

The Constitutional Right to Effective Legal Counsel In Criminal Cases©

By
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The precious right to have an attorney represent you is one of the cornerstones of our society. This right is so precious that the founder of our nation gave special significance to the legal profession in the U.S. Constitution. In fact, the U.S. Constitution only mentions two professions, journalist and lawyers. The Bill of Rights, without equivocation, asserts that government can not make any law which abridges the freedom of the press. Just as unequivocally the Bill of Rights asserts that any one accused of a crime must be given the assistance of an attorney to help defend against the government's charges.

The right to have an attorney is not only found in our federal constitution, but it is a right which twelve of the constitutions of the original thirteen colonies asserted as well. Despite the fact that this basic right has been one of the foundations upon which individual liberties have been based since the founding of our nation, it has taken Georgia over 205 to enact legislation which will ensure that this right is equally available to everyone. For the first time in its history, Georgia has created a means by which the capricious nature of the right to counsel will not be thwarted by those persons who place fear, convenience, cost, or political gain ahead of an individual's constitutional right of the assistance of an attorney.¹ The Georgia Indigent Defense Act of 2003 created a state wide public defender system with the mission

. . . to ensure, independently of political considerations or private interests, that each client whose cause has been entrusted to a circuit public defender receives zealous, adequate, effective, timely, and ethical legal representation, consistent with the guarantees of the Constitution of the State of Georgia, the Constitution of the United States and the mandates of the Georgia Indigent Defense Act of 2003; to provide all such legal services in a cost efficient manner; and to conduct that representation in such a way that the criminal justice system operates effectively to achieve justice.

The inclusion of the right to counsel in twelve out of thirteen of the original colonies was not unexpected. One of the many grievances which gave rise the Declaration of Independence was that the king's government was "depriving us, in many instances, of the benefits of trial by jury." The recognized need to have a lawyer to help defend against the awesome power of the state is indeed as old as this nation itself.

In light of the seminal foundation of the right to counsel, it is remarkable that it has taken many years for the right to achieve institutional permanence among the states of the Union. Even though by the turn of the 20th century, almost all states had some provision in their state constitutions which recognized the right to counsel, the states were not uniform or, in many instances, diligent, in enforcing that right. In fact, the United States Supreme Court did not begin to apply the federal constitutional guarantee until the mid-nineteen thirties. In the case of *Powell v. Alabama*, the famous *Scottsboro Case*, the convictions of several young black youths were reversed because the State of Alabama failed to ensure that they were provided with adequate legal counsel. Six years later, in 1938, the Supreme Court in *Johnson v. Zerbst* ruled that there would be no federal trial held without counsel being provided to poor defendants who could not hire their own attorney. The Court wrote

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has sometimes no skill in the science of law. He is incapable of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. He requires the hand of counsel at every step of the proceedings against him. If that be true of intelligence, how much more true it is of the ignorant or illiterate, or those of feeble intellect.

However, this right of counsel did not become mandatory on the "several states" until 1963! In the case of *Gideon v Wainwright*, the Supreme Court final decided that the U.S. Constitutional right of assistance of counsel was applicable to the states pursuant to the provisions of the

Fourteenth Amendment's due process clause. Justice Black, a former U.S. Senator from Alabama, wrote the majority opinion for the Court. He said

[i]n 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. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Similarly, there are a few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.

At that time, Florida, like many other states, only provided counsel for indigent defendants in capital cases. However, Clarence Gideon had some rather unusual supporters in his appeal to the United States Supreme Court. Eugene Cook, then the Attorney General for the State of Georgia, along with the Attorneys General from 21 other states, filed *amici curia* briefs supporting Clarence Gideon's assertion that he was constitutionally entitled to an appointed attorney. Attorney General Cook, as a representative of the State of Georgia, recognized that in order for Georgia's criminal justice system to work, everyone "poor and rich alike" must have the benefit of legal counsel when charged with a crime. The Supreme Court of the United States also agreed with Clarence Gideon. Justice Hugo Black, writing for the Court, held that the appointment of counsel for an indigent criminal defendant is a "fundamental right, essential to a fair trial."²

The issue of a poor person's right to legal counsel was one of the subjects at the meeting of the State Bar of Georgia's Board of Governors held in Columbus, Georgia, in November, 1964. At

that meeting, the Board of Governors created a “Special Committee on Assistance to Indigent Criminal Defendants.” The Board gave the Committee instructions to study the feasibility of establishing a statewide system to provide adequate defense services to indigent persons accused of crimes. Representing the lawyers in the state, the State Bar began what would become a twenty-five year struggle to apply Clarence Gideon’s “fundamental right” to indigent persons in Georgia. The Board also asked the Special Committee to draft proposed legislation to provide a statewide indigent defense system. The Board later submitted the proposed legislation to the full State Bar membership for consideration. The membership approved the Special Committee’s proposal.³

