

TESTIMONY

OF

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JUNE 4, 2009

ON

“INDIGENT REPRESENTATION:
A GROWING NATIONAL CRISIS”

TESTIMONY OF ROBERT M.A. JOHNSON FOR THE
HOUSE JUDICIARY SUBCOMMITTEE ON
CRIME TERRORISM AND HOMELAND SECURITY

Having been a prosecutor for nearly forty years, president of the National District Attorneys Association, chair of the Criminal Justice Council, worked for over a dozen years with national and international criminal justice organizations, and co-chair of the Constitution Project's National Right to Counsel Committee, I have some knowledge of the structure of our criminal justice system and the importance of capable defense lawyers representing a person accused of a crime. This importance goes far beyond the constitutionally generated right of an accused to have the assistance of counsel; the right to counsel is essential for the integrity and proper functioning of our criminal justice system.

The essential nature of an accused's right to counsel was reflective of the experience and wisdom of the drafters of our Constitution. They understood from their history and experience under the English criminal justice system that citizens must be guaranteed certain rights if we were to live in a free society. In the sixth amendment, they guaranteed "in all criminal prosecutions the accused shall enjoy the right ... to have the assistance of counsel for his defense." In applying this right to the accused in state prosecutions, our Supreme Court in a unanimous opinion stated in *Gideon v. Wainwright*, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." There have not been any credible challenges or even serious discussion challenging this constitutional right which the court affirmatively put in the same category as the taking of property for public use without compensation, and the prohibition of unreasonable searches. The only challenge has been and is the implementation of this right in the states.

Speaking as a prosecutor, I know of the importance of the right to counsel for an accused. I see an accused (and family) try to understand and struggle with an unknown system as I bring the weight of the state to bear. The family is often devastated by what the accused may have done and often unable to understand how the accused violated the law and how to proceed. They often are unable to afford an attorney to advise them and the accused.

There are a number of reasons a capable defense attorney is necessary for the proper functioning of our system of justice. First and perhaps most important is to protect an innocent person. As the Innocence Project has ably demonstrated, innocent persons are convicted of committing crimes. Such an injustice is abhorrent to a professional prosecutor. Not only is the guilty party free to commit more crimes, an innocent person is unjustly punished. Prosecutors must have capable defense attorneys challenging the state's proof to reduce the chance that an innocent person is unjustly convicted.

Secondly, prosecutors do a lot of sentencing in our current system of justice. Mandatory sentencing laws and sentencing guidelines permit a prosecutor to sentence by what crime is charged or plea bargained to a conviction. In these discretionary acts, the prosecutor does not have a pre-sentence report as is typically provided a judge before sentencing. Prosecutors see the victims and law enforcement and their view, but do not see the circumstances of the offender. From my experience as a prosecutor and an Army National Guard military judge, I tell you the characteristics of an offender are necessary to a reasoned decision as to sentence. A defense attorney adequately representing an offender and presenting mitigating reasons to a

prosecutor is the only chance the prosecutor will make a reasoned decision about a sentence.

A third reason for the full implementation of the constitutional right to counsel is simply for the criminal justice system to efficiently function. Unless a defense attorney is in the courtroom with the prosecutor, the case may not go forward. Judges do and should refuse to move forward with a case unless the accused has a defense attorney present in court.

I say again full implementation of this sixth amendment right to counsel is critical as both a constitutional and practical matter if we are to have the system of criminal justice that our Constitution promises. But this promise is not being kept. As set forth in the Constitution Project's comprehensive Report of the National Right to Counsel Committee entitled *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, the states have taken a number of approaches to complying with the constitutional mandate. Often these approaches are shockingly inadequate.

A common problem in the states meeting their obligations is insufficient funding. Whether state funded, county funded, or a mixture of both, the funding is inadequate. The budget issues in states and local governments are well known. As government struggles to meet its often self-imposed needs, it regularly does not adequately fund a constitutional right of the people it accuses of a crime. This shameful conduct often comes from a lack of understanding of the very practical reasons for funding an entire criminal justice system. Particularly troubling are the inequities between the adequate funding of law enforcement and prosecutors and the lack of funding for defense services. While the sentiment to make offenders

accountable is understandable, there is a lack of understanding of the issues earlier discussed. There seems to be a mentality that, if the police arrest and the prosecutor brings charges, the accused must be guilty and we should just lock them up. Sadly, this type of thinking is part of why the state of criminal justice is not good and public safety is less than it might be if our criminal justice system was balanced.

Of course, the lack of funding makes for excessive caseloads for the public defenders who are employed. Again, reference to the Report provides detail not repeated here. Efforts are underway to deal with this issue as public defenders are confronted with failing to fulfill their ethical duty to competently represent their clients. Public defenders are refusing to take on more clients when overburdened, judges are beginning to accept their refusals, and the criminal justice system is faltering.

