

THE FEDERAL DEFENDERS OF MONTANA



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Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
the Criminal Justice Act Program
ATTN: Arin Melissa Brenner
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

**Re: Written Comments of Tony Gallagher
Federal Defender, District of Montana**

Dear Judge Cardone:

Thank you for the invitation to testify before the Ad Hoc Committee to Review the Criminal Justice Act. I appreciate the opportunity to submit these written comments in advance. My remarks are based largely on twenty-three years as Executive Director of the Federal Defenders of Montana, Inc., a community defender organization formed in 1992 pursuant to Title 18 U.S.C. § 3006A(g)(2). My testimony is also informed by experiences as a member of the Defender Services Advisory Group, service as Chair of the Community Defender Organization Working Group, work on other Administrative Office groups and Expert Panels, and the decade spent as an Assistant Federal Public Defender and private attorney in Baltimore, Maryland.

Below I provide an overview of my District and the federal defense function in Montana, then discuss the focus topics for the Portland public hearing (quality of representation and CJA panel management), and finally I address other areas of particular concern.

Overview of the District and Federal Criminal Defense Services in Montana

The District of Montana is the largest judicial district in the lower 48 states – over 147,000 square miles. The District has five Divisions: Billings, Butte, Great Falls, Helena and Missoula. The largest, the Billings Division at about 54,650 square miles, exceeds the total land area of 24 states. The Rocky Mountains partition the District in the west, with the eastern two-thirds part of the Great Plains. If traversing Montana using the interstate highway system, the distance from the North Dakota border near Wibaux to Lookout Pass at the Idaho line (707 miles) is greater than the distance from Washington, DC, to Jacksonville, Florida (706 miles). Montana shares an international border with Canada of over 570 miles, which is also the maximum East-West extension of the state. The extreme North-South distance is 315 miles.

The state's population, estimated to be about 1.024 million, ranks 44th in the United States. Almost 7% of Montanans are Native American. Nearly 30% of the state's land is managed or otherwise controlled by the United States government, with national forests, wildlife refuges, monuments, recreation and wilderness areas located throughout the State. Major populated federal enclaves are Malmstrom Air Force Base and Glacier National Park. Legal assistance to clients from Montana's six federal jurisdiction Indian Reservations – Blackfeet, Rocky Boy, Fort Belknap, Fort Peck, Crow and Northern Cheyenne – comprises about 50% of the Federal Defenders of Montana criminal defense practice, including federal juvenile delinquency litigation.

The United States Attorney's Office in Montana prosecutes a wide range of criminal activities. The caseload includes violent offenses, sex crimes, grant and loan frauds, environmental crime, public official corruption, drug and money laundering activities, child pornography, and multiple defendant criminal enterprises. Federal prosecutors were absorbed for the last several years with alleged mismanagement, embezzlement and theft by tribal leaders. Drug distribution networks in Eastern Montana received national news coverage and intense federal law enforcement action. Indictments in multi-defendant drug cases and Indian Country crimes typically include multiple counts and/or overcharged clients in the attempt to coerce negotiated settlements. Sex offense and child pornography allegations carry multifaceted practical and legal problems – investigative travel, expert services, administrative support, and unique mitigation issues. Tendered plea agreements in these cases frequently required waivers of appeal and post-conviction relief, along with myriad constitutional and statutory rights. Consequently, some cases that should have been fairly resolved by negotiation are proceeding to trial or leading to guilty pleas to all charges, followed by contested sentencing hearings and appeals.

Appointed counsel representations must be viewed in the context of the character of my state. When compared to Federal Defender Organizations in urban districts, travel problems are unique, especially in extreme weather conditions, magnifying the time required to properly investigate and prepare any criminal case. Attorneys and investigators can encounter one-way trips in excess of 400 miles to meet with clients and witnesses and to carry out on-site investigations. In addition, the United States Marshal Service's practice of housing clients in remote detention facilities results in extraordinary travel costs and attorney/investigator time. The distance between the headquarters and branch offices complicates staff supervision and CJA Panel management.