The Special Committee on Assistance to Indigent Criminal Defendants first submitted its feasibility report to the Board of Governors at the State Bar’s annual meeting in June, 1965, in Savannah, Georgia. Along with this report, the Committee submitted a draft of proposed legislation entitled “The Defense of Indigents Act.” In large part, this proposed legislation was based on the “Model Indigent Defense Act” proposed by the American Law Institute. For more than twenty years this proposed legislation would be the basis of argument, discussion and compromise among members of the State Bar, the judiciary, and members of the General Assembly. With foresight in 1965, the Board of Governors of the State Bar of Georgia adopted a resolution approving the “Defense of Indigents Act” as a goal and urged its enactment by the members of the Georgia General Assembly.⁴

The “Defense of Indigents Act” failed to pass during the 1966 session of the General Assembly. This was to be the first of many defeats for legislation supported by the State Bar aiming to create a statewide indigent defense system. However, in June, 1966, the United States Supreme Court again entered the picture when it issued its decision in Miranda v. Arizona. The majority ruled that

prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence

against him, and that he has a right to the presence of any attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning.⁵

In order to fully apprise a person interrogated of the extent of his rights under the system, it is necessary to warn him not only of the right to consult with an attorney, **but also that, if indigent, a lawyer will be appointed to represent him.**⁶

The State Bar's Board of Governors met at St. Simon's Island, Georgia on August 26, 1966, and discussed the "Defense of Indigents Act" in light of the Miranda decision. The Board unanimously voted to recommend, again, that the Georgia General Assembly enact the bill. The Executive Council of the Younger Lawyers Section of the State Bar also met at that time and enthusiastically endorsed the "Defense of Indigents Act."⁷

On January 3, 2005, circuit public defenders from all over Georgia stepped into courtrooms across our state and launched a new era in the criminal justice system. Pursuant to the Indigent Defense Act of 2003,⁸ forty-two circuit public defender offices assumed responsibility for providing indigent defense legal services in 152 counties.⁹ The work of these men and women represent Georgia's commitment to the constitutional guarantee that all criminally accused people will have the right to professional and effective representation regardless of their economic or social status.¹⁰ The success of this new program is due, in large part, to the support it has received from the Association of County Commissioners' leadership and staff and from county commissioners across Georgia.

In addition to the responsibilities being assumed by the circuit public defender offices, The Georgia Public Defender Standards Council, on January 1, 2005 also assumed responsibility for providing legal counsel in conflict of interest cases in superior courts and juvenile delinquency

proceedings. These are cases which might not be handled by the circuit public defender office because of a legal conflict, i.e. multiple defendants, differing defenses between co-defendants, etc. The Standards Council has adopted a system for the appointment of defense counsel in those cases. When a conflict case is identified, either the conflict case manager or the presiding judge will appoint an appropriately trained and experienced attorney from an approved list of attorneys for that particular jurisdiction. This “conflict public defender” will be required to keep track of time and expenditures on a regular basis and will be paid by the Standards Council at a rate of \$45 for out of court work and \$60 an hour for in court work. There will be no costs to the individual counties for services provided by these conflict public defenders.

Although the Georgia Indigent Defense Act of 2003, as amended, creates a new State funded system for providing representation of indigent defendants in criminal cases in superior and juvenile courts, that system is estimated to cover only about one-half of the overall cost of indigent defense. Because the obligation of providing legal representation to indigent defendants in criminal cases is a constitutional obligation under both the United States and Georgia Constitutions, a county’s obligation to assist in funding this representation remains and the obligation can be enforced by the courts.

The *Final Report of the Chief Justice’s Commission on Indigent Defense*, herein “*Commission Report*”, describes in detail the issues concerning the legal representation of indigent defendants in criminal cases. This discussion is based in part on that report.

The United States Supreme Court has interpreted the Sixth Amendment to the United States Constitution to require the appointment of counsel for indigent defendants in criminal cases.¹¹ This right applies in all criminal cases in which there is the possibility of incarceration.¹²

After an exhaustive examination of the Georgia indigent defense system, the *Commission Report* concluded that this constitutional right is not being provided in Georgia. In response to this conclusion the Georgia General Assembly at its 2003 Session enacted and the Governor approved the Georgia Indigent Defense Act of 2003. At the 2004 Session the General Assembly funded the state positions and costs authorized by the Act, and at a special session in 2004 the General Assembly amended the Act and enacted court fees and fine surcharges to fund the appropriation. These actions were also approved by the Governor. As a result of these actions a state funded indigent defense system is now in operation. Because the staffing provided is limited and the scope of the representation restricted to superior and delinquency proceedings in juvenile courts, this system will address only about one-half of the overall need.

