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ESSENTIALS TO JUSTICE: A RIGHT TO COUNSEL SYMPOSIUM

**WHAT DOES A CLIENT HAVE THE RIGHT TO
DEMAND?***

By: Jonathan Rapping
Introduction: Mark Stephens

MR. STEPHENS: I must not have read the program. I didn't know I was going to introduce Rap the Genius we call him now. Rap recently won the MacArthur Genius Award and so we're having a whole lot of fun every time he does anything wrong or even questionable, we can throw that at him about he's such a frigging genius, you think he would be able to figure out this or that.

Several years ago, Jerry Black sent me a law review article and suggested that I read it written by John Rapping and it had something to do with building a foundation on shaky ground or something, you know, I was just kind of going through the motions. It was about how you structure indigent defense within an institutional defender organization and what Rap was basically saying in the article, and I know I'm going to get a bunch of crap for this because I'm sure I'm not summarizing it correctly, but what he was saying is you got to start from the ground up and you have to get the right people with the right commitment to the work to come in and transform a culture of an office that maybe isn't where it should be. You can't do that from the top down. You have to do it from the bottom up. And Rap was engaged in an organization called Gideon's Promise. At the time, it was called the Southern Public Defender Training Center, SPDTC, but so many people choked on that name that they eventually had enough -- I mean he is a genius, he had enough sense to change the

* Edited for readability.

name of the organization so the acronym at least is a lot easier to remember. And so I e-mailed him and I told him I don't know who you are but you get it, you get my world, institutional defense at being public defenders and how to structure public defense and so from that grew a friendship. I consider Rap a friend of mine and his organization has really transformed the Knox County Public Defender's Community Law Office. A third of my staff now have all gone through Gideon's Promise. I don't hire anybody that doesn't go through Gideon's Promise, and it is making an incredible difference in my office. It's making an incredible difference in the work that we do in our community. It has empowered and it fires up the older lawyers that are in my office, and I'm very, very thankful for Jerry Black for introducing me to Rap and then my relationship that I've had with him over the last seven years, so with that, let me introduce you to Rap. I also hope that you can come by the reception tonight. We're going to have a reception at the Sunsphere. We're going to tell you more about Gideon's Promise and Rap and his wife Illy, who really does all the work, and we would hope that you could come and learn a little bit more about the organization so with that, John Rapping.

MR. RAPPING: So if I was a genius, why would I be hanging out with Mark Stephens? That's what everyone is asking. I have to say thank you for your presentation, both of you. When Ndume said we couldn't put people on death row and execute people unless we saw them as something less than human, you know, I couldn't agree more. I think that's absolutely true. I think that extends beyond death row. I believe we couldn't lock people up for twenty years for drug offenses unless we saw them as less than human, and I believe we couldn't lock up people presumed innocent on bonds they couldn't make as they lose their homes and jobs unless we saw them as less than

human. I believe we couldn't shackle juveniles unless we saw those children as something less than human. So I couldn't agree with you more. I think that all of these problems we're talking about are symptoms and the problem we've got to tackle is injecting humanity back into a system that's lost sight of that.

I'm reminded of that every day because I really am married to a genius. Ilham Askia is the executive director of Gideon's Promise. She's not a lawyer. I'm reminded of that by just working with someone every day who lifted herself from a different perspective.

So Illy grew up in a household where every man in her family has been through the criminal justice system. Her father got locked up when she was five years old. She grew up and raised her baby brother. Every uncle and cousin she knew was locked up. Her baby brother ended up in prison, got out, back in prison. And Illy talks about how she became a teacher because she wanted to interrupt this cradle to prison pipeline at sort of the early part of the process and she talks about how she met these lawyers who represented the men in her lives and they didn't see the humanity in them. They didn't learn who they were as people. They didn't tell their stories and she had no faith in public defenders.

And then she started meeting some public defenders who were courageous and who care and who work against incredible odds. And when we started Gideon's Promise eight years ago, I asked her to take the year off teaching and help build this organization and she didn't -- she hasn't gone back because I think she believes that she can do more good at this stage, the last stop before the cradle to prison pipeline is finalized. But again, I think she reminds me, and I appreciate, Ndume, you saying this again, that this is about injecting humanity into the system. It's shocking to me that we could have gotten to a place where we have a system that sees people as so subhuman.

