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Who Pays the Price for Orleans Parish's Broken Indigent Defense System? A Summary of Investigative Findings

INTRODUCTION

Clarence Earl Gideon was a semi-literate man charged with burglary who was too poor to afford an attorney. At his trial, he asked the judge to appoint an attorney for him, and the judge refused to do so. After trial, he handwrote a petition for a writ of certiorari to the Supreme Court of the United States from his prison cell, asking that his case be heard.

Much like Clarence Earl Gideon, there are currently thousands of men and women in prisons throughout Louisiana who are picking up pens and paper to write judges, private attorneys and bar associations hoping to get an attorney for their case, hoping that their case will be heard. These people are from Orleans Parish. They are poor, they have not been convicted of any crime, and have not heard from their public defender in over 6 months. This report gives voice to those men and women as they are the ones who pay the price for our broken system.

In 1963, the United States Supreme Court answered Clarence Gideon's petition. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court ruled that the state was obligated to provide an attorney to an indigent person if it sought to take away his liberty, that lawyers were not mere trappings for the rich but an essential component of our justice system. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court held that defense counsel must be appointed in any criminal prosecution, "whether classified as petty, misdemeanor, or felony," *id.*, at 37, "that actually leads to imprisonment. And as recently as 2002, the United States Supreme Court affirmed this essential right to counsel, obligating the State of Alabama to furnish poor people with attorneys, where misdemeanants faced only the possibility of imprisonment. *Alabama v. Shelton*, 535 U.S. 654, 657 (2002).

Louisiana has struggled to fulfill the promise of *Gideon*, often saddling the poor with lawyers too encumbered to provide real representation. In 1992, the Louisiana Supreme Court addressed some of the systemic dysfunction of the justice system, holding that lawyers must be presumed ineffective if their case-loads reached certain limits – at that point 70 pending cases, and several hundred cases per year. *State v. Peart*, 621 So. 2d 780, 785 (La. 1993). When courts attempted to resolve the indigent defense crisis by appointing bankruptcy and tax lawyers, the Louisiana Supreme Court noted that trial courts were obligated to determine whether funds exist to cover the anticipated expenses, investigative and expert costs, and overhead to reimburse non-volunteer counsel. *State v. Wigley*, 624 So. 2d 425, 426 (La. 1993). As the problem continued to burgeon out of control, the Court held that prosecution must be stayed – stopped indefinitely – until funding is provided to defense counsel. *State v. Citizen*, 898 So. 2d 325 (2005). The Court in *Citizen* further noted that it was the Legislature's responsibility to fund indigent defense, that it had previously failed that responsibility, and that the Court was watching to determine whether the Legislature, and the Blue Ribbon Task Force it had adopted quickly addressed that issue.

This Report acts as a call-out to our leaders and elected officials, detailing the ongoing failures of the justice system, and the human costs of the systemic problems.

METHODOLOGY

This report is based primarily on interviews conducted with 102 individuals who were detained in Orleans Parish before Katrina and remain incarcerated over 6 months after their evacuation from the Orleans Parish Prison¹. Safe Streets/Strong Communities, an Orleans Parish non-profit organization partnered with the Atlanta-based Southern Center for Human Rights and conducted these interviews with detained men and women between the dates of February 22-24, 2006. The individuals interviewed were scattered throughout Louisiana in 13 facilities, some of them over 350 miles (5 hours drive) from New Orleans. To the extent possible, court dates and other facts reported by the pre-trial detainees were cross-checked and confirmed with online databases.

This report uses interviews with the men and women who are detained and awaiting trial as its primary source because it is with these men and women that the constitutional rights to counsel, to equal protection under the law, and to due process rest. In our experience and understanding, there is no faster or more accurate method to assess the actual performance of a jurisdiction's indigent defender program.

Other sources of information for this report include court transcripts, public databases, interviews with criminal defense attorneys who practice in Orleans, court records, previously released studies and reports, and observations of criminal court sessions.

STRUCTURE OF INDIGENT DEFENSE IN NEW ORLEANS PRE-KATRINA

Before Katrina, a number of reports documented the rash of systemic problems plaguing indigent defense throughout Louisiana and in New Orleans. Their findings do not need to be reprinted here, but a review of those findings confirms that policy-makers had thorough and sufficient notice of the pre-Katrina problems reported by the men and women we interviewed.