The Commission Report also contained the following finding:

Litigation designed to bring indigent criminal defense in various county systems into compliance with appropriate constitutional and legal standards has already been brought and, in some cases, yielded piecemeal reform by consent decree. Further litigation is being contemplated and likely will occur. Thorough, carefully considered reform of the Georgia system by the appropriate legislative and executive policy makers is far preferable to reform by litigation in the state and federal courts.

The litigation that has occurred is outlined in the *Commission Report* and that portion of the report is excerpted and attached to this memo as an attachment. In addition litigation in the Cordele and Augusta Judicial Circuits indicates that counties that do not provide financial support to the state funded circuit public defender office will be subject to court suit.

Much work has been done and much work remains ahead of us. However, the energy and excitement about the new public defender system remains high. In the coming year, every public defender will be required to undergo a rigorous and demanding training schedule. The Georgia Public Defender Standards Council requires that every public defender successfully complete a directed two-year training curriculum prior to being certified as a professional public defender.

Preparation is under way for the first state-wide public defender training program to be held during the third week of January. It is anticipated that there will be over three hundred new public defenders participating in this mandatory training.

It is the goal of the Georgia Public Defender Standards Council to establish a professional cadre of public defenders throughout our state. In addition to the mandated two year directed training curriculum, the Council has developed an "Honors Program" under the leadership of Deputy Director Gary Parker and Training Director Jon Rapping. The Honors Program is a three-year program designed to recruit and train new lawyers and recent law school graduates to be the best public defenders nation-wide. All participants in the GPD Honors Program will have demonstrated a strong commitment to providing the best possible representation to indigent defendants throughout the state of Georgia. This program will feature intensive and on-going training by some of the best attorneys throughout Georgia and the country. At the end of this three-year program participants will be top candidates for placement in any public defender office throughout the state of Georgia, and will be highly qualified to work at any public defender office at the state or federal level nationwide.

Each fall a new class will begin the GPD Honors program with the inaugural class beginning in 2005. The class will receive three weeks of intensive training in Atlanta before being placed in public defender offices throughout Georgia. Participants will continue to meet as a class for continued training at various locations across the state for approximately four weekends a year. In addition all participants will receive additional training through their attendance at an annual public defender conference, an annual week-long trial workshop, and semi-annual training seminars. There will be additional training programs as the need arises. Supervision will be provided through the

Circuit Defenders, supervising attorneys in a local public defender offices, and Standards Council staff.

The continued success of our statewide public defender program will depend, in large part, upon the building of this "team" of public defenders across the State of Georgia. The Circuit Public Defenders are preparing themselves to lead their assistant public defenders and staff members in one of the most daring adventures the criminal justice system in Georgia has ever seen. The Circuit Public Defenders have committed themselves to being leaders and the training sessions and the team building sessions have proven that they are up to the task.

¹ Thomas Jefferson once wrote, "A society that will trade a little liberty for a little order will lose both, and deserve neither."

² Id. at 344.

³ Bondurant, Emmet J. II, *The Challenge of Right to Counsel in Georgia*, 4,1, GEORGIA STATE BAR JOURNAL, 167 (August 1967).

⁴ Id. at 169.

⁵ Miranda v. Arizona, 384 U.S. 436 (1966).

⁶ Id., at 473.

⁷ Emmet J. Bondurant, II, *supra* at 170.

⁸ Pursuant to the Indigent Defense Act of 2003, certain single county judicial circuits were given the opportunity to apply for permission to provide indigent defense services without having a state public defender office established in those counties. Four counties, Cobb, Gwinnett, Douglas, and Houston County were granted such permission. Three counties, Clayton, Forsyth, and Cherokee, were denied permission to use an alternative indigent defense delivery system and those counties are presently in the process of organizing and staffing public defender offices. Those counties, it is anticipated, will join the state wide system in the coming months.

⁹ Under the Indigent Defense Act, the circuit public defenders are representing clients in superior courts and delinquency proceedings in juvenile courts; and in many counties, they are, by contract, representing clients in other courts.

¹⁰ The **Georgia Public Defender Standards Council** is an independent agency within the judicial branch of the state government of Georgia. The mission of the Georgia Public Defender Standards Council is *to ensure, independently of political considerations or private interests, that each client whose cause has been entrusted to a circuit public defender receives zealous, adequate, effective, timely, and ethical legal representation*, consistent with the guarantees of the Constitution of the State of Georgia, the Constitution of the United States and the mandates of the Georgia Indigent Defense Act of 2003; to provide all such legal services in a cost efficient manner; and to conduct that representation in such a way that the criminal justice system operates effectively to achieve justice.

¹¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹² *Alabama v. Shelton*, 535 U.S. 654 (2002). Article I, § 1, para. XIV of the Georgia Constitution is similar to the Sixth Amendment to the United States Constitution.