No.

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO ANGUIANO. PETITIONER

- against -

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO PROCEED *IN FORMA PAUPERIS*

The petitioner, Antonio Anguiano, requests leave to file the annexed Petition for a writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39. Undersigned counsel was assigned to represent Petitioner pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, in the United States Court of Appeals for the Ninth Circuit because Petitioner was indigent and incarcerated. Petitioner has remained both incarcerated and, to the best of counsel's knowledge, indigent since then to this day.

January 24, 2018

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Counsel for Petitioner

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Question Presented

As a matter of first impression: whether, in upholding structural error flowing from judicial control over the defense function under the Criminal Justice Act, 18 U.S.C. § 3006A, the Ninth Circuit went against the Sixth Amendment principle of independent counsel that this Court has established?

Absolutely.

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Statement of Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Opinion Below and Judgement of Conviction

The Opinion below and Judgment of Conviction are included in the Appendix ("A.") annexed hereto.

Parties to the Proceeding and
Corporate Disclosure Statement

Pursuant to Rule 14.1, the following list identifies all the parties appearing here and in the courts below:

The Petitioner is Antonio Anguiano. The Respondent here and in all prior proceedings is the United States of America.

Pursuant to Rule 29.6, Petitioner states that neither party is a corporation.

The question driving this petition – how to extricate the judiciary from the indigent defense function and achieve independence for counsel appointed pursuant to the Sixth Amendment to the United States Constitution – is of such importance that Chief Justice John G. Roberts convened an Ad Hoc Committee to Review the Criminal Justice Act (the "Ad Hoc Committee") to conduct a multi-year, nationwide study. Last year, that Committee released a 341-page report vindicating arguments that Petitioner Antonio Anguiano has been pressing – and which the courts below have either ignored or eschewed – this whole time.

Congress has failed to find a solution since recognizing the need for defense independence in the first round of amendments to the Criminal Justice Act ("CJA") in 1970. The judiciary have failed to find a solution since a prior CJA committee raised the flag one-quarter of a century ago in a 1993 study – and, meanwhile, there remains a "persistent data deficit" concerning the approximately $1B that the judiciary are charged with managing for CJA program expenditures.

It gets worse. In 2017, for instance, the judiciary failed to secure a $1.9M allocation needed to fund long-sought cost-of-living hourly rate increases for defense counsel – while nevertheless securing an additional $133M for judicial salaries and expenses out of the same pot.

Think about that.

No, really. Stop and think about it.

Statement of the Case

This petition seeks to correct a dual deficit in the federal criminal justice system that has compromised the proceedings below: a systemic failure of the United States courts to ensure independence for the defense function, and a lack of protocols and protections to maintain judicial impartiality in indigent defense matters such as this one. The result? An improper sentence of incarceration.

Mr. Anguiano has been represented by counsel appointed pursuant to the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, since the inception of this case in the United States District Court for the Central District of California (the "Central District," or, simply, "the court").[1] He was convicted by plea to the third count of a mail fraud indictment, and sentenced to 27 months in prison and three months' supervised release. For the reasons set forth below, Mr. Anguiano did not – and could not – get a fair shake, and, now that he will be serving the supervised release portion of his sentence (by the time this Court reads these words), his conviction and sentence should be vacated as unconstitutionally imposed.

I. Troubling Circumstances

Mr. Anguiano was charged in an indictment with five counts of mail fraud arising from a scheme to profit from fictitious or inflated invoices that were submitted

[1] Central District CJA protocols are imputed to the Central District as a whole and Central District judges individually. *See* testimony by the Honorable David O. Carter before the Ad Hoc Committee to Review the CJA Program, *infra.*

to CM Laundry – a commercial laundry facility located in Gardena, California. He pleaded guilty pursuant to a plea agreement and was sentenced to 27 months' imprisonment and three months' supervised release, plus restitution. The plea agreement included a loss amount of $1.023 million apportionable to Mr. Anguiano; however, the parties ultimately stipulated to an amount over 25% less – $761,903 – after sentence had been imposed.

Prior to sentencing, the defense moved to continue the proceedings and hold the prosecution in abeyance until court neutrality and defense independence were ensured in accordance with the Sixth Amendment.