The Quality of Representation under the CJA

The Criminal Justice Act has evolved over the years to offer those unable to afford to hire an attorney high quality legal representation in the most cost-effective manner. The system of providing criminal defense services under the Act in the vast majority of federal districts melds an institutional defender office with a dedicated group of private practitioners. The present federal defender program assures all appointed attorneys are well qualified, by virtue of experience, specialized training, and commitment, to serve as counsel. Over the years surveys of federal judges have ranked the quality of representation provided by Federal Defender Offices very highly and similar formal assessments have shown most panel lawyers across the country are among the best, brightest, and most devoted advocates found anywhere.

This did not happen by chance. Where the defender office and panel attorneys work in concert on administrative and management issues in their districts the benefits of that interaction has a direct impact on the quality of representation. Such coordination emphasizes that Defenders and assigned private counsel remain fully independent, free to act on behalf of their clients as dictated by their best professional judgment. In most districts, the Defender is the panel attorney's main source of assistance through, for example, formal and informal training and case consultation. Panel attorneys in districts without defender offices often note that the absence of a defender office creates real problems, adversely affecting the quality of representation.

Our experience in the District of Montana underscores the importance of a close working relationship between panel and defender. The Federal Defenders of Montana provides or coordinates all federal criminal defense services for those unable to afford counsel in accord with the District's Criminal Justice Act Plan, revised in 2014. The Plan says "the community defender shall be appointed in all cases assigned to that organization. Subsequent assignment to staff attorneys shall be made at the discretion of the community defender." The Plan also charges the Federal Defender with the responsibility "for the systematic distribution of cases to and for the management of the CJA Panel." The ratio of Federal Defender to CJA panel client representations called for in the plan (a "substantial proportion" of appointments), as defined by national directives, is 75% to 25%. In calendar year 2015, the split of appointments was 73% to 27%.

The District's CJA panel is made up of 68 active members. My organization monitors case assignments and screens them for potential conflicts using "Panel Tracker," an internally developed software program. Panel size is supervised and adjusted by a CJA Panel Selection Committee to assure that the panel is large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members will receive an adequate number of appointments to maintain their proficiency in the federal criminal defense work.

Common sense demands, and professional ethics rules require, that experience and appointment frequency must be combined with training to maintain the requisite knowledge and skill to perform the required tasks. My office regularly trains, mentors, informs, consults with and manages the Panel, devoting nearly 1,000 staff hours annually to CJA Panel matters. Our annual seminar in conjunction with the Montana Association of Criminal Defense Lawyers, advances the quality of CJA representation and increases the available pool of possible applicants for future panel openings. Additionally, low cost or tuition free high caliber multi-tiered seminars and specialized training programs are available to panel attorneys from the Defender Services Office Training Branch.

As with the nation, ninety percent of federal criminal defendants in Montana qualify for a court-appointed lawyer. The Montana Judges have frequently praised the advocacy of Federal Defender attorneys, the professionalism of our staff, and the effectiveness of our work with and for the CJA Panel. The Court has publically recognized panel lawyers whose commitment and talents have made a real difference in the lives of many. Despite problems of independence and recent funding shortfalls, the quality of representation in Montana is high. Nationally, it appears the program does not suffer from a systemic failing to provide capable and effective criminal defense services to the poor.

Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers

The current CJA Plan for the District of Montana says “the community defender will be responsible for the systematic distribution of cases to and for the management of the CJA Panel.” Consequently, in each case involving a financially eligible client in the five divisions of the District of Montana, CJA panel attorney assignments are initially made by the Federal Defenders of Montana, with ultimate approval of the Court by way of an appointment order. All management matters are handled by the organization; payments are the sole responsibility of the Court.

