

THE
PUBLIC
DEFENDER
SERVICE
for the District of Columbia



Avis E. Buchanan
Director

Rudolph Acree, Jr.
Deputy Director

BOARD OF TRUSTEES

David W. DeBruin
Chairperson

Jamie Gardner
Vice Chairperson

Ira Arlook

Blair G. Brown

Miriam Carter

Rev. Séamus P. Finn OMI

Marc Fleischaker

Marlon Griffith

Carmen D. Hernandez

Heather N. Pinckney

Julie Stewart

633 Indiana Avenue, NW

Washington, DC 20004

Tel (202) 628-1200
(800) 341-2582

TTY (202) 824-2531

Fax (202) 824-2784

www.pdsdc.org

May 11, 2016

The Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 4-200
Washington, DC 20544

Re: Testimony of the District of Columbia Public Defender Service (Revised)

Dear Judge Cardone:

We are Avis E. Buchanan, Director, and Julia Leighton, General Counsel, of the District of Columbia Public Defender Service (PDS).

PDS is a federally funded, independent organization governed by an eleven-member Board of Trustees. Originally operating as the Legal Aid Agency from 1960 to 1970, PDS was created in 1970 by a federal statute¹ enacted to comply with a constitutional mandate to provide defense counsel to indigent individuals.² The mission of PDS is to provide and promote quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia justice system and thereby protect society's interest in the fair administration of justice.

A major portion of the work of the organization consists of representing individuals in the District of Columbia's local criminal justice system who are charged with committing criminal acts. PDS attorneys represent indigent clients in the majority of the most serious adult felony cases filed in the Superior Court every year. PDS is an institutional defender (but not the default public defense provider as in other jurisdictions), working alongside a panel of private attorneys screened and funded by the District of Columbia court system.³

¹ Pub. L. No. 91-358, Title III, § 301 (1970); *see also* D.C. Code §§ 2-1601 – 1608 (2001).

² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³ Also, PDS provides legal representation to people facing involuntary civil commitment in the mental health system, as well as to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. PDS attorneys represent nearly all individuals facing parole revocation under the D.C. Code and all District of Columbia defendants requiring “stand in” counsel representation at Drug Court sanctions hearings. PDS provides technical assistance to the local criminal justice system, training for panel and pro bono attorneys, and additional legal services to indigent clients in accordance with PDS's enabling statute.

Both of us are former trial attorneys at PDS; Ms. Buchanan is also PDS's former deputy director. Ms. Buchanan has worked at PDS for a cumulative total of 20 years; Ms. Leighton has worked at PDS for a cumulative total of 24 years.

Thank you for taking on this important project, and thank you for requesting input from PDS.

As we perused some of the testimony you have heard, it became clear that you have heard from many corners about the problems besetting the federal criminal defense system. The testimony provided has been candid and ultimately damning of the current system. We concur but will not add to this assessment. Instead, we will focus on what our federal criminal defense system should be—a model system that local jurisdictions should emulate.

On the federal level, the full expression of an effective defense system rests in an adequately resourced national entity devoted solely to client-centered indigent defense with robust local defense systems in every jurisdiction. An analogous model is readily at hand—the Department of Justice and the Offices of the United States Attorneys (USAO). We cannot think of a moral, logical, or legal explanation for why the defense function should have less stature, less independence, or fewer resources than its counterpart, the Department of Justice. But understanding that, sadly, there is likely insufficient will to place the defense of the poor and vulnerable on a par with the resources and stature afforded to federal prosecutions, we will focus our remarks on steps that can be taken now towards this goal in the hopes that we will one day achieve it.

Extrapolating from PDS's experience, there are five overarching characteristics of an effective client-centered defense system—an institutional defender presence, independence, caseload control, a culture of excellence, and resource parity with the government.

Institutional Defenders

Institutional defenders serve a critical role within the criminal justice system. Judges, law enforcement officers, and prosecutors all work within institutions that can leverage collective information to improve internal practices and performance more effectively and efficiently than solo or small practice practitioners can. These same institutions can also leverage collective information to press for policy changes, legislative changes, and funding to their institution's benefit. The defense function, along with the defense perspective, will always be at a disadvantage if it does not have the same institutional platform from which to address policy, legislation, and funding. Every federal jurisdiction needs an independent institutional defender if the defense function is to have a meaningful voice within the criminal justice system.

While a local institution, PDS provides an example of how to design an effective institutional defender.

Independence

PDS's entire history reflects an unyielding focus on high quality representation of those charged with the most serious offenses in the District of Columbia. PDS's ability to maintain this focus while changing and growing in a manner always directed at improving the level of representation provided stems from its independence from any competing interests other than achieving the results sought by our clients.

