

Office of the
Federal Public Defender

District of Colorado

633 17th Street, Suite 1000
Denver, CO 80202
Phone: 303-294-7002
Fax: 303-294-1192

Districts of Colorado and Wyoming

Virginia L. Grady, Federal Public Defender
Warren R. Williamson, First Assistant
Veronica S. Rossman, Chief, Appeals
James H. Barrett, Wyoming Branch Chief

District of Wyoming

214 W. Lincolnway, Suite 31A
Cheyenne, WY 82001
Phone: 307-772-2781
Fax: 307-772-2788

TO: Ad Hoc Committee to Review the Criminal Justice Act
Judge Kathleen Cardone
Judge Edward C. Prado
Reuben Cahn
Judge Dale S. Fischer
Jeffrey A. Frensley
Judge John M. Gerrard
Judge Mitchell S. Goldberg
Orin S. Kerr
Neil H. MacBride
Katherian Roe
Robert E. Rucker
Judge Reggie B. Walton

DATE: November 16, 2015
Santa Fe, New Mexico

SUBJECT: Testimony of Virginia L. Grady, Federal Public Defender

The seemingly plain and simple words establishing the right to counsel in all criminal prosecutions became part of our Constitution in 1791. It took 141 years for the Supreme Court to recognize that the right to counsel is “fundamental” (*Powell v. Alabama*), another 6 years to recognize it as a “**federal** fundamental right” (*Johnson v. Zerbst*) and another 25 years to recognize the right to counsel as a fundamental right **equally applicable to the states**. (*Gideon v. Wainwright*). The Criminal Justice Act, delivered through Senate Bill 1057 in 1963, was born of a 172-year dialogue over what amounts to about 13 words in the Sixth Amendment.

As you know, the CJA bill was the work of a Committee appointed by Attorney General Robert Kennedy. The Committee was chaired by a distinguished scholar of criminal law, Professor Francis Allen. In 1970, the CJA was amended to authorize districts to establish federal defender or community defender organizations as counterparts to federal prosecutors and to serve as an institutional resource for providing defense counsel in federal judicial districts. As Judge Patti Saris has written: Federal Defender and Community Defender offices have become “the program’s flagship in terms of quality and cost-effectiveness.” (*Memorandum of June*

24, 2004, from Judge Patti B. Saris to Chief Judge Carolyn Dineen King.) Panel lawyers and federal defenders alike seek to implement the mandate of the CJA: to provide a comprehensive federal indigent defense system, by appointing and fairly compensating lawyers to represent defendants financially unable to retain counsel in federal criminal proceedings.

Since the inception of the CJA, Congress wrestled with the question of where the administrative offices of the Federal Defender Organization should be placed within our branches of government. It was essential to honor professional distance between appointed defense counsel and the court, just as there is professional distance between prosecutors and the court. In fact, the initial placement of Defender Services within the Judiciary was considered temporary. Until Congress could settle on a permanent placement, it cautioned “that the need for a strong independent administrative leadership be the subject of continuing review until the time is ripe to take this next step.”¹

The Prado Committee was tasked with that review 21 years later. Since release of the Committee’s report, our community has worked diligently to perform our public defense function within the judicial branch, while maintaining the same professional distance afforded privately retained or prosecution counsel.

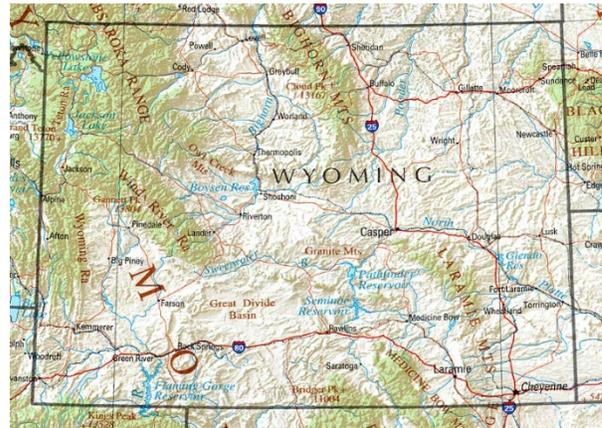
In recent years, with the federal budgetary crisis affecting the Judiciary at large, the defender community has faced the challenging task of responsibly performing the constitutionally-mandated federal defense function with increasingly scarce resources. Now, we are working within a sophisticated funding formula, following the great success of our cooperative work measurement study which recognized that federal indigent defense must be adequately funded. Drawing from this data-driven context, I hope your review will be able to focus more broadly on characteristics of our individual practices, shared and unique, that drive our resource demands.