When it comes to experts, investigators, and other providers, our Grant supplies the Federal Defenders with sufficient funding for needed services. On the other hand denial of expert and investigator requests is often a problem for the panel. Not only are some of the judges reluctant to approve requests, but when approved, the trial judge has unique knowledge of the defense case that the Court could not otherwise acquire. It would be more appropriate (and ethically sound) to keep those decisions within the purview of the defense function. The criminal justice system cannot function properly and produce fair and reliable results without competent defense counsel zealously defending the accused. Expert services are essential to that effort. Panel attorneys should have oversight regarding experts and other litigation-related services, but the decision on the propriety and cost should be independent of the Judges and in the hands of someone or some agency familiar with the best practices of the criminal defense profession.

The impact of judicial involvement in the selection and compensation of federal public defenders and the independence of federal defender organizations

With experience as a Supervisory Assistant in a Federal Public Defender Office (FPDO) and now as Executive Director of a Community Defender Organization (CDO), when it comes to the independence of federal defender organization, I must admit I prefer the CDO model, at least the way it was conceived, established and grew in Montana. Neither the District Court nor the Circuit Court name the Federal Defender in the District of Montana. Selection is in the hands of an autonomous, self-perpetuating Board of Directors which then periodically evaluates the Defender’s performance. Judges of the District do not name or recommend those Directors nor is the Court otherwise passively involved in the selection process for the organization’s leadership. None of the judicial officers have ever interfered with the operation of the organization nor tried to exert surreptitious influence on its policies. My compensation matches that of the U.S. Attorney for the District; that is not true in some districts.

There are now 18 Community Defender Organizations, but one will soon drop from the list. Citing concerns regarding oversight and the role of the Court, and other issues which could have been, if not already had been, addressed within the CDO structure, in 2015 the Judges of the Western District of North Carolina revised their Criminal Justice Act (CJA) Plan to dissolve the Community Defender Organization and establish a Federal Public Defender Organization. As an FPDO as opposed to CDO, the Defender is named by the Judges of the Fourth Circuit, not an autonomous Board. No matter what the motivation, independence of the defense function is diminished when a Court seeks to change governance structure, ostensibly to exercise greater oversight.

Beyond undue influence on selection of the Defender, Courts should not control the number of Assistants in the Federal Defender Office. As a the head of a Community Defender Organization, I am responsible for determining the number of attorneys needed to cover our caseload. My colleagues in Federal Public Defender Offices do not enjoy that flexibility to exercise professional and management judgment. Rather the Circuit Court can set a 'cap' for the number of trial lawyers the FPDO may employ. No one would seriously contend that a judge should decide how many lawyers the United States Attorney needs to prosecute, why is it then that decisions about the number of lawyers needed to carry out the defense function are made by appellate judges before whom those lawyers appear. There is at least an apparent conflict of interest when the Circuit is able to limit the number of lawyers the Defender may employ to litigate in that court. This arcane practice applied to FPDOs is simply not necessary in light of the adoption of the work measurement formula. The objective, data driven funding formula adopted by the JCUS in June 2015 should be the arbiter for all attorney staffing requests, not a subjective lawyer 'cap' set by circuit judges.

The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA

Although Montana District Judges have been kind to my organization, they have been less so of late to members of the Panel when it comes to compensation. I hear many complaints from CJA attorneys whose vouchers are delayed, sometimes for months after the case has closed. However, historically voucher cutting was rare in my District. In preparation for this hearing I solicited comments from panel members so my input to this Committee would be accurate and timely. I learned reductions in compensation have occurred with greater frequency in several high profile, multi-defendant cases in the past twelve months. The following capsulizes the problem:

It is difficult for me, as with most of all of us to run our sole practitioner practices at the CJA rate, much less a reduced rate. . . . I struggle to understand how a bill can be reduced if it is acknowledged that the work was done and that it was worthwhile, i.e. not superfluous. If a judge were to think that my bill was not based upon work that I've actually done, then my bill should not only be reduced, but I should be stricken from the CJA panel and reported to the State Bar.

