by Donna Lee Elm and Richard S. Dellinger

Dismantling *Gideon*'s Legacy: Sequestration's Impact on Public Defender Services

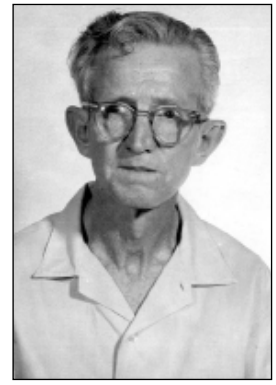
Clarence Gideon and his wife, Ruth, had a difficult time paying their rent and certainly could not afford to pay lawyers. They lived in a $6 per week hotel room in Panama City, Fla. With an 8th grade education, he worked as an electrician, splitting his free time between bars and gambling halls. Clarence frequently played nickel-ante poker to supplement his income. He had a lengthy criminal history, his life alternating between stints in jail, short-lived jobs, bar tabs, and card games.

In 1961, a neighboring pool hall was burglarized. The burglar took $65 in change, 12 beers, 12 colas, and 4 bottles of cheap wine. The eyewitness described a man similar to Clarence, wearing pants that were bulging with coins. Later that night, Clarence was arrested with a pocket full of coins. Though he protested that the coins were poker winnings, the police thought otherwise.

Clarence maintained his innocence. When asked if he was ready to proceed at trial, he said he was not—because he did not have a lawyer. Instead, Clarence asked the court to appoint counsel, citing the Sixth Amendment of the U.S. Constitution. His request was denied, and he proceeded to a speedy conviction and the maximum penalty of 5 years. While in prison, Clarence studied the law, and became convinced that he should have been appointed a lawyer. In a crude, hand-written appeal to the Supreme Court, he claimed that his Sixth Amendment rights were violated.

Clarence's case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), was accepted by the Supreme Court, which appointed Yale Law Prof. Abraham Fortas to represent him. Fortas successfully argued that defendants had a Sixth Amendment right to counsel. At his retrial, with the benefit of Florida attorney W. Fred Turner, Clarence was acquitted.[1]

As a result, Congress passed the Criminal Justice Act, 18 U.S.C. S 3006A (CJA), to create a system for indigent representation in its courts, replacing some jurisdictions' practice of appointing young, inexperienced attorneys to represent defendants pro bono. The Administrative Office of the U.S. Courts administers this federal indigent defense program, comprised of 80 federal defender organizations employing more than 3,000 professionals and serving 90 of the 94 federal districts. The representation is provided primarily through public defender programs, divided between federal public defenders (federal employees) and community defenders (nonprofit local agencies).



Their efforts are supplemented by private practitioners who accept conflict and overflow cases under a federal contract system (CJA panel).

This year marks the 50th anniversary of *Gideon v. Wainwright*. It is a time when the country should be celebrating the crucial work of its indigent defense offices. In a speech honoring the legacy of *Gideon*, Attorney General Eric Holder noted that *Gideon* "furthered the aspirations of countless lawyers and activists who, throughout history, have stood up—and spoken out—for the common humanity and basic rights of every citizen."[2] He called the federal public defender program "an example [of safeguarding due process] for all the world to see."[3] But while being honored as the acknowledged "flagship" of the U.S. courts,[4] the federal public defenders face the most serious threat yet to their cause.

Severe budget cuts are eviscerating the program. While most court entities had a 5 percent reduction this budget cycle, public defender cuts more than *doubled* that.[5] Despite headlines reporting no *discernible* impact of sequestration,[6] two federal agencies are undergoing appreciable furloughs: Department of Defense civilians have 11 furlough days,[7] and public defenders have 20 (amounting to an entire month of workdays)[8]—making the public defender program the most serious sequestration casualty in the country.[9]

The prospects do not appear any better for FY 2014: Though other agencies anticipate another 5 percent reduction for FY 2014,[10] public defenders face an additional 14 percent cut, potentially requiring layoff of 13 percent of all staff by September 2014.[11] The courts' Office of Finance and Budget predicts a loss of more than 900 public defender staff members in the next 15 months. This profoundly changes federal indigent representation.