There are other problems with how defense services are being provided. The Report details many of these problems: lack of independence, lack of training, inability to hire experts, lack of technology, inadequate client contact, and significant lack of investigation capability. Prosecutors have enormous investigative capability through police departments. Important for the defense is the ability to pursue alternative theories as to how the crime occurred or even whether a crime occurred. It is not unusual for law enforcement to end their investigation when the defense team has a plausible theory.

With a constitutional guarantee, practical reasons for implementing the guarantees, and strong evidence that effective counsel for the accused is not being provided, what is the responsibility of the federal government? The Report provides two recommendations which are reproduced here:

A National Center for Defense Services

Recommendation 12—The federal government should establish an independent, adequately funded National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation for persons unable to afford counsel in criminal cases and juvenile delinquency proceedings.

Commentary—As discussed earlier in this report, the duty of providing defense representation in criminal and juvenile cases derives from decisions of the U.S. Supreme Court and is based upon interpretations of the *federal* Constitution’s Sixth Amendment. Taken together, the Court’s decisions are an expensive unfunded mandate with which state and/or local governments have been struggling for more than 45 years. Although the federal government established the Legal Services Corporation in 1974 to assist states in providing legal services in civil cases, in which there is not a constitutional right to counsel, the federal government has not enacted comparable legislation to assist states in cases where there is a constitutional right to counsel or where states require that counsel be appointed, even though it is not constitutionally mandated. The Committee applauds the establishment of the Legal Services Corporation but believes there should also be a federal program to help the states defray the costs of defense services in criminal and juvenile cases.

Thirty years ago, the ABA endorsed the establishment of a federally funded “Center for Defense Services,” and the Association reiterated its support for such a program in 2005. The Center’s mission would be to strengthen the services of publicly funded defender programs in all states by providing grants, sponsoring pilot projects, supporting training, conducting research, and collecting and analyzing data. The original report submitted to the Association’s House of Delegates in 1979 explained the proposal’s importance: “If adequately funded by the Congress, the Center could have far-reaching impact in eliminating excessive caseloads..., providing adequate training and support services ... and in facilitating representation as well as ensuring that quality defense services are available in all cases where counsel is constitutionally required.”

Federal Research and Grant Parity

Recommendation 13—Until a National Center for Defense Services is established, as called for in Recommendation 12, the United States Department of Justice should use its grant and research capabilities to collect, analyze, and publish financial data and other information pertaining to indigent defense. Federal financial assistance through grants or other programs as provided in support of state and local prosecutors should also be provided in support of indigent defense, and the level of federal funding for prosecution and defense should be substantially equal.

Commentary—As noted in the Commentary to Recommendation 12, the call for a National Center for Defense Services is not new. Although Congress has not been persuaded to enact such a program, the Committee is convinced that the proposal

still makes excellent sense. However, in the absence of such a program, there are valuable steps that the federal government can take through existing agencies of the U.S. Department of Justice (DOJ) to enhance indigent defense.

The Office of Justice Programs (OJP) of the DOJ, for example, develops and disseminates data about crime, administers federal grants, provides training and technical assistance, and supports technology development and research. The OJP's bureaus include, among others, the Bureau of Justice Assistance (BJA), which gives assistance to local communities to improve their criminal justice systems, and the Bureau of Justice Statistics (BJS), which provides timely and objective data about crime and the administration of justice at all levels of government. Also, the National Institute of Justice (NIJ), the research and evaluation agency of DOJ, offers independent, evidence-based knowledge and tools designed to meet the challenges of criminal justice, particularly at state and local levels.

Although the overwhelming majority of expenditures by these agencies have been devoted to enhance law enforcement, crime control, prosecution, and corrections, a few successful defense-oriented projects have been funded, which suggest that increased federal attention to indigent defense could have significant positive impact. For instance, in both 1999 and 2000, BJA hosted two symposia that brought together from all 50 states criminal justice professionals, including judges and leaders in indigent defense, to explore strategies to improve the delivery of defense services. The National Defender Leadership Project, supported by a grant from BJA, offered training and produced a series of publications to assist defender managers in becoming more effective leaders. Grant awards by the Office of Juvenile Justice and Delinquency Prevention, another bureau of OJP, have supported a national assessment of indigent defense services in delinquency proceedings as well as numerous individual state assessments of access to counsel and of the quality of representation in such proceedings.

While the foregoing projects and programs are commendable, the financial support of DOJ devoted to indigent defense is substantially less than the sum spent on the improvement of prosecution services at the state and local level. For this reason, the Committee calls for the financial support of "prosecution and defense ... [to] be substantially equal."

You may say: How can we provide assistance with all the other demands we face? I ask: How can you not? You provide massive amounts of funds to police, prosecution, and prison. It is past time that you invest in an entire system and not simply a punitive piece of the system.