A. The Defense Stands Up for Equal Justice

A 25-page motion, accompanied by 31 exhibits totaling over 700 pages, supported the continuance and abeyance request. This submission – the substance of which resembled motions seeking various relief in other CJA matters I've been handling (the "Constitutional Challenges") – commenced with a challenge to the systemic bias resulting from exclusion of the defense from its own management and administration. With respect to the Central District specifically, the motion showed, intimidation tactics combine with legal services devaluation to effectuate a presumption that defense work requires "justification." It is this institutional prejudice, the defense has argued over and over, that conflicts with the presumption of competency otherwise accorded to counsel under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984).

The deterioration of CJA practice in the Central District has become known throughout the nation's legal community. Consider this exchange between the Honorable David O. Carter, who serves on the Central District "CJA Committee," and Judge Kathleen Cardone, Chair of a CJA study group known as the Ad Hoc Committee to Review the Criminal Justice Act Program,[2] at a hearing in March of 2016:

> Hon. Kathleen Cardone: …We as a committee are hearing that there's a problem in your District . . . [Central District CJA Committee Chair] Judge Fischer is on our committee and we are a very cohesive committee and work together very well, but the problem is that if – if there is a problem in your District and people perceive Judge Fischer as the problem, then, if you are her fellow judge, and you're not willing to take a contrary stand to Judge Fischer, where does that put the CJA Panel Attorneys in your District?
>
> Hon. David O. Carter: Okay, that, by the way, thank you for the question. And, bluntness between us. Um, we needed, if you will, more uniformity. That was going to require a strong hand, whether it was Judge Fischer or me, and I was supposed to succeed her as the Chair. I absolutely have refused do that for one reason. I don't want CJA counsel, or anybody, to outweigh the standards that have been set and agreed to by our entire court, and the changes that Judge Fischer has made, by CJA counsel outwaiting her term. So, from my perception in talking to CJA counsel, who quite frankly came rushing in the door, perceiving I was the next Chair, (1) I'm not undermining her, and (2) she's there forever, and she's going to live to be 105.[3]

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[2] *See* https://cjastudy.fd.org/frequently-asked-questions (last visited June 9, 2016) (Answer to Question 1: "The CJA Study is a comprehensive review of the operation and administration of the Criminal Justice Act program. The study is being undertaken by the Judicial Conference of the United States through the Ad Hoc Committee to Review the Criminal Justice Act Program.").

[3] *See id.*; "Panel 5 – Views from Judges," available at https://cjastudy.fd.org/hearing-archives/san-francisco-california (last visited October 27, 2016).

The defense further argued that CJA counsel are statutorily subjected to unreasonable "presumptive maximums" for attorney work and case expenditures that are simply inadequate in the modern age. This flaw combines with an unconstitutionally low standard for representation – the incorrect standard of mere "adequacy" as opposed to the proper bar of "effective" – to exacerbate the unconstitutionality of the mechanisms at work. Together, as the record below reflects, these shortcomings enable Central District CJA protocols and policy to curtail and diminish defense work.

Under the current CJA system, the defense competes with judicial salaries and expenses as a line item *within the judicial budget* seeking appropriations from Congress. To be sure, the standing Committee on Defender Services of the Judicial Conference of the United States – the body that oversees national CJA policy – recently recommended an overdue CJA Panel attorney rate increase (and one that had already been reduced to less than half of the amount required to fulfill the statutory authorization).[4] But all for naught: the United States Senate ultimately reduced the proposed increase to zero.[5]

[4] *See* Report of the Proceedings of the Judicial Conference of the United States, September 2014.

[5] *Cf.* appropriate portions of the appellate record *with* S. Rept. 114-280.

Another telling example of priorities here is the twenty-year period that lapsed between the most recent comprehensive nation-wide study of the CJA, *see* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, and the recent study by the Ad Hoc Committee, which was begun in 2015.[6] In that same two decades, the government built a ***second*** new federal courthouse in downtown Los Angeles – this one at a cost of approximately $400 million,[7] that is, about 40% of the 2017 budget allocation sought for the defender services program across the country.

