

STATEMENT OF RHODA B. BILLINGS

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SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Hearing on

INDIGENT REPRESENTATION: A GROWING NATIONAL CRISIS

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STATEMENT BEFORE THE SUBCOMMITTEE ON CRIME,

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“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The Declaration of Independence

“We, the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity do ordain and establish this Constitution for the United States of America.” Constitution of the United States of America, Preamble

“No person shall . . . be deprives of life, liberty, or property, without due process of law.” Constitution of the United States of America, Amendment V.

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” Constitution of the United States of America, Amendment VI.

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” Constitution of the United States of America, Amendment XIV.

An often-touted founding principle of our nation is that we are a free people, that we cherish liberty, for ourselves and others.

To ensure that liberty, we established an adversarial system of criminal justice in which accused persons are presumed to be innocent and the government cannot deprive a person of liberty unless an unbiased jury of the person’s peers is convinced by the evidence, beyond a reasonable doubt, that the accused person in fact is guilty.

To make the adversarial system work, the accused has a Federal Constitutional right “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 defense”.

Why, then, does the United States, the “Land of the Free”, incarcerate more people than any other country in the world?¹ Why were more than 2.3 million (one in one hundred) adult Americans in our prisons and jails in 2008?² Why, as of June 2006, did one of every six Americans over age 16 have a criminal record?³

Obviously, the answers are many and complicated, not the least of which is the fact that in recent decades we, as a society, have criminalized more and more behaviors and imposed mandatory sentences for many offenses, causing inmates to serve longer time in prison.

But a contributing factor surely is our failure, as a nation, to make our adversarial system work as it is intended to work.

Any competition - and an adversarial system of justice is indeed a competition - produces a fair result only if the competitors compete under rules in which no one is placed at an unfair disadvantage. An adversarial justice system in which one side is represented by trained and experienced lawyers, assisted by state-paid investigators (police, sheriffs, state and federal agents) and expert witnesses and the other side has either no legal representation at all or representation that is underpaid, overworked, hampered by lack of training and support personnel, and has little or no investigative resources or access to expert witnesses, is not likely to produce a fair result.

The Report of the National Right to Counsel Committee of The Constitution Project, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel*, points

¹. *The Pew Center on the States, One in 100; Behind Bars in America 2008* 3 (2008).

². Id.

³. Id.

out how the adversarial system in many of our states fails to provide competent lawyers and the tools for lawyers necessary to make their criminal justice systems worthy of the claim that the American criminal justice system is the best in the world.

The Report cites areas of the country where criminal defendants are pressured to waive the right to counsel and plead guilty, despite a claim of innocence, in order to obtain pre-trial release so they can return to work to support themselves and their dependents; states where, even if a lawyer is appointed, investigative services are completely or nearly completely unavailable; states where a defense attorney is not appointed for days or weeks after a suspect is arrested, and innocent persons charged with crime lose their jobs as they sit in jail awaiting trial; or places where, because of backbreaking caseloads or inadequate compensation, appointed attorneys do not contact and confer with their clients until the day of trial and do little or no pretrial investigation.

Gideon v. Wainwright⁴ was decided the year I entered law school - 1963. When I graduated from law school three years later, unlike the federal government, that required lawyers to represent indigent defendants without pay, North Carolina was complying with Gideon to the extent that the state paid lawyers who were appointed to represent persons charged with serious felony offenses. However, my experience as appointed counsel was altogether too typical. As soon as I was sworn in to practice, I was put on the list for appointed counsel and assigned to my first case - a jury trial representing an elderly, indigent African-American man charged with murder. While he admitted to shooting the victim, he claimed that the shooting was in self defense. With no one else to “investigate” the case, I did what I could to locate and talk with

⁴372 U.S. 335 (1963).

witnesses and present my client's defense, even though the district attorney tried to intimidate me by telling me that I had violated ethical rules by talking with "his" witnesses without his permission. Fresh out of law school, I was not competent to preserve my client's rights in a jury trial. He was convicted of manslaughter and died in prison.

My husband, who also is a lawyer, often tells the story of representing a client charged with common law robbery, a felony punishable by imprisonment for up to 20 years. The judge kept insisting throughout the trial that the defendant should accept a plea offer made by the district attorney and, in fact, said that if he did not accept the plea and was found guilty, the judge would impose the maximum sentence. In fact, the defendant was found guilty - of simple assault. The judge kept his word; he sentenced the defendant to the maximum, 30 days in jail. Of course, at that time judges also set the attorney fees, and the amount was totally within the judge's discretion. After four days of trial, the judge, appearing upset that he had not been able to complete his week's court work early, set the total fee at \$75. Risking contempt, my husband replied, "Judge, you can keep your \$75.00. I didn't try this case for the money."

In many states, little has changed over the last 40- plus years. There are no standards that a lawyer must meet to be eligible for appointment to represent persons charged with serious crimes. Little or no investigative assistance is available. Judges control compensation for appointed defense counsel and thus, if they are so inclined, may attempt to use that power to exercise control over the attorney.

But the Report also reveals some encouraging trends. A number of states have undertaken to provide state funding for criminal defense, instead of relying on inconsistent patterns of financial support from the counties, although in many of those states, the pay is

woefully inadequate. In addition, several states have either established or are in the process of establishing boards or commissions, like the ones recommended in the Report, with the responsibility for overseeing the delivery of legal assistance to indigent criminal defendants.

Fortunately, since 1966 and my first appearance in court, my state of North Carolina has made significant changes. It is one of those states with an Indigent Defense Services Commission, and I have served on that Commission for the past eight years. We feel that we have made great strides in fulfilling the promise of the Sixth Amendment Right to Counsel as interpreted in Gideon and Argensinger v. Hamlin⁵, although we know we still have a long way to go.