It's shocking to me when I think about how last year we celebrated the fiftieth anniversary of *Gideon vs. Wainwright*, which I really see as a milestone, not a criminal justice milestone, I see it as a human rights milestone and a civil rights milestone. I think *Gideon* was decided, it was, I don't think, I know it was decided in 1963. It was decided the same year as the march on Washington, the same year as so many civil rights milestones and that's not coincidental. It was decided at a time when we as a nation were struggling with our rhetoric not matching our actions, when we realized we weren't affording people, humans, basic civil rights in all walks of life and certainly the criminal justice system was one of those areas. And so *Gideon* said something really simple. It said that when a person is in the criminal justice system, a complex system, complex procedures, complex rules, they cannot receive justice if they don't have a lawyer. The lawyer is literally the vehicle necessary to ensure that justice is done. And if we believe in equal justice, which is what *Gideon* was about, then it goes without saying poor people have to have the kinds of lawyers that those of us with means would pay for, right? It's really, I think, quite simple.

And I think about this all the time, but as I sort of thought about this coming over here, I was reminded of some of the young lawyers I started working with when I first moved to Georgia. I just saw Steve Bright walk in the room and I remember I got a call from Steve Bright when I was a lawyer in Washington, D.C. back in 2004, and he asked how I would feel about moving from Washington, D.C. to work with the public defender system in Georgia and I was like, you got to be kidding. Then I talked to Illy, and she was like, you got to be kidding me. We asked our six-month-old daughter. She was like (unintelligible), you got to be kidding me. But Steve's persuasive so we moved down there and we started trying to do what Mark was

talking about, build a community from the ground up of sort of lawyers who were inspired and help them sort of keep that inspiration.

And one of them after two years, she left. She wrote a letter to the Atlanta Journal Constitution and she talked about how she couldn't do the work any more because she was sort of losing her soul. When she talked about on the last thirteen months, she had closed nine hundred cases. She calculated for the readers of the paper that if she worked every single day taking no vacation and working fifty hours a week for a year, she could give each client three hours and so she quit because she felt she just couldn't be the lawyer that *Gideon* demanded that she believed she needed to be. And she left and that was sad. That was sad to me. And over the years, I've seen a lot of lawyers leave for that reason, but I think what was sadder to me was she left behind a group of lawyers, many of whom believed they were doing right by their clients, that what they were doing was okay, that in fact, there are three hour cases, and let me just be very clear when I say this because I really don't want to be misunderstood. I do not mean to be critical of those lawyers. They stepped into an arena that most law students will graduate and never consider stepping into. They have decided to do really important work but they walked into a system that has shaped them. It has shaped them and they have become lawyers they never meant to be when they started, but sometimes these systems make our public defenders become lawyers who have to process human beings and so to me, that was the sadder part of the story, was not that Marie left, but that we have a system that allows so many who have been left behind feel okay about the three hour case,. And so I've talked to Mark Stephens about that quite a bit, about this idea of the "three hour case," and I think there are a lot of public defenders who I respect who would say to me oh, that case, you could do that case in three

hours. And I actually think that's not true. I think there's no such thing as a "three hour case."

When Mark asked if I would speak about what clients deserve, I want to talk a little bit about why I say there is no such thing as a three hour case. I can't imagine a case and I ask any of you to imagine the most minor charge you could be charged with, and you walk into a lawyer's office to hire them and they say it's your lucky day. I'm looking at my calendar, I've got three hours this year that I can give you. How many of you would hire that lawyer? My guess is none of you for any case. And so what do people accused of crimes deserve? I think, you know, we can look to the floor, we can look to things like the Rules of Professional Conduct, and that informs the answer a little bit.

Here in Tennessee, like all over the country, you have Rule 1.1, right, [referring to a slide] that's supposed to be an incompetent lawyer with a clown mask. But competence, quite literally, right, the Rules of Professional Responsibility demand that lawyers have legal knowledge, skill, that they are thorough, that they are prepared and that comments made clear that in every case you must [engage] in factual and legal analysis so that means before you ever advise a client to plead guilty, you have to engage in factual analysis. You have to do an investigation. You have to identify legal issues and hit the law library or the computer and do some legal analysis. That takes time. So that's step one. I don't know how many of you how who have ever sort been in courtrooms, have seen lawyers, and again, I don't mean to be critical, I'm just curious, seen lawyers who have advised clients to take pleas the day they meet them? It happens all over this country. I would suggest to you that, by definition, is a violation of Rule 1.1.

