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Reply to: Columbia

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Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the CJA
Attn: Arin Melissa Brenner
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One Columbus Circle NE
Washington, DC 20544

Re: *Testimony of Parks N. Small, Federal Public Defender, District of South Carolina*

Dear Judge Cardone:

Fifty years ago Congress responded to the Gideon decision with the Criminal Justice Act and placed the implementation of an indigent federal criminal defense program with the U.S. Courts. The Defender Services Division of the U.S. Courts and the Defender Services Committee of the Judicial Conference were tasked to oversee a joint federal defender and private attorney response for each federal district. The growth of the program, as well as the budget, has been impressive and driven in large part by the necessary response to the immense growth of federal prosecutions.

The Federal Public Defender for the District of South Carolina, in office for thirty-nine years, opened as a single office with two assistant federal public defenders in 1977 and has grown into four offices with sixteen assistant federal public defenders and seventeen support staff. The office has a panel administrator to review all CJA panel vouchers and to act as the director of panel training and other panel support to help lawyers with obtaining experts and interim payments. The defender sits on the local CJA panel committee. The office caseload is derived primarily from drugs, firearms, fraud, child pornography, and sentencing guideline amendment cases.

The Gideon Court would, I submit, be pleased with the level and quality of legal services being dispensed by the program. In its decision, the Supreme Court recognized the expense of criminal representation by saying the government, "spends vast sums of money to establish machinery to try defendants accused of crime". Clearly, the Court had some type of parity in mind for indigent defendants in making that statement. Nevertheless, it is natural in stressful economic circumstances, when pressures increase to conserve appropriated resources, that questions arise about the performance of the program, and such is one of the tasks on the ad hoc committee's list.

It is generally recognized the program has produced a very high quality of representation as now provided by Federal Defender offices and CJA panel attorneys in all court districts. That quality speaks to the success of the program, and quality representation is implicit, if not explicit, in the whole Gideon decision. The program has reached this level of services by evolving from an original core of dedicated people, working from scratch to establish a delivery system of Sixth Amendment services to the poor. Those collaborative efforts have continued and have produced insightful and responsive changes; thus, the form of the program has worked well, but not necessarily flawlessly. Not all ideas were necessarily adopted or were as extensive as some sought, but the program has been a crucible for innovation. One such positive conception is the CJA panel administrator. Operating out of defender offices, a CJA panel administrator provides a technical and qualitative review of vouchers that relieves much of the court's burden before reviewing vouchers. In many defender offices, the panel administrator takes charge of a proactive training program, as well as assisting panel attorneys with obtaining all kinds of necessary resources.

The competing interests of independence, the bedrock of criminal defense and fiscal responsibility, the concern of good government stewardship, will always be testing the direction of the program. These dynamics have evidenced themselves in recent changes, and many see these changes as a cause of concern to the independence of the program. A serious problem was the Sequestration legislative movement, driven by the need for austerity, that first began to ferment concerns. It directly confronted what was necessary to provide effective assistance of counsel. That was followed by administrative changes in the structure of the program and a more direct management of resources as a result of a detailed work study. These changes caused real concern about continued independence and funding.

Rising costs can be difficult to analyze. One suggested cost factor is the recognition that the practice of criminal law, like all law practice today, is not the same as when the Gideon case was decided. Indeed, the four topics that are the focus of the forum here in Miami were not factors even recognized fifty years ago. Nevertheless, the fundamental acknowledgment of Gideon remains true today. Effective assistance of counsel cannot be achieved under the Sixth Amendment unless the defense is equally capable of responding to the skill and resources of the prosecution.

To be more specific, the changing nature of federal criminal defense is driven by a number of things uncontrollable by the defense machinery, which include: the kinds of cases being prosecuted; the legislation creating new offenses; the Sentencing Guidelines; mandatory minimums; language barriers; communication technology; electronic discovery and computer technology; and large document cases. Also, crime detection and forensic advances have greatly broadened the skills necessary to prepare an adequate defense. Robust training is now an essential----bright and experienced lawyers are needed to deal with these changes and provide effective assistance. Additionally, the percentage of those charged with federal crimes, who cannot afford counsel, has greatly increased, and the increase impacts the size of a well-trained private bar. These changes do have fiscal and qualitative consequences. Nevertheless, it should be considered that the government's purposes are all well-served, including cost accountability, by cases wherein quality representation has been achieved in the first instance, not only to prevent injustice, but to diminish further costly post-conviction litigation. Value is received when justice is served.

Trust in the lawyers serving the program is ultimately essential. Defense lawyers must be trusted to give quality services and to manage the costs of a case in a reasonable and necessary manner. Mechanisms of oversight of those functions can call the independence of the attorney into question and jeopardize the core purpose of the program. Of course, there must be an oversight mechanism for the situation where trust is misplaced; however, that mechanism already exists in the statute and allows for the removal of defenders for cause and provides for the CJA panel to serve at the pleasure of the court.

