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By Email

The Hon. Kathleen Cardone, Chair
Ad Hoc Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Judge Cardone and Committee Members:

My name is Anthony L. Ricco. I am a criminal defense attorney whose practice is now primarily in the area of federal capital defense. For the past three decades, I have been involved in the representation of criminal indigent defendants in both state and federal courts. In that effort, I have served on the Criminal Justice Act panels for the Eastern and Southern Districts of New York and as Resource Counsel to the Federal Death Penalty Resource Counsel Project. I am currently the Panel Representative for the Eastern District of New York. In that capacity I have served for several terms on the Defender Services Advisory Group and the Death Penalty Working Group subcommittee. It is from that perspective, coupled with my unique life journey that I provide the following statement which primarily focuses upon the independence of the federal defender service organizations, judicial involvement in the appointment of investigator, experts and other necessary services and increasing diversity in the federal defender programs.

Summary of My Recommendations:

1. Judges should not be involved in the decision making process of authorizing the approval of investigative, expert and other services that defense counsel deems necessary for the development and presentation of the defense case.

2. The need for structural changes to bring about an increase diversity in the participation of attorneys in the national defender service programs, including the CJA Panels and in Federal Defender Offices through the development of mentoring programs.

My Personal Background and Perspective:

Over the past several weeks, I have thought very deeply about what I wanted to say to this Committee about my individual experiences as a member of the Criminal Justice Act Panel, to add to the many voices discussing the issues critical to the improvement of the delivery of a high level of legal representation to indigent defendants.

I must first say that it has been a tremendous honor to be given the opportunity to appear in federal court to advocate on behalf of the indigent defendants. I have served as a member of the Southern District CJA Panel (SDNY) since 1990 and the Eastern District CJA Panel (EDNY) since 1993. Each day, I am in deep reflection upon the responsibilities of my cases in juxtaposition to the tremendous journey that I have been on in my life.

I am particularly proud of the opportunity, because I am conscious of the fact that as an African American there have been great sacrifices of made by others, many losing their homes, their jobs and some their lives so that a young person like myself, born and raised in an impoverished forgotten racially segregated community, could have the equal opportunity to attend college, law school and become an attorney to stand up and advocate on behalf of many whose life journey is foreign to most prosecutors, jurors and members of the judiciary.

The Beginnings:

Several decades ago, I began on an extraordinary journey from a hellish place in Harlem, known as 116th Street and 8th Avenue. I attended college on an academic scholarship under the nationally hated and denigrated effort then infamously known as Affirmative Action. Upon completion of college with academic honors, I had the opportunity to attend law school. Upon graduation, I clerked for a distinguished but despised New York State African American Judge, Bruce McM. Wright. Upon completion of an extraordinary clerkship, I began upon my unintended career of representing indigent defendants in criminal court.

As I look back over my life journey, I recognize that there were many who took a chance on me, seeing promise where others chose not to and helped provide professional opportunities that would have otherwise been foreclosed. With the encouragement and recommendation of the late Judge Murray Mogul, a former federal defender, then serving as a New York State Supreme Court, Trial Judge, I applied for and was accepted on the CJA Panel in the SDNY and later the EDNY. Although I was an experienced state criminal defense attorney, at that time, I had more potential than actual federal experience. An opportunity was provided. The task ahead was formidable, it would take hard work and commitment.

Over the course of my career as a CJA Panel attorney in federal court, I have represented defendants in the most challenging of cases, from international terrorism to the representation of defendants facing the death penalty to those presently on death row. During my journey, I have met many distinguished, committed and talented individuals, from those who staff the Office of The Defender Services Offices, to CJA Panel attorneys from all over the country, government prosecutors and members of the judiciary of all races and backgrounds. However, it has been my representation of defendants facing the death penalty that has given me the

opportunity to meet and work with some of the most distinguished attorneys of our era including many at the Federal Death Penalty Resource Project, along with many dedicated government prosecutors and many extraordinarily distinguished members of the judiciary and, of course, the accused.