In 2004, a report by the National Legal Aid and Defender Association (NLADA) and the National Association of Criminal Defense Lawyers (NACDL) concluded simply that "Louisiana fails to meet its federal obligations under *Gideon*."² The NLADA study echoed the findings of a study conducted 12 years earlier, when the Louisiana Supreme Court Judicial Counsel's Statewide Indigent Defender Board Commission retained the Spangenberg Group to review the adequacy of counsel to poor people. The report found the system severely under funded throughout the state.³ When the Spangenberg Group focused its attention on the Orleans Indigent Defender Program, the deficiencies were even more pronounced.⁴

¹ Orleans Parish Prison refers to the complex which includes: Community Correctional Center, Conchetta, Fisk Work Release, House of Detention, Old Parish Prison, Rendon, S. White Street Juvenile Alternative Facility and Templeman I, II, & III.

² NLADA and NACDL, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE (March 2004).

³ Spangenberg Group, STUDY OF THE INDIGENT DEFENDER SYSTEM IN LOUISIANA (1992).

⁴ Spangenberg Group, THE ORLEANS INDIGENT DEFENDER PROGRAM: AN OVERVIEW (February 1997).

The annual reports of the Metropolitan Crime Commission make clear that citizens pay the price for the languid representation upon initial arrest.⁵ Moreover, the MCC report indicates that over 65% of the people arrested remain in jail for indefinite the lengthy time periods discussed below, and then are released never charged with a crime. The MCC report indicates that representation at the outset would resolve wrongful arrests, return citizens to their jobs and families, and save the tax-payer money.

The Orleans Indigent Defender Board (hereafter "OID Board") is commanded by state statute to select a system of providing counsel to poor people accused of felonies and misdemeanors in New Orleans who are unable to afford an attorney.⁶ Appointed by the judges of criminal court, there are 7 members of the OID Board.

The OID Board in New Orleans created the Orleans Indigent Defense Program (hereafter "OID Program") to provide counsel to people in criminal, municipal, juvenile, and traffic court. Before Katrina, the OID Program employed 42 attorneys, 6 investigators, and 6 office personnel to provide counsel for indigent defendants in municipal, traffic, juvenile, and criminal district courts.⁷

⁵ *MCC, Case Processing in New Orleans: Arrest Through the Billing Decision Aug. 2002*, at 22 ("The lengthy time period between arrest and the billing decision significantly increases the city's annual expenditure for the pretrial incarceration of pretrial defendants. The City of New Orleans must pay the OPCS \$19.65 a day for each inmate held on state charges prior to disposition of charges.").

⁶ La. Revised Statutes, Title XV § 144.

⁷ *State of Louisiana v. Kenneth Edwards*, Transcript of Court Proceedings at 7 (Feb. 10, 2006).

SUMMARY OF PRELIMINARY FINDINGS:

- The average number of times that each interviewee had spoken to his or her OID Project attorney outside the courtroom *before* Hurricane Katrina hit was 0.
- The average number of times that each interviewee had spoken to his or her OID Project Attorney *since* the hurricane was also 0.
- The average number of days that the men and women we spoke to have been detained pre-trial was 385 days, with the longest wait being 1289 days and the shortest being 179.
- Poor people accused of felonies and unable to afford an attorney typically sat in jail for more than 60 days before even being appointed an attorney.
- The pre-trial detainees we interviewed all reported that they were brought to court for an initial appearance a day or two after being arrested. Some individuals were brought to magistrate court, where a public defender was appointed "solely for the purposes of this hearing." The assigned attorney did not do even the most cursory interview about an arrestee's ties to community, charges, or any other information relevant to setting bond. Other individuals were brought to a room where they faced a judge on a video screen. These individuals uniformly reported there was no defense attorney present.
- After appointment, the OID Program's attorneys by and large did not visit the crime scene, did not interview witnesses, did not check out alibis, did not procure expert assistance, did not review evidence, did not know the facts of the case (even on the eve of trial), did not do any legal research, and did not otherwise prepare for trial. One interviewee described talking to his attorney for the first time while sitting at counsel table waiting for his trial to begin, and his dismay at discovering that his attorney could not remember his name and had apparently not spoken to his alibi witness.
- With few exceptions, attorneys with OID Program *never* met with their clients to discuss their case. Appointed counsel did not take calls from the jail, did not respond to letters or other written correspondence, and generally did not take calls or make appointments with family members. The men and women we interviewed uniformly reported that OID Program attorneys did not ask for names of witnesses or alibis, did not respond to requests that critical witnesses be interviewed, and frequently did not know the names of their clients.
- OID Program attorneys do not seem to be working full time for the OID Project. Though the OID Program claims it employed full-time public defenders, attorneys working for the OID Program were permitted to take private cases. By allowing its attorneys to take as many private cases as they wanted, without any limit or reporting mechanism, the OID Program was essentially getting part-time attorneys at full-time pay. This contributed to a host of related complaints, including:

- The men and women who could not afford to hire an attorney pre-Katrina and now continue to languish in jail described their appointed attorneys' pre-Katrina performance as "passive," "not interested," and "absent." One public defender is known for spending his days in court solving crossword puzzles rather than talking to clients.
- Bonds were unusually high, yet OID Program attorneys almost never advocated for lower bonds. Paid attorneys routinely and vigorously argued for bond reductions. There is at least an appearance of conflict so long as OID Program permitted its part time attorneys, who did not argue for bond reductions when acting as an appointed attorney, to do paid defense work, where they *did* argue for bond reductions.
- The OID Program explicitly did *not* represent people during the period before an arrestee's charges were accepted⁸ maybe to avoid competing with private attorneys who made their money getting clients released from jail during this period. The paid attorneys who sought out clients during this 45 or 60 day period included those who also work for the OID Program, and attorneys employed by members of the OID Board.
- One recurring complaint voiced by both advocates and indigent defendants is that the OID Board is not committed to securing an adequate defense for poor people facing criminal charges. The OID Board was repeatedly characterized as a "patronage board," with members appointed to the OID Board by the district court judges for political reasons. Though it is impossible without more investigation to verify such a charge, there is little dispute that even though state law specifies that members of the OID Board should be selected from nominees provided by each bar association within the judicial district, there is no record that the OID Board was in fact selected from such nominations.⁹
- Repeatedly, interviewers were told that OID Program attorneys acted as functionaries for the court rather than advocates for the poor people they represented. It was stated that the customs of criminal court excused – and often encouraged – poor policing and wrongful arrests. OI DP worked as a cog in this system rather than a check on its dysfunctions.

⁸ The state has 45 or 60 days to accept (indict on) misdemeanor or felony charges respectively, during which a person can be held without counsel

⁹ La. Revised Statutes, Title XV § 144.

REPRESENTATIVE INTERVIEWS

Interviews reported below were conducted by investigators and attorneys from Safe Streets/Strong Communities and the Southern Center for Human Rights in late February 2006. All individuals interviewed had been detained in Orleans Parish before Katrina and remain incarcerated over 6 months after their evacuation from OPP. None of the individuals below can afford to hire an attorney without undue hardship. Where a total number of days incarcerated is reported, it is as of the date of the interview. To the extent possible, court dates and other facts reported by the pre-trial detainees were cross-checked and confirmed with online databases.

JJ. JJ was arrested on May 23, 2005 for begging in the French Quarter, violating his parole. JJ suffers from mental illness and since being evacuated from OPP in August 2005 his mental illness has not been properly treated. He has now been in jail 9 months awaiting his trial for begging.

BE. BE has been sitting for 323 days on a possession of heroin charge. His last court date was in August.

FF. FF is a 59 year-old African American man who was arrested 2 days after Christmas in 2004. He was charged with possession of crack, possession with intent to distribute, and possession of marijuana 1st offense. On February 3, 2005 FF was brought to court for arraignment on the crack charges, but was not appointed counsel. A public defender stood in for the purposes of arraignment only. On March 18, FF was brought back to court, this time for arraignment on the marijuana charge. A public defender, different from the attorney who had stood in for FF's February 3 arraignment, stood in for FF's March 18 arraignment. FF was again not appointed counsel. Over 2 months passed before FF was brought back to court for a lunacy hearing and yet another public defender appeared as FF's appointed counsel. On June 24, yet another public

defender appeared in court for a motions hearing, but FF was not brought to court. This was the 4th or 5th public defender assigned to "represent" FF. The motions hearing was reset for mid-August, and then reset again for mid-October. FF has now been incarcerated for nearly 15 months. Of the 4 or 5 public defenders who have stood in court during FF's court appearances, none have ever gone to interview FF, none have written him, and none have contacted him in any way regarding his case. FF does not know whether he is represented at this time.

