No.

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN ZEPEDA. PETITIONER

- against -

UNITED STATES OF AMERICA, RESPONDENT

Appendix

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

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JONATHAN ZEPEDA, a.k.a. Chino, a.k.a. Japs, a.k.a. Lilchino, a.k.a. Johnathan Zepeda Ortiz, a.k.a. Jonathan Ortiz, a.k.a. Jonathan Zepeda Ortiz, a.k.a. Trooper, Defendant-Appellant.	No. 18-50092 D.C. No. 2:15-cr-00334-PSG-3 Central District of California, Los Angeles ORDER

Before: WALLACE, SILVERMAN, and McKEOWN, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 15) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable).

Appellant's motion to strike appellee's motion to dismiss (Docket Entry No. 17) is denied.

DISMISSED.

United States District Court
Central District of California

JS-3

UNITED STATES OF AMERICA vs. **Docket No.** CR 15-334(A)-PSG

Defendant Jonathan Zepeda **Social Security No.** 7 3 9 0

akas: Ortiz, Johnathan Zepeda; Ortiz, Jonathan; Ortiz, Jonathan Zepeda; Trooper; Lilchino; Chino; Japs (Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
03	05	18

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSEL **CJA Zoe Dolan**
(Name of Counsel)

PLEA [X] **GUILTY,** and the court being satisfied that there is a factual basis for the plea. [ ] **NOLO CONTENDERE** [ ] **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:

Violent Crime in Aid of Racketeering, in violation of Title 18 U.S.C. §1962(d), as charged in Count 1 of the First Superseding Indictment.

Conspiracy to Distribute and Possess with Intent to Distribute Controlled Substances, in violation of Title 21 U.S.C. § 846, as charged in Count 5 of the First Superseding Indictment.

Brandishing, Discharging, Carrying, and Using a Firearm During and in Relation To, and Possessing in Furtherance Of, a Crime of Violence and a Drug Trafficking Crime, in violation of Title 21 U.S.C. § 924(c)(1)(A)(i), as charged in Count 20 of the First Superseding Indictment.

Felon in Possession of a Firearm and Ammunition, in violation of Title 18 U.S.C. § 922(g)(1), as charged in Count 24 of the First Superseding Indictment.

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

240 months. This term consists of 180 months on each of Counts 1, 5, and 24 of the First Superseding Indictment, to be served **concurrently**, and 60 months on Count 20 of the First Superseding Indictment, to be served **consecutively**.

It is ordered that the defendant shall pay to the United States a special assessment of $400, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline §5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court recommends that the Bureau of Prisons conduct a mental health evaluation of the defendant and provide all necessary treatment.

The Court recommends that the defendant be considered for participation in the Bureau of Prison's Residential Drug Abuse Program (RDAP).

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **five years**. This term consists of five years on each of Counts 1, 5, and 20 and three years on Count 24 of the First Superseding Indictment, all such terms to run **concurrently** under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office and General Order 05-02.
2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
3. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using alcohol and illicit drugs, and from abusing prescription medications during the period of supervision.
4. The defendant shall participate in mental health treatment, which may include evaluation and counseling, until discharged from the treatment by the treatment provider, with the approval of the Probation Officer.
5. As directed by the Probation Officer, the defendant shall pay all or part of the costs of the Court-ordered treatment to the aftercare contractors during the period of community supervision. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required.
6. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.
7. The defendant shall cooperate in the collection of a DNA sample from the defendant.
8. The defendant shall not associate with anyone known to him to be a member of the Frogtown Gang or Arnold Gonzales Organization Gang and others known to him to be participants in the Frogtown Gang or Arnold Gonzales Organization Gang's criminal activities, with the exception of his family members. He may not wear, display, use or possess any gang insignias, emblems, badges, buttons, caps, hats, jackets, shoes, or any other clothing that defendant knows evidence affiliation with the Frogtown Gang or Arnold Gonzales Organization Gang, and may not display any signs or gestures that defendant knows evidence affiliation with the Frogtown Gang or Arnold Gonzales Organization Gang.
9. As directed by the Probation Officer, the defendant shall not be present in any area known to him to be a location where members of the Frogtown Gang or Arnold Gonzales Organization Gang meet and/or assemble.

The Court authorizes the Probation Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the sentencing judge.

The Court authorizes the Probation Officer to disclose the Presentence Report, and/or any previous mental health evaluations or reports, to the treatment provider. The treatment provider may provide information (excluding the Presentence report), to State or local social service agencies (such as the State of California, Department of Social Service), for the purpose of the client's rehabilitation.

On Government's motion, all remaining counts, underlying Indictment, and underlying Information to Establish Prior Conviction are ordered dismissed as to this defendant only.

The defendant is advised of the right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

March 6, 2018
Date

Philip S. Gutierrez, U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

March 6, 2018
Filed Date

By Wendy Hernandez
Deputy Clerk

USA vs. Jonathan Zepeda Docket No.: CR 15-334(A)-PSG

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;
3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. the defendant shall support his or her dependents and meet other family responsibilities;
6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;
8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;
15. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours;
16. and, <u>for felony cases only</u>: not possess a firearm, destructive device, or any other dangerous weapon.

