

***Padilla* and Beyond: The Future of the Defense Function**

Cardozo Law School -- June 21, 2011

Remarks of Chief Judge Jonathan Lippman

Introduction

Good morning. I am honored to have the opportunity to address this conference of distinguished *criminal* defense leaders, and to share some thoughts with you on the future of the criminal justice system and the criminal defense role in the wake of the Supreme Court decision in *Padilla v Kentucky*. I particularly want to thank Norman Reimer for this invitation, and for facilitating my participation.

I come to speak to you today from my own perspective as the Chief Judge of one of the largest and busiest judicial systems in the country. As we consider the fundamental challenges facing the American justice system today, to me, it is important to remember that 97% percent of the nation's judicial business is conducted in the state courts. More cases are heard in our nation's state courts in a single day than are heard in an entire year by the federal judiciary. I say this not to diminish the work of the federal courts in any way, because their caseloads are immensely challenging, complex, and important, but rather to emphasize that it is in the state courts that the average American interacts with the justice system. It is in the state courts, more so than anywhere else, where the 21st century issues affecting the daily lives of our citizens and the quality of life in our communities are being confronted head-on by judges working in the trenches to resolve the most intractable human problems of our time: domestic violence and drug-related crime and recidivism in our criminal courts; family breakdown, child abuse and neglect in our family courts; and home foreclosures, evictions and consumer debt defaults in our civil courts, especially during these difficult economic times. Our state courts are the emergency room for society's worst ailments, particularly as reflected in our criminal dockets.

Out of sheer necessity, state court systems have become laboratories for reform

and innovation, contributing to – and sometimes even driving – important policy changes in criminal justice and so many other areas. What better example than the drug-treatment, domestic violence, mental health and other specialized courts that have sprung up in the last two decades and which are directly tackling the underlying problems, such as addiction, that fuel so much criminal activity? The goal is to reduce recidivism and incarceration, which is critical during these difficult fiscal times, when states around the country, including New York, are desperately seeking ways to reduce corrections spending, which is growing at a faster rate nationally than every other state expenditure except Medicaid.

The role of the Judiciary, and of judges and lawyers, among the most tradition-bound of all professions, is evolving in response to the rapidly changing needs and expectations of our society. As changes in our nation's immigration laws and enforcement practices have dramatically raised the stakes of a noncitizen's criminal conviction, the Supreme Court has rightly responded by elevating our respective responsibilities and the overall standard by which we carry out and measure effective legal representation. In this process of change and evolution, state court systems are taking an increasingly active role on issues affecting the equitable and efficient administration of justice, such as indigent criminal defense and civil legal services, because these are integral to the ability of judges to do their jobs. We tackle these problems not gratuitously or because we have an agenda of one kind or another, but because our very reason for being is to pursue justice for all in each and every courtroom and courthouse.

Impact of *Padilla*

It is through this prism of the growing leadership role of the state courts that I share my own thoughts on *Padilla* and what it means for the future of the criminal defense bar, the courts and the entire criminal justice system. The immediate import of *Padilla* is clear for the very large number of cases involving noncitizen defendants, but the longer-term systemic impact of the decision for defendants, lawyers and judges, as well as for the judiciary as an institution, is far more profound given the broad range of serious consequences that can arise from a criminal conviction, including bars to housing,

employment, voting, student loans and other public benefits; sex offender registration; civil commitment and forfeiture; and the loss of professional licenses.

Despite fiscal limitations and structural obstacles, the criminal defense bar in New York long ago anticipated the holding of *Padilla* and began taking affirmative steps to implement its teaching. The State Defenders Association and the State Bar Association each adopted standards that require criminal defense counsel to advise their clients about the potential collateral consequences of a conviction. The State Defenders Association has been a national leader in awakening criminal defense lawyers to the necessity of educating themselves and advising their clients as to increasingly onerous collateral consequences of criminal convictions through training, research materials, practice tips and statewide hotline support. The State Bar Association has created a Special Committee on Immigration Representation that is setting standards for immigration law practice that emphasize the need for immigration lawyers to become involved with their clients' underlying criminal cases. The Special Committee is also providing training and other assistance to unrepresented prisoners for their in-prison immigration or removal hearings.

