Indigent Defense

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A Tale of Two Counties And Two Very Different Outcomes

Assistant public defenders have it really tough in the trial courtrooms. These lawyers are typically assigned to large caseloads in which surprises can arise at any time, even when meeting the client for the first time. First meetings can be very tense, and a lawyer must possess the required skills to resolve the tension and seek a favorable solution for the client.

Sometimes this tension comes from a difficult client who demands more than should be realistically expected from a lawyer assuming the case for the first time on "day one" of representation. Tension can also stem from a prosecutor who extends a plea offer with an "it's good for today only" deadline. Finally, tension can come from a judge who believes that assistant public defenders are "fungible," meaning that *any* assistant public defender whom the judge wants to step up on a case should be able to do so at a moment's notice regardless of the posture of the case. This is true for some judges even when the subject is forcing an unprepared lawyer to defend the client at trial.
This rare, but unfortunate practice has come to the forefront in recent years in published cases in which a judge chooses to push forward with a trial when a new assistant public defender represents the client. This moment requires the greatest degree of zeal by the lawyer on behalf of the client. One would hope that this practice of forcing an unprepared assistant public defender to trial will someday come to an end. Unfortunately, despite the recent celebrations of the 50th anniversary of the U.S. Supreme Court decision in *Gideon v. Wainwright,*[1] it seems that the current trend of case law may mean that appointed counsel must take a firmer stand in requesting a continuance at the trial court level than one would normally prefer.

Portage County, Ohio

While the case involving attorney Brian Jones has already been written about and seems like old news,[2] it bears some repeated discussion. In August 2007, Jones was a young, relatively new assistant public defender with the Public Defender's Office in Portage County, Ohio. He was assigned to a misdemeanor assault charge that was set for trial, having received the assignment the day before the trial date.[3]

On the day set for trial (the next day), Jones asked for a continuance because he thought he should have more time to interview the witnesses of whom he had become aware. Some of these witnesses were in the courtroom; some of them were not. Believing that the lunch hour would be enough time for Jones to interview the witnesses that were there, the judge broke for lunch.[4]

After the lunch hour, the judge called the case. When Jones indicated that he needed more time, the judge responded with a threat of contempt of court (including the threat of jail) if Jones did not go forward. Acting as a champion for his client, Jones refused to proceed. He gave the judge case law supporting his request for a continuance, which the judge refused to consider as "not pertinent." The trial court also informed Jones that if a conviction resulted, his client could appeal based on Jones' ineffective assistance of counsel. Jones stood firm, and was taken into custody as a result of his principled stand.[5]

The appellate court reversed the contempt finding because it agreed that a continuance was warranted for the defendant. Specifically, the appellate court noted that the need for a continuance was legitimate and that both effective assistance and ethical compliance were impossible because Jones did not have sufficient time to complete an investigation in this case. The court noted specifically that it would have been unethical for Jones to proceed with trial and merely try to provide effective assistance.[6]

Mercer County, New Jersey

The lessons of the heroic stance by Brian Jones — risking jail for himself for the sake of his client — would seem to just be another legal footnote but for the fact that in some of this country's trial courtrooms the issue still rises. The New Jersey State Supreme Court seemingly ratified an opposing viewpoint in 2013: approving of a trial court's decision to force counsel to trial.

In *State v. Miller*,[7] an assistant public defender was transferred from the Juvenile Division of the Mercer County Public Defender's Office to the Felony Division. His assigned caseload included Terrence Miller's felony drug case. The lawyer received this transfer on Dec. 6, 2007, with the hearing date for the client set on Dec. 10. He immediately went to see the trial judge and learned that no continuance would be granted.[8]

The lawyer then spent 10 to 11 hours preparing for the suppression hearing and trial, with none of that time having been used to meet with the client.[9] On Dec. 10, he spent just under an hour meeting with the client. He moved for a continuance, and when that was denied, he conducted a suppression hearing on the same day.[10] Miller's jury trial started on Dec. 11, and he was subsequently convicted.[11] Agreeing with the trial court, the appellate court affirmed the conviction, with one appellate judge dissenting.[12]

The state Supreme Court decided that there was no indication Miller's counsel was systemically ineffective as outlined by the U.S. Supreme Court in *United States v. Cronic*.[13] The *Miller* court admitted that the Sixth Amendment does require that a lawyer be effective and available, requiring open and free communication, but that at the same time, the Sixth Amendment does not require an interaction between attorney and client that gives rise to a meaningful relationship or rapport.[14] In short, the *Miller* court ruled that the Sixth Amendment does not encompass a right to counsel that allows the lawyer to know the client, and the client to know the lawyer, for an hour before litigation commences.

The *Miller* court went on, in an interesting juxtaposition to the Brian Jones ordeal, to affirm the denial of the request for a continuance. After reviewing a number of factors, including the lack of a state objection to the continuance request, the *Miller* court held that while the trial judge would have been better served by postponing the suppression motion (for a few hours), the trial court did not abuse its discretion in forcing counsel to go forward.[15]

Justice Barry T. Albin's impassioned dissent is well worth reading in full. He noted that a woefully prepared attorney was forced to "stumble" through a suppression hearing, calling the client to the stand "cold."[16] Justice Albin, without referencing *Jones* specifically, noted the phrasing of the continuance request made by Miller's counsel. The lawyer made the formal request as if the client, not the lawyer, was making the request, to avoid bringing the "ire of the court down on himself."[17] With a sense of chagrin, Justice Albin stated that the trial court's response exhibited a tension between the court and the public defender's office as a whole, indicating that the court decides whether cases go forward on the court's calendar, not public defender offices, stating that "the judge decides whether an attorney can be relieved and under what conditions."[18]

Finding that there was both "a hopelessly unprepared attorney unwilling to declare in a firm and clear voice that he was not ready for trial" and a judge intent on making a point to the Public Defender's Office about the court's calendar,[19] Justice Albin stated what should be self-evident: no attorney can provide effective representation at a suppression hearing if he has not interviewed witnesses, spoken to his client, prepared him for testimony, or consulted the client in any meaningful fashion. Justice Albin wrote that this case falls within the kind of cases identified by the *Cronic* court as presumably providing ineffective assistance.[20]

Walking the Line

One of the most difficult things for any lawyer to do for a client is to provide zealous advocacy that risks trying the patience of a trial judge. Any lawyer who thinks about preserving a good relationship with a judge also thinks about that judge's future rulings for the lawyer's clients who appear in front of that same judge.

The line is sometimes very difficult to draw regarding what to say and what not to say in court. Perhaps all defense attorneys need to remember the line Brian Jones drew, and walk that line the next time a Terrence Miller comes forward for a public defender to represent.