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## **Proactive Change: How One Day Can Make a Difference**

**Page 18**

### **Inside**

**Supreme Court Watch — Police Dogs, DUI Blood Draws and the Fourth Amendment 2**

***Wilbur v. City of Mount Vernon*: A Five-Point National Road Map for Addressing Systemic Violations of the Sixth Amendment 10**

**What's the True Value of Your Services? Use Social Return on Investment to Find Out. 24**



**“Those brought into court who could not afford lawyer’s fees were routinely deprived of any meaningful opportunity to consult with an attorney, let alone have their voices heard in court or confront accusations.”**

# ***Wilbur v. City of Mount Vernon* : A Five-Point National Road Map for Addressing Systemic Violations of the Sixth Amendment**

By Mark Houldin

In a powerful opinion issued in *Wilbur v. City of Mount Vernon*<sup>1</sup>, a Federal District Court in Washington found that the cities of Mount Vernon and Burlington routinely violate the Sixth Amendment rights of individuals by failing to adequately fund and monitor the provision of the right to counsel. Those brought into court who could not afford lawyer’s fees were routinely deprived of any meaningful opportunity to consult with an attorney, let alone have their voices heard in court or confront accusations. The court’s indictment of the current structure in Washington was unflinching, stating that “the system is broken to such an extent that ... the individual defendant is not represented in any meaningful way.”<sup>2</sup>

The case had already attracted national attention with the U.S. Department of Justice’s unprecedented filing of a Statement of Interest in August, reflecting the federal government’s obligation to protect the Sixth Amendment Right to Counsel and a signal of DOJ’s willingness to take meaningful action to address the crisis in the right to counsel.<sup>3</sup> With

the case of *Hurrell-Haring*<sup>4</sup> pending in New York and increasing systemic challenges to failures of local and state governments chronic underfunding of public defense, this decision by a federal court is especially timely and relevant. The analysis of the Court was impressively precise, showing a significant understanding of the systemic causes behind the glaring symptomatic issues in public defense delivery — both in Washington and across the nation.

Highlighted here are five important points of significant national import to take away from the decision in *Wilbur*.

## **1. The Right to Counsel - A Personal Right**

The Sixth Amendment requires that each person accused of an offense has the right to be represented by an attorney to zealously protect their fundamental rights to liberty and due process. The current problems plaguing the realization of this right are so pervasive that the matter is usually described through broad brush strokes. Yet none of this should detract from the most basic reality of the Sixth

Amendment — and all fundamental rights — that they are possessed by individuals, and are therefore unique to each person’s situation. It is often easy for courts to lose sight of this fact in the face of a system failure or a large-scale constitutional challenge. Some courts fall into the trap of reducing the right to a ‘law of averages’: whereby a systemic challenge is assessed based on whether most defendants receive a semblance of the bare minimum requirements of the Sixth Amendment.

Yet the Western District Court of Washington showed an understanding that chronic structural problems that deprive any defendant of the effective assistance of counsel are constitutionally infirm and that these violations are manifested at the most basic level. Meaningful representation by an attorney requires a relationship; an understanding of the individual goals and circumstances of a person’s life and situation. “It is the lack of a representational relationship that would allow counsel to evaluate and protect the client’s interests that makes the situation in Mount Vernon and Burlington so troubling and gives rise to the Sixth Amendment violation in this case.”<sup>5</sup>

The Court looked to specific performance functions of an attorney that are guaranteed throughout the course of representation, and there found glaring constitutional violations, including:

- “[A]n almost complete absence of opportunities for the accused to confer” with counsel, and rare meetings that did occur were not in a confidential setting, as required, but in public, often in open court immediately before a hearing;
- Attorneys with no information about the person standing beside

them and their case, such as “possible defenses, the need for investigation, existing physical or mental health issues, immigration status, client goals,” and potential outcomes.

