Is the process choking PD system?

**Forget the red tape: State should pay attention to funding, but leave control up to local jurisdictions**

By JUDGE ANDREW A. MICKLE

Special to the *Fulton County Daily Report* (the Georgia legal newspaper), April 11, 2008

Judge Andrew A. Mickle took the Atlanta Municipal Court bench in January 1982 after three years in the Atlanta Public Defender’s Office, the last year as chief public defender.

The Brian Nichols [capital case involving the killing of a judge, court reporter, deputy sheriff and another person] funding fiasco [involving the costs for Nichols’ lawyers, investigators and experts] has brought to a head the mounting crisis of an already tottering indigent defense system. As a former city of Atlanta public defender and a sitting lower-court judge since 1982, I offer the following five theories of what is wrong and then, seriatim, suggest possible solutions: 1) the statewide Public Defender Standards Council, while well-intentioned, is mired in red tape; 2) local control of appointed counsel is essential; 3) there are more than enough eager defense attorneys who would work for much lower hourly, if not per case, rates 4) the federal and state constitutions, and accompanying case law, mandate an initial appearance within 48 hours but not such immediate appointment of counsel; and 5) judges at all levels but especially in the lower courts are all too quick to appoint counsel while often neglecting so-called indigency standards. I now look at each of the above points.

**Good intention, poor results**

The advantages of a statewide indigent defense system, by any name, capital or noncapital, are generally statewide funding and budgeting. Clearly, there are many poor counties in Georgia with insufficient tax bases to fund even one capital murder trial; it would literally break the proverbial county coffers. Statewide funding can trickle down from the top to those counties on a proportionate basis. Call it redistribution of funding if you will, but redirection is a better term, a funneling of funds to satisfy constitutional mandates. Defendants’ rights do not vary by county but observance of those rights all too often does. The state can, and should, pay attention to funding, but should leave control of the appointive process to local jurisdictions. Without going into whether life without parole is a viable option in the Nichols case, are there no attorneys in the Fulton County Public Defender’s Office capable of handling the defense? If [District Attorney] Paul Howard’s office did not recuse, why should the public defender not handle the defense?

**Local control of counsel’s appointment**

I am often (as are many of us in the legal profession) asked to recommend attorneys, both criminal and civil; in either case, my first question is, “What county? You need home-cookin’!” It is a poor defense attorney who does not consider associating “local” counsel because of the county venue. The same can be done by local PD’s offices where they exist. Advantages of local counsel are self-evident, not the least of which is familiarity with the prosecutors and judges. I have seen salaried PD and appointed attorneys outperform private attorneys in many instances, and familiarity with the “courtroom workgroup,” as well as a feet-to-the-fire competence, are two of the reasons why.

**Enough attorneys to go around**

There are many eager (and some starving) attorneys out there jockeying for position on court-appointed lists. And the more appointments, the greater the competence. We all had to start somewhere.

Presently, the city of Atlanta pays appointed attorneys, needed in case of PD conflicts, $50 per case (not appearance) until it is resolved. Additional, compensation must be approved by the chief judge. Granted, only lesser crimes and violations come through the Municipal Court, as in most lower courts – traffic, disorderly conduct, possession of marijuana, shoplifting, et al. And there is of course a predominance of guilty pleas. But the principles are the same, whether felony, misdemeanor or ordinance: The lawyer is a shield and the person gets representation if desired. Let’s face it – no one gets rich on appointed cases. Public defenders are salaried. But when we appoint, we generally schedule that attorney for several cases. So the trip to the courthouse is worthwhile, and the upstart defender of the downtrodden gets his name and face out there and learns quickly.
I tell my classes at Georgia State, where I have taught criminal procedure to undergraduates since 1983, that if the average American (or non-American) is going to have a personal encounter with the unquantifiable, indefinable concept of justice in an American courtroom, that experience is most likely to occur in a lower court such as mine. Who among us has not had to appear, for one reason or another, in a traffic court? (If not, your time will come!) So it is in the bowels of the halls of justice so eloquently and satirically portrayed in Tom Wolfe’s “The Bonfire of the Vanities” that Joe American gets a first, and often, last impression of “justice” and the criminal justice system. Most crime is routine – that’s why it doesn’t make news. But appointed counsel is required at every level except for fine-only offenses. I would think the aggregate costs of defending petty offenders far exceeds the total outlay for capital defense. You don’t need Bobby Lee Cook for those “lower depths.” There are those who work for $50 to $75 per case.