PDS's Director and Deputy Director are selected by an eleven member Board of Trustees. In addition to selecting the Director and the Deputy Director, the Board is responsible for the annual audit, and for working with the Director in setting policy and lending its expertise when needed to assist and protect PDS from external pressures. At the same time, the Board is prohibited from directing any single PDS case or the Director's hiring decisions. While the Board is selected by several members of the judiciary and the Mayor of the District of Columbia, their powers are diluted, and the Board, in practice, presents a slate of candidates for approval by each of the four appointing officials. PDS's authorizing statute prohibits judges from sitting on the Board, and consideration ought to be given to excluding current law enforcement and creating a more formal role for the Board in selecting new Board members. Whatever the selection process, the result should be a Board of lawyers and lay persons dedicated to the institution and to a vibrant defense system who can serve as good counsel to the chief defender.

Since its inception, PDS has been independent of the judiciary and the executive. At points in its history, PDS has had to defend that independence and has done so successfully in large part because the argument for independence is unassailable. Very little work is required to explain to those unfamiliar with the criminal justice system why it is inappropriate to have the defense function answerable to the court or to the prosecution.

Maintaining its independence is what allows PDS to set priorities and make decisions with its clients' interests front and center. In tight times and in times of adequate funding, PDS has always been able to make adjustments to maximize its services to clients without compromising on quality.

Controlled caseloads

PDS controls its caseload by preselecting the type and number of cases it will accept. PDS is designed to develop lawyers, through training and supervision, into lawyers qualified to handle the most serious cases in the District of Columbia in four to five years, depending on the individual trial lawyer's development. PDS maintains caseloads for each lawyer that allow the lawyer, who works significantly more than 40 hours a week, to do what needs to be done to fully investigate and litigate each case. These caseloads allow PDS to adequately staff each case (number of attorneys, investigators, mitigation specialists, experts) based on the needs of the case. PDS's system of supervision and training ensures every case is staffed with a defense team fully qualified to handle all aspects of the case. PDS does not, for example, treat general felonies any differently from felony I cases (that carry longer sentences) in this respect. Instead, PDS is designed to treat any conviction and any period of incarceration as seriously as any paying client would want their lawyer to treat their case. Failure to provide this level of representation in "less

serious” cases contributes to a tiered justice system that gives second rate representation for offenses that still impact liberty and have significant collateral consequences. PDS has managed this caseload and system of lawyer development and still handles more than 70 percent of the felony I cases and the majority of the life offense cases brought in the District of Columbia by successfully advocating for the resources required to fulfill this role.

A Culture of Excellence

PDS has created a culture of excellence that allows it to attract a talented pool of lawyers and develop them into exceptional litigators. PDS’s client-centered representation, caseload controls, training program, and reputation for excellence are the most oft-cited reasons candidates give for applying to PDS and for selecting PDS over other options. The ten-week training program is followed by bi-weekly training and intense supervision for the next four years. Lawyers stay at PDS for the collaborative practice and the specialty practice support.

In response to ever more complex cases, PDS has created a forensic practice group, hired a forensic scientist, created a division specializing in systemic issues (e.g., *Brady* violations, due process violations in civil forfeiture proceeding, advances in understanding faulty eyewitness identification), and hired an immigration specialist and a tri-lingual interpreter. During the same time period, PDS has expanded its investigative and mitigation resources to address such changes in practice as the growing presence of digital evidence and the increase in the percentage of clients with mental health issues.

PDS’s supervision and collaborative practice are built on the premise that every pleading, every opening, every cross-examination, and every oral argument can be improved through input regardless of the individual lawyer’s level of experience. Mooting and editing are everyday practices at PDS. There is no win at PDS that does not end with a thank you email citing a half dozen colleagues who were the source of a turn of phrase for a closing, a legal issue previously unseen, a line of cross, a helpful expert witness, or a novel jury instruction.

Pay and Resources

We mention this element last because PDS has been successful throughout its history despite extended periods in which its lawyers were paid only two-thirds of what their counterparts at the USAO were paid and while they are still paid far less than their counterparts in the private sector. Within an institution, it is hard but possible to build a model practice on less than pay parity. This is because PDS has been able to provide staff with non-monetary benefits—camaraderie, technical support, specialty support, training, and a marketable reputation.

But the failure to resource indigent defense cases presents a larger problem even for an institution such as PDS. While PDS at one point in time relied on volunteer interns to investigate cases and often depended on the pro bono assistance of experts cultivated by individual staff, this is no longer a tenable model. While PDS still has interns in addition to full-time investigators and still presses experts to lower their rates, the absence of parity between the government and the defense for technical resources combined with limited discovery and increasing reliance on forensic and digital evidence is having an impact. PDS uses its budgetary independence to shift

resources to adapt to changing needs in the short term, but over the long term, the only sustainable answer is resource parity.