Those who suffered reductions in requested compensation viewed the cuts as arbitrary. Often no reason for the reduction was ever provided even in the face of repeated requests. When the Court did respond to questions about cuts to the voucher, it was clear the Judge had little or no understanding of defense function. Judges complained that the attorneys were visiting clients too frequently and for too long, despite the legal and ethical requirement to thoroughly review sensitive discovery materials personally with a detained client since the Local Rules prohibited copying and dissemination of the material by mail. In another case, a judge refused to pay for work incidental to a request to review a detention order entered in another district, even though the attorney demonstrated that underlying circumstances had changed. Sometimes panel attorneys perceived that the decision whether to pay a voucher in full was not based on an assessment that the hours worked were reasonable and necessary to provide a defense, but were strictly tied to comparison with others in the case ("your voucher was much higher than the co-defendant's lawyer").

Anecdotal information indicates judges are cutting vouchers and denying expert funding requests based on a perception that they need to reduce payments in order to contribute to the overall judiciary cost-containment effort. Judges must be disabused of the idea that CJA payments come out of the money appropriated by Congress for Judges salaries, Clerks Offices and Staff. The Defender Program is funded in a separate line item. Further, Judges must not treat CJA clients as deserving of work that is inconsistent with the best practices in the profession. Just because an attorney is paid at appointed counsel rates (already below what would normally be an attorney's hourly fee) does not mean the client should get discounted service or denied a necessary expert.

The provision of services or funds to financially eligible arrested but unconvicted persons for noncustodial transportation and subsistence expenses, (including food and lodging) prior to, during, and after a judicial proceeding

In rural districts such as mine, clients come from vast distances for Court appearances. Clients are often transported to court locations in the custody of investigative agencies, but then left to their own devices to return home if defense counsel are able to secure their release. No bus, train or taxi service serves the reservations in Northeast and Southeast Montana from any of the Court's five divisions. Providing funds for travel is not the issue; it is more a need for a mode of transportation. Perhaps subsidies for lodging and for reimbursement for travel expenses for family members who retrieve loved ones accused of crimes is needed.

An examination of the national structure and administration of the defender services program under the CJA

Since the inception of my organization, the Federal Defenders of Montana has enjoyed an excellent relationship with the Court. The depth of that support was put to the test when sequestration, coupled with the Judicial Conference Budget Committee's decision to cut the Defender Services Account, resulted in a substantial reduction in our budget in 2013. As we dealt with mandatory leave without pay and other destabilizing impacts of reduced funding, the United States District Court in Montana cooperated with the organization's attorneys, adjusting schedules when able to do so without violating statutes or rules. Moreover, the District's Chief Judge, with other district chiefs, urged policy makers to fully fund the institutional defender office.

Our local experience has not been duplicated nationally. The last several years attest to a decline in the defender program's relationship with the Judiciary. The harsh fiscal measures imposed by the Budget Committee nearly decimated Defender offices. Because Federal Defenders have a constitutional obligation to our clients, we could not absorb budget cuts without adversely affecting client services. Even under significant fiscal restraints, ethical rules demand that lawyers serve clients consistent with the best practices of the legal profession. Adjustments were made in other areas: employees were laid off or terminated, furloughs were imposed, training was suspended, non-case related travel was reduced or eliminated, temporary concessions were obtained from vendors and experts. In extreme cases, offices were unable to accept new cases.

The reorganization of the Administrative Office of the U.S. Courts devalued defender operations. The Office of Defender Services (ODS) was renamed and its chief demoted from

Assistant Director status. ODS morphed into the Defender Services Office (DSO). The DSO is within one of the AO's three reorganized departments, the Department of Program Services (DPS), which also includes the offices of Judicial Services, Court Services, Judiciary Data and Analysis, Probation and Pretrial Services, and Case Management Systems. A new, flatter structure mandated shrinking DSO to four divisions: Internal Services, Legal and Policy, Program Operations (which encompasses the budget as well as the operations and assessment functions), and Training.