On a practical level, Central District CJA decision-making occurs by unchallengeable judicial fiat, and the court has unleashed a bureaucratic tsunami on the defense over the last few years. The national representatives for the Central District CJA Panel have described the atmosphere in no uncertain terms:

> Each time [another Central District CJA memo] is issued to the panel, the panel views the court as imposing more requirements and obstacles, designed to make review easier for the court, but not designed to improve or facilitate their representation of the client. *Most panel members simply view new billing and record keeping requirements as an attempt to shrink the defense function, dissuade members from billing for their time, or otherwise creating obstacles to receiving payment for their services.*
>
> These constantly-increasing impositions on panel counsel – which result in burdensome and time consuming billing and record keeping which is not compensated – have adversely affected panel morale. We recently took a survey from our panel about how they feel about their membership on the panel

[6] *See h*ttps://cjastudy.fd.org/frequently-asked-questions (Question 5) (last visited April 18, 2017).

[7] *See* http://www.gao.gov/assets/290/280735.html (last visited October 27, 2016).

> compared to past years. Uniformly, our panel members reported morale at an average of a level 4 on a scale of 1 to 10, and reported that their morale was much lower than in past years. The survey requested specific written reasons and repeatedly the panel members reported that: (1) the court did not respect them; (2) the court treated them with persistent suspicion in billing; (3) the court questioned their judgment in how to defend a case by reducing payments for review of discovery (by directing presumptive time for review (60 pages per hour), docking conversations with family, for litigation of motions the court felt lacked merit and questioning length and frequency of meetings with clients. *The lawyers surveyed all required anonymity in providing the information for fear of reprisals from the Court–itself a reflection of how our members feel.*
>
> Vibrant collaboration has deteriorated among the panel. The primary conversation among members has become about billing issues, delays in payment, and the increasingly burdensome court requirements. The panel "List serve," which ideally should be a forum for sharing ideas, legal theories, information about government experts and judges' practices, is a further reflection of this dissatisfaction. The Listserve emails are now primarily about complaints of increasing billing obstacles, audits, requests for repayment, additional new forms. As the panel representatives for the Central District, we are the recipients of these daily email streams. *They are constant and persistent.*

These "chilling effects" extend beyond how cases are handled to the practices and lives of individual attorneys – including me. But don't just take my word for it: Central District CJA Trial Attorney "Panel" membership has declined by one-third since 2014 or so.

B. The Court Retaliates

While Mr. Anguiano's case was pending, the court froze my previously submitted CJA vouchers in numerous cases – including this one – and terminated me from the Central District CJA Panel. The court's pretexts amount to these two issues: I declined to: (1) undermine my clients' litigation positions in the Constitutional

Challenges; and, (2) make what I believe would be ethically questionable statements that could potentially undermine my clients' post-conviction claims.

Inexplicably – and tellingly – the court voluntarily conceded that my previously appointed CJA representations would continue.

II. The Defense Seeks Case Abeyance and a Continuance

It seemed – as it still does – inappropriate for a defense lawyer to remain complicit in an unbalanced and broken system that operates to the client's detriment. Accordingly, noting that injunctive relief is available to rectify improper use of appropriations enacted by Congress, *see United States v. McIntosh*, 2016 WL 4363168, at *5 (9th Cir. Aug. 16, 2016), the defense sought a suspension of proceedings prior to sentencing until the court's neutrality – and independence for the defense function – were ensured.

The court summarily denied the motion to continue. Subsequently, at sentencing, the court stated:

> All right. We're here for sentencing. And let me first begin by saying that the request for a stay was denied because of the facts of this case. There have been – this case is – was a plea to me. This case does not involve any request that was denied, that I'm aware of. And, in fact, [Defense Counsel], I found your papers to be very thorough. . . . So that was why the motion to stay was denied.

No oral argument was invited. The systemic flaws and institutional biases raised by the defense went unaddressed.

III. Sentencing

The District Court sentenced Mr. Anguiano, as mentioned above, to 27 months' custody and three years of supervised release, plus restitution. According to the Bureau of Prisons website as of this petition, he is scheduled for release from incarceration on January 26, 2019; and he will, in accordance with the Judgment and Commitment Order, commence supervision under the appropriate United States Office of Probation at that time.

IV. The Appellate Process

The appellate process in the Ninth Circuit was a farce. At oral argument, one member of the adjudicating panel indicated that his Honor had decided a result without having fully reviewed the record;[8] another member revealed a lack of familiarity with the issue of structural error – which imbued the litigation for two years and pervaded the opening brief;[9] and the third member asked the government whether the defense had raised its (longstanding) central claim in the District Court.[10]

The result was predictable – a wisp of dreck that reframed the issues for the Circuit's convenience and disposed of the Constitutional principles at stake, all with about as much intellectual heft as the average high school essay.

