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SPECIAL TO THE NEWS

The indigent deserve effective legal defense

By RON WATERMAN

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HELENA, MT — New York is wrestling with calls to revamp its current system of public defense services for clients who cannot afford a private lawyer. Perhaps Montana's experience can shed light on how we dealt with similar challenges to our failure to provide a system that honored the constitutional right of all defendants to an effective defense enshrined in the 1963 U. S. Supreme Court decision in Gideon v. Wainwright.

While Montana and New York differ profoundly in size, population, demographics and political culture, there are striking similarities in the factors driving each state to confront the failings of its public defense system.

Each state had a disjointed, unaccountable and underfunded system. The vast majority of accused qualified for publicly-funded defense attorneys to confront charges against them. Too many defendants — a disproportionate number of them ethnic or racial minorities — were pressed into accommodating the needs of an overburdened court system and defense bar to negotiate guilty pleas, regardless of their innocence or guilt.

Both states also failed in repeated efforts at reform. And both states faced lawsuits charging those failures were so egregious as to warrant judicial intervention to order a fix that elected lawmakers were unwilling or unable to accomplish.

In New York, the New York Civil Liberties Union filed a still-active suit in 2007. In Montana, I was the lead local lawyer in a 2002 lawsuit filed in the state's First Judicial District Court in Helena, our capital, by the American Civil Liberties Union and other individual plaintiffs.

In 2004, as a trial neared, the Montana Attorney General requested that we suspend our suit to give the legislature time to adopt a plan that would meet constitutional muster. We agreed, and accepted the challenge to draw up the plan. To ensure that the system that emerged received adequate funding, we reserved our right to revive our suit until after the 2007 session of the Montana legislature.

While we were not privy to discussions within the Attorney General's office, we suspect they realized that the prospect of losing raised the specter of massive disruption to the orderly processing of criminal cases. It not only threatened to put prosecutions on hold going forward, it could reopen countless past cases in which defendants could point to a judicial decision declaring the existing system constitutionally deficient, allowing them to claim inadequate representation resulted in their convictions.

That threw the issue of finally reforming Montana's public defense system to the Montana legislature. It took vision and courage for State Sen. Dan McGee, a conservative Republican from Laurel, a city of 7,000 in the center of the state, to embrace both the challenge and the opportunity posed by the ACLU lawsuit.

While the lawsuit dealt only with the rights of indigent defendants facing felony charges, McGee quickly realized the same arguments applied to other indigent defendants — including juveniles and those charged with misdemeanors or facing the removal of dependants from the home — who all qualified for public defense attorneys. Realizing that those parties could subsequently seek similar redress, McGee's response was to fix the whole system.

McGee strove to have one system of justice serve the needs of all Montanans, not one system for the rich and another deficient system for the poor, as the public defender system had operated for years. Working across a partisan and ideological divide, he joined with Sen. Mike Wheat, a Democrat from Bozeman, to lead a process that yielded an independent Montana Public Defender Commission.

This statutory system has become a national model as the first such state agency designed to comply with the American Bar

Association's Ten Principles for a Public Defense Delivery System. Those principles call for setting and enforcing standards on such issues as training, caseload limits and the availability of investigatory resources so each indigent accused can fully confront charges that could result in a loss of freedom.

We also have become a source of information and, frankly, inspiration for states around the country from Utah to New York to Louisiana seeking to reform their own public defense systems. We are eager to share our experiences and our results, which in a few short years have already begun to bear fruit.

For clients, the result has been access to competent counsel who address their needs in a timely, professional manner. For the state, we have replaced an inadequate, unconstitutional system with one that represents the rights of our poorest citizens, and is no more costly to taxpayers than its predecessor.

For Montana, disruption to the orderly processing of the criminal cases threatened by the ACLU lawsuit provided the spark that led stakeholders, including legislators, to craft a solution. We stand ready to assist New York and other states as they seek to make the slogan "justice delayed is justice denied" a memory instead of a reality.

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