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Chambers of
ANN AIKEN
Chief Judge

January 29, 2016

Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Bldg.
1 Columbus Circle, NE
Washington, DC 20544

Re: Testimony of Ann Aiken, U.S. District Judge, District of Oregon:
A CJA for the 21st Century: Holistic Criminal Defense Lawyering and Equality of Arms

Dear Judge Cardone:

Thank you for inviting me to participate in this review of the Criminal Justice Act.

I've been a judge for 28 years and a federal judge for 18 of those years. Over that time I've seen some extraordinary criminal defense work from both federal defenders and panel attorneys.

The work is all the more extraordinary when you consider the situation that individual criminal defendants and their lawyers face every day. Let's step back and think about it for a moment: Every time an individual becomes a criminal defendant in the federal system, that individual must defend him or herself against the United States government – As President Obama said in his recent state of the union address, "The United States of America is the most powerful nation on earth. Period."

As a judicial officer sworn to uphold the Constitution and the principles embodied therein, the situation of today's federal criminal defendant troubles me greatly. Obviously, I'm not the only one. As we all know there has been a great deal of discussion about criminal justice reform and we've seen some positive movement on that front from the Sentencing Commission and Justice Department. There are some interesting reform-oriented bills floating around on Capitol Hill and several states have engaged is some impressive reforms. Indeed, there seems to be broad acknowledgment that there is a deep and profound problem with our country's criminal justice system. As we all know the Framers of the Constitution were deeply concerned about

concentrations of power, so after the terrible experience of the country under the Articles of Confederation, they set out to again try to create a system of limited government that combined the best of the liberal and republican traditions. A system of representative government grounded in civic virtue while simultaneously respecting individual rights. These rights, would be protected by the structure of the government itself, exemplified by separate yet interdependent branches of government, the conceptually most radical of which was the relatively independent judiciary. Simply read the Bill of Rights, which came just a bit later as part of the price of ratification, and you'll see deep concern for the rights of people involved in the criminal justice system. I think the country, in its present discussion about mass incarceration for example, is asking itself: What happened to that deep concern? How can it be that 97% of all criminal cases end with a plea bargain? It was not always this way.

Quite frankly, when it comes to federal criminal justice reform it has been the independent federal judiciary, not the Justice Department, leading the way. Federal defenders and panel attorneys have been an integral part of this judiciary-driven reform. For example, over the past eight years or so, in a trend that began prior to the current presidential administration, the federal courts have seen the exponential growth of problem solving courts; there are now approximately 70 such courts in about 60 districts. There are federal reentry courts, drug courts, mental health courts, veterans courts, and gang courts; there are pre-plea, post-plea, and post-conviction programs. They are designed to deal with higher risk/higher need defendants and offenders and they are about supporting and respecting both participants and the community. They are about using evidence-based approaches to incentivizing good behavior by defendants and parsimoniously sanctioning bad behavior with the ultimate goal of reducing recidivism. They are about bringing the federal court into the community and bringing the community into the federal court.

As I said, defenders and panel attorneys have been major players in this quiet revolution. And what they have discovered is that there is a better way to be a criminal defense lawyer. They've discovered that the defender's role is not merely about getting the best plea deal possible for his or her client – which, let's face it, is what much defense work has become. (Of course it has when, as a defender and a defendant you're facing a deck of cards stacked against you. Remember folks: when you're a defendant and a defendant's lawyer, you're facing, in President Obama's words "the most powerful nation on earth. Period.") By participating in problem solving courts, defenders and panel attorneys are learning how to become holistic lawyers.

What does this mean?

- At pretrial it means understanding that zealously advocating for your client's release, when release is appropriate according to both the law and the empirical research, by perhaps recommending alternatives to detention, could result in a better sentencing outcome. Indeed, if the client is a parent, or has a job, or needs mental health or drug treatment, advocating successfully at pretrial can enable the client to continue being present for his or her kids, remaining employed (which also means bringing home a

paycheck and paying taxes), or getting treatment to address a chronic mental illness or substance use disorder. Holistic lawyering also means being able to understand, use, and explain the social science and behavioral research that says defendants who are successful on pretrial release tend to be more successful on post conviction supervision.

