost of providing counsel over the past fifty years, as "by far the most significant cause of our national failure." At the Department of Justice *Gideon* anniversary program on March 15, 2013, I made two specific recommendations to remedy these federal failures. First, I proposed the immediate adoption of the American Bar Association Resolution 104A, passed by the ABA House of Delegates in February, 2013, as follows:

> **RESOLVED, That the American Bar Association urges Congress to establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their Constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings, and to appropriate sufficient funds for the Center to successfully carry out its mission.**

Second, I made a suggestion that does not require Congressional action. I proposed that a national commission be established to spur renewed federal interest in and action to remedy the well-known deficiencies in the provision of counsel to people who enjoy a legal right to effective representation, but are unable to purchase it. On April 4, 2013, fellow *Gideon* anniversary speakers Sue Bell Cobb, Bryan Stevenson, Walter Mondale and I formally proposed the creation of a **White House Commission on the Fair Administration of Justice for the Indigent Accused**. The goal of this Commission is to kindle bipartisan federal support for the right to counsel – support that has been too often absent during the half-century since the *Gideon* decision became the law of the land. State and local indigent defense leaders, who bear the crushing, never-ending burden of seeking adequate state or local funding to make courtroom reality comply with Constitutional requirements, are crying out for an end to this neglect. Thus it no surprise that as of this date, letters of support for the White House Commission have been submitted to the Attorney General by indigent defense leaders and supporters in at least 46 states, the District of Columbia, and two Territories. The White House Commission, assuming that it is adequately staffed and supported and that its membership is composed of experienced, creative and highly respected persons as we have recommended, should lead the way to the first significant federal political support for the right to counsel in decades. Specifically and most importantly, it should lead to the adoption by Congress of the ABA proposal for the independent national Center for Indigent Defense Services.

And here is where this Bar Association can take a stand and make a difference. In chapter 10 of *Gideon's Trumpet*, Anthony Lewis recounts the inspiring story about how the Florida Attorney General's request to other states for *amicus curiae* support became a rallying cry against Florida's effort to deny counsel to Clarence Earl Gideon. Then-Minnesota Attorney General Walter Mondale led this effort. In the end twenty-three states, including the State of Kentucky, supported Mr. Gideon's right to the assistance of counsel, and only two states supported Florida.

Now, in 2013, it is Kentucky's time to lead. I propose that this Bar Association, which has done so much to preserve and protect Constitutional rights, (1) endorse the ABA Resolution 104A; (2) urge

your elected federal officials to support it; **and** (3) communicate to the other 49 state Bar Associations your request that they join with your Association in endorsing the ABA Resolution and advocating for its enactment. The creation of a Center for Indigent Defense Services is in my view essential, if the right to counsel in our state and local courts is to thrive and be meaningful over the next half-century and beyond. It is essential, if the proud words pronounced by the Court in the *Gideon* case are not to be besmirched. It is essential, if our adherence to fundamental Constitutional values is to be honored. The combined influence of the ABA and all 50 State Bar Associations augmented by major City Bar Associations can bring to fruition a proposal that should logically have followed hard upon the decision in *Gideon*, and that is vitally needed if the dream of that landmark case is not to wither and die.

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July 2, 2013