- If the information was exchanged, it was in a “perfunctory and/or public manner.”<sup>6</sup>

The Court found that these realities were tantamount to the people receiving no representation at all. The assignment of an attorney, the court found, was “little more than a formality,” a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual.<sup>7</sup>

## 2. Addressing the Root Cause - A Systemic View

While the violations are individual, the causes of these deficiencies occur at a systems level. The fact that these violations have become so rote is both what makes the problem so abhorrent, but also at times what has made the problem so difficult for courts to detect and remedy. The machinery of justice, in place long before *Gideon*, has in many places turned into an assembly-line wherein so-called efficiency can masquerade as fairness.

Yet the court in *Wilbur* recognized the stark reality of injustice. In fact, the court suggested that we should not be surprised by these results, as these violations were the “natural, foreseeable, and expected result” of crushing and excessive caseloads left unaddressed by the city and local courts. The effect is “little more than a ‘meet and plead’ system.”<sup>8</sup>

Many cases challenging system-wide deficiencies lay blame at the feet of individual attorneys for not provid-

ing proper service, regardless of other factors rendering proper representation impossible. Yet this case, brought as a class action, was postured to avoid such hindrances before a court that was able to identify root causation. Most importantly, the court did not play the shell game of viewing the different manifestations of constitutional deficiencies as a false indicator that they are somehow unrelated. Rather, in identifying the root cause of the problem, the court exposed the government’s abdication of their responsibility to protect this right for all individuals coming before the trial courts.

## 3. Obtaining Relief in the Courts is Not *Strickland*-Limited.

*Strickland* is often thought to be the only manner by which Sixth Amendment violations can be raised — albeit incredibly difficult to win. In so doing, they are subject to the rigid and antiquated *Strickland* test, requiring the defendant to prove not only that their attorney did not meet professional rules of conduct, but that such representation would have resulted in a different result to the case.<sup>9</sup> However, regardless of the rigidity of the test, *Strickland* was always intended to be used for especially deficient performance in *individual* cases.<sup>10</sup> In fact, the rule set forth in the case was expressly narrowed by policy considerations that apply only to individualized challenges.<sup>11</sup>

Yet, whether due to inertia or a misunderstanding of the remedies available, courts have routinely explicitly or implicitly applied this strict, outcome-based analysis. This approach allows for many serious constitutional violations throughout the critical,



life-altering process of a criminal case to go ignored and permit the problem to continuously compound. The deficient remedy thus defines the right, rather than the other way around.

#### **4. Governmental Accountability for Protecting the Right to Counsel**

In this opinion, the Western District Court makes a much more scathing indictment of the government's role: that the cities "are regularly and systematically failing to provide effective assistance of counsel" to people unable to pay for an attorney.<sup>12</sup> The freedoms outlined in the Bill of Rights are the Government's responsibility to protect. If they are to have any meaning at all, these fundamental rights must be scrupulously enforced by Courts. The need to hold government accountable has been remarkably absent in the many discussions of the violations of the right to counsel prior to *Wilbur*.

The Washington Court states plainly, that "[m]unicipal policymakers have made *deliberate* choices regarding the *funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.*"<sup>13</sup> In other words, ignoring the choices made at other points in the criminal justice system (e.g. funding, sentencing, and arrest decisions) does not abdicate a local government of their responsibility to ensure that the court system can adequately protect the rights of the individuals flowing through the system.

As the Court chastised, "the Cities... remained *willfully blind* regarding [the attorney's] overall caseloads and their case processing techniques. The City officials who administered the public defense contracts did not feel it

was necessary for them to know how many [private] cases [the attorneys] were handling, the number of public defense cases they were assigned, or even whether the defenders were complying with the standards for defense counsel set forth in the Cities' own ordinances and contracts."

#### **5. Allowing pre-*Gideon* Structures to Continue Operations Prevents Realization of the Right**

The opinion in *Wilbur* touches on one of the lesser talked about reasons that *Gideon* has remained unfulfilled for 50 years — that lack of changes in how public defense is administered and by what level of government keep the Sixth Amendment frozen in time. *Gideon* explicitly overruled the case of *Betts v. Brady* — a 1942 decision holding that the constitution required counsel only in "special circumstances", and that it was a matter of state legislative policy to determine whether all remaining individuals facing loss of liberty have access to effective representation. The *Gideon* decision, two-decades later, was cast by the Court not as a watershed decision, but stating "an obvious truth,"<sup>14</sup> one that returned to past precedent and restored "constitutional principles established to achieve a fair system of justice."<sup>15</sup>