The judiciary in New York has also responded to *Padilla* by developing a series of training programs and best practices. Our supervising judges have arranged for trial court judges around the state to view live web casts, which focus on getting judges to take a more active role in assuring that accurate immigration advice is being given. Judges are being instructed to exercise vigilance in plea allocutions to ensure that there has been an adequate dialogue between defense counsel and their clients on these issues, while respecting the attorney-client relationship. These measures dovetail with the efforts of the defense bar to address the broader needs of their clients.

The good news is that *Padilla* calls for a more holistic and comprehensive approach to criminal defense representation. Yet it would be naive not to recognize that *Padilla* greatly expands the responsibilities of an already overburdened and under-resourced criminal defense system, and it does so at a time when state and local governments are facing serious budget deficits and public resources are stretched to the limit.

Padilla must be assessed in the context of the current state of indigent defense

services in this country. Almost half a century after Clarence Earl Gideon insisted, all the way up to the United States Supreme Court, that he was entitled to counsel under our federal Constitution, there remains a disturbing disconnect between the promise of the *Gideon* decision and what is sometimes the reality of our criminal justice system, in which many dedicated but chronically overburdened public defenders don't have enough time to thoroughly investigate the facts, get to know their clients or build a truly competent legal defense in each case. Particularly in misdemeanor courts around the country, defendants often are being represented without sufficient attorney-client contact, contrary to the spirit and intent of *Gideon* and its progeny. To make matters worse, the economy has put a damper on the prospects for enhanced resources to implement important mandates like those in *Padilla*.

And yet the challenge to all of us in the courts and the defense community is clear: we must find ways not only to preserve the values of *Gideon* but to go beyond them to provide criminal defense representation that has a broader vision -- one that is responsive to the complex world we all live in today. And this is not your job alone. I believe, in no uncertain terms, that the judiciary has a critical leadership role to play in this effort.

Caseload Caps

To be sure, this is a daunting task, but there is cause for optimism if the entire criminal justice system pulls together. Here in New York, there has been real progress in a very short time, notwithstanding the grim fiscal situation, and I would like to take a few minutes to report on the developments here, and to reflect on what I believe state court leaders around the nation should be doing to support the criminal defense function. The New York State Judiciary, I am proud to say, took a very important step last year in adopting new court rules to establish caseload limits for attorneys who represent indigent criminal defendants in New York City. The rules provide for a four-year phase-in of caseload caps that will take full effect on April 1, 2014, when attorneys will be limited to handling no more than 400 misdemeanors or 150 felonies in a 12-month period, with felonies representing the equivalent of 2.66 misdemeanors in mixed caseloads.

While other jurisdictions have adopted caseload limits in the past, I am so pleased that we have gone further by putting the necessary funding behind this initiative, and putting it right in the Judiciary's budget – \$10 million dollars in our budget last year, and \$17 million dollars for this fiscal year that began on April 1st – leaving no doubt whatsoever about our own absolute commitment to ensuring appropriate and reasonable caseloads for public defenders. And this funding is making a real difference, with scores of additional lawyers, investigators and support staff being hired.

All of us concerned with public defense in New York recognize caseload limits as a major breakthrough in improving the quality of representation for low-income criminal defendants, giving lawyers more face-to-face time with clients, and more time and resources to adequately investigate the facts and prepare a competent legal defense. I don't have to tell any of you that lawyers with more manageable caseloads are in a better position to secure just outcomes for their clients, which is in the best interests of defendants, the courts and the entire criminal justice system.

