SEATTLE UNIVERSITY
SCHOOL OF LAW

January 22, 2016

Judge Kathleen Cardone and
Ad Hoc Committee to Review the Criminal Justice Act
By email to autumn_dickman@ao.uscourts.gov

Dear Judge Cardone and Members of the Committee:

Thank you for the opportunity to speak to the Committee about federal public defense.

Introduction—The Need for a Culture of Excellence

To have a strong public defender program it is important that there be a culture of excellence, in other words, that all the participants in the criminal justice system expect that the defenders will be zealous advocates for their clients, providing thorough representation and when necessary, challenging existing practices that are unconstitutional or unfair or ineffective. Judges and prosecutors should be supportive of comprehensive defender practices and recognize that the adversary system requires them. Defenders themselves must have the resources they need to investigate cases, do legal research, and prepare for trial and sentencing. They need access to expert witnesses and they need training and supervision to maintain a high level of proficiency. My observation is that in the Western District of Washington there is such a culture, but structural protections are needed to ensure that that culture is maintained.

In whatever structure is developed for public defense, the appointing authority and the funding authority need to accept the value of effective public defense and be willing to provide the resources necessary. If cases are important enough to prosecute, they are important enough to defend.

My Background

To give you a sense of the background from which I offer my comments, I will provide a brief summary of my experience. I was a chief defender directing a non-profit defender office in Seattle, King County, for 28 years. I have appeared at all levels of state and federal court. For nine years I have been a professor at Seattle University School of Law, where I direct The Defender Initiative, a project aiming to improve public defense representation. I have helped to evaluate public defense services in Washington, Michigan, Nevada, Idaho, Louisiana, Utah, and the District

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of Columbia. I have observed and assessed public defense practices in New York, Kentucky, Pittsburgh, Pennsylvania, and Phoenix, Arizona as well. I have been an expert witness in systemic litigation regarding effective assistance of counsel in New York and in Washington, and I recently testified as an expert witness in a New Orleans hearing on excessive defender caseload. I have co-authored an amicus brief on right to counsel in a case in South Carolina and provided expert witness declarations in New Hampshire, Kentucky, and Miami, Florida. Under a Department of Justice grant, I work with The Sixth Amendment Center to provide technical assistance to states, including Mississippi and Utah, and we recently published a report on public defense in Utah. I am consulting with a small city in Washington to assess its public defense services. I have written several articles about public defense and criminal justice. I serve as chair of a subcommittee on standards for the Washington State Bar Council on Public Defense. I served as chair of a subcommittee of the American Council on Chief Defenders that developed a Statement on Caseloads and Workloads. More information on my work and publications is available at Seattle University School of Law's website at http://www.law.seattleu.edu/faculty/profiles/visiting-and-affiliated/robert-c-boruchowitz.

Strong Defender Programs Need Independence and Adequate Resources

I agree with the seven fundamental recommendations of the National Association of Criminal Defense Lawyers in its report, "FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE". In this letter I will focus on three of them: independence from judicial interference, adequate funding, and payment decisions for CJA panel attorneys should be made promptly by an entity outside of judicial control.

In assessing what defender programs need, it is helpful to consider the words of U.S. District Court Judge Robert Lasnik, a member of the Executive Committee of the Judicial Council, in his opinion finding that two Washington cities had been wilfully blind to their Sixth Amendment obligations. He wrote:

> Timely and confidential input from the client regarding such things as possible defenses, the need for investigation, mental and physical health issues, immigration status, client goals, and potential dispositions are essential to an informed representational relationship. Public defenders are not required to accept their clients' statements at face value or to follow every lead suggested, but they cannot simply presume that the police officers and prosecutor have done their jobs correctly or that investigation would be futile. The nature and scope of the investigation, legal research, and pretrial motions practice in a particular case should reflect counsel's informed judgment based on the information obtained through timely and confidential communications with the client. A failure of communication precludes the possibility of informed judgment. If actual, individualized representation occurs—as opposed to a meet and plead system—the systemic result is likely to be more adversarial testing of the prosecutor's case throughout the proceeding and a healthier criminal justice system overall.

Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

Judge Lasnik's words recognize the importance of comprehensive representation that includes investigation and the use of expert witnesses. Federal defenders and CJA panel attorneys need to have access to those resources.

Independence

In my experience, when a defender program is independent, it can hire the staff it chooses, it can develop a client-centered approach to representation, it can bring motions that challenge unfair practices, and it can advocate for the resources it needs. Independence can be obtained by having a non-profit defender with a strong board of directors, by having a government defender office whose chief is chosen by a panel of community and bar leaders and who serves for a term of years, or by electing the public defender. Ideally, the federal defenders and CJA lawyers would operate in a structure that provides complete independence from judicial control, for the reasons identified by NACDL, including freedom to advocate for needed resources and compensation without fear of losing appointments. As NACDL noted, judges often are not in a position to evaluate whether experts are needed or how much time lawyers need to invest in a case. And the selection of the Federal Defender should be independent of the control of the judges before whom the Defender will appear.

There are three major issues regarding independence in the Federal Defender system. One that is of particular timeliness is the requirement that the Circuit judges approve the addition of staff to the Defender offices. It is my understanding that even though a new workload formula supports the addition of defender staff to many of the districts, the Circuit judges have to approve the addition of those lawyers. I can offer an alternative approach from my own experience in King County. King County developed a method of calculating attorney workload based on a combination of the type of case and the amount of hours needed to do the work. When the workload reached a certain level, the County provided funding for additional staff, both attorneys and support staff. The number of supervisors is driven by the number of staff to be supervised. Judges play no role in that process.

Another issue is the selection of the Federal Defender. The American Bar Association Criminal Justice Section Standards, Providing Defense Services, specify that the selection of defenders and CJA panel members should not be made by the judiciary:

> **Standard 5- 1.3 Professional independence**
> The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.