Yet this idealism was undercut by the inertia set in motion by years of courts churning under a *Betts* framework,<sup>16</sup> in which there was no national or enforceable right to counsel, and local and state jurisdictions would decide when and how to provide the right to counsel. Thus, even post-*Gideon*, the lack of federal oversight, funding, training, or direct assistance to pro-

**Continued on page 37**

tect the essential constitutional right allowed for local and state governments to continue dictating whether or not adequate counsel will be provided.<sup>17</sup>

Recognizing this, the Washington court states that “legislative enactments are required to ensure that the right is maintained.”<sup>18</sup> Instead of the required enactments, Washington municipalities (and state and local governments across the nation) have done much the opposite, as “funding limitations imposed over the past few years are having a cumulative and adverse impact at both the state and national levels”<sup>19</sup> on the right to counsel.

The ruling, delivered on December 5th, 2013, comes as the year of *Gideon’s* 50th anniversary comes to an end. However, with the momentum built throughout the year towards rectifying long-ignored civil rights problems — through state-level changes, DOJ-led efforts, and the historic introduction of the National Center for the Right to Counsel Act in Congress<sup>20</sup>, the powerful language of the opinion serves as a fitting sounding of *Gideon’s* trumpet as the march towards equal justice enters a new era. ■

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1. *Wilbur et. al v. City of Mount Vernon*, No. 2:11-cv-01100-RSL, Mem. Op. & J (Wa. W.D. Dec. 4, 2013) (available at <https://aclu-wa.org/sites/default/files/attachments/2013-12-04--Dkt%20325--Memorandum%20of%20Decision.pdf>).

2. *Id.* At 8.

3. Statement of Interest of the United States of America, U.S. Department of Justice, Civil Rights Division, 2:11-cv-01100-RSL Document 322 (Filed 08/14/13) (available at <http://www.justice.gov/crt/about/spl/documents/wilbur-soi8-14-13.pdf>).

4. *Hurrell-Harring v. NYS*, 8866-2007, NYLJ

1202633856261, (December 16, 2013)

5. *Id.*

6. *Id.* at 14.

7. *Id.* at 3.

8. *Id.* at 3.

9. *Strickland v. Washington*, 466 U.S. 688 (1984).

10. *U.S. v. Cronin*, 466 U.S. 648 (1984); See also, *Strickland* 466 U.S. at 683 (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. E.g., *United States v. Cronin*, ante p. 466 U.S. 648. With the exception of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), however, which involved a claim that counsel’s assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of “actual ineffectiveness” of counsel’s assistance in a case going to trial.”).

11. See *Strickland*, 466 U.S. at 693 (“This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings”).

12. *Wilbur*, *Supra* Note 1 at 1-2.

13. *Id.* (emphasis added).

14. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

15. *Id.*

16. *Betts v. Brady*, 316 U.S. 455 (1942) (overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963)) (Holding that there existed no federal right to counsel, as “it has been the considered judgment of the people, their representatives, and their courts that an appointment of counsel for indigent defendants in criminal cases is not a fundamental right, essential to a fair trial, and that the matter has generally been deemed one of legislative policy.”)

17. See generally, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel*, A Report. Constitution Project (2009).

18. *Wilbur*, *Supra* Note 1 at 10.

19. *Id.*

20. H.R. 3407 (2012).

**Resources for Arrests Related to Seizure Behavior**  
continued from Page 30

and select #3 or email us at [legal-rights@efa.org](mailto:legal-rights@efa.org). ■

*Provided by the Jeanne A. Carpenter Epilepsy Legal Defense Fund.*

1. <http://www.epilepsyfoundation.org/resources/epilepsy/legal/upload/Arrest-for-Seizure-Related-Behavior.pdf>

2. <http://www.epilepsyfoundation.org/livingwith-epilepsy/firstresponders/>

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**What’s the True Value of Your Services?**  
continued from Page 28

ue to our communities — both in the immediate term and over longer time periods.

The Social Return on Investment results provide that proof of value. ■

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