Defender offices offer much upon which the district courts can rely. Because of the high cost of retained criminal defense, the pool of experienced private attorneys to staff CJA panels is diminishing. Defenders have broad experience in managing offices, and they have built a special reserve of legal experience and training. Defenders are familiar with the needs of counsel in defending clients, which include: experts, techniques, investigation, and legal research. The main reason is that they practice the specialty every day; thus, building great experience. That experience is widely shared with the CJA attorneys. These defender skills and resources are being utilized by many district courts and should be utilized to relieve even more courts of the tedious first review oversight of not only CJA vouchers, but for expert needs and panel attorney expenses.

Recommendation: The independence of the attorney is essential to the program for its integrity and for constitutional reasons. Direct oversight should be the absolute minimum necessary. Rededication of that basic trust in the program, with tried and true practices, would assure the continued quality of work that is the hallmark of the program.

Suggested matters for consideration

Administration of the Act

The Act has enjoyed success since it began because it engaged quality lawyers and administrators dedicated to making the vision of the act become a reality. It progressed for many years under singular leadership dedicated to independence and quality. That approach has seemed to come under question recently because of actions perceived as encroachment on independence. That perspective leads to questions about the long term viability of the program within the current framework. Significantly, Congress has not suggested a review or change in the system. To even suggest a major course change may start in motion an outcome much different than what the proponents of change had intended.

The original program evolved after a significant study of various program forms by Professor Oaks. Even the Prado Committee, some twenty years ago, did not see the benefit of redirecting the course of the program. The program for a long time has endured within a successful framework and that framework, although not perfect, has served the purpose for which it was established. Sometimes, changes in the program can occur and the result, although not intended, can erode the functionality of the program. Calling upon the ad hoc committee to periodically review the program is healthy. Periodic review should identify those things that are working, as well as identify potential improvements and comment upon them.

Recommendation: Go slow in initiating change, especially change that impacts independence. Consider returning the status of the Defender Services Office to its former organizational level within the Administrative Office and restore the traditional authority of the Defender Services Committee.

Work management study

No program is above review and a decision to do an in depth work measurement study of the defender program was reasonable. What is of concern is using the results of such a study as though criminal defense is a delivery system as precise in operation as the making of an industrial product. The program implements a constitutional right to effective assistance of counsel. The attorney's responsibility to carry out that duty is a significant one and measuring what it costs to produce that necessary quantum of duty is even more difficult. The attorney's duty is to perform in a reasonable and necessary manner to provide a vigorous defense. No two cases are identical.

While a study will always produce a statistical value, it does not produce a reliable number to the singular case because each case has numerous variables for which statistical analysis has difficulty defining. Simply, it does not and cannot address what is reasonable and necessary in the individual case. Not only are cases unique, but offices and districts are unique, and no doubt, also a characteristic of the total court system. Thus, to draw a conclusion that caseload per attorney is the defining assessment of human resource assignment is unjustified. The work management study was professionally done and conducted in a collaborative manner with the defenders as it should have been. Any criticism is with the premise that such analytical studies can put a fiscal value on effective assistance of counsel, the mandate of Gideon, is not warranted.

A work measurement study does not establish criteria for quality which in terms of the Sixth Amendment is effective assistance of counsel. That quality measurement should be factored into the fiscal equation to recognize that quality is essential to criminal defense. Trust and integrity are also called for in carrying out delivery of services. Neither can such a study evaluate the defender office's contribution to the defense function by the assistance it gives to panel lawyers who are co-counsel or just need help in a case to which they have been appointed. The defender office is a truly unique resource. The functions of the defender office are best fostered by the most independence possible.

Recommendation: Give more flexibility to staffing than just the statistical result implies. A reasonableness test, relying on the integrity and trustworthiness of counsel, while more subjective, is the best evaluation that can be applied in measuring the delivery of Sixth Amendment services.

CJA Attorney fees

The CJA panel is an important contributor to the system recognized under the Act, and panel attorneys are essential in the multi-defendant cases. The federal defender office for the District of South Carolina functions with a panel administrator that serves as the first line review of vouchers. The administrator's goal is to bring district wide consistent review to the panel vouchers. Employing a reasonable and necessary standard of review, the great majority of vouchers are considered

appropriate. Attorneys with problem vouchers are first questioned by the administrator for explanations before the voucher is forwarded to the court with comments for approval. Courts have become reliant on such review, and it relieves much of their need to scrutinize claims.