To avoid interruption of services and delay in court proceedings, public defenders implemented agressive austerity measures.[12] Training, furniture, books, supplies, and equipment were sacrificed, and major slashing of travel, communications, supplies, experts, and benefits was implemented. Some branch offices are closing, and many are

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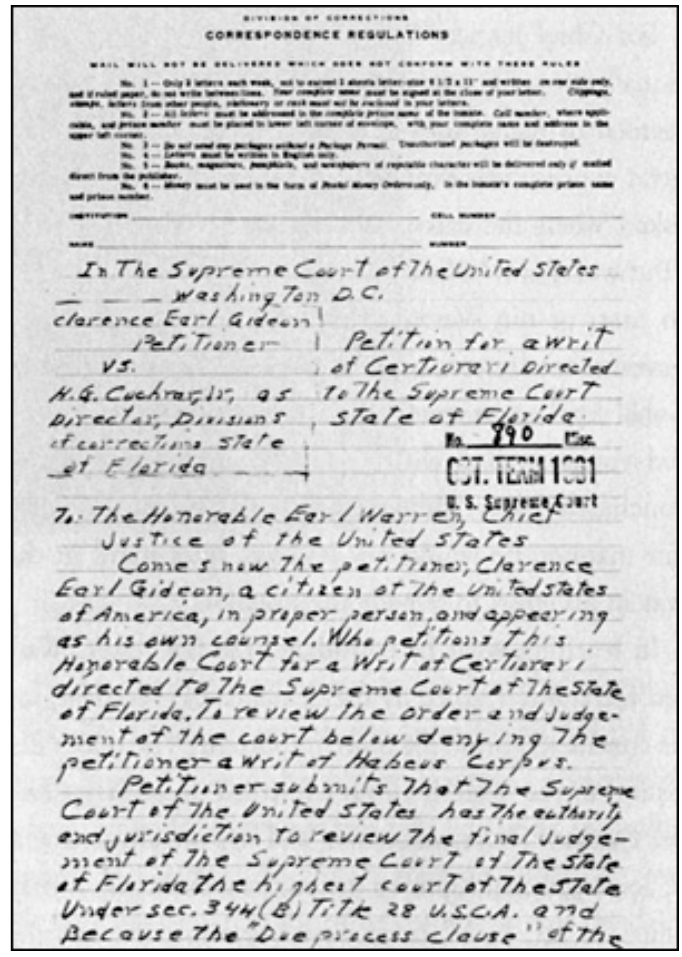
downsizing. Community defenders ceased contributions to retirement plans. If the budget problem is not addressed, important services will be eliminated, most serious being administering, training, and assisting the terribly important CJA contract counsel program. Offices also contemplate abandoning drug, veterans, and re-entry courts, as well as intern programs.

No amount of austerity, however, will permit the present program to absorb a 23 percent budget cut by this fall.[13] Public defenders traditionally played the central role in indigent defense, accepting the most-culpable defendant, taking leadership responsibilities, coordinating joint defenses, and managing discovery in multi-defendant cases; this practice could not be sustained. The offices take 60–70 percent of the cases,[14] but that proportion will start declining as public defenders are stretched to their ethical limits. In an effort to avoid across-the-board caseload cuts, many offices are targeting the types of cases that most impact their budgets. Hence, they will refuse cases that would need experts or interpreters, require extensive travel, or involve massive evidence. Thus, the Idaho public defender office just withdrew from the terrorism case of a Uzbek national,[15] the San Francisco office is declining death penalty and securities frauds appointments,[16] and the Tucson office is turning down "Operation Streamline" border immigrations cases.[17] Similarly, the Massachusetts office could only undertake the Boston Marathon bomber representation given a congressional appropriation specifically for it.[17]

Gutting public defender funding is "penny wise and pound foolish."[18] Although many agencies can cut back on services during sequestration, Sixth Amendment counsel is mandated for *every* defendant. Meanwhile, the prosecution tide has not stemmed during sequestration.[19] Because defense attorneys may not accept more clients than they can competently, ethically handle, as defender offices and workdays shrink, they necessarily must take less of this burgeoning caseload. Their overflow goes to the CJA panel at $125 per hour ($175 per hour for capital defense), whereas salaried public defenders are paid $24–$73 per hour for all cases.[20] Furthermore, defender offices benefit from efficiency of scale, employing investigators, paralegals, IT, and sometimes experts on staff, while the court pays for that separately in CJA panel cases. Nationally, the CJA panel costs the court $1.8 million *per day*;[21] but when their caseload doubles or triples (as defender offices shrink), the price of indigent defense will skyrocket well above the funds saved by cutting defender offices—undoing the whole point of sequestration.

