



# Nationwide, public defender offices are in crisis

By DEBORAH HASTINGS

It wasn't the brightest decision she'd ever made. She admits that. But if she'd had enough money to hire a lawyer she might not have lost six months of her life.

Kimberly Hurrell-Harring, a certified nursing assistant and mother of two, had driven seven-and-a-half hours to visit her husband and then secreted a small amount of marijuana in her private parts. He'd pleaded with her on the phone to bring it, saying he needed to get high in this awful place.

He was calling from a maximum-security prison, and someone must have been listening because when she walked into the Great Meadows Correctional Facility in upstate New York, guards immediately yanked her to the side.

They told her things would go easier if she handed over the dope without a fuss. She did, and things immediately got worse.

With a swiftness that made her head spin, she was handcuffed and hauled to jail. At her arraignment, there was no public defender available, though she was entitled to one. Standing alone, she was charged with one felony count of bringing dangerous contraband into a prison.

And so she tumbled headlong into the Alice-in-Wonderland chaos of court-appointed lawyers, where even those lawyers say there is little time for clients. There are simply too many and not enough hours in the day.

"If you can't afford an attorney, and you fall into the criminal justice system, you are really, really screwed," said Demetrius Thomas of the New York American Civil Liberties Union.

Especially now. The spiraling recession and overwhelmed public defenders, some who've rebelled by filing lawsuits to reduce caseloads, pose one of the greatest challenges to the system since the U.S. Supreme Court in 1963 overturned the petty larceny and breaking-and-entering convictions of Clarence Gideon, a poor Florida man tried without a lawyer. In a landmark, unanimous ruling, justices said state courts must provide attorneys to every criminal defendant unable to afford counsel.

After her arraignment, Hurrell-Harring went back to jail because she couldn't afford bail, either. Three weeks passed before a public defender appeared, and she says she spent a total of 15 to 20 minutes with him before her sentencing hearing.

He told her not to fight the district attorney's recommended punishment — six months behind bars and five years of probation. It was the best she could hope for, he said. But she had no criminal record. Surely, she begged, couldn't possession of less than an ounce of pot, a misdemeanor under other circumstances, be bargained down to probation?

"It was like he had no time for me," she says now, still unemployed 17 months after her release because she lost her nursing license when she became a convicted felon. "He told me to plead guilty."

The accused, their lawyers, and even prosecutors agree that courts increasingly neglect their constitutional duties. In a series of Capitol Hill hearings, the latest scheduled for this week, congress members are struggling to grasp the enormity of the crisis. But the options are far from clear, particularly when virtually every state and local government is crying poor.

Meanwhile, defendants suffer.

In Georgia, a man accused of murder spent eight months without a lawyer because the state's public defender office couldn't afford one. In Washington, an appeals court awarded \$3 million to a man falsely accused of child molestation who was jailed for seven months because his public defender failed to investigate the case.

There are open lawsuits in at least seven states — including populous New York, Florida and Michigan — where overburdened defenders claim those presumed innocent until proven guilty are routinely denied their right to an attorney. Their suggested remedies: capping the number of cases assigned to them and completely overhauling state systems.

Decisions in similar suits are pushing legislators to act, but in limited ways, advocates say.

In Missouri last month, lawmakers approved a bill that would limit the crushing caseloads of public defenders who had lost an earlier court battle to refuse new cases. The state could contract with private attorneys to handle the overflow, the legislation says, but only if additional funding is available.

But where would that money come from in these harsh economic times? President Barack Obama's economic stimulus plan offers no money for hiring public defenders.

In April, the bipartisan, nonprofit Constitution Project released a phone-book-sized report titled "Justice Denied," a national review of court-appointed lawyers. The five-year analysis, the most comprehensive look at indigent defense in decades, said many states fail terribly in their constitutional duty to provide lawyers for the poor.

"Sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the Gideon decision," said report signed by former Vice President Walter F. Mondale and former FBI Director William S. Sessions. "The call for reform has never been more urgent," the study said.

In May, a major reform battle was lost by court-appointed lawyers in Florida's Miami-Dade County. An appellate court harshly rebuked and reversed a lower court ruling that allowed the public defenders office to refuse certain felony cases because it faced funding cuts and crushing workloads. Under the initial ruling, attorneys would have been brought in from a smaller state office and from private firms, which would have increased costs.

But the Third District Court of Appeal said in a unanimous opinion that solutions should be sought in the legislature. Petitioning the courts for relief is "nothing more than a political question masquerading as a lawsuit," wrote Judge Frank Shepherd.

Reform advocates said the decision was history repeating itself.

"In the 1960s, the state of Florida believed Clarence Earl Gideon could get a fair trial without the guiding hand of counsel," said David Carroll, research director for the National Legal Aid and Defender Association. "Today,

the assumption is that a poor defendant in Florida can get equal justice. They were wrong then and are wrong today."

Smaller states facing public defender lawsuits include Georgia, where defendants have gone without lawyers for as long as six months and indigent lawyers have begged legislators for \$1 million to deal with backlogged capital cases.

But even in the best of times, public defenders say a quick plea bargain is sometimes as good as it gets. Court-appointed lawyers often have only seconds to whisper with clients they've just met — before standing while a judge sets bail.

Their days are spent like emergency room doctors performing triage. The worst cases get the most attention, the lesser cases wait the longest. Pleas are shuffled like prescriptions — take this, it's a good deal. Plead guilty, settle for time served. No, going to trial won't prove you innocent, it will get you convicted.