In Colorado and Wyoming, we live with three immutable resource demands – geography, weather, and time.

¹ Senate Report No. 91-790, 91st Cong., 2nd Sess., April 23, 1970, at 18, as noted in *Report to the Committee on Defender Services of the Judicial Conference of the United States*, Subcommittee on Long-Range Planning and Budgeting, The Honorable John Gleeson, Chair, December 2005.

District of Wyoming

The District of Wyoming covers more than 97,000 square miles. It is served by two major interstate highways, I-80 running east/west, and I-25 running north/south. I-80 is a major national trucking thoroughfare, and during Wyoming winters, one of the country's most dangerous. We have one office in Wyoming. It is located in Cheyenne, in the state's far southeastern corner. Our lawyers and our investigator spend many hours navigating the treacherous I-80.



The United States District Court for the District of Wyoming sits in Cheyenne, Casper, Mammoth, and Jackson. The Wyoming United States Attorney's Office is headquartered in Cheyenne and has branches in Casper, Mammoth, and Lander.² The criminal docket is largely limited to Cheyenne and Casper.

We have three Assistant Federal Public Defenders assigned to our Wyoming branch. In Fiscal Year 2014, five of our seven jury trials were held in Casper. Casper is 179 miles, one way, from our Cheyenne office. With no office in Casper, our attorneys stage their litigation out of hotel rooms.

There are no federally-owned detention facilities in Wyoming.³ Most of our clients are detained in the State of Nebraska, Scotts Bluff County. Scotts Bluff is about a two-hour drive from our Cheyenne office. The rest of our Wyoming detained clients are scattered in county jails across the state.

² <http://www.justice.gov/usao/wy/contactus/contact.html>

³ <http://www.bop.gov/locations/list.jsp> (listing no BOP facilities in Wyoming)



The Wind River Indian Reservation occupies a 2.2 million acre swath of land in the middle of the state. Two tribes, the Eastern Shoshone and the Northern Arapaho, reside in Wind River. There are approximately 14,000 enrolled tribal members, most of whom live within the boundaries of the Reservation.⁴ The crime rate on the Wind River Reservation has historically been five to seven times the national average.⁵ Many serious, violent offenses arise in Wind River. These cases require on-site investigation. Wind River is close to Lander, where the United States Attorney has a branch office.

Wind River is geographically isolated, and truly cut off from access to justice. From our office in Cheyenne, it is a 306-mile, 7-hour drive. There is a courtroom in nearby Lander, but it cannot be used in criminal cases because it has only a one-person cage to serve as a holding cell. Most of the Wind River cases are heard in Casper. The deplorable detention options in Wyoming hurt the Native Americans hardest. Most are either housed about an hour from the reservation in a county jail that restricts all federal inmates to 23-hour segregated lock-down, or, in the Scotts Bluff County jail five hours away in Nebraska. Wind River is a very poor community, and many of its residents do not have the means to travel far from home.

The CJA Panel in Wyoming is small. Most of the attorneys have very small practices and reside in the Cheyenne area. All must deal with the same travel-related and geography-related impediments faced by the staff in our Wyoming office.

⁴ <http://www.bia.gov/WhoWeAre/RegionalOffices/RockyMountain/WeAre/WindRiver/>

⁵ See, e.g., Timothy Williams, *Brutal Crimes Grip Wind River Indian Reservation*, The New York Times, Feb. 2, 2012, <http://www.nytimes.com/2012/02/03/us/wind-river-indian-reservation-where-brutality-is-banal.html>.

District of Colorado

Our resource demands in Colorado are similar driven by distance and geography. The district encompasses more than 100,000 square miles and supports the largest population of any judicial district in the Tenth Circuit. Federal lands comprise about one-third of the state, including four national parks, five national monuments and twelve national forests. Colorado also has several major military installations, including Fort Carson and Buckley Air Force Base.



