The Expansion of Constitutional Right to Counsel by the US Supreme Court – Who Pays?

January 31, 2010 by Terry Lenamon's Death Penalty Blog

According to the Sixth Amendment of the United States Constitution, *"[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."* What isn't provided in this constitutional mandate is how the defense lawyer's fees and expenses are to be paid. The result of this financial myopia is a deepening financial crisis in Florida and across the country today.

Applying the Constitutional Right to Counsel

Over time, the constitutional right to counsel provision has been reviewed and applied by both legislatures and courts – always with a resulting expansion of its application. For instance, a citizen's right to legal representation in federal proceedings was initially set by statute and then approved by the U.S. Supreme Court in *Johnson v. Zerbst,* 304 U.S. 658 (1938), when our country was still suffering through the Great Depression. State courts were a different story, however.

Until the early twentieth century, those who could not afford to pay for their own criminal defense attorneys in state matters were dependent upon the local bar's pro bono efforts. Individual attorneys made their own personal decisions on their commitments of time and expense in representing the poor. Legal Aid? Public Defender? These terms were not known in this country before World War II (unless you looked at a select few metropolises like New York City, where a legal aid organization had been in operation since the late 1800s).

Of course, historically this dovetails with an attitude that the practice of law was a "profession" not a "business," where it was part of the profession's honor and duty to undertake pro bono cases in their local area. Today, we no longer turn a blind eye to the realities of a law practice operating as a business concern. What was at one time a stigma – that lawyers work for a profit -- is an attitude that has not stood the test of time.

Expansion of the Right to Counsel into State Courts – first, the felonies

As the highest court in the land, the U.S. Supreme Court slowly began to hear cases coming before it that dealt with these state court situations, where state statutes did not require the particular state to provide a criminal defense counsel for the defendant. While the nation was still reeling in the Great Depression, the High Court heard *Powell v. Alabama*, 287 U.S. 45 (1932) and held that states had to provide legal counsel to indigents in all state cases where capital punishment was at issue.

It took almost 30 years for the 6th Amendment to be applied to state felonies that did not involve the death penalty. With Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court found that an indigent defendant, accused of a serious crime, was constitutionally protected and entitled to a lawyer, who would be appointed and paid for by the state. With *Gideon,* the High Court had spread the shade of the 6th Amendment umbrella to cover all accused of felonies in either federal or state courts, regardless of whether or not the death penalty was at issue.

Horizontal Expansion of Right to Counsel – Particular Types of Indigent Defendants

Within a short amount of time, the U.S. Supreme Court would take review of a number of other right to counsel situations, and continue widening its application to (1) children in juvenile delinquency proceedings (*In re Gault*, 387 U.S. 1 (1967))and (2) indigent defendants facing misdemeanor charges in state courts that involved possible loss of freedom (jail time) (*Argersinger v. Hamlin*, 402 U.S. 25, (1972)).

Vertical Expansion of Right to Counsel – Stages of the Criminal Justice Process

Having defined who would be covered by the right to counsel, the High Court also considered cases that delved into the issue of when the right to counsel would start to apply in a particular case. Seeing justice as a poor person having the right to a lawyer long before he came before a judge, the U.S. Supreme Court issued a series of opinions in the mid-twentieth century that covered the indigent citizen almost from the moment that he or she first came into contact with law enforcement authorities, all the way to the point that he or she might theoretically be setting before the U.S. Supreme Court itself.

For example, the Sixth Amendment right to counsel was held to apply in:

arraignments (*Hamilton v. Alabama*, 368 U.S. 52 (1961));
appeals of right (*Douglas v. California*, 372 U.S. 353 (1963));
post-arrest interrogation (*Miranda v. Arizona*, 384 U.S. 436 (1966));
line-ups (*US v. Wade*, 388 U.S. 218 (1967)) ;
probation and parole proceedings (sometimes)(*Mempa v. Rhay,* 389 U.S. 128 (1967));
preliminary hearings (*Coleman v. Alabama*, 399 U.S. 1 (1970));
sentencing (*US v. Tucker*, 404 U.S. 443 (1972));

More Expansion – Into Quasi-Criminal Proceedings

Like kudzu in the South, the reach of the 6th Amendment right to counsel continues to grow, moving past boundaries of the past. Today, indigent defendants in a range of proceedings that are not within the criminal justice arena proper are nevertheless within constitutional mandate. For example, indigent citizens alleged to be mentally incompetent and facing commitment proceedings are entitled by law to legal counsel. Indigent parents facing the loss of their paternal rights due to allegations of child abuse or child neglect are also entitled to state-funded legal counsel. There are many more.

Show Us the Money

Awareness of the need to fund all these appointments of counsel has not gone totally unnoticed by the U.S. Supreme Court. For example, Justice Powell pointed out that "available funding" was an acute problem back in 1972, when he concurred in *Argersinger* and its expansion of the right to misdemeanor cases carrying the possibility of jail time. *Argersinger,* 407 U.S. at 59. And, the Argersinger majority did tip its hat to the money issue when it opined that lawyers be provided when only fines where at issue would "impose unpredictable, but necessarily substantial, costs on 50 quite diverse States." *Id.,* at 373.

Still, the economic realities of how lawyers are to be paid – and the expenses of litigation are to be covered – by states who are also responsible for paying the legal fees and costs of prosecuting the exact same case have not been a bull's eye topic of the United States Supreme Court. State legislatures and the federal government are left with the implementation, and things are not going well.

Aside from their personal determination to do their best for their clients, defense attorneys are constitutionally mandated to provide "effective assistance," and their failure to do so in any criminal proceeding in which counsel appears can be the basis for appellate reversal of any conviction. *Strickland v. Washington*, 466 U.S. 688 (1984). Financially, the indigent defense matter may not be profitable – it may well be a loss leader on the firm's docket – but legally and ethically, the case is not to be viewed any differently than any other case undertaken by the firm.

This is particularly difficult conundrum for Florida criminal defense attorneys who are death penalty qualified. The expansion of the right to counsel in this country has grown to stretch beyond all reason the monies available for indigent defense in this state. Some defense attorneys have faced bankruptcy, and some judges have started making involuntary appointments (ignoring the attorney's needs or desire to decline the case) in their frustration.

And no where is this financial crisis more grave than in the circumstance where an indigent defendant (sometimes suffering severe mental illness, mental retardation, or other significant handicap) is facing the possibility of death at the hands of the state for a charged capital offense. Particularly in these capital cases, the roar of injustice sounds most loudly.