Last March, Supreme Court Justice Breyer told the House Appropriations Committee that cutting public defender funding would "actually mean greater public expense." He added, "You need people who would present a case fairly and honestly, so that the right people are convicted." At the same time, a number of congressmen sent an urgent letter to Chief Justice Roberts asking for his intervention in salvaging the federal defenders (referred to as "one of the most cost-effective ways to comply with [*Gideon*'s] constitutional mandate").[22] These efforts resulted in a funding supplement that reduced furlough days to the present 20, helping offices in the most critical need (some had faced 40 days, and one had been slated for 60 days[23]) stave off the worst impacts of the funding crisis for this budget year. A bill to provide a substantial funding supplement for the rest of this year was recently introduced by the U.S. Judicial Conference, and the bill has the strong support of the Federal Bar Association.[24] It would provide considerable relief for the present budget year.

Nonetheless, prospects for this coming budget year (23 percent budget and 33 percent staff reductions) are simply unsustainable, and significant funding increases or redistributions are critical to keep the promise of *Gideon* alive in federal courts. Those concerned with maintaining a fair and robust justice system, who love the Rule of Law, and who simply want to lower indigent defense costs should speak out to save this valuable and cost-effective program. Attorney General Holder captured the spirit of what is at stake: "In the end, this may be the single most important legacy of *Gideon*: that it serves as a reminder of the obligation entrusted to every legal professional—not merely to serve clients or win cases, but to do justice."[25] ⊙



DIVISION OF CORRECTIONS

CORRESPONDENCE REGULATIONS

MAIL WILL NOT BE DELIVERED WHICH DOES NOT CONFORM WITH THESE RULES

In The Supreme Court of The United States
— — — Washington D.C.
Clarence Earl Gideon
Petitioner
vs.
H.G. Cochran, Jr. as
Director, Division
of corrections State
of Florida

Petition for a writ
of Certiorari directed
to The Supreme Court
State of Florida

No. 790 Misc.

OCT. TERM 1961

U. S. Supreme Court

To: The Honorable Earl Warren, Chief
Justice of the United States
Comes now the petitioner, Clarence
Earl Gideon, a citizen of the United States
of America, in proper person, and appearing
as his own counsel. Who petitions This
Honorable Court for a Writ of Certiorari
directed to The Supreme Court of The State
of Florida, To review the order and Judge-
ment of the court below denying The
petitioner a writ of Habeas Corpus.
Petitioner submits That The Supreme
Court of the United States has the authority
and jurisdiction to review the final Judge-
ment of The Supreme Court of The State
of Florida The highest court of The State
Under sec. 344(B) Title 28 U.S.C.A. and
Because the "Due process clause" of the

Endnotes

[1]The retrial's transcript is at www.jud14.flcourt.org/CourtReporting/Gideon.pdf .

[2]U.S. Courts, Appointment of Counsel, www.uscourts.gov/FederalCourts/AppointmentOfCousel.aspx.

[3]Eric Holder, Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (March 15, 2013).

[4]Letter from House of Representatives Conyers, Nadler, Scott, Watt, and Deutch to Chief Justice Roberts (March 12, 2013).

[5]Defender offices had more that 10 percent funding cuts upon sequestration. CJA contract attorneys remain 100 percent compensated, though their payments will be delayed several weeks. Virtually the entire sequestration impact fell on public defenders. Office of Defender Services Training Branch, Budget Cuts: The Devastating

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required to pay a penalty when filing Form 5500 through the DFVC Program, this penalty amount is often significantly lower than those assessed outside the program.

As with EPCRS, the DFVC Program has been revised recently. On Jan. 28, 2013, EBSA announced several updates to the program. The most significant revisions to the program are the requirement that all filings be made electronically through the ERISA Filing Acceptance System (EFAST2).

Because EFAST2 only provides the appropriate Form 5500 for a limited number of years, the revisions also specify which plan year forms and schedules must be used for a delinquent filing. If the delinquent filing is related to plan years 2008 or earlier, or in cases where the filing is for a plan year more than three years prior to the most recent plan year forms available in EFAST2, plan administrators should file using the most current plan year form available on EFAST2, but with correct plan year dates in appropriate places on Form 5500 (and with PDF attachment of correct year schedules—for certain schedules specified in the guidance). When a delinquent filing relates to 2009 or a later plan year, plan administrators must use the correct plan year form and schedules (unless, as described above, the plan year is more than three years prior to the most recent plan year forms available in EFAST2).