The Bureau of Prisons has a significant presence in Colorado. The complex in Florence includes the country's highest security prison (Supermax), a USP, an FCI, and a camp. The Florence complex is located in desolate country, 2½ hours southwest of Denver. Clients charged with crimes in a Florence prison remain detained there during the life of the case.

The only way to get to Florence is to drive the remote highways. Client visits require advance appointments and are frequently thwarted by long waits and last minute shutdowns within the prison complex. As you might imagine, the prison cases produce conflicts of interest and frequently require appointment of CJA panel attorneys.

In recent years, the United States Attorney has had two assistants dedicated to prosecuting cases that occur in Florence. There is also an FCI, a camp, and a detention center just outside of Denver.⁶ Prison prosecutions are on the rise.

⁶ <http://www.bop.gov/locations/list.jsp> (listing BOP facilities in Colorado).

Colorado is also home to two Indian nations in the Four Corners region of the state: the Southern Ute Indian Tribe, headquartered in Ignacio (a half-hour drive south-east of Durango); and the neighboring Ute Mountain Ute Indian Tribe, (an hour drive west of Durango).



Historically, all federal criminal cases arising in southwestern Colorado were transferred immediately to federal court in Denver, along with any detained clients. But in the last two years, the District of Colorado implemented an access-to-justice initiative to bring the court to the people on the western side of the state. Every other month, a designated district judge holds a formal term of court in Durango, and a formal term of court in Grand Junction.⁷ The United States Attorney’s Office has full time assistants staffed in both locations. Prosecutions tied to these locations now remain in these locations. As a result, our lawyers are spending an unprecedented amount of time on the road.

The Rocky Mountains and the Continental Divide sit between our office in downtown Denver and these remote court programs. In good weather, door-to-door travel from our office to court in Grand Junction is four hours, whether driven or flown out of Denver International Airport. A trip to Durango generally takes a half day when flown; it is otherwise a minimum 7-hour drive. Some clients designated to the Grand Junction docket are being held in a very remote county jail that is 2 hours from Denver and 4 hours from Grand Junction. Locally detained clients are scattered among jails in all directions from Denver, some as far as a one-hour, one-way drive.

Our office in Denver also maintains an established appellate section that takes cold record appeals from all over the Tenth Circuit. Our appellate practice is quite varied and complex. Since 2009, we have had two appellate positions occupied by attorneys who have special expertise in capital habeas appeals. Since we began this practice, the attorneys who have occupied these positions have largely represented defendants from Oklahoma’s death row. We do not have a Capital Habeas Unit, and our work is limited to the appeal, but death cases at any stage of litigation are professionally demanding and emotionally taxing.

⁷ Order Adopting Durango and Grand Junction Protocol, D.COLO. General Order 2015-1.

The attorneys in our offices have all contributed to training the Colorado and Wyoming panel attorneys through a program I started 15 years ago. Because I am not sure whether you'll hear from our panel attorneys, I would like to speak specifically on their behalf. Most are solo practitioners with little or no staff. They keep their overhead low. They contract out for everything. Most do not have access to paralegals with expertise managing big discovery cases. They do their own billing. And when a solo practitioner must spend a day traveling to review paper on a case with a detained client, she leaves an empty office. Voicemail has never been considered an effective means of keeping the lights on.

I tell you this because when you hear testimony about voucher cutting and rejected requests for investigators and experts and other support, know that this is the landscape of many who serve on the panel in the Districts of Colorado and Wyoming. Panel attorneys are a critical component of our hybrid system, and without them, the Criminal Justice Act would not reach all of the people it is intended to serve.

Next week marks my 25th year as a federal public defender. Our organization has grown up. We have indeed become the flagship of the Criminal Justice Act, and we are now equipped with a formidable financial management tool to remain responsible stewards. The Committee's view of our future should be at least as long as our past. Your view of our future should be seen through the lens of preserving not simply our financial parity, but also our functional parity. To echo Judge Saris' words in 2004, the top priority must be to maintain the integrity of the Federal Defender Organization.

s/ Virginia L. Grady
VIRGINIA L. GRADY
Federal Public Defender
Districts of Colorado and Wyoming