Securing money in the judiciary's budget to support indigent criminal defense services makes total sense to me. The message is simple – as far as the Judiciary is concerned, ensuring meaningful representation goes to the very heart of our constitutional mission. Justice, to be meaningful, must be accessible to all, both rich and poor alike. If we can't live up to this most basic of principles, which goes back to biblical times, then we might as well close the courthouse doors. As judges and lawyers, we are all witnesses to how the lack of effective legal aid can unbalance the scales of justice and prove devastating to the lives of our fellow citizens and their families. *Gideon* -- and now *Padilla* -- demand that we as judges and members of the legal profession step forward to make sure that justice really and truly is being done in our courthouses, that the rights of the accused are being properly protected, and that our public institutions are held accountable when they fall short of federal and state constitutional requirements.

I believe that if our society is ever going to make good on the promise of *Gideon* and *Padilla*, the Judiciary as an institution and through its leaders, and in cooperation with the criminal defense bar and our justice system partners, must be bold and proactive in

championing a strong defense function. Because if those entrusted with the fair and equal administration of justice aren't in the forefront of efforts to provide quality representation to criminal defendants, who will be? If not us, who? As Justice Stevens made clear in *Padilla* when he referred to the role of the courts: "It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the mercies of incompetent counsel." This statement applies every bit as much to our institutional responsibilities as it does to our adjudicative responsibilities – it is the right and moral thing to do, and it is indispensable to our ability to fairly adjudicate the millions of cases involving low-income criminal defendants. What could be more important to the individuals concerned, and to the fabric and well being of society?

Indigent Legal Defense Office

As Chief Judge, I see the lack of adequate legal representation for low-income New Yorkers as the greatest threat to the continued legitimacy of our justice system. In fact, in 2006, the report of our own Commission on the Future of Indigent Defense Services found that New York's indigent defense system was in many respects dysfunctional and incapable of providing poor defendants with effective legal representation, and there is a pending constitutional challenge to our county-based system that will be determined on its legal merits. In the end, however, this issue must be addressed from a policy perspective. This has begun to happen in New York with the establishment by statute of a Statewide Indigent Legal Services Office, whose Board I am privileged to chair in order to ensure the fairness and integrity of our criminal justice system in New York. And I am energized by the progress we've made in conjunction with our partners in government and the entire justice community in our state.

We now have broad statutory powers to carry out the overriding responsibility of improving the quality of indigent defense services. And we have brought the three branches of government together in support of this effort. By act of the Legislature, I, as the institutional head of the judicial branch, serve as chair of the Board of an executive branch entity devoted to funding and reforming the criminal defense function.

We are working to identify and address major deficiencies, such as excessive caseloads, inadequate or non-existent investigatory capacities, lack of attorney qualification standards, insufficient training and supervision, lack of oversight for appellate representation, as well as, in some areas of the state, the arraignment of accused persons without affording them the assistance of counsel.

I am committed, along with the Office's Director, William J. Leahy, to using our discretionary grant-making authority to encourage and support localities in crafting creative approaches to improve the delivery of criminal defense services. This has particular relevance to the *Padilla* decision, where we have acted promptly to support the development of a uniform statewide network of training and legal support programs that are focused on immigration consequences. We will soon be funding the "Western New York Criminal Immigration Advisory Center," which will serve as a much-needed legal resource center and clearinghouse to provide expert legal advice and training to public defenders about the immigration consequences of criminal convictions. It will cover the vast western region of the state, including 22 counties and the cities of Buffalo, Syracuse and Rochester. This Center, which is a collaboration of several of the largest public defender offices in western New York -- together with a similar program we will be funding in New York City and with others still in development around the state -- will help our public defense community implement *Padilla* as effectively and efficiently as possible, while providing a model for how defense lawyers can meet a broader range of collateral obligations in the future.

Earlier this year, we also authorized grants in exchange for commitments by counties and local defender offices to implement innovative, quality-enhancing measures to improve the delivery of services. The results of this initiative could not be more encouraging. Dozens of counties submitted plans that would, for example: add attorneys to provide representation at arraignment in our rural courts; reduce excessive caseloads through enhanced attorney staffing; obtain labor-saving case management systems to monitor caseloads, identify conflicts, and prepare mandated reports; add alternatives to incarceration coordinators to link eligible defendants to drug and mental health treatment

services; restore necessary attorney training which had been lost to budget cuts; upgrade existing investigatory capacities, and many, many others.