Rule 1.3, diligence. A lawyer has to act with reasonable diligence and promptness in representing a client. Steve Handlin is going to talk tomorrow about

workloads and what's in your comments, and comments in similar codes all over the country say is that a lawyer's workload must be controlled. We can't be diligent if our caseloads and workloads, and there's a difference, are too high. Again, Steve will talk about that quite a bit. But diligence, communication. You know, the greatest complaint that I think in most places, I haven't looked into it in Tennessee, but I bet it's true here, the greatest complaint to bar counsel when it comes to lawyers not living up to their obligation to clients, is a lack of communication, right? I've met again a lot of lawyers who I have respect for, who will say to me I know what I need to do in the client's case and I've got limited time and so I would rather focus on that than going to meet with the client. It is really missing something fundamental, right, and that is it's not your case. It's your client's case. And how can they direct you if you haven't communicated? That communication means keeping clients informed, having them, you know, replying to requests that they make for information and explaining things so they can make informed decisions.

This reminds me, I was doing a training in Kentucky, a leadership training in Kentucky. This was a few years ago. And I was leading a small group of managers from Kentucky and we were talking, everyone brought a management challenge and we were talking about a management challenge. And one of the lawyers said, one of my challenges is I've got this lawyer, he's a really good lawyer, but he hates his clients. Whoa, time out, right? That's like an oxymoron. How is that possible? How can you be a really good lawyer and hate your clients? I think what he meant was this lawyer is really good at cross-examination, they're a great orator, but they're not a great lawyer because a relationship with the client is, by definition, part of being a great lawyer, but we're in a world where we start to be -- it's signaled to us that being a good

lawyer is about skills as opposed to representing people. It's part of the dehumanizing that we see.

Conflict of interest, Rule 1.7, makes clear that you are prohibited as a lawyer from taking on a case if that representation may materially limit, may be materially limited by your responsibilities to existing clients. And quite simply, what that means is if I take on a case right now, am I going to be able to give it all the time it deserves looking at my caseload, and so I think what Rule 1.7 says if you can't honestly say you are able to give every client what they are entitled to do under the Constitution and the Rules of Professional Responsibility, you are by definition ineffective. Now I think as public defenders in this country, listening to that, you think whoa, I'm ineffective. Yes. You are, by definition, as a public defender in America, you are ineffective, but rather than trying to cover that up, rather than trying to suggest we are effective, that we can do a three hour case, what I think we need to be doing is owning the fact that we are ineffective and it's not our problem; it's a system. We're in a system that won't let our clients have the lawyers they need and we should own that and we should move to improve it, but we shouldn't run from it or we're becoming part of a community that is justifying the process.

While not binding, the ABA Standards for Criminal Justice also tell you some other -- give you some other insight into what clients deserve, right, duty to render effective quality representation. Again, about the client, lots in there about communication and interviewing and client relationships, investigation and preparation, preparing for trial. And this doesn't mean preparing for trial in those cases that will go to trial. It means preparing in every case, because how can you advise a client as to whether the right course of action is foregoing a trial and taking a plea or going to trial if you haven't prepared and you don't have a sense of what the likely outcome is at trial and what the

likely consequences are. Sentencing advocacy, I think was illustrated in Ndume's case, right, often overlooked. And advising clients with respect to appeal. So all of these, all through the case, there are these obligations that I would suggest mean that there is no such thing as a three hour case. Are we there yet? I guess you know my answer to that. No. We're not there yet.

And I think about when I first moved to Georgia and we did a training. We did a training for all of the new public defenders. There were chief public defenders. There were brand new public defenders. And it was in the first training January of 2005, and we this training on motions practice, basic motions practice. And it was just, I thought pretty straightforward stuff. It talked about filing Fourth Amendment, Fifth Amendment, Sixth Amendment Motions, the kinds of motions I had filed in every single case for ten years as a public defender, the kinds of stuff that every law student learns in basic criminal procedure. And we finished the session and one of the new chief public defenders, one of the leaders who's tasked with ushering in this new system in Georgia, came up and he said, "I love that, that's great, but, you know, we can't do that where I practice." And I said, "what do you mean you can't do that?" He said, "we can't do that." And I said, "oh, no, you can do it, I assure you. That's the Federal Constitution. It applies in Georgia. You can do it." And he said, "no, we can't do that, because when we file motions, our Judges get mad." It was my first introduction to a world where systemic pressures drive defenders to be Judge-centered."