Practicing law as a CJA Panel attorney has been perhaps one of the greatest challenges of my life. Members of this committee will never know the number of hours, emotional toil, and pressure that is placed upon the attorneys who take on the task of representing indigent defendants faced with charges in federal court.¹ I have embraced this great challenge and have attempted to fulfill the promise that those saw in me many years ago through striving to provide a high level of committed, dedicated service. So, this is the back drop of my perspective, of my comments and recommendations.

Independence From The Judiciary

There has been a great deal of discussion about whether the Federal Defender Services Program should remain under the judiciary or become an independent agency. Resolution of this issue is complex. I believe that our defender service program functions at its best when people of integrity, dedication and an understanding of the defense function are involved in the process that delivers the high level of legal representation to indigent defendants. When individuals of such character are not involved, then the best interest of the indigent defendants

¹ For example, in 2009, Bruce McIntyre, an African American attorney of extraordinary skills and an unsung hero of the CJA Panel, at age 54 was found dead inside his office, at his desk slumped over 3500 materials preparing for an upcoming trial, having suffered a massive heart attack. Bruce was an extraordinary attorney, who lost his life providing service to indigent defendants, putting his professional responsibilities for indigent defendants before his personal health. Long forgotten by our national program, Bruce was unable to afford proper health care coverage.

will not be served whether the defender services program is under the judiciary or served through an independent agency.

For most of my career, I have had the great opportunity to practice on a regular basis before judges within the 2d Circuit on both the trial and appellate level. Practicing criminal defense before trial judges in the EDNY and SDNY is unique, special. The judiciary in both districts take great pride in ensuring that indigent defendants are the recipients of a high level of legal representation. The Judges of both the EDNY and SDNY have, over the decades, made tremendous efforts to maintain a positive, extremely supportive relationship with the CJA Panel attorneys and the Federal Defenders of New York. The judges, many from backgrounds of enormous privilege, have always recognized the necessity to provide indigent defendants with strong and responsible legal representation. Great pressure is placed upon the CJA Panel attorneys to maintain a high standard of excellence, to meet the emotional and physical challenges that are part of the daily representation of defendants many from backgrounds of enormous depravity and neglect.

There has been a willingness on the part of the judiciary in both the EDNY and SDNY to remain responsive and committed to the challenges faced by the CJA Panel attorneys who take on this extraordinary challenge in tremendously difficult and increasingly complex cases, where defendants, who are often times bitter, frustrated and despondent with the system and the derailment of their own lives. In my view, it has been the mindset and willingness on behalf of the judiciary, that has directly resulted in a level of representation that our nation can be proud of. Over the past decades, many challenges have been met; from the devastating challenges faced by sequestration to increasing the quality of representation by addressing the lack of diversity on both panels.

In my role as a CJA Panel Representative and from the representation of defendants on federal and state capital cases, I have had the opportunity to meet and work with CJA panel attorneys and Federal Defenders from around the country. I am aware from those interactions and my own professional experiences, that in those districts where maintaining such a relationship with CJA Panel is not a priority with the members of the judiciary, the level of representation, the professional morale and commitment of the CJA Panel attorneys suffers. The result, defendants in those districts do not receive the same level of professional representation afforded defendants in other jurisdictions. The result is reflected in the disparity in the number of death sentences, longer periods of incarceration and the intangible; the nuances that quality representation provides is lost. Rather than having a system that we hold up with a sense of pride, we have a system that is subject to national and international derision with unfathomable incidents of injustice.

Americans should be assured and confident that when an individual is confronted with having to address criminal charges in federal court, that there is one system of justice; a system where the rights we hold so precious are protected and a high level of attorney representation is available to anyone; not based upon race, culture, popular politics, or income.