The most significant result of the AO's reorganization was loss of an autonomous Information Technology (IT) division. The AO leadership decided to place all of the information technology functions and staff in a newly created Case Management Services Office (CMSO), also located within DPS. The CMSO consolidated Defender IT with other IT components. In addition to federal defender IT, CMSO has responsibility for CM/ECF maintenance as well as probation and pretrial services IT. This consolidation ignores the critical role DSO IT had played in developing and supporting federal defender IT capacities – from the defender wide area network and email to defender case management and data systems. The change negatively impacts critical aspects of the federal defender mission, with potential ethical violations and constitutional infringements.

The Judicial Conference removed meaningful power from the Defender Services Committee, eliminating ultimate budget and staffing authority. Thus the JCUS eviscerated the authority of the only committee within its structure with an informed view and institutional knowledge of the defender program. The Executive Committee directed that the Judicial Resources Committee's (JRC) responsibility was expanded with respect to federal defender organization (FDO) staffing, compensation policies, and administrative and operational (other than information technology) training for FDO personnel.

The actions detailed above fly in the face of the publically and historically expressed role of the judiciary in its relationship with the Defender Program. In response to the Prado Report (Report of the Committee to Review the Criminal Justice Act, January 29, 1993), the Judicial Conference Report (pp. 16-17) said "criminal defense programs have no constituency, no power base, and no better champion than the judiciary." Yet when sequestration and the budget crisis struck, our champion redirected energies and resources elsewhere, leaving Defenders to fend for themselves.

Conclusion

When Congress amended the Criminal Justice Act in 1970 to allow two types of institutional defender organizations, legislators recognized the need for a strong, independent federal defender program and emphasized the need for ongoing congressional review of its structure. The Congress considered as a possibility the immediate establishment of a new, independent official – a "Defender General of the United States." It also considered establishing a special directorate for defender programs within the Administrative Office of the United States. Such an independent office was spurned by the committee considering the CJA legislation. Members believed the initial stages of the Defender Program was no time to be outside the protective umbrella of the Judicial Branch. Now, forty-six (46) years later, perhaps we are finally beyond the initial stage.

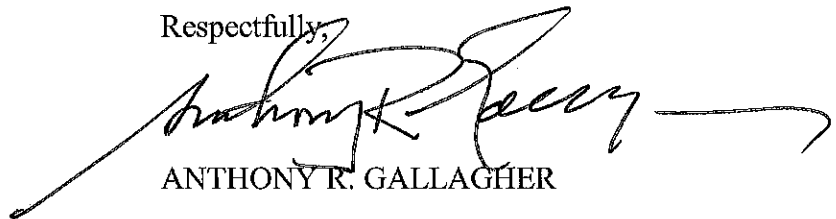
I frankly do not know what the new structure should be or if it should be within the judiciary.

At the very least:

- The Committee should recommend that the Defender Services Office be restored to its distinct high-level position (a Directorate) within the Administrative Office of the U.S. Courts.
- To assure confidentiality and avoid even the appearance of impropriety, Defender Information Technology should be restored to its former autonomous position and removed entirely from the AO's Case Management Services Office.
- The Committee within the Judicial Conference with unique knowledge of defender issues, the Defender Services Committee (DSC), should regain the ultimate budget and staffing authority that it traditionally possessed.
- The DSC should be restructured to include voting participation by Defenders.
- Judges should be relieved of the obligation of reviewing CJA vouchers.
- CJA voucher payments must be rendered promptly; if reductions to vouchers are ordered, a meaningful, transparent appeal process should exist.
- The decision on the propriety and cost of experts, investigators and like CJA Panel defense services should be independent of the Judges.

Thank you again for the opportunity to testify before the Committee, and to submit these comments in advance.

Respectfully,



ANTHONY R. GALLAGHER