I began thinking about that. And I sort of share, you can't hear me talk without seeing this slide, so people like Paul DeWolfe, who has probably heard me talk ten times in the last two weeks because Gideon's Promise is in this great partnersipp with the State of Maryland, and so he's seen this slide more times than he would like to

acknowledge. But I love this slide. It's my favorite painting. It really is not about public defense. But it's all about public defense. It's these robotic legs walking past this homeless veteran curled up in a fetal position and the label just says indifference, the caption is indifference, and it's a simple message, right? We are all bombarded everyday by so much misery and poverty that our defense mechanism is so frequently to just kind of become desensitized. It happens to all of us. It happens to those of us who know better. We have a beautiful ten year old daughter and a six year old son, and my daughter is this ten year old homeless advocate. She wakes up in the morning and she goes into her piggy bank and gets change and puts it in a baggy so when we drive on her way to school down the off ramp, she can give it to the homeless man.

And not long ago, I was walking down the street and there was a homeless man who asked me for a dollar and I said, "I'm sorry," and I kept walking and I felt this tug on my sleeve and I looked down, it's my daughter. And I said, "yes?" and she said, "daddy." And I said, "yes, baby." She says "doesn't that man need a dollar more than you?" And I thought of course, right, it happens to all of us. It's not like she just, you know, she just learned that lesson in school. She gets that from her parents. But we forget the lessons we teach our own children when we go into systems and we go into the world every day that beats that out of us. And it happens to lawyers all the time. Well intentioned lawyers who are overwhelmed, who are forced to look for shortcuts. And it's one thing to look for shortcuts with your eyes open knowing that's what you need to do and being thoughtful about it while you try to change the system. It's another thing to accept those shortcuts as what our clients deserve. And so, that's what I think about when I think about culture.

Steve Bright is going to talk tomorrow and I'm sure he will talk about what's happening in Georgia, but there's

an opening for a new chief public defender in Georgia and the state posted a job announcement and the job announcement listed job requirements. One of the job requirements was you're expected to run an office that handles seventeen hundred cases a year with three lawyers. That's five hundred and sixty-six cases each. The job requirement wasn't, you have to have the passion, the creativity, the thoughtfulness, the advocacy skills to change this. The job requirement was you have to be able to do this, as though this is okay.

I was watching a video of a budget hearing here in Tennessee and there was one of the leaders here in Tennessee was speaking for some of the public defenders [and] was asked a simple question. Do you have enough resources? And he described his situation. He said, "you know, I've got five lawyers in a five county district and we have five courthouses and I've got one investigator for those five lawyers and last year we closed four thousand cases, that's eight hundred cases per lawyer, and he said we're blessed, we have enough resources." And again, I want to be really clear. I don't mean to suggest, if you asked me ten years ago, I might have been really critical of that human being. I'm not anymore. I now believe that is a person who probably came into this work thinking it wasn't okay to process eight hundred cases. But has become part of a system that taught that's what justice for poor people is. And, so, I really try to be less about pointing fingers and placing blame and thinking how can we as a community start to change that justice narrative that is accepted something so far short of what we know clients deserve until we get into a system that beats that out of us.

In D.C. recently, well, not recently, it's been a couple years now, there was a story about a young public defender, and DC is a public defender office, if you don't know about that office, it is sort of a model public defender office. Not because the public defenders there are any

better than any of the public defenders I work with all over the country, but because those public defenders have manageable case loads, they have resources, they have an eight week training program they go through before they even handle a case. They are given, and I don't point to them and say they should have less, they are given what every client deserves and they have worked on changing the culture and educating Judges and educating prosecutors about what you better expect when it comes to advocacy for poor people.

And a couple of years ago, a young public defender in DC was before a Judge and it was a probation violation hearing and her client lost his job and lost his home, and was homeless, and one of his conditions of release was that he maintain a residence and report his address to his probation officer. Well, he didn't have an address. And so the Judge said, "let me ask you one question, counsel, has your client reported his address to probation?" She said, "well, no, but he doesn't." Stop counsel. That's all I need to hear. I'm revoking probation." She said, "Judge, you have to understand. "Counsel, I don't want to hear another word from you. "Judge, but he's homeless." That's enough. One more word and you will be help in contempt." "But, Your Honor." Contempt. She was taken away and put in lockup.