We have talked about pay and resources in the context of PDS and independent institutional defenders, but for alternative counsel systems, pay and resources may be the most important aspect of creating an exceptional client-centered defense system after independence.

What is Needed in Addition to an Institutional Defender

There is little evidence that relying on a system that does not include an institutional defender produces better outcomes for clients. To the contrary there is growing evidence that institutional defenders produce better outcomes. These outcomes, combined with the need for an institutional voice to meet the institutional voices of the judiciary and the government, are the basis of our recommendation that every jurisdiction have an institutional defender. But every jurisdiction will need an alternative counsel system as well to handle conflict cases. Whatever form the alternative counsel system takes, it should be designed to provide the same caliber of representation as the institutional defender does.

If the alternative is an institutional conflict counsel office, it should be built on the model described above for an institutional defender, though it might reasonably share the same board. For a panel system made up of small practice or solo practitioners, some of the practices may have to be adjusted to create a high functioning panel system.

The first design issue is the size of the panel or conflict office.

Size of the Conflict Office or the Panel

What size office or panel produces a sufficient number of sufficiently qualified lawyers to handle, at a minimum, all conflict cases? In the District of Columbia, because of conflicts, PDS typically cannot take more than 80 percent of the homicide cases. Thus, the question locally is what panel size and structure are needed to produce enough lawyers qualified to handle 20 percent of the homicide cases annually.

Another factor in determining the size may be the availability of other high quality representation options. For the local District of Columbia courts there are law school clinics that provide high quality representation in cases involving minor offenses and law firms that have applied for and received pro bono certification from the Superior Court to handle more serious cases based on the involvement of experienced lawyers (typically former Assistant United States Attorneys, PDS alumni, or both), an internal training program, investigative resources, and a commitment to fully fund the litigation.

Whatever resources the local jurisdiction may have, the goal should be to design an alternative counsel system that attracts and develops a sufficient number of qualified lawyers to handle all conflict cases, including the most complex and difficult cases.

Once the size of the alternative counsel system is established, the next design issue is how to imbue the system with the independence critical to client-centered representation, caseload control, and a culture of excellence. For a system built on solo or small practice practitioners, different systems, incentives, or supports may be needed than for an institutional defender to create the same effect.⁴

Independence

Selection, assignment, and payment of panel attorneys must be removed from the control of the judiciary and placed with professional staff committed to and knowledgeable about indigent defense. There is no independence if the judiciary is involved in selecting, removing, appointing, or paying individual lawyers. There is no independence if the judiciary is involved in determining what resources are provided to which cases.

Creating a structure to support panel independence will likely vary some from jurisdiction to jurisdiction and may depend on the size of the institutional defender and the panel. But ideally, every panel system should have professional defender staff managing the panel and coordinating with the institutional defender under an established set of guidelines addressing selection, removal, appointment, and pay. For the reasons explained above, the guidelines should be designed to make maximum use of the defender institution while maintaining a robust panel.

Budgets and funding for panel systems must be removed from the control of the judiciary. Just as the institutional defenders must have an independent voice in securing and defending budget requests, so, too, should the panel system. On the other hand, pitting the institutions and the panels against one another for funding would be a recipe for mutual destruction. It encourages low ball bidding in an already under-resourced function. Instead, this is the role of a national defense entity. The national entity should work with jurisdictions to develop the optimal balance of available defense resources (institutional, panel, conflict office, and/or pro bono) that produces the best client outcomes and then to advocate for a budget that meets these needs across the country. Again, the model for this system already exists—DOJ.

Culture of Excellence

An independent panel system of small practice or solo practitioners can and should cultivate a culture of excellence in defense representation. There are four key components to creating a culture of excellence outside of an institution—pay parity, payments that incentivize client-centered representation, competition, and training.

⁴ Though not a central topic to this presentation, we would encourage creating separate panels for trial and appellate practice. Most prosecution and institutional defenders separate these practices, and PDS's own experience is evidence that specialty staff performing appellate work, and not the trial lawyer, is the best practice.

1. Pay parity with the institutional defenders and the government

Pay for all defenders should be in parity with that of prosecutors. To maintain parity, panel attorneys' hourly rates need automatic increases just as pay is increased for prosecutors and federal defenders. Hourly rates for CJA lawyers and investigators should be tied to the pay raises for federal employees or some other index. Annual caps for panel attorneys should encourage participation in the panel and encourage manageable caseloads.