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[8] *Cf.* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000013974 at 0:42-0:50 *with* 12:55-13:03.

[9] *See id.* at 4:56-5:04.

[10] *See id.* at 16:45-16:50.

Reasons for Granting the Writ

It is beyond cavil that equal justice must be available to all parties before the courts of the United States of America, regardless of financial condition. Mr. Anguiano's case exemplifies the fundamental problem infecting the CJA and indigent defense cases: No reasonable observer would claim that the system is fair and impartial, and the role of the court in administering and managing defense work must be minimized – if it is to be maintained at all.

Argument

I. The Ninth Circuit Went Against This Court's Jurisprudence.

In our era, it is difficult to imagine an issue of greater magnitude than the current war on defense independence. Preliminarily, as we all appreciate, the Fifth and Sixth Amendments of the United States Constitution provide for the assistance of counsel and Due Process, U.S. Const. Amend. V and VI, and the promise remains a full one: this Court has long recognized that indigent defendants in federal criminal cases are entitled to the appointment of counsel, *see Johnson v. Zerbst*, 304 U.S. 458 (1938), and, furthermore, the Court has held that the right to counsel for the accused is the right to *effective* counsel, *Strickland*, 466 U.S. 668.

But there is more: the right to counsel comprises the right to *independent* counsel: "[O]ur Constitution imposes on defense counsel an overarching duty to advance the undivided interests of [her] client, and on the State a concomitant

constitutional obligation to respect *the professional independence* of [the defense]." *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 445-46 (1998) (internal quotation marks and citations omitted) (emphasis supplied); *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1982) ("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages."); *see also Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("[T]he primary office of appointed counsel parallels the office of privately retained counsel. . . . [Appointed counsel's] principal responsibility is to serve the undivided interests of [her] client.").

In addition to underpinning this Court's jurisprudence, these principles are echoed in the Criminal Justice Standards for the Defense Function ("Defense Function Standards"), published by the American Bar Association (the "ABA"). By way of background, "[f]or fifty years, the ABA Criminal Justice Standards have guided policymakers and practitioners working in the criminal justice arena."[11] "[I]ntended to provide guidance for the professional conduct and performance of defense counsel,"[12] the Defense Function Standards recognize the importance of an environment that ensures independence and zealousness in indigent defense. At heart, there is an

[11] See https://www.americanbar.org/groups/criminal_justice/standards/ (last visited January 17, 2019).

[12] Standard 4-1.1(b).

overarching duty for counsel to provide effective and high-quality representation in advocating on behalf of the client:

> The government has an obligation to provide, and fully fund, services of qualified defense counsel for indigent criminal defendants. In addition, the organized Bar of all lawyers in a jurisdiction has a duty to make qualified criminal defense counsel available, including for the indigent, and to make lawyers' expertise available in support of a fair and effective criminal justice system.

Standard 4-2.1(a).

> Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. *The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.*

Standard 4-1.2(b) (emphasis supplied).

The courts below do not appear to have grasped the paramountcy of these values as this Court has. "It is true enough that the purpose of the rights set forth in th[e Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Accordingly, wrongful deprivation of the Sixth Amendment right to counsel is "structural" error, that is, error so fundamental that it results in automatic reversal. *Id.* at 148-49; *Gideon v. Wainwright*, 372 U.S. 335 (1963). At the root of this respect for the legal framework on which our criminal justice system depends is the principle that the defense shall remain independent and free from interference. *See Gonzalez-Lopez*, 548 U.S. at 146, 150 (sanctity of right to choice

of counsel to protect defense ability to pursue strategy); *see also McCoy*, *Dodson* and *Ferri*, *supra*; *United States v. Morrison*, 449 U.S. 361 (1981).

In a similarly robust vein, "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 100 S. Ct. 1610, 1613 (1980). This adjudicatory structure remains – at least in concept – central to our system of justice:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Id. (internal quotation marks and citations omitted). Thus, proceedings before a biased judge also present structural error. *See Tumey v. Ohio*, 273 U.S. 510 (1927).

