

## Georgia Indigent Defense Symposium

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Remarks of H. Scott Wallace  
Director, Defender Legal Services  
National Legal Aid and Defender Association

### Indigent Defense – The National Picture

I am deeply honored by your invitation to join you today, to humbly share some thoughts about what's happening at the national level that will have the greatest impact on indigent defense and the criminal justice system into which it is interwoven.

What are the biggest happenings in indigent defense nationally this year? Three words:

*Shelton*

**Principles**

**DNA** (is that a word?)

By *Shelton*, I mean the May 20 decision in *Alabama v. Shelton*, where the Supreme Court extended the right to counsel.

By **Principles**, I mean the adoption by the American Bar Association of a wonderful document called the Ten Principles of a Public Defense Delivery System. (I say wonderful because I co-wrote it.)

By **DNA**, I mean – well, you know...

I'll tell you about the *Shelton* case. It started 30 years earlier, when the Court handed down *Argersinger v. Hamlin*. John Richard Argersinger was a young door-to-door magazine salesman from the great state of Georgia, who was stopped by police in Florida because a woman didn't like him wandering around her neighborhood. They searched him and found a set of brass knuckles that he carried for protection, and charged him with the misdemeanor offense of carrying a concealed weapon. His request for a lawyer was ignored, the prosecutor offered him a "deal" of 90 days in jail, and he was convicted.

The Supreme Court used John Argersinger's case to issue its second most famous ruling on the right to counsel: that the right to counsel in felony cases enunciated in *Gideon v. Wainwright* should extend to any case where any amount of incarceration is imposed.

What matters is not whether the charges are classified as felony, misdemeanor, or even petty, said the Court. What matters is the loss of liberty. The Court explained that the legal issues are just as complex, that people without lawyers are five times more likely to be convicted, and that imprisoning someone even briefly can result in "quite serious repercussions affecting his career and his reputation."

What the Supreme Court did in *Shelton* 30 years later was not much of a leap. It ruled that the *Argersinger* decision applies to cases where a sentence of incarceration is imposed, but is suspended, or conditioned upon compliance with the terms of probation. The Justices reasoned that a person who is found to have violated such a condition is really going to jail for the underlying offense, not for the technical violation – say, being in the wrong neighborhood – for which there is no right to counsel in any event, and no right to challenge the underlying conviction or contest the facts leading up to it.

*Shelton* is significant because it could have so many different impacts – not just on indigent defense, but on the whole system and how it treats minor offenses.

Much of the *Shelton* ruling focused – oddly, I thought, for a constitutional ruling – on the practical impact, like whether it would cost too much. The majority concluded that it wouldn't really cost very much, since all but 16 states already had enacted statutes extending the right to counsel to this category of cases.

(Never mind that a nationwide survey we did right after *Shelton* found that the existence of such a statute is a far cry from counsel actually being furnished. You'd be amazed at how many jurisdictions make a sham out of such a right – for example, by herding a few dozen misdemeanor defendants into a courtroom with no public defender in sight, and offering to let them go home then and there with a suspended sentence and a fine, OR ask for a lawyer and spend a few more weeks in detention waiting for one to be appointed.)

But that's not relevant here, because Georgia is one of the 16 states that doesn't even have such a statute. The more important point is where the Court's discussion leads, for jurisdictions that don't comply with *Shelton*'s broader right to counsel, and never have pretended to.

The first, most obvious answer, is that it will cost a bundle. Suspended sentences, or probation, are increasingly commonly used.

Nationally, according to recent Justice Department research, the number of people on probation for a misdemeanor has increased by 600,000 over the past decade, to almost 4 million, probably due to the cost of incarceration, tight state and county budgets, and a corresponding sense that maybe it's not quite so essential to lock up minor nonviolent offenders.

Georgia's population of people under probation supervision rose 40,000 last year, to 360,000.

Of the 4 million people under probation supervision nationally, one-quarter – one million – were under a suspended sentence.

Providing lawyers to all of this *increasing* population of people charged with minor nonviolent offenses could significantly increase indigent defense costs. If jurisdictions want to continue their patterns of suspended or probationary sentences, there's no doubt that providing counsel is not only constitutionally required, but prudent. Aside from the *Argersinger* Court's observation that even a brief incarceration can ruin someone's job and reputation, there's the modern legislative trend to tack on endless additional punishments – generally referred to as "collateral consequences."

A minor drug conviction can *forever* preclude welfare benefits – including AFDC payments for food for the offender's small, absolutely guiltless children.

It can forever preclude public housing, student loans, voting, government service, hundreds of different types of jobs requiring licensing, and for an immigrant, mandatory deportation – even if your husband and kids are all American citizens.

And if you have the misfortune to be an addict and get arrested again, it turns you into a career criminal, meriting recidivist or three-strikes sentences to extended incarceration as a felon.

Making an indigent – and perhaps addicted, mentally impaired, uneducated or illiterate – person plead guilty without some effort to convey this complex raft of consequences, seems almost sadistic – whatever the cost.

But *not* providing lawyers to these people could cost even *more* – by the time Steve Bright gets done with you.