Immediate appointment not constitutionally required

There is a right to a first appearance detention hearing within 48 hours, if not 24, but no such right to an attorney. A five-to-seven day window for attorneys makes much more sense for the following reasons: First, many defendants will post bond and immediate counsel is not needed. Second, it is surprising how many “technical” indigents get on the horn and muster up enough familial resources to hire a lawyer. If some can hire a lawyer, let them! See my comments in the next section.

Judges appoint attorneys virtually automatically and often without regard to actual indigency determinations. This pet peeve of mine hearkens back to my PD days from 1978-81. It has been my experience over the years that public defenders and assigned/appointed counsel are grossly overused, overappointed, overworked and abused by being appointed to represent many non-indigents. One such horror story: A single MARTA bus driver making more than $120,000 was given a public defender (not by yours truly). Or a more familiar refrain: “I’ll take a public defender now and get me a real lawyer for the big court.” And of course anyone who has public defense experience knows that an affidavit is virtually all that is required; there in no way to “discover” defendants’ assets. Not only does this frustrate the private bar because it is potential money out of their pockets, but it is an additional expense for the appointing jurisdiction. I submit that a roughly one-week hiatus between charging and appointment of counsel would result in more private defense bar involvement and an easing of the crunch on indigent defense systems. I remember cases in the 1970s and ‘80s where private counsel, in court on retained matters, would often graciously volunteer pro bono services instanter. “Judge, let me have a minute with this fine young man. …” Yes, the Ed Garlands, John Tylers, Stanley Nylens and countless others of yore. …

My point in all of this is that perhaps what is needed is a little more common sense, fewer rules and regulations and more local control, recognizing that state, county and local funding are still needed. The defense bar will be happier and so will public defenders. There is no panacea but I offer these ideas as food for thought.

Mickle’s ‘home cooking’ not good for indigent defense

By STEPHEN B. BRIGHT
Special to the Daily Report, April 17, 2008

“Home cooking” has frequently been used to describe the kind of justice local courts have given people accused of crimes. In capital cases, defendants were often assigned incompetent lawyers who offered little or no resistance as their clients were swiftly dispatched to death row. The practice was cheap and efficient—the lawyers weren’t paid much and the trials didn’t last long.

But it undermined the credibility and legitimacy of the courts. The cases had all of the integrity of a professional wrestling match. And many cases were reversed because of ineffective assistance of counsel – often for egregious deficiencies in representation.

For example, in three cases tried in different parts of the state, locally appointed lawyers referred to their African-American clients with a racial slur before the jury. In another, the lawyer
was unaware of the Fourth Amendment to the United States Constitution. In another, a lawyer was parking his car while a prosecution witness was testifying on direct examination, but nonetheless cross-examined the witness. There is a long list of similar examples.

This kind of local control was a major factor leading to recommendations several years ago to create an independent, statewide public defender program.

Nevertheless, Judge Andrew Mickle recommends a return to what he calls “home cooking,” based on 25 years of presiding over traffic and other petty cases in Atlanta Municipal Court. In an At Issue last Friday [April 11, “Is the process choking PD system?”], he offered several other surprising recommendations with regard to Georgia’s continuing struggle to meet its constitutional responsibility to provide counsel to poor people accused of crimes.

One was to pay lawyers less. He pointed with pride to paying lawyers $50 a case in municipal court. Despite a rate less than most lawyers charge per hour, he assures us that there are eager and “some starving” lawyers “jockeying” for appointments.

Most of those lawyers are equally eager to meet the three or four clients they are appointed to represent, put down guilty pleas and collect their $150 to $200 in as little time as possible. This serves judges’ interest in obtaining guilty pleas and moving their dockets, but it discourages lawyers from spending more than a few minutes on a case. People are processed; they are not represented.

Lawyers supposedly gain competence by learning at the expense of their poor clients – “the more appointments, the greater the competence.” That may have been the best that could be done at one time, but today, most indigent defense programs in the country provide comprehensive training and supervision to ensure competent representation. That is what Georgia must do if it is ever going to provide competent counsel to those accused in all kinds of cases.

Most radically, Judge Mickle proposes to leave those arrested in jail longer without an attorney in hope that they will post bond so that “immediate counsel is not needed” or “get on the horn and muster up enough familial resources to hire a lawyer.” This is Alice-in-Wonderland justice: a person spends time in jail first; guilt or innocence will be decided later. Or, as it is often put to those in jail, “if you plead guilty, you will be sentenced to time served.”