The pay is awful and so are the hours.

Hurrell-Harring's court-appointed attorney is a case in point.

For a yearly salary of \$54,000, Patrick Barber juggles between 100 and 120 cases in his Washington County, N.Y., office — on top of his private practice. Between himself and four part-time defenders, he says they represent 1,661 cases.

"If I had more money, could I do more? Of course," he says. "But the public doesn't care. They want the DA's office to be funded, but they don't care about the public defender."

He agrees with his former client. He doesn't have much time to visit clients. It's not possible to see every defendant, he said. Many have no car, and can't get to his office. Others are in jail, and he simply can't get to all of them, he says.

Barber claims he did the best he could for Hurrell-Harring.

"She couldn't have been charged with a misdemeanor because it wasn't offered. It wasn't going to be offered. The district attorney takes a very hard stance when it comes to prison contraband," he said.

Hurrell-Harring, 33, doesn't much care about Baker's caseload, and she has two pending legal actions over her incarceration.

In one, she's part of a class-action lawsuit filed by the New York Civil Liberties Union against the state, accusing it of "persistent failure" in providing legal services to the poor. The suit also claims a dysfunctional and unmonitored system has caused wrongful convictions, harsher-than-normal sentences, improper guilty pleas and excessive bails.

In the second, she's asked the appellate division of state Supreme Court to reduce her conviction to a misdemeanor because of inept legal representation, and because a recent appellate ruling said a small amount of pot did not qualify as "dangerous contraband" in prison settings and should be charged as a misdemeanor.

"I can understand why you don't want people bringing in sawed-off shotguns or large amounts of drugs that could be sold inside," said private attorney Roberta Kaplan, who is working pro bono to get Hurrell-Harring's conviction reduced. "But this is a traffic ticket."

If the high court agrees, Hurrell-Harring could get her nursing license back. She is living with her mother, who suffered a recent stroke, and her two girls, ages 5 and 18. She's getting by on Social Security.

Poor people like her constitute about 80 percent of criminal defendants. And in bad economic times, crime rates increase, legal researchers say, adding more weight to the groaning system.

In troubled Miami-Dade County, the public defenders office has lost 12 percent of its budget in the last 18 months, while the average felony caseload per lawyer increased from 367 to 500 over the past three years, officials said. The maximum number of cases an attorney should carry is 200, according to Florida's public defender association. And that's a conservative number — the Constitution Project study suggested 100 cases per lawyer is too many.

"It's gotten very desperate down there," said Maureen Dimino, who spent four years as a court-appointed Miami lawyer before quitting last year. Now she works as an indigent defense expert with the National Association of Criminal Defense Lawyers in Washington, D.C.

"The burnout rate is extremely high," she said. "That's why I got out."

After the rigors of law school and passing the bar, and with starting salaries averaging \$40,000 per year, why would anyone want to get in?

Dimino laughs. "I started at \$37,000," she said. "It was possibly the most rewarding time of my life. There really is something to be said for trying to do the right thing. You're crazy, but you love it."

In her new job, Dimino hears plenty about the deteriorating public defense system. "Every state I've talked to has been hemorrhaging. They're being asked to take more and more cuts."

In April, New York became the first city to cap the number of criminal cases juggled by public defenders. Tucked inside the state budget bill, the law requires that standards be established by 2010, and phased in over the next four years as funding permits.

But like other legislation, it has been criticized for not going far enough.

"A major metropolitan area in our country is finally willing to enforce caseload standards," says Carroll. "But if you look at it, it says at some future date some standard will be enforced, if there's money to do it.

"How can you say someone in New York City deserves a reputable lawyer, but if you're in Buffalo, sorry? It's really not doing anything to help the indigent defense crisis," he said.

Topping a list of 22 recommendations at the end of the Constitution Project's massive analysis are calls for organizing indigent defense at the state level with "adequate" funding, and establishing an independent oversight board to create attorney standards, and remove lawyers who don't meet them.

Project members say they will meet with members of Congress, the U.S. Attorney's office and state and local leaders, to promote their recommendations. But whether those officials can come up with "adequate" funds is an entirely different matter.

Still another sign of the dysfunctional public defender system is its lack of basic, centralized records. States and counties employ about 12,500 full-time defenders, said Carroll. But no one knows how many private attorneys work under contract.

Often, those contracts are awarded at a fixed rate, meaning no matter how many extra hours a case requires, reimbursement stays the same. Which is another reason plea bargains have become so popular, lawyers say. If there's no money to mount a defense, what's the use of going to trial?

"It turns justice into a sham," said attorney Donna Lieberman, executive director of the NYCLU, who started her legal career as public defender in the South Bronx.

In some areas, attorneys say overhauling the system could actually save government money.

The Michigan Appellate Defender Office, for example, saved nearly \$3.7 million in prison costs by correcting four years worth of sentencing errors.

"You don't have to just throw money at it," said Carroll. "We could just allow law enforcement more leeway in deciding whether to issue a citation or arrest someone."

Hurrell-Harring, of course, wishes she had been given a ticket instead of six months in prison. But then she is asked what possessed her to smuggle a controlled substance into a state prison?

"I asked myself the same question," she says, matter-of-factly. "My husband asked me. It was for his own purposes. I should have put my foot down and said no. But let's be honest, we all did things for men that we shouldn't have did. I bet it's happened to you."

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