But there are other options presented by the *Shelton* decision, which go beyond indigent defense.

Obviously, you could *reduce* the number of people falling into this new class of entitlement to indigent defense services.

One way to do this was suggested directly by the Court. They called it "pretrial probation." Keep the concept of probation or a suspended sentence as a threat – that is, you screw up and we'll whack you – but instead of threatening them directly with jail, you threaten them with reinstatement of formal criminal proceedings, *with* a lawyer, at the end of which they will be exposed to jail. It's basically pretrial diversion.

Actually, not that many people need that second level of whacking. Of the people serving a probationary or suspended sentence in 2001, only about 13% were subsequently

incarcerated for a violation of their probationary conditions. And this number has decreased dramatically. It was 21% - 50% higher – in 1995.

As the *Shelton* Court noted, 23 states have statutes authorizing this type of pretrial diversion, and 7 others allow it in a limited class of cases. Georgia is one of the 23 with a full-scale Pretrial Diversion Program, under Georgia Code section 15-18-80.

So Shelton presents you with the choice of providing lawyers to 100% of this population to whom you are currently giving probationary or suspended sentences – or to 13% ... later, when they violate their terms and have to be formally prosecuted.

And it offers not only the chance to reduce counsel costs, but jail costs, judge time, prosecutor time, court time – and overall reliance and demands on the formal criminal justice system.

Another option flowing fairly naturally from this one is simple decriminalization. For minor offenses, just eliminate any possibility at all of incarceration.

It's incredible the number of states these days that are simply cutting back on their use of incarceration.

States like Louisiana, Mississippi, Connecticut, Washington, and North Dakota have reduced mandatory minimum and other sentences for drug and other nonviolent crimes, driven by budget constraints and the fact that corrections has been rapidly outstripping all other categories of government expenditures.

Other states have passed a range of legislative initiatives to reduce prison overcrowding, like Arkansas, Montana and Virginia, Kansas, Ohio and Alabama.

A logical variant being pursued by some states is not to reduce, but to *eliminate* incarceration sentences for the most minor offenses – such as "victimless" crimes in areas like drugs or prostitution, or minor property offenses, or even minor physical altercations, that can just as well be taken care of with restitution, a fine, victim-offender mediation, or community service.

Voters in Arizona and California have passed initiatives putting drug abusers into treatment rather than jail, and Ohio, Michigan and the District of Columbia have such measures coming up on the November ballot.

Other states have expanded the role of drug treatment as a sentencing option, like Arkansas, Idaho, Oregon and Texas.

Legislatures in states like Florida and North Carolina are looking at decriminalizing other types of offenses.

Nevada has a voter initiative this November that would eliminate criminal penalties for simple possession of three ounces or less of marijuana – and it was endorsed by the state's police association, who liked the idea that it would free them up to go after worse criminals.

So *Shelton* presents a fork in the road, and it illustrates something that we and the Justice Department and criminal justice planners and budgeters in every nook and cranny of the country have been recognizing with increasing frequency: that indigent defense does not stand alone, but is symbiotically connected to every other piece of the criminal justice system. What happens in indigent defense – or doesn't happen – affects everybody else.

And as Yogi Berra once advised, "When you come to a fork in the road ... take it."

So what about the PRINCIPLES – the "Ten Principles of a Public Defense Delivery System" adopted by the American Bar Association?

Jim Neuhard, the longtime state appellate public defender for Michigan, and I were asked to write an introduction to a compendium being published by the US Justice Department, gathering all the indigent defense standards in the nation. Jim was a past president of NLADA, from which all of the indigent defense standards in the nation have originated in the past three decades – and he had been personally involved in writing most of them.

As we looked at these six volumes and thousands of pages of dense, impenetrable and heavily footnoted and documented standards, we concluded that the most useful thing we could do would be to distill them down to their briefest, most fundamental, easily understood essence. "Ten Commandments" had a nice ring. The Ten Commandments of Public Defense Delivery Systems.

So the Department of Justice published it, in the massive Compendium, and sent it out on CD-ROM to thousands of legislators, policymakers, funders and judges around the country.

And the interest was high and the feedback was very positive.

Then the ABA, which has adopted much of the NLADA standards and written some of its own, got interested. They have committees focused on indigent defense – with which Bob Spangenberg works closely. And they worked with us to tweak our version – mostly by changing the title. They found "Ten Commandments," I think, to be a little sacrilegious. And they adopted them this past February.

[Copies here and on the web]

So, it's "Ten Principles." And since the ABA adopted them, they have risen to near-Gospel proportions.

When we conduct a management audit of a public defender agency now, we find that state and county officials are eager to find out how they measure against the ABA's Big Ten.

When we printed them up for chief public defenders from all over the country who came to Washington this Spring for congressional visits, the Senators and Representatives, and their staff, loved it. We ran out of copies.

Public defense agency heads are reporting an unprecedented level of satisfaction in their discussions with state legislators and funding officials, who, after a brief skim of the Ten Principles, feel they finally get the Big Picture of what it takes to run a decent public defense system.

