The Curious Creation, Perilous Present and Favorable Future of the Office of Indigent Legal Services

Remarks delivered at the New York State Defenders Association
44th Annual Conference, Gideon Putnam Hotel,
Saratoga Springs, New York

July 25, 2011

I. Historical Antecedents and Conflicting Passions

The history of the right to counsel in America is a story of the struggle for fundamental fairness and equal treatment for all in the operation of our criminal justice system. Before we even became a nation, the colonists thought it unfair to put reviled British soldiers on trial without counsel for the killing of civilians in the Boston Massacre, and John Adams stepped forward to conduct their defense. Yes, our nation's second President was one of our first private defenders. His intervention is evidence that the roots of the Right to Counsel are embedded in our national fiber. Unfortunately, punitiveness and individualism and racism are also components of our national character, and all contribute to the inconsistent progress we have made in achieving fairness and equality for all.

After the Revolutionary War had been won, the Sixth Amendment of the Bill of Rights in our new Constitution gave assurances that:

> "In all criminal prosecutions, the accused shall enjoy the right...
> to have the Assistance of Counsel for his defence."

That right, seemingly guaranteed to all, shared with the right to liberty itself the shame of being restricted in practice to those who were white, wealthy and privileged. This did not change for 140 years, until the Scottsboro Boys were railroaded, and an American courtroom became a farce and a mockery of Justice that laid bare the emptiness of our pretensions before the world. Justice Sutherland's passionate opinion in Powell v. Alabama 287 U.S. 45 (1932) explained the necessity of counsel to the provision of fair trials in practical language that no one could fail to understand. Powell eventually gave rise to Gideon, in 1963, and it is here that our modern history begins.

II. The Die Is Cast, in the Nation and New York

To understand the context of the rights to counsel in New York, one must look back to the years 1963, 1964 and 1965. Nineteen sixty-three, that year of halcyon beginnings, followed by Rev. Martin Luther King's I Have A Dream speech in the summer and the tragic autumn assassination of President John F. Kennedy, was the year in which the emergence of spring was greeted by the historic decision in Gideon v. Wainwright, 372 U.S. 335. By overruling Betts v. Brady, 316 U.S. 455 (1942), Gideon recognized that representation by counsel is essential to fair trials and a fair system of criminal justice.

Nineteen sixty-four saw the publication of New York Times reporter Anthony Lewis's extraordinary book, Gideon's Trumpet. In chapter thirteen, Lewis presciently stated the challenge presented by that decision to the nation:

> It will be an enormous social challenge 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 the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.

By nineteen sixty-five, implementation of the Gideon decision had taken almost as many shapes as there were states. In Florida, elected public defenders were established in each judicial district. In Massachusetts, a statewide public defender office that had been created in 1960 quickly became overwhelmed with cases, assigned counsel defense was under the thumb of the judges, and serious statutory reform was not accomplished until the end of 1983. In New York, County Law Article 18-B was enacted with high hopes, but without adequate understanding of the enormous costs it would impose on every county, the poor as well as the rich. This was a failure to recognize the reality that effective lawyering is expensive. A second failure was the inability to see that, structurally, you must have a single statewide entity if you are serious about providing a consistently high quality of representation through the the state.

One of the architects of the Article 18-B legislation, Michael Whiteman, former counsel to Governor Rockefeller, expressed his disappointment at a public hearing in Albany in 2005:

> We had great faith and hope that the process we envisioned would breathe life into the guarantee of the right to counsel, that through our efforts, New York would be a vanguard state enforcing the rights of poor people. We sought to create a model for the nation that would provide the independence of defense lawyers and zealous representation of clients necessary to a fair criminal justice system. That was a long time ago. In the interim, New York State has neglected the public defense system that was created in 1965....We now have an outdated system on the verge of collapse.

III. The Kaye Commission Report (2006)

In June, 2006, the Commission on the Future of Indigent Defense Services, better known as the Kaye Commission, issued its Final Report concluding that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." The Commission's scathing assessment of New York's dysfunctional indigent defense structure drew no dissent and has never been rebutted.

IV. The Curious Creation of 2010

A straightforward response to the Kaye Commission would have been to enact a statute to effectuate its recommendation for an independent, statewide and state funded Indigent Defense Commission. But New York has not yet found the political will to do that. The first public defense commission proposal, under former Governor Spitzer, was doomed by its inclusion in and dependence upon the Executive Branch, in violation of the first and most fundamental of the American Bar Association's Ten Principles of A Public Defense Delivery System.

Governor Paterson's proposal, as rigorously negotiated and amended before its enactment in June, 2010, can be likened to a kaleidoscope, whose true colors and meaning change as successive viewers assess it from their own perspectives. To take a few specific examples:

(1) Does the Director have unfettered power to appoint employees, as the language of Executive Law section 832(2)(d) appears to say; or does the provision in section 832(1) "that administrative matters of general application within the executive department shall also be applicable to [the] office" give the Governor authority to review that appointment in any fashion?

(2) Do the Office and Board have independent and unreviewable authority to distribute funds to counties to improve the quality of representation, as sections 832(3)(f) and 833(7)(c) appear to say - or do the fiscal responsibilities of the Executive Branch and/or the State Comptroller require the Office and Board to comply with extensive procedural requirements before such funds may be disbursed?

(3) What was the intent and what is the effect of the provision in the State Finance Law section 98-b(3)(b) and (c) that guarantees New York City $40,000,000 per year, while annually diminishing the amount of funding which each of the state's 57 other counties may rely upon until 2015 and thereafter, when they can rely upon the number zero?