Given the complexity of the rules for determining the appropriate form to use, the revisions also explain that an online tool will be available to plan administrators to assist in determining which version of Form 5500 (or Form 5500-SF) to use when filing a delinquent annual report.

Along with online filing, online payment is now the preferred method of paying the appropriate penalty. The website provides a calculator for determining the amount of the penalty, and once calculated, allows the user to click through to a payment site for immediate processing. Generally, the penalty for a plan that has less than 100 participants at the beginning of the plan year and is required to file Form 5500 will be $10 per day for each day the Form 5500 is late. This penalty is capped, however, at $750 per Form 5500, or $1,500 per plan if the plan is filing late Forms 5500 for multiple plan years. For plans with 100 or more participants at the beginning of the plan year, the penalty is still $10 per day for each day the Form 5500 is late, but the cap on the penalty is raised. For these plans, the penalty will not exceed $2,000 per Form 5500 or $4,000 per plan if the plan is filing late Forms 5500 for multiple plan years.

Conclusion

These programs are, in part, an acknowledgment by the IRS and the DOL of the difficulties involved in complying with two sources of complex law. Accordingly, they provide a means of correcting failures. While compliance failures will often result in some form of financial penalty, even penalties can sometimes be avoided if a failure is not significant. Further, the penalties associated with participating in these programs will inevitably be preferable to the alternative of plan disqualification. ⊙

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Impact on Indigent Federal Criminal Defense, www.fd.org/ods-other/budget-cuts-the-devastating-impact-on-indigent-federal-criminal-defense.

[6]For example, CBS News Polls (May 1, 2013) www.cbsnews.com/8301-250_162-57582228/poll-most-say-sequester-has-not-impacted-them/.

[7]Defense Secretary Hagel lowered their original estimate of 22 days furlough to 11. Julian Barnes, *Hagel: 11 Furlough Days for DOD Civilians*, Wall Street J., May 14, 2013.

[8]The BLT: The Blog of LegalTimes, U.S. Courts Announce Sequestration Plan for Defenders, legaltimes.typepad.com/blt/2013/04/us-courts-announce-sequestration-plan-for-defenders.html (April 18, 2013).

[9]As a practical matter, many dedicated defenders and their staff have continued to work during their furlough days despite not receiving pay for the work. *See* money.cnn.com/2013/05/03/news/economy/public-defender-furlough/index.html.

[10]U.S. Courts, Federal Judiciary Braces for Broad Impact of Budget Sequestration, news.uscourts.gov/federal-judiciary-braces-broad-impact-budget-sequestration (March 12, 2013).

[11]Letter from Federal Public Defender Steven Kalar to Hon. Claudia Wilken (June 7, 2013).

[12]In the Southern District of Ohio, the public defender, Steve Nolder, eliminated his own job after cutting travel, getting rid of cell phones, stopping expert payments, and a furlough of his entire staff for 17 days. *See* now.msn.com/steve-nolder-federal-lawyer-fires-himself-to-save-other-jobs-in-his-office.

[13]*See* endnote 11, *supra*.

[14]*See* endnote 2, *supra*.

[15]*Uzbek Charged with Terrorism Gets New Lawyer*, Idaho Press-Tribune, June 19, 2013.

[16]*See* endnote 11, *supra*.

[17]The BLT: The Blog of LegalTimes, Federal Courts Ask for Emergency Funding, legaltimes.typepad.com/blt/2013/05/federal-courts-ask-for-emergency-funding.html#more (May 15, 2013).

[18]*See* endnote 4, *supra*.

[19]For instance, April 2013 filings showed a 6 percent increase over the previous month, and a 12 percent increase over the preceding April. TRAC Reports, Prosecutions for April 2013, trac.syr.edu/tracreports/bulletins/overall/monthlyapr13/fil (June 10, 2013).

[20]*See* endnote 2, *supra*.

[21]*See* endnote 10, *supra*.

[22]*See* endnote 4, *supra*.

[23]Ian Millhiser, *Public Defenders Hit up to Six Times Harder than Prosecutors by Sequester*, Think Progress, March 18, 2013.

[24]*See* endnote 3, *supra*.