Well, some of her colleges in the courtroom ran back to the office and described it to the office and phone calls started being made and motions started to be filed and the next day all of the lawyers in the D.C. public defender system showed up for work in the courthouse with black clothing and a red armband. They were essentially saying, we as a community aren't tolerating this and as an organization, they stood up to a system and reminded the system that this was a human being and he deserved an advocate. And what was the end result there? A Judge apologized.

Now, I'm not suggesting that will happen all over

the country and that all of a sudden public defenders should show up in red armbands. I'm not suggesting that at all. But what I am saying is this was forty years of changing a culture, forty years of reminding a system of what poor people deserve and the question I think isn't how do we change things tomorrow. It's how do we start reeducating today and it's a long game.

So I'm going to end with a final story, and it's a story about another young lawyer I know, a young lawyer named Janelle. Again, I met her when I was working in Georgia. Janelle in this remarkable lawyer. She came from Brooklyn, New York, an all African American community, and she went to Spelman College for undergrad Howard Law School, both HBCUs, historically black colleges and universities. Came to Georgia to become a public defender, because in her words she wanted to represent people who looked like her. And she joined this program we started which was kind of like a Peace Corps for public defenders where we invited public defenders to come to Georgia and we placed them in places where the need was the greatest and they didn't choose where they went. They agreed for three years to go work somewhere. And she got placed in Bartow County, Georgia. And it's about forty-five minutes outside of Atlanta, but it may as well be a whole other world. And Janelle, she was the only African American female lawyer in the county at the time and she would walk into court and she would describe how weeks into her job she would walk into court with her suit and her briefcase and the Judge would say, "where's your lawyer?"

And she started appearing, she started handling juvenile cases. And she was in juvenile court and she had a sentencing hearing or a disposition hearing and she was going to argue that the Judge could not detain this client because she found a less restrictive alternative in the community, and by statute, the Judge has to go with the least restrictive alternative. And she started talking to some

senior lawyers in the community about that and the senior lawyers said to her, “I wouldn't argue that.” The Judge is going to laugh you out of the courtroom. This is what the Judge does in every case. And undeterred, she started calling some of her colleagues from the Honors Program, which is what we called it at the time, the precursor to Gideon's Promise. And people started talking to her and saying, “of course, you got to make that argument.” And she said, “of course, I do.” And so she sat down and prepared a sentencing argument, and the next day she stood up and she made that argument, [she] describes how she heard snickers in the back, in the background, some of these more seasoned lawyers who thought it was humorous that she was doing this. And she made her argument. And the Judge ended up agreeing with her.

And to this day, some of those snickerers now make that same argument. Right. It's a story of how when we individually can maintain sight of what our clients deserve, and we can become part of a community that understands that and starts to do that and spread that from county across the state across the region across the nation. It's a long game, but we can start to raise expectations so that maybe fifty-one years from now that promise of Gideon will be a reality.

The last thing I'm going to say is this: I really do, I would be remiss if I didn't give a nod to so many of the public defenders I know in the audience and many of you who I don't know, but I do think what you all are doing in Knoxville, Mark, and all of public defenders here in Knoxville, it's not an easy place to practice and I know that you all have case loads that are higher than they need to be and sometimes you walk into courtrooms where you're expected to do less than your clients deserve, but what I've seen in working here and partnering with Mark and with the Knox County Public Defenders Office over the last probably six years now is really just a spirit that is

contagious. Lawyers who don't quit. And I think while poor people in Knox County, surely not everyone is getting everything they deserve in every case, they have an amazing group of advocates. So I just want to end by just giving a nod to the public defenders, and can I ask you to stand because I want to give you a hand, public defenders, all the public defenders, come on public defenders. All right. Thank you. I hope to see some of you at the reception. It's been great.

PROFESSOR RADICE: Thank you so much. So, we have the reception at the Sunsphere. I think it is going to be just exciting and beautiful, and we will be showing the movie around six-thirty, Mark? Six-thirty. So come just for some drinks and some food or stay the whole time for the movie and then everybody, we'll see you eight-fifteen for breakfast tomorrow morning. Looking forward to it.