And it's gotten to such a point that we have been resurrecting discussions – including with Justice Department officials – of an idea that has been dead since it first surfaced several decades ago – the concept of accreditation of public defense systems – as is used with hospitals, law schools, or correctional facilities.

So let me briefly run through these ten basic ideas, to give you an idea of their simplicity and power. And bear in mind, we didn't make these things up – they are just restatements – condensed, of course – of reams of standards that have been around since shortly after Gideon and Argersinger, when the Justice Department started the ball rolling, promoting the development of standards for every component of the criminal justice system.

In the full version, printed by the ABA and which we have handed out, there are short but dense footnotes to every national standard which serves as authority for the Principle stated. All those national standards are accessible – black letter, full text – through the NLADA web site, [www.nlada.org](http://www.nlada.org) (Defender Resources, Standards), with links to all the ABA standards too.

[Slides]

The other significant development related to the Ten Principles that I'd like to tell you about is a study we just finished a few weeks ago for the Department of Justice's research arm, the National Institute of Justice. As we were doing the National Compendium of Standards – obviously as a vehicle to encourage the replication of standards as a desirable thing around the country – it suddenly occurred to all of us that a crucial body of information was missing.

It had always seemed obvious to us that standards were good. Anything important requires minimum standards, to ensure that quality doesn't fall to unsafe levels. Standards are especially important when life or safety are at stake, like in building a bridge – and are especially detailed and rigid when it's a government function that is being regulated.

Maybe the effect of some standards is pretty obvious. If a standard calls for a 2" bolt, the effect is a 2" bolt. But what about a standard calling for independence of the chief public defender, or one limiting an assistant public defender's workload to 150 felonies per year. What are the effects of that? Nobody had ever thought to document them, and it seemed that the lack of empirical documentation of the impacts of mostly non-empirically framed standards – together with their density and length – might be operating as a significant impediment to their more widespread replication.

So the study that we conducted was the very first examination ever of the impact of indigent defense standards – in terms of dollars and cents, efficiency, staffing and caseloads, as well as external measurements like court dockets, speed of disposition, costs of pretrial detention and corrections, workload of judges and prosecutors – and of course, uniformity of the quality of justice.

[handout – draft – summary, overall findings – read from specific Indiana findings]

And briefly, my third Big National Indigent Defense Theme of the Year: DNA.

I needn't belabor the constant stream of DNA exonerations. They are well known, and contributed to the temporary shutdown of the capital punishment systems of two states. But more broadly –

They have proven – for the first time, absolutely conclusively – that our system of justice is fallible.

They have gotten even the most tough-on-crime conservatives to wonder how such egregious mistakes could happen – an innocent person festering for years behind bars, or even on death row, while the real heinous predator still roams free.

They have brought serious attention and understanding to the *causes*, like mistaken eyewitness identification, false confessions (such as through psychological manipulation or mental susceptibility or immaturity), suppression of exculpatory evidence, or forensic error.

And perhaps above all, because these travesties happen almost exclusively to people who cannot afford to hire a private lawyer, they have brought a greater understanding than ever of the importance of a decent quality indigent defense system.

Americans now "get it" as never before. NLADA commissioned the first-ever national poll of moderate, middle-American voters' attitudes toward the rights of the poor in our legal system. 88% believe that the type of justice you get should not depend on the amount of money you have. Large majorities believe –

that indigent defense and prosecution should have parity of resources,

that public defenders need the tools to get the job done, like DNA testing, experts and investigators – just like doctors need to be properly equipped, and

that the field of public defense ought to be governed by minimum national standards, just like standards for teachers.

Innocence-protection legislation, prominently featuring a right to DNA testing, has passed in many states.

Congress is poised to pass its own version, including \$100 million in grants annually to states to improve their systems of indigent defense representation in capital cases.

When we told them about the problem that is driving more qualified and experienced public defenders – and prosecutors too – out of public service – staggering student loan debts as high as \$140,000 – the Senate Judiciary Committee added a program of loan forgiveness for attorneys who promise to stay a while in a state or local prosecution or indigent defense agency.

Congress and Chief Justice Rehnquist are talking about building a national, federally funded training college for public defenders, to match the beautiful \$30 million center they built a few years back for federal, state and local prosecutors.

Indigent defense improvement is coming in the darnedest places – Texas, North Carolina, Alabama – that you'll hear more about later from Bob Spangenberg. And we're trying to help move it along as much as possible, with leadership training, litigator training, agency and system evaluations and studies, technical assistance, and providing a forum for agency heads to come together to learn "best practices" from each other and spread them around the country.

These are challenging times for our great democracy. It's been touch-and-go there for a while in the struggle between security and liberty. But as the dust settles, and our national impatience grows with any suggestion that we can be locking up people indefinitely without charges, without a lawyer, and without a trial, I am reassured more and more that the country values its freedoms – including its proud tradition of equal justice – perhaps more than ever.

We still can't seem to get that voting thing right, though.

I commend you for this Symposium, bringing together this diverse crowd, for this good cause, and I thank you for inviting me.

If I can answer any questions, I'd be delighted to...