It’s also second-class justice that is only for the poor. If Mickle were to be arrested, he would not want to spend a week in jail before seeing a lawyer. And, even if released, he would want a lawyer immediately to investigate the charges and start preparing a defense. Of course, he would have the resources to avoid languishing in jail without a lawyer. That’s only for the poor.

Finally, Judge Mickle perpetuates the myth that people who can afford lawyers want to take their chances with the kind of $50-a-case lawyers provided in municipal court. He says that when he was a municipal court public defender between 1978 and 1981, a MARTA bus driver making over $120,000 was represented by a public defender. Of course, something like that happens only if people like Judge Mickle are aware of it and do nothing.

Good public defenders working under crushing caseloads will not represent such a person because they know it hurts their ability to represent the people who are eligible for their services.

Unfortunately, Judge Mickle does not offer a vision of where to go with regard to indigent defense in Georgia, but instead reveals how far there is to go in Atlanta Municipal Court.

**Atlanta judge arrested on DUI charge**

*Police say Municipal Court Judge Andrew Mickle admitted to having ‘one too many drinks’*

**By TIM EBERLY**

*Atlanta Journal-Constitution, April 30, 2008*

An Atlanta Municipal Court judge was arrested on a charge of driving under the influence last month after getting into an accident with another motorist on his way home from a restaurant, according to police and his attorney.

Judge Andrew Mickle, 58, did not cause the
March 24 accident near Oakland Cemetery in southeast Atlanta, but admitted to a police sergeant that he had “one too many drinks” after police and others smelled alcohol on his breath, according to an Atlanta police report.

Mickle did not return a phone call seeking comment, but had his defense attorney, Steve Weiner, respond to questions.

“He’s very upset,” Weiner said of the arrest. “He’s taking it very seriously. He clearly understands the seriousness of the charge. Being a judge, it clearly troubles him that he’s in this situation.”

Mickle is still on the bench, but his caseload has been restricted. The Judicial Qualifications Commission, which oversees Georgia judges, agreed to let Mickle stay on the bench, as long as he doesn’t preside over any DUI cases, Weiner said.

Both the Municipal Court and City Solicitor’s Office recused themselves from Mickle’s case, asking the Atlanta Judicial Circuit for an independent judge and prosecutor, neither of which have been named yet.

The wreck was reported at 8:54 p.m. at Memorial Drive and Oakland Avenue after another driver traveling the wrong way down a one-way street pulled in front of Mickle’s vehicle on Memorial, the report said.

Weiner would not say which restaurant Mickle had just left.

A Municipal Court judge since 1992, Mickle refused to take a chemical test of his blood, breath or urine, as required by state law. The refusal could result in the loss of his driver’s license for at least a year.

He did, however, take several field sobriety tests, including walking in a straight line and turning around.

“He was not stable and could not follow instructions,” Officer Malcolm Kempton wrote in a police report. “He would mimic what my sergeant said when he was giving out the instructions.”

Mickle twice failed that test before moving on to another one: the one-leg stand.

He failed that one, too, according to police.

“He lost his balance everytime [sic] he tried to complete the test,” Kempton wrote. “My sergeant and I both agreed that he failed both tests and that he was impaired.”

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Mickle, who was not injured, was booked into Atlanta City Jail. He was released at 12:07 a.m. on $1,453 bond, according to the jail.

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Paperwork snafu lets DUI-charged judge off hook

Police officer failed to turn in documentation

By TIM EBERLY
Atlanta Journal-Constitution, July 28, 2008

An Atlanta Municipal Court judge arrested on drunken-driving charges earlier this year will not lose his license for refusing to take a sobriety test because an Atlanta police officer failed to turn in paperwork documenting the refusal, the judge’s attorney said.

Judge Andrew Mickle would have had his license suspended for one year for refusing to take a chemical test of his blood, breath or urine during his March 24 arrest.

“For whatever reason, the officer never sent it in,” defense attorney Steve Weiner said Friday. “That is fortunate for [Mickle].”

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When a motorist refuses a chemical test and is arrested on a DUI charge, the arresting officer is supposed to send a form to DDS documenting the refusal, Ammons said. The license suspension goes into effect 30 days after the arrest.

It’s not clear why the officer who arrested Mickle, Malcolm Kempton, did not submit the paperwork.

An Atlanta police spokesperson, Eric Schwartz, said Monday afternoon that Kempton was unavailable for comment.

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