Sometimes a problem is the prompt and full payment of vouchers. Most panel attorneys are not sufficiently wealthy to wait weeks, if not months, for payment, to forego interim payments in a lengthy case, or to forego unjust voucher reductions by the district judge. For example, a prevailing view by one judge is that a guilty plea is only worth $2,500.00, regardless of the case facts. The fact that attorneys have no way to challenge voucher reductions beyond the individual district judge is problematic. That lack of an administrative review for irrational voucher cutting needs to be addressed. Long delayed voucher approval can also be a problem. These abuses are humiliating, unnecessary, and give the appearance that justice is not being served. The establishment of some kind of administrative review process and timely payment element would be of substantial help. The Fourth Circuit Court of Appeals issued an opinion on voucher reductions in Rosenfield v. Wilkins, 280 Fed. Appx. 275 (4th Cir. 2008).

Some effort has already been made by the courts in recognition of the voucher problem. However, volume 7 of the Guide to Judiciary Policy addresses voucher review only as a good practice advisory. Section 230.36(a) advises that "prior notice of the proposed reduction with a brief statement of the reason(s) for it", should be given to the attorney submitting the voucher. The Guide also notices at Section 230.13(b) that "[a]bsent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission." These guides are insufficient in some cases.

Recommendation: Put some standards into the model CJA plan, not just the Administrative Guide, to direct timely payment and to add some level of review so that the presiding district judge is not the sole arbiter of payments. A possible solution would be to allow further review by the chair of the local CJA committee or the entire CJA committee, even if non-binding.

The Special Focus of This Meeting

Multi-defendant cases

These cases present another dimension to criminal practice, often involving groups of people in long running criminal activity and numerous counts to the indictment. These cases can be resistant to resolution short of trial for various reasons ranging from unorthodox views of government authority, complex sentencing issues of legal accountability, defendants in custody, voluminous discovery, and language barriers. Such cases can defy categorization and can be labor intensive and challenging to the CJA attorney.

The nature of these cases relies on a strong reserve of panel attorneys with sufficient skill to operate in the multi-defendant environment. Skill is all the more important if the case goes to trial. The federal defender office can function as a valuable resource to the group in many instances.

Often a problem is the management of discovery and especially when the discovery is on disc or e-discovery. The office has a number of laptops with sufficient capacity and dedicated to the task of holding discovery. In some cases with court authorization, laptops have been delivered to the jail so that each defendant can view discovery individually without the necessity of the panel attorney being present. The savings are obvious.

The defender office is often capable of working with panel attorneys who are not as experienced in these cases both as a training device and to facilitate the defense process. That process can mean joint motions and providing defense investigative services through the defender staff investigators. Other experts can also be provided and shared through the defender office.

These kinds of contributions are unique contributions to the system through well-trained staff with valuable and substantial experience. That experience will often result in the defender office being appointed to the lead defendant, another valued contribution.

Electronic discovery

This is a new device for getting discovery to defendants and their counsel. The problem comes in converting the discovery into a form usable in preparing a defense. E-discovery can be and usually is voluminous. E-discovery presents several problems which the defender office can assist to resolve. If a panel attorney is involved, they often can be overwhelmed and often do not have the physical capacity to download the discovery. When a defendant is in custody, it is especially difficult to get that person access to the material, unless it is in hard copy form. Hard copy discovery presents its own set of problems. There are also various jail policies about bringing laptops to the jail or leaving a laptop for the defendant to review the material. Prosecutors and courts now favor blanket orders prohibiting leaving discovery with defendants, which adds another layer to the problem. Some additional degree of training support staff to handle e-discovery review is also required. From a defense point of view, e-discovery overall adds time to the review of such material particularly when not all of the material is searchable or in the same format. The defender office aids the defense process by analyzing how to move forward with efficiency in those situations.

Extraterritorial discovery

This kind of discovery presents a whole new set of problems. First, by definition it is outside of United States jurisdiction, it is in a foreign country and the rules about subpoena, deposition, availability of witness for proffer of testimony, and investigation are complex, if they exist at all. The case may call for foreign travel which invokes passports, perhaps diplomatic passports, and recognizing the legal process of a foreign country. The laws of foreign countries can be tricky, and some places are just dangerous to the well-being of the foreign traveler. Second, even if all the obstacles can be overcome, the time necessary to engage in such travel is lengthy.

Also, if a panel attorney is involved, the defender office often has had exposure to these foreign problems before and can function as a valuable resource.

Use of experts in criminal cases

The prosecution of cases often relies heavily on investigative techniques requiring expertise in analytical methods or scientific techniques. These are in addition to such traditional experts for psychiatric, fingerprint and firearm issues. The defense has need to confirm or rebut the conclusions used by prosecution experts by access and use of their own experts. These experts are essential in that process.

In addition, a substantial body of information has developed on the validity of some of the current techniques and conclusions that are essential to a proper defense. The cost of these experts are often substantial, but made necessary by their use in the first instance by the prosecution. Not only is the defender office familiar with often used experts and their validity, but can assist the panel when it needs access to these experts.

Very truly yours,

PARKS N. SMALL
Federal Public Defender

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