

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing #7—Minneapolis, Minnesota

May 16-17, 2016

Transcript: Via live stream—Testimony from David Carroll, Sixth Amendment Center

Judge Cardone: Welcome. Mr. Carroll, we are here doing this video via live-stream, and so hopefully, it'll work out fine. The Committee is here, and what I would ask you to do is go ahead and give us a short opening statement. What we have found is that really the question and answer portion of this really helps us to get to the heart of what we'd like to talk about, so we'd ask you to keep that opening statement brief.

Whenever you're ready.

David Carroll: Thank you very much, and thank you for accommodating me by video conference. My name is David Carroll. I'm the executive director of the Sixth Amendment Center, a nonpartisan, nonprofit organization dedicated to assisting policymakers build indigent defense systems.

Over my twenty-year career, I've had the pleasure and privilege of traveling to all but states studying how state and local governments attempt to implement *Gideon* and its progeny. Unfortunately, those travels lead me to concur with the U.S. Department of Justice, that state-level indigent defense services in America are inadequate, broken, and unjust, with devastating consequences to both defendant and the society as a whole. The situation according to DOJ, and I agree, is unacceptable, unconscionable, morally untenable, economically unsustainable, and unworthy of legal standing, a legal system that should stand as an example to all the world.

The root cause of America's state-level indigent defense crisis is a lack of independence of the defense function. Judicially-controlled indigent defense systems often follow or adjust to the needs of each judge in each court, rather than focusing on providing constitutionally effective services to each and every defendant. Fearing the loss of income by not pleasing the judge overseeing their compensation, state-level defenders often take on more cases than they can ethically handle, will delay working on a case, will triage the hours available in favor of some clients to the detriment of others, thereby failing to meet the parameters of ethical representation owed to each and every client.

It does not take a judge to overtly say, for example, "Please do not file any motions in my courtroom." Defense attorneys simply bring into their calculations what they think they need to do to garner favor with the judge, thereby not advocating solely in the interests of the clients, as is their ethical duty. Such practices stand in contrast with Sixth Amendment case law.

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As I put in my written testimony, in *Ferry v. Ackerman*, the court states, “Independence of appointed counsel to act as an adversary is an indispensable element to effective representation.” Two years later, the court determined in *Polk County v. Dodson* that states have a constitutional obligation to respect the professional independence of the public defenders whom it engages.

Observing that, a defense lawyer best serves the public not by acting on government’s behalf or in concert with it, but rather by advancing the undivided interests of the client. The court concluded in *Polk County* that a public defender is not amenable to administrative direction in the same sense as other government employees. This is confirmed in *Strickland v. Washington*. In that case, the court states that independence of counsel is constitutionally protected, and that governments violate the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to best conduct a defense.

Most importantly, *Strickland* must be read in conjunction with *United States v. Cronin*. *Cronin* sets out the systemic deficiencies that may result in a constructive denial of the counsel. In *Cronin*, the court points to the deficient representation received by the Scottsboro boys and detailed in the U.S. Supreme Court case *Powell v. Alabama*, as demonstrative of *Cronin* violations. In the *Scottsboro* boys’ case, the trial judge controlled every aspect of the defense, appointing unqualified counsel, and limiting the time needed to properly prepare the case. In *Powell*, the U.S. Supreme Court says, “How can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? You can’t, and should see to it that in the proceedings before the court, the accused shall be dealt with justly and fairly, but he cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and the accused which sometimes partake of the character of a confessional.” In other words, it is never possible for a judge to properly assess the quality of the defense lawyer’s representation because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to a crime scene, or sit in on a witness interview.

In 2002, the ABA promulgated ten principles of the public defense delivery system, which former Attorney General Holder called “the basic building blocks of a well-functioning public defense system.” The first of the ABA Principles explicitly states that public defense functioning, including the selection, funding, and payment of the defense counsel is independent, and in the commentary, the ABA notes, “Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of the defense function.”