As Chief Judge and as Chair of the Indigent Legal Services Board in New York, I very much see my role and that of the judiciary as engaging the policymaking branches of government and all affected constituencies in developing an effective systemic process for meaningful reform of indigent criminal defense in our state, now and in the future. I cannot think of a more appropriate or critical role for the Chief Judge and the Judiciary.

Wrongful Convictions

Our efforts to buttress criminal legal representation in New York are a prime example of the growing involvement of state judiciaries in public policy issues affecting the administration of justice. The judiciary has a very important part to play in promoting reforms that enable us to better serve the public, our ultimate constituent. In the criminal justice arena, there are vital reforms that state court systems should be promoting -- modernizing criminal discovery, effective speedy trial rules, and bail reform -- to name just a few. Another one of these challenges that I would like to briefly address today is the scourge of wrongful convictions.

Two years ago, I announced the formation of the New York State Justice Task Force, a permanent, independent group of defense attorneys, prosecutors, lawmakers, police officials, scientists, judges, academics and others who are dedicated to analyzing the causes of wrongful convictions and developing systemic remedies to make the criminal justice system more effective. The Task Force is the only judicially-created body in the country devoted to addressing the problem of wrongful convictions on a permanent, ongoing basis. It reviews documented exonerations in order to identify why the system failed in each case. What misled police and prosecutors? What caused juries and courts to find an innocent person guilty beyond a reasonable doubt? What patterns keep repeating? They extrapolate the lessons learned to formulate remedies and, most importantly, they monitor these issues on a permanent basis to evaluate the impact of reforms and developments and the need for further action.

Shining light on the causes of erroneous convictions can only help our efforts to support the criminal defense function by highlighting the critical importance of a strong indigent defense system and the need for enhanced resources to ensure that defense attorneys have a full and fair opportunity to prepare a competent legal defense.

But just as in the case of re-thinking the indigent defense function, real progress in eliminating wrongful convictions can only occur through a process of genuine collaboration among the three branches of government and among the many different constituencies involved in investigating, prosecuting, defending and adjudicating accused persons. This requires that we come together and have a dialogue that moves beyond parochial perspectives and finger pointing. Going forward, I am very optimistic about the Task Force's potential to foster criminal justice reform and serve as a model in terms of bringing the criminal justice community together in a holistic way that fosters the input and involvement of all stakeholders and builds constructive working relationships as we all strive to develop effective systemwide solutions.

Conclusion

I have tried to give you a sense of how the Judiciary is working to reform the criminal justice system in New York, and why, for us, strengthening and championing criminal defense is such a critical part of that effort. State courts in New York and around the country should be, and are, markedly contributing to the policy solutions being adopted to improve our system of justice. State judiciaries are uniquely positioned to educate the public and the other branches of government, to convene the necessary stakeholders, and to serve as the catalysts that stimulate the kinds of comprehensive, cross-system strategies we need to improve criminal justice processes and produce better outcomes for offenders, victims and our communities.

This is what we in the Judiciary are doing, and what we must continue to do, in order to meet the challenges that lie ahead. And as we go forward, we very much need to work together, engaging in innovative thinking that inspires policymakers to pursue new directions, and informing and elevating the public debate about crime and punishment in this country.

I want to make one thing unmistakably clear -- and that is my own unequivocal commitment to work with all of you, in a very concrete way, to make the ideal of equal justice a reality in New York and around the country. As the head of New York's judicial branch of government, and the steward of our court system, I have dedicated my own tenure as Chief Judge to that end, and I salute each one of you in the defense bar for dedicating your life's work to this noble cause. The playing field must be leveled if the pursuit of justice is to be fulfilled, and the pursuit of justice is what you, and I, and our partners in the justice community are all about -- it is our very reason for being, today and every day. Thank you.