

**FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW MEXICO**

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November 2, 2015

Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the
Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Suite 4-200
Washington, DC 20544

Re: *Testimony of Stephen P. McCue, Federal Public Defender,
District of New Mexico*

Dear Judge Cardone:

With the passage of the Criminal Justice Act in 1964, the Federal Judiciary assumed a fiduciary duty to protect, promote, and preserve the independent defense function promised by the Sixth Amendment to the U.S. Constitution. This Committee is engaged in a comprehensive, impartial review of the CJA Program. My personal view¹ of the functioning of the CJA Program, based on my 29 years in the Federal Public Defender's Office for the District of New Mexico, is that while the Federal Public Defender Program is the gold standard of indigent criminal defense in the world, much work remains to be done to ensure the survival of a vibrant, vigorous and independent criminal defense function. The budget woes of the last several years have led to a scarcity mentality in the federal judiciary that has exposed serious flaws in the current model of providing effective assistance of counsel. The scarcity mentality has fallen most heavily on the CJA Panel component of the Criminal Justice Act. That aspect of the CJA program requires rigorous reassessment and revamping.

The Federal Public Defender for the District of New Mexico was founded in 1972 pursuant to 18 U.S.C. § 3006A. The federal judicial district of New Mexico includes the entire state. New Mexico is the fifth largest state, geographically, in the Union. New Mexico has a border with the Republic of Mexico of over 150 miles. The greater

¹ The opinions expressed herein are my own and do not represent the views of the Defender Service's Office, the federal judiciary or any other entity or organization.

Albuquerque metropolitan area has a population of over one half million people. New Mexico also includes 22 Indian nations. Through the 1970's and the early 1980's the office was a small organization with three or four lawyers in one office and a caseload comprising bank robberies, Dyer Act cases, and major crimes from New Mexico's Indian Reservations. Starting in the 1980's with the war on drugs and the general federalization of street crime, the caseload of the Federal Defender grew. The staff of the office grew to match the workload. When I started work in this office in 1986, I was the fourth lawyer. We now have 31 attorneys in two offices closing thousands of criminal cases per year.

Indian Country Issues

Indian major crimes act cases constitute a significant portion of the caseload in our Albuquerque office. As of this writing, we have eight pending first degree murder cases, one pending second degree murder case, five pending manslaughter cases, one involuntary manslaughter case, 28 assault cases, eight adult rape cases, and 18 aggravated sexual abuse of a child cases. These cases are almost exclusively from New Mexico's 22 Indian reservations. These reservations generally are located in remote areas of New Mexico, far from our Albuquerque office. Shiprock, New Mexico, in the heart of the New Mexico portion of the Navajo Reservation is a solid three hour drive from Albuquerque. New Mexico's Indian reservations are plagued with poverty, unemployment, alcoholism, substance abuse, and few resources. Our Indian reservation cases are very serious. First degree murder carries a mandatory sentence of life without parole. Aggravated Sexual abuse of a child carries a mandatory minimum 30 year sentence. Due to the great distances that must be traveled to investigate and prepare to defend these cases delays, are both necessary and regrettable. Building a relationship with Native clients is essential as they must make life changing and life affecting decisions while learning to understand what is in essence a foreign system. They must digest and understand the evidence arrayed against them, the federal statutory scheme, the federal sentencing guidelines, and the realities of decades in a federal prison far from home.

Border Issues

New Mexico has a border with the Republic of Mexico of approximately 150 miles. The border area of New Mexico is desolate and isolated. While it is partially fenced, patrolled regularly by Border Patrol, and is under constant electronic surveillance, it is a regular route for illegal entries into the United States, human trafficking, and drug smuggling. The 14 lawyers in our Las Cruces office opened more than 2000 cases in FY

2015. These lawyers close an average of 140 felony cases per year. While most of these are reentry cases, there is nothing perfunctory about a reentry case. Each case represents an individual with a unique personal history and background. Each case must be screened for derivative citizenship or other defenses to the charge of reentry. To its credit, the court in Las Cruces is anxious to move these cases as quickly as possible. This puts tremendous pressure on our attorneys to meet and interview clients who speak only Spanish, to explain the American criminal justice system to them, to negotiate a plea, to get the plea entered, to assist in preparation of the Presentence Report, and to get the client sentenced. The “Fast Track” procedures employed to expedite these cases are good for the clients, but they are not good for the lawyers. Many of these clients are held in jails that are an hour’s drive or more from the Federal Defender office in Las Cruces. As in northern New Mexico, our attorneys in southern New Mexico spend a significant amount of “windshield time” traveling to visit clients to attempt to resolve cases on short deadlines. Lawyer burnout is a significant problem on the border. The repetitive crush of cases and time pressures leads to short tempers, frustration and depression. We attempt to prevent burnout by sharing non-reentry cases equally in the office, by encouraging training, breaks, and vacations and by team trying the few cases that actually do go to trial.