FP. FP was arrested on April 28, 2005 and charged with bank fraud. He alleges he put up a fence for a woman in January and in April, she paid him with a \$200 check. When FP took the check to the woman's bank, he was told that the signature on the check didn't match. He was arrested the next morning. FP's bond was set for \$10,000. At his arraignment, he was appointed a public defender. When he went back for his motion day, his public defender was on vacation, and his motion day was reset for August 29. Katrina hit that day, and he has not heard from his public defender since then. FP has now been in jail for 303 days awaiting trial on his bank fraud charge.

AT. AT was arrested on May 12, 2005, for purse snatching. His bond is \$5,000. TA does not have any prior convictions. TA's co-defendant hired a private attorney and was released from jail after Katrina. TA cannot afford an attorney and has now been in jail for 288 days awaiting trial and without any meaningful contact with his public defender.

BD. BD is a 17 year-old who is charged with armed robbery and aggravated battery. He has been in jail since May 10, 2005. He went to arraignment on July 12, 2005, where he was appointed a public attorney. BD claims that when he went back to court on August 12, he was appointed a different public defender, who could not tell him what he was charged with and openly noted that she did not have a file on him. He has not been to court since. He has no idea who is working on his case because no one has ever come to the jail to visit him. Next month will make a year in jail, and because of Katrina, he's being housed in a prison 3 hours from home.

Report Researchers and Authors

SAFE STREETS/STRONG COMMUNITIES

Safe Streets/Strong Communities (Safe Streets) is an Post-Katrina formed organization of lawyers, victims advocates, investigators and community organizers dedicated to working toward a new criminal justice system in New Orleans, one that creates safe streets and strong communities for everyone regardless of race or economic status. Safe Streets envisions a system that:

- Keeps people safe from all forms of violence and crime including street violence, domestic violence, and law enforcement violence;
- Is transparent, democratic, fair and accountable to the community it serves; and
- Supports community-driven responses to crime that are based in best practices

Safe Streets seeks reform of the New Orleans Police Department, the Orleans Parish jail System, and the Orleans Parish criminal court system including the indigent defense system in order to achieve our vision of a true public safety system.

THE SOUTHERN CENTER FOR HUMAN RIGHTS

The Southern Center for Human Rights is a non-profit, public interest law firm dedicated to enforcing the civil and human rights of people in the criminal justice system in the South. Since 1976, the Center's legal work has included representing prisoners in challenges to unconstitutional conditions and practices in prisons and jails; representing people facing the death penalty who otherwise would have no representation; and challenging systemic failures in the legal representation of poor people in the criminal courts.

On January 2, 2005, Georgia went from a hodgepodge system of indigent defense, where each of the state's 159 counties chose and was responsible for funding its own method of providing counsel, to a state-funded, statewide public defender system. The same day a capital defender office opened with responsibility for defending people accused of the death penalty. The Center played a major role in bringing about the creation of the statewide public defender system by issuing reports, filing and prosecuting half a dozen class action indigent defense lawsuits, providing information to the media, and working with the Georgia Bar, a commission appointed by the Chief Justice of Georgia and other organizations in seeking a comprehensive system.

The Center's indigent defense litigation includes:

Stinson v. Fulton County Board of Commissioners, Civil Action No. 1:94-CV-0240 (N.D.Ga.).

Class

Parks et al. v. Fennesy et al., Civil Action No. 1:96-CV-182-3 (M.D.Ga.).

Foster et al. v. Fulton County et al., Civil Action No.1:99-CV-900 (N.D.Ga.).

Bowling et al. v. Lee et al., Civil Action No. 01-V-802 (Sup. Ct. for Coweta County).

Smith et al. v. Fulton County Board of Commissioners, Civil Action No. 1:02-CV-2446
(N.D.Ga.).