Twenty-one states now have state-wide indigent defense commissions that

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oversee all aspects of indigent defense services. As you heard yesterday, the public defense services of the District of Columbia does it the same way, too. I recommend that the task force should recommend a similar federal commission to oversee all aspects of the delivery of the right to counsel at the federal level. Thank you, and, again, thank you for letting me testify via video conference. I'm happy to take your questions now.

Judge Cardone: All right, I appreciate it. Let's just take it, since this is via live stream, Dr. Rucker, do you have any questions at this time?

Dr. Rucker: Thank you, Judge Cardone. Let me just follow up and ask you to give some more specificity, if I could. What kind of structure are you proposing that we should recommend? Something partially within the judiciary, something totally outside? How would that work both at the national level and if we go to the local level?

David Carroll: Personally, I think it should be outside the judiciary altogether. I know you've heard from several advocates that think doing it partially within the judiciary is best. I think following the standards to the letter of the law, to the letter of the standards, is the best way to go with a commission that is overseeing and responsible for every aspect of indigent defense delivery. Now, whether you need regional panels or regional commissions under that one uber-board, I think there's arguments both pro and con for that. I think what you want, though, is at least one national commission that's able to set standards for how the defense function should go about its business.

Dr. Rucker: Let me follow up, then, with a funding question. One of the things, and we just heard from two judges. They're very concerned that if this was outside of the judiciary, that the funding would be vulnerable to the whims of Congress or other political winds, if you will. How would you respond to that? How could we make sure that we have the money that we need? Right now, we're at \$1.1 billion, and I could easily imagine those costs going much higher if it were outside the judiciary and needing a new administrative structure. What kind of assurances could you give us that the funding would be there?

David Carroll: Well, there's obviously not assurances that I could give that say it's never going to happen. What I can do is point to the state level, in that the systems that follow this structure are the ones that end up being the most well-funded. You heard about Massachusetts' system yesterday. It's one of the systems that are most fully funded in the country. I think part of that is policymakers don't understand the right to counsel because they don't have public defense practitioners arguing for their own budget and educating them on why this needs to happen.

I think it was a good idea to start out the federal defense system within the judiciary. I think it needed to be incubated. But it's now fifty years later, and

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I think there's an aspect of paternalism, that indigent defense can't survive without the judiciary. That hasn't been the experience on the state level when it has gone to true independence.

Judge Cardone: Judge Prado, any question? Judge Fischer.

Judge Fischer: What role, if any, whether it's just being consulted occasionally on certain issues or otherwise, do you see judges having in this totally independent structure? Do they just butt out altogether, other than sitting on the bench?

David Carroll: Absolutely not. I think judges have an important role in, for instance, whatever they're seeing in the courtroom. Are public defenders not properly prepared for their in-court work? Are they not in front of you when the case is called? Those are things that judges should be having frequent contact with the defense system to say, "Hey, this needs to be improved, that needs to be improved." It's not like a defense position can never talk to a judge outside of the courtroom. It should be frequent and ongoing, just as if a judge saw an unprepared district attorney, they should be talking to the supervision of the prosecutors as well.

I'm not saying there can't be any talking. In fact, many of the best state systems will say that directly in their statutes. They'll say even though there's independence, there must be a way for judges to express their opinion of what they're seeing of the defenders in the courtroom.

Judge Fischer: Thank you.

Judge Cardone: Ms. Roe?

Katherian Roe: Mr. Carroll, the question I have is about the federal commission that you're recommending, and you said that it was to set standards. Would it also administer the program?

David Carroll: Well, what usually happens at the state level is that there is an overarching commission to set policy, but, of course, the day-to-day management can't be done by a commission. It has to be done by a director of public defender services. Again, in the best systems at the state level, that's how. There's a commission and then there's an office that's actually doing the day-to-day management.

Katherian Roe: Are you recommending that there be some kind of a federal agency or federal office that oversees all of the federal defender and CJA program?

David Carroll: Yes.

Katherian Roe: What would that look like?

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David Carroll: Well, I think the commission following ABA policy should be made up of diverse appointing authority. For instance, I think all these details could be worked out, but the President could have two appointments, the Chief Justice could have two appointments, the Speaker of the House, the President of the Senate, could each have an appointment. Perhaps the American Bar Association President gets two appointments. That's how it's created on the local level.