2. A payment system that incentivizes client-centered advocacy.

Too many jurisdictions use flat rates or presumptive rates for classes of cases at both the trial and appellate level that create economic incentives that are at odds with client-centered representation. Instead, cases should be evaluated on a case-by-case basis by a professional staff dedicated to indigent defense.

If a system continues to rely on presumptive rates, these rates need to account for differing investigative and expert needs depending on the facts and not just the charges. A starting point would be to examine the average time spent on similar matters by the federal defender offices, the community defender offices, and prosecutors. A similar starting point should be used to assess presumptive investigative and expert costs while accounting for additional costs associated with private sector experts.

3. Competition

The system for selecting and removing attorneys from the panel should be designed to achieve the overarching goal of maintaining the most highly qualified/successful attorneys possible on the panel.

The panel cannot become stagnant. Instead, lawyers must be encouraged to continually improve, with incentives for improvements and with the possibility of being dropped from the panel. The system must avoid the inertia or complacency that places attorneys on the panel in perpetuity. Instead, the panel should be reassessed on a regular basis, and provisions should be in place to bring on new talent, including those who are qualified, even if less experienced, or those who might be new to the jurisdiction.

A professional defense staff or panel dedicated to indigent defense should be created that can evaluate qualifications based on objective standards (e.g., office or meeting space accessible to client population, education, experience), testable skills (e.g., language skills), and more subjective areas, including assessments of written and oral trial skills. The institutional defender and the panel as a whole should be assessed on an ongoing basis on performance (case outcomes), including rates of trial, trial results, plea results, and sentencing results.⁵ The

⁵ Developing the capacity to gather and analyze this information/evidence is vital to developing and maintaining a high performing system. Just as the public health system monitors outcomes and trends looking for areas of improvement, the defense system should monitor client outcomes so it can assess trends and look for areas of improvement.

aggregate results should not dictate the evaluation of an individual lawyer but should over time inform the evaluation.

4. Training

Ongoing skills acquisition is a key element of PDS's culture of excellence and success. PDS promotes skills acquisition by promoting and providing ongoing training and by rewarding skills development through internal recognition and advancement within PDS. The panel system should recognize the value of training by paying (perhaps at a lower hourly rate) for the time panel attorneys devote to selected trainings over and above what is required to maintain a license.

The training that qualifies for hourly payments should be specific to the needs of indigent clients and should be designed and presented by those committed to quality indigent defense. The best trainings target specific needs and give the participants the tools needed to execute what they have learned. The institutional defender and the national defense entity should be funded on a par with judiciary and prosecution to design and deliver this training in a combination of national and local trainings. Attached is a sampling of training programs produced by PDS for District of Columbia panel attorneys.

In addition to training, a solution to achieving continual improvement might include experimenting with higher hourly rates for demonstrated specialty skills in cases requiring those skills (e.g., DNA, insanity, digital evidence).

Resources

In addition to independence, pay parity, competition, and training, the panel system needs to be resourced to provide clients with the varied representation required in modern criminal defense.

Some of the knowledge-based resources can be provided by funding the institutional defender to expand on what it can already provide its lawyers as a result of its efforts to leverage its collective knowledge. In addition to training, the institution should be able to provide the panel attorneys with brief banks, motions banks, manuals, transcript banks, and access to its internal specialists.

Investigative resources for indigent defense also need to be developed just as panel attorneys are developed. In the District of Columbia, there is a panel of certified investigators that are screened and trained by PDS, though ultimately certified by the court. Ongoing training is provided by PDS, and PDS conducts periodic joint lawyer/investigator trainings.

Finally, the panel system needs support in identifying and developing consulting and testifying experts and the resources to hire experts. Modern cases demand that defense attorneys understand a wide and growing field of forensics. Just as prosecutors have access to a wide variety of forensic experts so, too, must the defense.

The Role and Responsibility of the Judiciary

At this juncture, there is a critical role for the judiciary and this Committee in the future of indigent defense. Indigent defense can remain in crisis, or we can seize this opportunity for federal leadership in modeling a quality defense system. It is completely consistent with the role of the judiciary to advocate for an independent defense system and for resource parity. This is simply an issue of fairness and access to justice. The absence of an independent and adequately resourced defense system is a glaring hole in our criminal justice system. Advocating for independence and parity does not favor the defense over the prosecution. Instead, it puts the judiciary exactly where it should have been from the beginning.

Thank you for inviting us to participate in this effort; we look forward to further discussing these issues that are central to producing quality representation for those who cannot afford counsel.

Sincerely,


Avis E. Buchanan
Director


Julia Leighton
General Counsel

Attachments