An Indigent Willie Smith Might Be in Jail

Stephen J. Schulhofer

A recurrent theme in commentary on the William Kennedy Smith rape trial was that money made the difference. The New York Times reported that the outcome—Smith's acquittal—hinged in large part on a disparity of resources and talent: two civil servants for the prosecution versus four private practitioners, including a man many regard as the finest criminal defense lawyer in southern Florida. News reports stressed the prosecutor's strategic errors and supposed lack of polish. The skilled defense team also hired a leading consultant on jury selection and spent tens of thousands of dollars on expert witnesses and exhibits. By one account, the defense cost about $1 million.

A few experts, with 20/20 hindsight, assure us that the state's case was a loser all along. Some even charge that the prosecutor was irresponsible to bring it. But the accuser showed bruises consistent with a physical assault and her demeanor in the hospital emergency room strongly corroborated her claim of having suffered a traumatic experience. Taking date rape seriously means that complaints of this sort cannot easily be disregarded.

If it is proper to prosecute in this kind of case, will resources make a difference to the outcome? You bet. Without the financial backing that his family provided, Smith could today be a convicted rapist sentenced to one of Florida's oppressively overcrowded prisons.

Does this mean that a fair system would have convicted him? Not for a minute. It means only that the adversary system worked as it should. Vigorous cross-examination exposed weaknesses in the prosecutor's case, a jury applied its common sense to conclude that the state had not proved guilt beyond a reasonable doubt.

Smith deserved the acquittal, but he was also lucky—lucky he got the chance to invoke safeguards that should be available to all. In most cities, 80% of criminal defendants are poor. Until 1963, an indigent Florida defendant in a case like Smith's would have faced trial without the help of any defense attorney at all. It was only the Supreme Court's Gideon v. Wainwright decision, requiring courts to appoint counsel for indigent felony defendants, that put a stop to this travesty of justice.

But the promise of the Gideon case was never fully implemented, and the current Supreme Court is busy dismantling it. Big city public defenders often must handle fifteen to twenty felony cases in a single day. Many are skillful and do their best under adverse conditions, but they are forced to render perfunctory service. Many are not so skillful. Low salaries for public defenders force rapid turnover, and court-appointed private practitioners in many states receive only $10 to $30 per hour, with a cap of $500 or $1,000 per case—often not even enough to cover overhead.

In theory, the Constitution requires counsel to render "effective assistance." But standards of acceptable performance are low, and doctrines defining "effectiveness" are too vague to serve as real safeguards. There are no minimum requirements for investigation or trial preparation and no minimum standards of competency. Any member of the bar is presumed competent, even in a capital case and even if he or she has no prior trial experience or has never before worked on a criminal matter.

There is another problem. How can the indigent defendant claim ineffective assistance? Usually the only viable way is to file a complaint after conviction. But the Supreme Court has held that there is no right to counsel for such complaints, which are known as "post-conviction" proceedings. Even prisoners on death row have no constitutional right to post-conviction legal assistance in trying to show unfairness at their trials. So the uneducated, often illiterate inmate who wants to challenge the performance of his trial attorney must do so without professional help.

In 1990, the court erected another hurdle. Roger Coleman, a prisoner on Virginia's death row, sought a hearing on his claim of ineffective assistance. But in prior state proceedings, his new attorney had filed the appeal papers three days late. Justice Sandra Day O'Connor wrote for the majority that this procedural technicality prevented federal courts from inquiring into the competence of the lawyer who represented Coleman when he was on trial for his life. "This case," O'Connor wrote, "is at an end."

Rules like these remove any incentive for states to provide decent representation for the indigent. If defendants are incompetent or make mistakes, their clients, innocent or guilty, will pay the price.

Money made a big difference in the Smith case. It makes an even bigger difference in common criminal cases where the charge by itself does not elicit skepticism. Every day, defendants without resources are convicted on shaky evidence in our urban courts. Many of them may be guilty anyway. Some of them almost certainly are not. The rich will continue to get special justice because our society remains unwilling to make the constitutional guarantee of a fair trial a reality for all.

Stephen J. Schulhofer is Frank and Bernice J. Greenberg Professor of Law and Director of the Center for Studies in Criminal Justice. This article first appeared in the Los Angeles Times, December 17, 1991, in the Metra Section, Part B, page 7.