Usually, interests of the predominant minority aspect of the defender community client is represented, so in Montana, somebody representing the interests of Native Americans is on it. In Louisiana, a member of the African American Bar is on the commission. There's lots of ways in which the commission could be formed, but basically, you want to have all three branches of government looking at this so that they have a vested interest in continually trying to improve the system.

Katherian Roe: Thank you.

Judge Cardone: Judge Walton?

Judge Walton: Am I correct in you saying that you only evaluate it when . . . sorry. Am I correct in saying that you've only evaluated the operations of the systems at the state level and not the federal level?

David Carroll: That's correct. I have not done any evaluation of the federal, either defenders or CJA panel. That's correct.

Judge Walton: Thank you.

Judge Cardone: Judge Gerrard?

Judge Gerrard: No, I have no questions, and I've read your testimony. Thank you. Appreciate it.

Judge Cardone: Arin, Ms. Brenner?

Arin Brenner: Hi, Mr. Carroll.

David Carroll: Hi.

Arin Brenner: What we've heard over the course of the hearings is often, the issue of adequate funding and independence are conflated. Since you've studied . . . you've studied state systems, so has independence always meant problems with adequate funding? Have there been space between these issues? Are they always linked? What have you seen?

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David Carroll: I can tell you, in every single underfunded indigent defense system in the country, there's a problem of a lack of independence in the defense function. In that sense, I think they're directly related. In systems that have proper independence, they tend to be the most well-funded systems in the country. I don't want to paint it as that simple an equation, but basically, the worst systems, the most underfunded, are the ones with the most excessive caseloads, are the one that have the most political independence questions, political and judicial independence questions. The systems like Massachusetts, for instance, Oregon, some of the better indigent defense systems in the country, all are the most well-funded and have the most independence in the system.

Arin Brenner: I just have one last question. On the state level, when defender systems have moved towards independence, and being moved outside of the judiciary, have judges stopped supporting the systems? Do they still step up and support those systems? What is their level of support when they're not as intimately involved with the defender function?

David Carroll: Sure. I think there's always a fear on the part of the judiciary because this is the way it's always been done. In state reform after state reform I've been involved with, judges have been a critical partner in working out how best to let go and how best to create the independence.

In state after state I've been involved with, you go back three, five years down the road, and judges will always say, "I can't believe that I wanted to have this much control of the indigent defense function." That's happened in every case reform that I've been involved with. They realize they don't want to be . . . on the state level, it's a lot about calling to try to track down a public defender that's supposed to be before them. They like that the system's organized and set up so that someone is there when they're supposed to be there. They think about all the time that's spent reviewing requests for experts, for instance. In an independent system, there's a budget line within the day-to-day operations of the defender and panel systems where they're making requests of somebody that can look at the case file, can talk to the defendant, can do things to say, "This is a legitimate request, let's approve this," or not. Judges tell me, "I never really realized how much of my day was spent with so much time trying to figure out all these requests for experts and investigators and things like that."

Time after time, I can tell you, even as scared as people are of thinking of the potential problems on the back end, they've all said they're glad they've gotten rid of it.

Judge Cardone: I have a question, Mr. Carroll, that has more to do with systems in place. Let me use as an example . . . what you're saying about the independence is

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understandable and makes sense. The difference that I see in the federal system versus the state systems is . . . and, the best way I can explain it is, if we were to legalize drugs, there's an entire agency, DEA, that would essentially have to agree or . . . I don't want to say "agree," but the concept that somehow their function would no longer exist. The AO has an entire system in place to manage the federal public defense function. I don't know, are there other states that had that kind of a system in place?

I mean, it's one thing to say judges at a local level, and small town or running it, but it's a completely different thing to have essentially an entire agency that controls a system. We have that in the federal system. It seems to me that structure is different than what you've seen in states, and that is somewhat of what we're dismantling if we take this away from the judiciary. Do you have any sense of that or any thoughts about that?