- At the sentencing phase holistic lawyering means knowing how to make behavior-based, empirically supported arguments for an appropriate sentence under the advisory Guidelines and section 3553(a) that will reduce the chances of the defendant engaging in behaviors that contribute to criminal activity. In other words, helping the court answer the question: How will this sentence adequately address the behavior that landed the defendant before the court in the first place in a way that will enable the defendant to change his or her behavior for the better? It also means, if a defendant is to be sentenced to a term of incarceration, knowing which BOP institutions offer programming that will assist the client in getting his or her criminogenic needs met and, therefore, facilitating his or her successful reentry. A holistically minded criminal defense lawyer will make sure the probation department, the government, and the court are aware of such programming and will ask both the court and the government to try to ensure the client is designated and classified appropriately by the BOP.

- Finally, holistic lawyering for defenders and panel attorneys means that the case isn't over when the client reports to the BOP or when his or her conviction has been affirmed. The case isn't over because the client's tour of our federal criminal justice system isn't yet over. After prison, the client will most likely end up in a residential reentry center followed by a term of supervised release. At that point, there is really only one professional who most defendants still can truly trust: their lawyer.

What does holistic criminal defense lawyering look like? Here's an example. For the past ten years the district of Oregon has operated two reentry courts: One in Eugene and one in Portland. 169 offenders have graduated from these specialized courts. This intensive supervision program is overseen by a judge and staffed by a probation officer, AUSA, federal defender, drug treatment provider, mental health treatment provider, and, in the case of our court in Eugene, a specialist in Structure of Intellect assessment. The defenders who staff our reentry courts have said to me and others that participating on their reentry court teams has made them better lawyers. Why? Serving on the team has enabled them to see participants multi-dimensionally and to offer advice and guidance that the participants value. Also, they are able to establish professional, collaborative relationships with other team members and the judge that not only assist participants in reentry court but spill over very positively into their other case work. Finally, they are able to better appreciate the role of empirical research in improving their understanding of both criminal behavior and interventions that have been shown to be effective in addressing that behavior.

So this is what I mean by holistic criminal defense lawyering, and I believe the implications are potentially quite profound. In 2013, the Justice Department with its Smart on Crime initiative

finally endorsed what the federal courts had been doing with problem solving courts for the previous nine plus years. Since that time, the Department has been requiring USAOs to create reentry coordinator positions and has been urging prosecutors to engage in problem solving justice. Our own USAO, I'm happy to say, has been participating on our reentry court teams from the beginning. My point here is that I believe we will soon achieve critical mass in the federal courts when it comes to problem solving justice as well as what the scholar Tom Tyler refers to as procedural justice.

So, what should a CJA for the 21st Century do? First, it should acknowledge and support the broader approach to criminal defense lawyering that I have been describing. Second, it must fully embrace the concept of equality of arms. If we are to have a truly fair criminal justice system, there must be no doubt – none – that the resources available to criminal defendants are as seemingly limitless as those available to the government in every case.

This is, basically, the modern definition of equality of arms. The concept, which is firmly established in international human rights law, has been adopted by the European Court of Human Rights, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Court, and the U.N. Human Rights Committee, not to mention the judiciaries of multiple developed countries. However, I would also argue that equality of arms is really what Gideon, at its core, is all about. Yet, somehow, our criminal justice system never has gotten to full equality and, as a result, remains fundamentally unfair. We've stopped well short of making Gideon's promise a reality. We have never truly acknowledged, through our legal institutions and expenditure of resources, equality of arms.

Public defenders remain under resourced and second class citizens in the American legal hierarchy. The way we've organized our legal institutions has reinforced this pecking order. How is it, for example, that we have a Department of Justice that only consists of prosecutors? Wouldn't a true Department of Justice consist of both prosecutors and equally well funded public defenders. Why is it that we have a sort of crazy quilt system of federal defenders and panel defense attorneys when we would never tolerate such an approach for prosecutors? Creating such a true justice department would be a manifestation of our country's commitment to the meaning of Gideon and equality of arms.

It shouldn't go unnoticed in this regard that the current administration has created an office within the DOJ called Access to Justice. The office was established by Professor Laurence Tribe during his brief tenure at the Department and is now staffed by several lawyers with criminal defense backgrounds It's a small office and works on access to justice policy issues, but I would argue that this could be the first small step in the Justice Department's evolution into an institution that would live up its name.

The CJA was revolutionary in one sense and long overdue in another. There's no question that the CJA has improved our system mightily, making it fairer and more just. But, clearly, much more needs to be done. We need to look at criminal defense lawyering in a new way. We need to

create institutions that elevate the defense function to one of equal stature with the prosecutorial function. I've made some suggestions here and I'd be happy to discuss them.

Thank you for the opportunity to testify. I look forward to providing additional testimony and responding to any other questions you may have at the hearing on February 4.

Sincerely,

Ann Aiken
Chief Judge
District of Oregon