Vermont Digger Commentary – Robert Sand

Editor's note: This commentary is by Robert Sand, who is the founding director of the Center for Justice Reform at Vermont Law School and a former Windsor County state's attorney. He is also the high bailiff-elect for Windsor County.

"The spirit of liberty remembers that not even a sparrow falls to earth unheeded."

So wrote famed jurist Learned Hand paraphrasing a biblical passage. In 2019, the Vermont House of Representatives took an important step toward ensuring that all Vermonters, especially indigent ones, do not fall within the criminal legal system unheeded.

In Gideon v. Wainwright, the U.S. Supreme Court recognized a constitutional right to indigent defense services. Gideon, and subsequent decisions, limited the mandate to offenses for which incarceration or a suspended jail sentence would be part of the consequences upon conviction. The line of cases creates a constitutional requirement to provide public defense services to people charged with a felony or a misdemeanor where imprisonment is an option but does not create a similar requirement for crimes where incarceration or probation will not be imposed. Vermont law follows this line of cases, denying public defender services to indigent defendants charged with misdemeanors if the court states it will only impose a fine upon conviction. Vermont law draws a distinction between "serious crimes" and other criminal offenses. Since all crimes are serious, the Legislature should eliminate this distinction and provide counsel to all indigent people.

Under our federalist system, United States Supreme Court constitutional interpretations provide a baseline of protection. States are free, however, to provide broader protections than mandated by the U.S. Constitution. Many states do just that by providing public defenders to indigent people charged with *any* crime. In 2019, the Vermont House took an important step in joining other states that recognize the fundamental importance of making public defense services available whenever an indigent person is charged with any crime.

House Bill 342, co-sponsored by Rep. Selene Colburn, passed the House but was not considered by the Senate. The bill provided public defenders to indigent people charged with any crime. The House recognized the significance of all criminal charges, even those classified as misdemeanors. The state records convictions for all crimes on a person's criminal record history, a mark that can last a lifetime. A criminal history may affect employment, housing, loans, standing within the community, and self-worth. Even crimes with relatively low penalties present complex issues and require the person accused to navigate the intricate, confusing, arcane world of the criminal legal system. How many people understand (or can even pronounce) infrared spectrophotometry or retrograde extrapolation – two key aspects of DUI cases?

People of means do not have to navigate this world alone. They hire an attorney. People without wealth, who cannot afford counsel, should not have to go solo. Poverty punishes

enough. All people, rich or poor, are presumed innocent until the prosecution overcomes that presumption with proof beyond a reasonable doubt. Public defenders, and all criminal defense attorneys, hold government to its constitutional burden.

Young adults make up most of the people charged with crimes. We all know that impulsivity and inadequate long-term planning are hallmarks of this age. Yet in courthouses across the state, judges — following current Vermont law — deny public defender services to people charged with crimes, effectively forcing self-representation against law-trained prosecutors. With remarkable frequency, these people accept whatever offer of resolution the prosecution extends without consideration of legal defenses or the possibility of alternative, less punitive or permanent outcomes. Certainly, this is not justice.

Some have suggested a change in the law will increase caseloads and cost for our excellent public defense system. A fair criminal legal system provides adequate funding for defenders and prosecutors. The inquisitive eyes of a public defender looking at these cases may yield an unexpected result — prosecutors filing fewer cases or making more referrals to restorative justice programs. Caseloads may decrease under the proposal. Even if caseloads increase, this is the right thing to do.

We must also acknowledge the compounding effects of punishment for subsequent convictions. The impulsive young adult who blindly accepts an offer of resolution to a criminal charge without considering the long-term ramifications may find herself in a much deeper hole upon returning to court on a new charge. Public defender representation for an initial charge helps avoid the deepening chasm of returning to court as a recidivist.

This proposed change in the law may also prompt the General Assembly to continue its inquiry into whether some offenses now treated as crimes and adjudicated in the criminal division could be heard more expeditiously and fairly as tickets in the Judicial Bureau or, better yet, addressed restoratively at the community level. The Vermont Sentencing Commission provides the perfect vehicle for considering the proper classifications of misconduct.

At a time when the rule of law seems perilously in danger on the national level, we have the opportunity in Vermont to make a small but important change. House Bill 342 helped define our commitment to fairness for all who come into our criminal system and reflected the “spirit of liberty” we hold dear. The Vermont Legislature should reintroduce and pass a version of H.342 during this legislative session.