There is presently a strong partnership between the judiciary and the attorneys in the federal defenders service program in many districts and a tenuous relationship in others. That partnership is in jeopardy and will be destroyed where there is not a continuous effort on behalf of the judiciary to learn and to be part of an evolving work-in-progress needed to maintain the delivery of a high level of representation. In those districts where judges are unwilling to take on that rewarding responsibility, the ability to maintain the high level of representation and the high level in which our federal courts are held is in jeopardy. In those districts where there is

such willingness, an excellent model for continued and future success exists . In those districts where judges are indifferent to the maintaining the integrity of the defense function and are unwilling to learn about the challenges faced by CJA panel attorneys, serious consideration must be given to defender services programs and the judiciary going separate ways, so that the delivery of a high level of representation of indigent defendants can be ensured.

Recommendation

Even under the present partnership, Judges should no longer be involved in making *the* assessment and *the* determination of what investigative and expert services are necessary for the development, preparation and presentment of the defense case. There are very few Judges who have ever represented indigent criminal defendants or have had the requisite background and training in the defense function necessary to prepare an effective defense in federal court. There are very few Judges from the backgrounds of the overwhelming majority of the defendants who are before the courts for sentencing and are therefore not sensitive to the need to bring in experts and other specialists to assist CJA Panel attorneys with sentencing advocacy and litigation. The notion that an individual who has never had such training or similar life experiences is responsible for ultimate determining what shall be permitted in order to prepare for a defense, under cuts the integrity of our system.

A possible remedy is for each Circuit to have a CJA Commissioner, an individual who works along with Case Budget Attorneys and others with a background in the representation of indigent defendants in federal court, to serve as an independent clearinghouse to which the defense request for services are submitted for authorization and approval. The request is then submitted to the court for endorsement only. In this way, Judges are not interfering with the defense function, which includes presenting a defense that is often a work-in-progress until actually presented.

The selection process of attorneys who will serve on the Criminal Justice Act panels, must include a sense of faith that the attorneys selected have the requisite experiences to recognize, explore and develop appropriate defenses in federal criminal prosecutions.

Diversity in Federal Court

Throughout my years of service on the CJA Panel, I have been unwilling to accept the pathetically low numbers of the attorneys from diverse backgrounds who participate on the CJA Panels and the Federal Defender Services Programs. The low numbers are a disgrace and our system suffers tremendously from the lack of inclusion of ideas from individuals from diverse backgrounds with sharp minds, powerful life experiences and innovative ideas. The need is for diversity, not based solely upon race or gender of the attorney but rather diversity of ideas and perspectives. Those ideas and perspective serve to enrich every aspect of our society and especially in the area of criminal defense, where understanding of subtle nuances and having a willingness to explore non-traditional remedies and innovative approaches to the presentment of evidence can, in some federal cases, provide the difference between life and death. In non-capital cases, the imposition of staggering sentences of incarceration.

In both the EDNY and SDNY, the district CJA programs have been amended to include innovative structured mentoring programs designed to increase diversity. Over the past seven years of existence in the SDNY, 19 participants who completed a 18 month program now serve on the SDNY or EDNY panels. The graduates of the SDNY mentoring program include individuals from all backgrounds, races and genders. Thus far we have had acquittals, significant impact on sentencing litigation and success on appeals.

Presently on the drawing board is a mentoring program to increase diversity in the area of federal capital representation. The capital mentoring program is being developed with

participation from the judiciary, the Federal Death Penalty Resource Project, Federal Defenders, CJA Panel members and NAACP Legal Defense Fund.

In addition to a strong commitment to my work, developing and participating in the SDNY mentoring programs is my way to showing appreciation for the opportunities that were made available to me over the course of my career and to ensure that a high level of legal representation shall be provided to indigent defendants in the future by helping make opportunities available to younger attorneys from diverse backgrounds.

Respectfully,

Anthony L. Ricco
Anthony L. Ricco, Esq.

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