Nothing in the decisions below – especially considering the Ninth Circuit's dodge – indicates an understanding of how these principles guide analysis of judicial bias in this case.[13]

II. The Criminal Justice Act System Is A Mess.

The fundamental problem here is that the matter proceeded to sentencing before a court that has grown too compromised to adjudicate indigent defense cases.

[13] The Second Circuit, on the other hand, appears to appreciate the Sixth Amendment right to independent counsel. *See United States v. Stein*, 541 F.3d 130, 152 (2d Cir. 2007).

A review of the record should leave no question in any reasonable mind that the Central District's control over the defense function is improper – if not unethical – and, in any case, unconstitutional. Even if the atmosphere were not inimical to defense work, involvement of the judiciary in the defense role would continue to undermine the separation of powers undergirding our form of government. Converting the defense function into an arm of the court breeches the levees of fairness and neutrality upon which American criminal justice relies.

As of this petition, I am still owed over $18,000 for Central District work that was performed years ago. Assuming *arguendo* that the funds are paid – and there is no reason to hope that they ever would be – the court will still have disregarded Due Process and applicable CJA Guidelines in the process. *See Guide to Judiciary Policy*, Vol. 7, Defender Services, Part A, Chapter 2, § 230.13(b) ("Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission."); *Id.* at Appx. 2A: Model Plan for Implementation and Administration of the Criminal Justice Act VIII.A.6. (establishing propriety of voucher cutting notice and hearing requirements and involvement of CJA Committee including federal public defender and Panel representative).[14] Meanwhile, of course, I financed court operations through labor and out-of-pocket expenses – without interest.

[14] The Model Plan is insufficient. *See* David Patton's *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335 (2017).

Such treatment of lawyers exacerbates the very problem that the CJA is supposed to address: an expectation that the federal indigent defense system will persist through diversion of resources from the private defense bar for the benefit of the judicial budget.

To the extent it can be rationalized, the structural error at work here appears to derive from misguided Circuit authority on the architecture of court-appointed representation. *See In re Smith*, 586 F.3d 1169, 1174 (9th Cir. 2009) (oft-cited, lone Circuit Judge CJA voucher-cutting opinion relying, at heart, on *United States v. Dillon*, 346 F.2d 633 (9th Cir. 1965), a pre-CJA case in which this Ninth Circuit retroactively caused counsel to represent a defendant in a criminal case *pro bono*).

Furthermore, in broader context, pursuant to 28 U.S.C. § 455(b), a federal judge "shall disqualify [herself] in any proceeding in which [her] impartiality might reasonably be questioned." So too shall she disqualify herself where "[s]he knows that [s]he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." *Id.* at (b)(4).

These lines are routinely crossed in the current CJA system. During the pendency of this case, the judicial allocations process put the defense on the chopping block while the judiciary sailed through: at last, as reflected above, the standing Committee on Defender Services recommended a long overdue CJA Panel attorney compensation rate hourly increase of $13 per hour – which was supposed to bring the

rate commensurate with the current statutory maximum set decades ago – but even that proposal was reduced to $6 as the issue made its way through the Judicial Conference of the United States. And then, to worsen matters, judicial support for the defense became either non-existence or non-effectual, as the Senate proceeded to extinguish the necessary $1.9 million earmark from the total $7,582,995,000 sought for the courts overall.

Meanwhile, available amounts for judicial salaries and expenses increased by more than $133 million.

Think about that.

No, really. Stop and think about it.

What feels even more troubling is to consider how such trade-offs have benefitted the judiciary over time. There was a 9% increase for judicial pay raises and judicial and court staff augmentation from 2015 to 2017, as compared to a 6.4% increase for panel attorney allocation during same period.

The need for change becomes even more pressing when one considers CJA history and legislative objectives:

> The 1970 Congress that finalized the CJA did not expect its structure to remain static. In particular, according to the Senate Report accompanying the passage of the amendments, the placement of the defender program in the Judiciary was deemed temporary, pending the "eventual creation of a strong, independent office to administer the Federal defender program" and the possible "establishment of a new, independent official—a 'Defender General of the United States.'" The temporary placement was felt to be necessary because the creation of an independent office would have been "premature

> until Congress . . . had an opportunity to review the operations of the defender program over the course of a few years."
>
> In explaining why independence would eventually be necessary, the Report stated that, "the defense function must always be adversarial in nature as well as high in quality. It would be just as inappropriate to place direction of the defender system in the judicial arm of the U.S. Government as it would be in the prosecutorial arm."