David Carroll: Sure. In some of the reform I've been involved in, there has been something analogous to an AOC department, something that has traditionally been running the day-to-day management of it. It's certainly possible to write legislation so that there's a transfer of those services and the people involved in it into a new, independent system. It's not like you have to build this thing from scratch. If there's working parts that are doing a good job, efficient use of taxpayers' money, all those things, those parts can be kept in any new legislation creating a new entity. It's just a matter of sliding over.

Again, I'm not saying it's going to be easy. There's going to be growing pains. Some people are going to like it, some aren't. Some people are going to say, "You know what? I'm going to just retire. I don't want to go to a new agency that may not be funded as well," and all that, but it has been done on the state level. Yes, usually the reforms we're talking with are locally controlled indigent defense systems by the judiciary, but there have been a couple state transitions that's analogous to what you would be facing.

Judge Cardone: Can you give us some examples of those state transitions?

David Carroll: Sure. In Oregon, for example, there was something analogous to what you're talking about before their reforms, which, I believe, were in 2002 or 2003, which then went to a more independent system. I'm trying to think. There's also . . . let's see. I'm doing some work with Tennessee now that's somewhat similar. That's the one that jumps out to me, but I'd be happy to sort of go state by state through my mind and submit examples that might be analogous.

Judge Cardone: If you could do that, it would be greatly appreciated because we are dealing with that kind of an issue. The other question I have for you, which just left my mind . . . Oh! It has to do with the placement of this function. We're talking about the federal government. Is it an executive function, is it a judicial function? How do we create . . . I mean, what do we say to the

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legislature when we say, “We want to enact this and create this system,” where does this system go? How would it work?

David Carroll: The answer in which branch of government it should be, if you look at the states that have created these type of commissions, they’re split at just about 50/50 between the judicial branch and the executive branch. In most instances, the systems that have been around the longest are [inaudible] branch, because a lot of people are [INAUDIBLE].

Judge Cardone: Can I interrupt you, Mr. Carroll? We . . .

David Carroll: It can’t even be housed in [INAUDIBLE].

Judge Cardone: We’re losing you. Can you start that again? We lost you.

David Carroll: Sure. In the states that have statewide commissions, about half are currently in the executive branch, and about half are in the judicial branch. The systems that have been around the longest tend to be the ones that are in the judicial branch. A lot of people that are doing more recent reforms are reading the ABA Ten Principles to say they can’t even be in the judicial branch of government at all. I don’t believe that. I think if you look at some of the better systems, again, Oregon and Massachusetts comes to mind, they’re housed in the judicial branch of government.

Most recently, the Idaho reforms have the new commission in the judicial branch. It just says it’s there simply for separation of powers, but it is truly independent. There are examples out there for you. My personal opinion is, I don’t think it matters too much which branch, but I think, given the history of how the AO has developed this and incubated it, I think it makes the most sense to leave it in the judicial branch of government, but have it be independent from the judiciary otherwise.

Judge Cardone: Thank you. Anyone else have any follow-up? Anybody?

Well, thank you very much, Mr. Carroll. It’s been really, really helpful. I would appreciate if you do have any systems, like we talked about, if you would submit that to us. If there’s anything else that you think of that you’d like to add to today’s testimony, we very much would appreciate it, because we’re really trying to gather as much information as we can.

David Carroll: My pleasure. Thank you very much.

Judge Cardone: Thank you. All right. We stand adjourned at our last meeting. Yay!

Okay. I believe Judge Tunheim . . .

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Katherian Roe: Our last hearing.

Judge Cardone: Last hearing, not our last meeting. Our last hearing. I believe Judge . . .

Katherian Roe: Clap again.

Judge Cardone: Yeah. Judge Tunheim has a reception for us in just a bit.

Oh, and let's give a round of applause to our [motioning to the A/V team] . . .
yes. Thank you, gentlemen, for all the work. You've been with us through
thick and thin.

Judge Prado: They said they're going to share the Oscars with us.

Judge Fischer: Right.

Judge Cardone: And the winner is . . .