Each of these issues involves both persuasion as to statutory interpretation and the garnering of political support to enable actions consistent with our interpretation.

V. Dramatically Changed Circumstances and the Perilous Present

The thirteen months since the ILS legislation was enacted have witnessed several tectonic shifts in our political, fiscal and judicial landscapes.

* The Governor who proposed and signed this legislation is no longer in office. His successor, Governor Cuomo, was elected on a platform of streamlining and downsizing state government - a reflection of harsh state budget realities and the imperative of decisive action to restore fiscal stability. The combination of these factors - the absence of personal investment and the primacy of cutting spending - mark two momentous shifts from what might have been foreseen last summer as to the strength of gubernatorial support for our development.

* The Senate Democratic majority which championed this legislation is now the Senate minority. The new Republican majority conducted a serious and sustained effort to undo the enactment and abolish the office - and succeeded in blocking half the office's proposed operations funding and a critical $6 million increase in funding to counties.

* Recently we saw the enactment of a property tax cap, binding upon counties, which was not accompanied by any relief from state mandates. This puts even more fiscal pressure on county leaders, and makes them even more wary of state initiatives. One county executive stated earlier this year that a tax cap without mandate relief would place counties in an impossible fiscal situation - and that is exactly what happened.

To these four major changes, not of our making, I would add a fifth, that is:
Chief Judge and Chair of the ILS Board Jonathan Lippman's Law Day speech,
in which he announced that the Board's top priority was to end the unlawful absence of counsel at a criminal defendant's first court appearance - and to do it, statewide, within a year.
I supported (and contributed to) that speech, for all the reasons I mentioned in the New York Law Journal Q & A last month: 1) it is the law, both constitutional and statutory; 2) it is essential to the early development of an effective attorney-client relationship; 3) it is important for prompt investigation and discovery; 4) it reduces the risk of a deprivation of liberty before trial; and 5) it is what anyone of means would purchase. In sum, the absence of counsel at arraignment is a blatant and unacceptable violation of equal justice. I hasten to add that the "appearance" of counsel must mean counsel's active physical presence and participation -- neither a telephonic nor a video pseudo-presence will do, nor will a physically present wallflower.

VI. Given the Curious Creation and the Perilous Present, Why Do I Forecast A Favorable Future?

First, because we have a vision. That vision, shared alike by the Office and the Board, is nothing less than the independent, state-funded Indigent Defense Commission proposed by the Kaye Commission five years ago. I do not mean to suggest that there is unanimity about the exact structure of that future agency. But I can assure you that the right to counsel for poor people throughout New York State cannot be achieved without the creation of an agency whose responsibility is to ensure that every criminal defendant and every parent in Family Court is represented by a qualified, trained, and supervised attorney, whose caseload permits him or her to provide zealous, high quality representation.

Second, because we have a strategy. That strategy is to solidify support by those who agree with our goals; to gain commitments of support from those who have not yet had the chance to contribute; and to persuade those who may remain dubious. That is why we are accepting every invitation, traveling any distance, reaching out to all interested partners. It is why we have requested and received a meeting with the Governor's Counsel and the Assembly Speaker's Chief of Staff. It is why we are communicating regularly with NYSAC, our indispensable partner. It is why we are insisting that county leaders communicate with their Chief Defenders concerning their allocations of state funding.

Third, because we are absolutely determined to succeed, and because our cause is just. Let me give you two examples to try and illustrate what I mean. One occurred to our west and recently; the other to our east and over decades.

To our west, in the county of Chautauqua, a citizen legislator, Dr. Rudy Mueller, championed a movement to provide counsel at arraignment for defendants in the Jamestown City Court. He was motivated by the unnecessary loss of liberty suffered by residents following their arrest and arraignment without counsel. He secured allies whose motivations were more in the nature of cost savings. But what is remarkable is that his proposal was put into effect by the county legislature, well before and independently of the Chief Judge's speech and the ILS initiative.

To the east, in Massachusetts, there had existed a statewide public defender agency since 1960, three years before Gideon. Yet, by 1973, that agency - the Massachusetts Defenders Committee - was in disarray, saddled by tired leadership and burgeoning caseloads following the expansion of the right to counsel in misdemeanor cases. Two consecutive articles in The

New Yorker magazine in April, 1973 chronicle the moment of change from an overwhelmed public defender office to one that was vibrant and client-centered. Still, private counsel assignments were under the thumb of local judges in every county. It took a report commissioned by the Chief Justice of the Supreme Judicial Court and authored by Justice Herbert Wilkins to establish that judges should play no role in the oversight of assigned private counsel performance or billing, and that an independent statewide agency should be created to oversee and assure the quality of all publicly funded mandated representation. That agency, the Committee for Public Counsel Services (CPCS) began operations in 1984 and today stands as a model for other states to follow.

Let me close with a specific message for the Chief Defenders:

We are going to pull this off. And each of you is absolutely essential to our success. During my first months on the job, I have been pleasantly surprised by the openness of most county officials to our communications about improving the quality of representation. I have been equally impressed by the large number of experienced public defender, conflict defender and assigned counsel leaders who have asserted themselves effectively within their county's political system. How you have done it, I do not know. But what I do know is that without your consistent support and your advocacy with county officials, state Assemblypeople and Senators, our chance for success drops like a rock.

Yesterday, New York celebrated its first day of marriage equality. I believe that if New York can become the sixth state to achieve marriage equality, it can certainly become approximately the thirtieth state to achieve statewide compliance with Gideon. Working together, we can and we will accomplish this goal.