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Gideon's 50th anniversary deserves only two cheers

This year marks the 50th anniversary of *Gideon v. Wainwright*, the Warren court decision that held that all indicted felony defendants have a constitutional right to a court-appointed lawyer, 372 U.S. 335 (1963). The anniversary has triggered a certain amount of self-congratulation from some legal commentators.

But others have offered a more jaundiced view. Karen Houppert's new book "Chasing Gideon" (New Press, 2013) chronicles the plight of overworked public defenders, underpaid contract attorneys and incompetent, appointed panel lawyers. Part of the problem, of course, is the phenomenal increase in the number of drug prosecutions in the years since *Gideon*.

For example, in 1963 drug arrests in America numbered less than 50 per 100,000 people; by the turn of the century it had jumped to 750 per 100,000. But funding has not kept pace. In the nation's largest counties, expenditures for public defender programs constitute only about 3 percent of government spending on criminal justice. Moreover, funding for federal defender offices will be cut 14 percent for the 2014 fiscal year.

And the role of criminal defense attorneys has changed. Even at the time of *Gideon*, about 75 percent of all American criminal convictions resulted from pleas. But today the figure is closer to 95 percent. *Missouri v. Frye*, 132 S. Ct. 1399 (2012). Some of that increase is undoubtedly caused by the avalanche in the number of drug cases. Most cases aren't "tried"; they are "processed."

Professor Pamela R. Metzger comes at *Gideon* from a different angle. She contends that by increasing opportunities for participation by defense attorneys, courts have ironically decreased the power of criminal defendants to exercise important constitutional rights that belong to them personally. Metzger, "Fear of Ad-

versariness: Using *Gideon* to Restrict Defendants' Invocation of Adversary Procedures," 122 Yale Law Journal 2550 (2013).

Criminal procedure rights can be roughly divided into two categories. The large majority are "tactical" or "nonfundamental." These are rights that can be exercised by defense counsel without consulting the defendant. These include most trial decisions such as how to conduct a cross-examination; which witnesses to call; what motions to file; and when to object at trial.

Yet a limited number are referred to as "fundamental" rights. These are considered so personal to the accused that only he or she may waive them. The U.S. Supreme Court has clearly identified four rights as fundamental: "whether to plead guilty, waive a jury, testify in his or her own behalf or take an appeal." *Florida v. Nixon*, 543 U.S. 175 (2004). *Nixon* makes it clear that the defendant must personally waive the right voluntarily, intelligently and knowingly. Defense counsel cannot waive unless she has both consulted with the defendant and obtained his consent to the waiver decision. If there is doubt, the judge must indulge every reasonable presumption against waiver.

These four fundamental rights are all rooted in the Constitution: the Sixth Amendment for jury trial; the due process clause, Fifth Amendment, and Sixth Amendment for the right to testify; the due process clause for the right to decide to take an appeal; and various constitutional provisions for the variety of rights waived through a guilty plea.

In the usual criminal appeal, if the court finds a constitutional violation, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the error was harmless. Thus, if the trial judge or the prosecutor violates a defendant's exercise of a fundamental right, the prosecution must then overcome the presumption of prejudice. See, e.g., *U.S. v. Mullins*, 315 F.3d 449 (5th

CRIMINAL PROCEDURE

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Cir. 2002).

But courts do not use this defense-friendly standard when evaluating situations in which the defense counsel has interfered with a defendant's personal exercise of a fundamental right. Instead, they use the much more prosecution-friendly *Strickland* standard used to evaluate ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, if the defendant proves that counsel was deficient, he then must go on to prove that the deficiency resulted in prejudice. "Prejudice" arises only in the rare case in which the defendant can show that there is a reasonable

probability that, but for the attorney's error, the verdict below may have been different.

Consider how Illinois deals with the defendant's fundamental right to decide whether to testify. Illinois courts concede that this right belongs solely to the defendant and that any waiver must be made voluntarily, intelligently and knowingly. Yet the courts perversely refuse to require the trial judge to actually tell the defendant that he has this right.

Moreover, there is no requirement that the defendant make an on-the-record waiver of the right. *People v. Davis*, 378 Ill.App.3d 1, (2007). Illinois follows a "see-no-evil" approach and relies largely on the defense attorney. As professor Metzger sees it, *Gideon* offers a strong incentive for trial courts "to oversee less and less of the trial process by delegating more and more to defense counsel, most of whom are underfunded and overworked." And doing so provides "an almost bulletproof way for trial judges to avoid the risk of reversal: Foist as many potential judicial errors as possible onto trial counsel."

The same is true with the defendant's right to choose whether to take a jury or a bench trial. It's clear that the defendant in Illinois has a personal right to decide which to choose. *People ex rel. Daley v. Joyce*, 126 Ill.3d 209 (1988). Yet the 2nd District Appellate Court recently held that a judge has no duty to inform him of his right to a bench trial. *People v. Brown*, 988 N.E.2d 706 (2013).

And as to his right to a jury trial, the Illinois court holds that there is no duty on the part of the trial judge to provide the defendant with any set admonitions or advice. Nor is there a requirement of a written waiver. Instead, the validity of the waiver is determined on a case-by-case basis. *People v. Bracey*, 213 Ill.2d 265 (2004).

So on *Gideon*'s golden anniversary, let's give two cheers. But let's also withhold the third until all of its promises have been fulfilled.

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