A third issue is control over compensation and allocation of expert witness and investigation resources. This can be related to control over appointment of counsel as well. The NACDL report noted, "Perhaps most telling was the sentiment, expressed by numerous defenders and panel lawyers, of their willingness to speak with the Task Force only on the condition of anonymity." This suggests an apprehension that challenge to the status quo could result in losing appointments or in not receiving adequate compensation or resources.

The NACDL report noted: "…the Task Force heard of many instances of judges denying or limiting panel attorney voucher requests for experts, investigators, and other support services." Professor Stephen Bright in his written testimony to this Committee cited examples of Circuit Judges cutting severely expenses authorized by District Judges. This illustrates the problems when judges have exclusive control of what defense attorneys are able to spend to represent their clients.

Seattle Federal Defender Mike Filipovic has reported "erratic views" among his district's judges as to what is effective representation when the judges are reviewing CJA panel attorneys' invoices. That is another reason to have a reviewer of invoices who is independent from judicial control.

The lack of independence can affect the quality of representation to clients in other ways. Although federal defenders were willing and able to work on the clemency petitions invited by the Department of Justice, the Director of the Administrative Office of the Courts sought an opinion from the general counsel that concluded the defenders could not represent clemency petitioners in non-capital cases. As the NACDL report noted, "Instead of representation by defenders and CJA panel attorneys with extensive federal criminal law experience and client familiarity, clemency cases must rely on volunteer lawyers from different practice backgrounds, which can further delay the clemency process."

The Presumptive Maximum Compensation Rate for CJA Attorneys Threatens Their Ability to Provide Effective Representation

Jennifer Horwitz, the CJA Panel Representative for the Western District of Washington, has written to you that her colleagues have found that in many instances the statutory maximum fee (for 77 hours of work in a felony case or 55.8 for appeals) is "far too low to allow the CJA attorney to provide high quality representation." She outlined the variety of factors that can make even a so-called "garden variety case" require many hours of attorney time. I support her concern, and agree with the complex factors she cites as occurring regularly in federal cases. I would note that many felony cases at the trial level require more than 77 hours of work and certainly the appeals require more than 55 hours.

The Miami Federal Defender, Michael Caruso, in his testimony to this Committee detailed the complexity of several fraud and multiple defendant trials that highlights the enormous resources that can be required to provide effective representation.

The requirement that the trial judge certify and the chief circuit judge approve any request to exceed the presumptive maximum presents challenges to the independence of the lawyers and

raises the possibility that a judge who became upset about vigorous representation could "punish" the lawyer by not approving the amount requested. Professor Bright cited examples of this possibility.

The hourly rate for CJA attorneys, particularly given the presumptive maximum rates, raises issues of parity with the prosecution. I note that the salary range for assistant U.S. attorneys goes up to $135,519 for staff attorneys and up to $160,300 for supervisory, special assistant, and Senior Litigation Counsel AUSA's.[1] If one uses a billable hour year of 1744[2], the hourly salary range for the most experienced AUSA's amounts to from $77.77 to $91.91. Recognizing that those attorneys have significant fringe benefits and do not have to pay any overhead, in effect their compensation rate is from approximately $155 to approximately $183.[3] This is significantly more than the $129 paid to CJA attorneys in non-capital cases, and of course the AUSA's have no 77 hour limit for a felony case.

In addition, the common practice of assigning two AUSA's to a trial, when in many cases a CJA attorney is required to work alone, raises concern about the parity of resources and the ability of the defense to respond to prosecution efforts, particularly in cases with large numbers of documents and/or hours of recordings.

Mr. Caruso's testimony highlighted another dimension of the lack of parity, noting that his office has approximately one fourth the number of attorneys that the U.S. Attorney has. Even recognizing that some defendants have retained counsel, that disparity is significant.

And as the NACDL report emphasized, the DOJ has dramatically more resources for AUSA training than do the Federal defenders.

Recommendations

The establishment of a Center for Federal Defense Services, as recommended by the Prado Committee, possibly with regional offices, would facilitate resolving the issues of independence and could lead to improvements in the processing of CJA panel members' requests for compensation and for funding for expert witnesses. If the Center had a strong Board, it could advocate effectively for needed resources for defenders and CJA panel attorneys.

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[1] (Administratively determined pay plan chart at http://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts.)

[2] The Office of Management and Budget (OMB) has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. Performance of Commercial Activities, OMB Cir. No. A-76 (Revised) (Aug. 1983), at p. IV-8.

[3] See, **Financial Benchmarks for Your Firm** by Peter Roberts, available at http://www.wsba.org/Resources%20and%20Services/LOMAP/~/media/Files/Resources_Services/LOMAP/Financial%20Benchmarks%20for%20Your%20Firm.ashx, for discussion of overhead rates.

Another option would be to incorporate into the existing Defender Services structure the independence features of the Public Defender Service of the District of Columbia. As an evaluation of PDS concluded, "PDS' status as an independent agency has allowed it to maintain a singular focus on providing zealous advocacy, as ethical standards require, and to set its policies and programs based upon what that high standard requires."[4]

In any event, in the short term the Defender Services Office should be restored to its previous higher status within the Administrative Office of the Courts, recognizing that Defender Services are different than program services such as probation or pre-trial services.

Thank you for your consideration and for the opportunity to testify to the committee.

Sincerely,

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Professor from Practice
Director, The Defender Initiative

[4] See, "Halting Assembly Line Justice, PDS: A Model of Client-Centered Representation (2008)", p. i, National Legal Aid and Defender Association, available at http://www.nlada.net/sites/default/files/dc_haltingassemblylinejusticejseri08-2008_report.pdf.