Recruiting and diversity

I have been the Defender in charge of this organization for 16 years. As stated above, we have experienced tremendous growth during this time. In hiring attorneys and staff, we are always mindful of our obligation to promote equal opportunity. We advertise widely and recruit diverse candidates locally. New Mexico is a poor state so federal salary and benefits are a substantial incentive to work for the Federal Public Defender. Counterbalanced against this is the work that we do. We represent individuals many consider the worst of the worst. We defend people accused of murder, rape, child sexual abuse, child pornography and offenses of that ilk. While the atmosphere of the office is open and supportive, federal criminal practice is widely known to be strict and difficult. The results for clients are excessively punitive. The national plea rate in federal cases is around 97%. The work is too difficult to do for money or benefits. People must be committed to the mission of the office. Due to the serious consequences our clients face we must hire experienced criminal defense lawyers. It is a rare individual who can thrive in this environment. In our border office, caseloads are repetitive and crushing. Most of the clients in our border office speak Spanish. We advertise for lawyers as “Spanish fluency preferred.” The language issue further limits an already small pool of interested and qualified applicants.

Within these limitations we strive to ensure a workforce that is diverse, that represents the diversity of our state bar, and that respects the cultural and ethnic background of our clientele. All things being equal, we always hire the younger, minority candidate. While clients may prefer a lawyer who can communicate with them in their native language, it is my experience that they prefer a lawyer who is fluent in federal court over one who is fluent only in Spanish. We always try to involve as many employees as possible in our hiring decision. I am firm believer in the notion that none of us is as smart as all of us. Our interviews are always group affairs. I always remind everyone at the beginning of each phase of the hiring process that we need to be aware of our own implicit biases and recognize that we are very likely to favor individuals who look and speak like we do.

Independence

Criminal defense by its nature is an anti-authoritarian and antagonistic endeavor. It is a tribute to the founding fathers and the authors of the Criminal Justice Act that they valued due process and equal justice over swift and certain punishment of those who are thought to be guilty. The defense function breathes life into the Sixth Amendment's guarantees of due process and a fair trial. Without an active, intelligent, fearless advocate, constitutional rights are just words on paper. In recognizing the unique aspects of the criminal defense function, the authors of the Criminal Justice Act sought to promote and preserve that function by establishing a structure that protected independence. A separate appropriation and a separate directorate in the Administrative Office of the Courts were essential components of this structure. The reason structure is essential is that policies are carried out by an ever changing group of individuals. Federal judges are not a monolithic corps of black robed automatons. They are individuals with very different backgrounds, beliefs and biases. To my knowledge, there are currently only four federal district judges who were Federal Public Defenders. Most federal district judges come to the bench with a civil law or prosecutorial background. They have little personal experience with what criminal defense lawyers do or what it takes to successfully defend a federal criminal case. For every federal district judge who values the work of Federal Public Defenders, there is another who views them as an annoyance or a threat to the judiciary's budget. The influence of these individuals can only be offset by a structure that clearly and resolutely promotes the independence of the defense function.

The existing institutional structure protects defenders only to a certain extent. The current structure is effective only because of the organized and outspoken advocacy of defenders themselves. Recent experience during sequestration shows that if protection is

left solely to the judges it is less than effective. As a result of budgetary concerns, Defender Services has been downgraded to just another program in the Administrative Office and has lost control of basic budget, IT, and administrative issues. Even if judges are sympathetic to and understand the importance of the independence of the defense function, the policies they establish are implemented by clerks, probation officers and bureaucrats who may not share or appreciate the judges' understanding. The problems of the lack of independence fall most heavily on individual CJA panel attorneys. In New Mexico, most CJA panel attorneys are solo practitioners. They agree to take a case at an hourly rate with the assurance that they will be paid for time reasonably spent in representing criminal defendants. Criminal cases move quickly. Deadlines are strictly enforced. Yet at the end of the case, vouchers often languish on judges' desks. In New Mexico, I hear many complaints from CJA attorneys whose vouchers are delayed or cut. Sometimes the reasons are valid, other times they are not. CJA lawyers are essentially powerless to contest cuts. Most lawyers see the "appeal" process of telling the judge that they have made a mistake in cutting a voucher as throwing good money after bad. They worry that they will only antagonize the Court and jeopardize future appointments. No one would seriously contend that a judge should decide how many lawyers the Department of Justice should have to do its job or whether they should be able to hire experts or investigators. Yet we tolerate that very situation on the defense side of the equation.

Personally, I view the role of judges in reviewing vouchers as anachronistic. In the late 60's and early 70's, when CJA was established, there was no one else to perform that function. Judges perform similar functions in determining attorneys' fees in civil cases so the task of reviewing CJA vouchers was assigned to federal judges. Now, however, it makes more sense for Federal Defender's to perform that function. Every recent study has shown that Federal Defender offices are well run and efficiently managed. We deal with multi-million dollar budgets and are Federal Certifying Officers. Unlike most federal judges we have years, if not decades, of experience in defending federal criminal cases. Federal Defenders are in a better position to determine whether vouchers are appropriate and reasonable. Many Federal Defenders around the country already perform this function by reviewing vouchers and certifying them to the District Court. This procedure would take federal judges out of the uncomfortable, if not inappropriate, position of making decisions about funding the cases that appear before them and reviewing detailed information about the defense of cases that may come back before them after an appeal.

In sum, the structure of independence should be reinvigorated by restoring Defender Services Office to a full independent directorate within the Administrative Office of the Courts. Judges should be relieved of the obligation of reviewing CJA

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vouches. These steps will ensure that Federal Defenders and CJA lawyers continue to provide effective representation in federal criminal cases.

Sincerely,

STEPHEN P. McCUE
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Albuquerque Office

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