Since their creation in 2001, the Office of Indigent Defense Services and the Indigent Defense Services Commission have:

- 1) Expanded the number of counties with Public Defender Offices.
- 2) Established uniform hourly rates across the state for payment of private assigned counsel.
- 3) Established guidelines for eligibility for appointment to represent indigent criminal defendants and juveniles.
- 4) In conjunction with the School of Government, provided numerous affordable CLE programs for attorneys in Public Defender offices and private assigned counsel.
- 5) Established listservs to provide networking for Public Defenders and private assigned counsel and on which training materials, performance guidelines, trial manuals, and other materials are available.
- 6) Entered into contracts for private counsel to represent indigent defendants in situations where establishment of a Public Defender's Office would not be cost effective.
- 7) Obtained funding for investigators in Public Defender offices and for private assigned

⁵ 407 U.S. 25 (1972) (extended the right to counsel to any case in which a defendant is sentenced to confinement).

counsel when needed.

- 8) Obtained funding for expert witness availability in those cases, such as insanity defenses or capital sentencing hearings, when expert testimony is necessary.
- 9) Assumed responsibility for and expanded the staff of the Capital Defender, who now has the responsibility for representing or appointing and providing assistance to lawyers for persons accused of capital murder.
- 10) Assumed responsibility for and expanded the staff of the Appellate Defender.
- 11) Established the Office of Juvenile Defender to investigate and assist in meeting the needs of the juvenile justice system, including promulgation of standards of practice, training, and investigation of the accuracy of dispositional orders. Creation of this position was prompted by the 2003 report prepared by the ABA Juvenile Justice Section and the Southern Juvenile Justice Center following an assessment of access to counsel and quality of representation in delinquency proceedings in North Carolina, supported in part by the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs of the U.S. Department of Justice.
- 12) Conducted numerous studies on matters that affect the cost or effectiveness of programs of indigent defense, providing the Commission with information upon which to base decisions, evaluate program effectiveness, and advocate to the legislature or other parts of the criminal justice system for change. Among those are (a) a study of minor offenses for which imprisonment is possible but never imposed, to be used as a basis for urging decriminalization of those offenses and significant cost savings; and (b) a capital case study showing how much money is spent unnecessarily when prosecutors charge as capital homicide cases that eventually are disposed of at a much lower level.

The National Right to Counsel Committee's Report encourages all states to provide state funding for indigent criminal defense and to create a board or commission to oversee all components of indigent defense services. For states that have not yet established such a board or commission, the Report recommends a task force or study commission to gather information and make recommendations for change. This is likely to be a hard sell to legislatures in these difficult economic times. However, our experience tells us that, not only does a well-run state-wide system increase the effectiveness of representation and provide consistent quality across

the state, a state-wide system is no more expensive than county funded systems and, in fact, can effect cost savings that are not possible when the delivery of defense services is fragmented. Of course, the overall system will cost more if the state is paying inadequate compensation to defense attorneys and the board or commission can convince the legislature to appropriate a reasonable amount for those services.

We think the federal government can help the states to fulfill their Constitution responsibility to indigent criminal defendants in a number of ways, and Recommendations 12 and 13 in the Report speak to the federal government's possible role.

Recommendation 12 asks the federal government to establish a National Center for Defense Services to assist state governments to provide quality legal representation to indigent criminal defendants. As the Commentary to that Recommendation states, "The Center's mission would be to strengthen the services of publicly funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data."

Recommendation 13 requests that, until a National Center is established, the Department of Justice provide financial assistance through grants or other programs to conduct research and to provide funding in support of indigent defense. As I mentioned earlier, the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs of the U.S. Department of Justice provided funding for a study by the American Bar Association and the Southern Juvenile Justice Center of access to counsel and quality of representation in delinquency proceedings in a number of states, including North Carolina. The results of that study was the impetus for the North Carolina General Assembly to provide funding for the Office of Juvenile Defender within the

Office of Indigent Services. This is the kind of seed money that can move states forward in recognizing a need and meeting their obligations to their most vulnerable citizens.

In the past couple of decades we have had to face the reality that in these United States, we do, in fact, convict and even execute innocent people. The exonerations that occurred through DNA analysis were not cases in which the defendants did not have lawyers. They usually involved charges of rape or murder - the types of case in which all jurisdictions provide counsel. But if, even with the assistance of counsel for the defense, the system of justice fails to protect the innocent, how much more likely is it that an innocent person facing the power of the state without counsel or with counsel who is poorly trained, distracted by an excessive caseload, unable because of the pressure of too many clients and too little time to investigate adequately, if at all, or is simply not competent, will be found guilty? The skill of a dedicated and trained defense lawyer is especially needed when the identity of the perpetrator of a crime cannot be established by DNA evidence but is dependent upon eyewitness identification, or when the defendant is faced with perjured testimony, a coerced confession, or falsified scientific evidence. Only an advocate effective in cross examination, schooled in motions practices, and a master of evidence and exclusionary rules can defend against a false verdict of guilty. And because, in the absence of DNA evidence, there is no scientific fact that can show that a witness who makes an eyewitness identification is mistaken, if the jury accepts the identification, an appellate court has no basis for overturning the conviction, even if the evidence causes members of the court to have doubts.

Only if we as a society are willing to make a commitment to providing at least as much assistance to exoneration of the innocent as we are to conviction of the guilty can we truly claim to be “one nation, under God, with liberty and justice for all”.

Respectfully submitted,

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