Patton, David, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335, at 114 (2017) (quoting S. REP. NO. 91-790, at 18 (1970)).

Reform is in order at this time. Mr. Anguiano – and justice herself – deserve no less.

III. Prejudice Impacted The Result.

Although prejudice need not be shown for structural error to require reversal, an examination of the record reveals that improper forces did impact the outcome. Indeed, the current system is so entrenched that the systemic flaws and institutional biases raised by the defense appear to have gone ungrasped: The district court's analysis – such as it was – did little more than hoist an ineffective assistance scaffold over quicksand of the judiciary's own making.

To understand the context here, it seems helpful to focus on sentencing. The defense emphasized various arguments, including the social goal of restitution and the impropriety of the United States Sentencing Guidelines generally. With respect to the latter, the defense sentencing submission quoted observations by the Honorable James S. Gwin:

> Congress directed the United States Sentencing Commission to develop sentencing ranges consistent with community sentiment regarding the gravity of the offense and related public concern. 28 U.S.C. § 994(c)(4)-(5). Rather than creating punishment levels from whole cloth, however, the Sentencing Commission analyzed the sentences imposed in 10,000 past cases. During this process, the Sentencing Commission did not attempt independently to determine sentences that would accurately reflect community sentiment. Thus, the Commission relied on inputs distant from any meaningful measurement of community sentiment – past or present.

Gwin, Judge James S., *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 185 (2010).

This shocking deficiency matters, the defense argued, since relevant study results

> suggest the Guidelines do not accurately reflect community sentiment. . . Because our system – and any just system of punishment – focuses on the retributive purpose of punishment, and because community sentiment is especially important in such a system, these results raise serious questions about the efficacy of the Guidelines.

Id. at 195.

But all was to no avail: the sentencing transcript does not yield any impression that the Guidelines arguments based on Judge Gwin's research were truly considered and weighed into a sentence. With a swiftness that typifies a lopsided system premised against the defense function, the court imposed exactly the adjusted Guidelines result that the government asked for – without an independent analysis.

The Circuit ignored the issue entirely.

IV. The Remedy Is Simple.

Rectifying structural weaknesses in the CJA and ensuring independence for the defense within the adversarial system must be a common goal.

> Criticism of the Judiciary's governance of federal public defense should not be mistaken for criticism of the individual judges who have played a role in managing the program. Many judges have acted as fierce advocates for the program and are largely responsible for the successes it has enjoyed. The issue is one of structure and professional role, not individual actors. In a criminal justice system that prides itself on its adversarial nature, it would be inconceivable to have judges decide who is hired in a prosecutor's office, how much they should be paid, or how and whether prosecutors should investigate individual cases. It would be equally problematic to have the Judiciary act as the voice of the Department of Justice in Congress when explaining program needs and seeking appropriations. And yet the Judiciary currently does all of those things with respect to the defense function.

Patton, David, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335, at 109 (2017).

In the defense's view, the problems and conflicts discussed above may be resolved by striking as unconstitutional the subparagraphs of the CJA that improperly involve the judiciary in the defense function – 18 U.S.C. § 3006(A)(d)(2)-(3) – for all the reasons already set forth.

Conclusion

> ***Genuine independence is crucial to providing a high-quality defense—not just in some cases but in all cases.*** It must be the standard of practice in federal courts nationwide. Under the current administrative structure too many attorneys are compromised—if not hamstrung—by the lack of financial resources, training and guidance, and latitude to mount a skilled and vigorous defense of their clients in federal court. When the defense is undermined in these ways, the innocent are more likely to face wrongful conviction ***and the***

> ***guilty are more likely to face harsher punishment***, including execution. ***The failures that play out tragically in individual lives are systemic.***

– Honorable Kathleen Cardone and Honorable Edward C. Prado[15]

For the foregoing reasons, this Court should grant the petition for certiorari, and, after full briefing, strike the relevant portions of the CJA for what they are – unconstitutional – and remand for modification of Mr. Anguiano's sentence.

January 24, 2019

s/ Zoë Dolan
Counsel for Appellant
Antonio Anguiano

[15] Chair and Chair Emeritus of the Ad Hoc Committee to Review the CJA, from the Committee's 2017 report – discussed *supra* – with emphasis supplied.