☐ The defendant will also comply with the following special conditions pursuant to General Order 01-05 (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant shall pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution-pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence (pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

SPECIAL CONDITIONS FOR PROBATION AND SUPERVISED RELEASE

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure; and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Jonathan Zepeda Docket No.: CR 15-334(A)-PSG

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

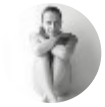
(Signed) _____ _____

Defendant Date

_____ _____

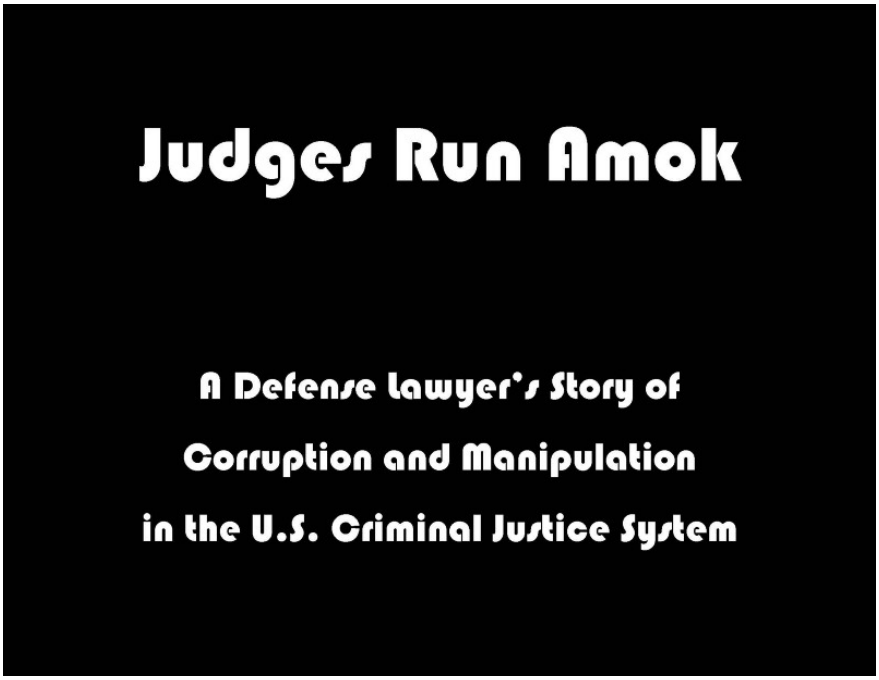
U. S. Probation Officer/Designated Witness Date

Judges Run Amok: An Exposé



Zoe Dolan

Nov 27, 2017 · 16 min read



Washington, We Have a Problem

As a federal criminal defense lawyer, I get front row tickets to the imploding hot mess that is the United States of America. I've saved a seat for you.

No one will be surprised to hear that the deck is stacked against individuals facing criminal charges in federal court. But the real problem goes far beyond what you may think.

It's more than just how the rules of evidence and procedure are written to benefit the government and secure convictions. It's more than just

how the system skews toward the prosecution over the defense—in everything from judicial interpretation of the Bail Reform Act (which was once intended to reform the bail process), to insurmountable jury instructions that end up swallowing human conduct like a black hole, to Draconian sentencing guidelines that lead to unnecessarily long sentences.

The problem is that many judges—the very people who are supposed to ensure that everything is played down the middle—demonstrate bias against defense advocacy.

Unfairness becomes acute in cases involving people who need court-appointed counsel due to lack of funds to retain an experienced trial lawyer costing $50,000, $100,000, or more. Indigent defense cases comprise almost 90% of the federal criminal caseload nationwide.[1]

I've been handling indigent defense cases—in which the court appoints me pursuant to legislation called the Criminal Justice Act[2] (the "CJA")—for a dozen years. I started out as an associate with a small firm, and then went solo in 2008 working with numerous mentors. Since 2010, I've served on CJA Panels in New York (Brooklyn) and California (Los Angeles).

We CJA Panel lawyers are currently paid $132 per hour—up $3 per hour from last year, but still nothing near the $500–1000+ hourly fee that we might charge as privately retained counsel, and not even close to the $200 per hour that the U.S. Department of Justice pays to retain private counsel to represent current or former federal employees in civil, congressional or criminal proceedings. Personally, I do this work as a component of my practice because I enjoy the fight to protect our rights, and I believe that holding our government accountable is good for society.

I mean, how many other jobs are included in the Constitution?

It is respect for that very honor that causes my heart to break when I see an inalienable privilege of being American—the Sixth Amendment right to counsel—being trampled upon.

How It Works: Judges in Control of the Defense

It wasn't supposed to be this way. When the CJA was passed into law in 1964, Congress appears to have understood the measure as a temporary solution. Vesting power over the defense function in judges —who control the defense process from attorney Panel selection all the way to payment for attorney services—was obviously not how things could work forever.

Indeed, as the United States Senate recognized along with certain amendments to the Act six years later in 1970, the court-appointed counsel system was intended to evolve into "a strong independent office to administer the Federal defender program"—with the possible "establishment of a new, independent official—a 'Defender General of the United States.'"[3]

How unfortunate for our country that the opposite has happened.

Consider, for example, the United States District Court for the Central District of California—the most populous federal district in the nation, serving over 19 million inhabitants—based in Los Angeles.

Now, to be fair, several years ago, a handful of Central District Panel lawyers who were either lazy or unscrupulous—or at the very least not paying as close attention as they should—overbilled for their services. By like a lot.

Instead of responding with precision and focusing on targeted reform, however, the court turned into a wrecking ball.[4]

Appointed counsel in the district are now subjected to a tome of a "manual" covering virtually every conceivable aspect of legal representation.

One casualty of the assault, as you would expect, is attorney productivity. Necessary communications via text, email or phone calls with clients or opposing counsel often result in losses for attorneys due to onerous and time-consuming billing requirements; invoices must be kept to the minute—rather than tenth-of-an-hour increments otherwise utilized in the legal profession—and the court examines attorney records for bathroom breaks. (I'm not kidding.) Legal representation has become a mountain of uncompensated busywork.

Demoralized from being treated like children, some Panel lawyers have spoken openly about whether they can provide sufficient services under threat of retaliation from the court. It's a real dilemma.

Though exact figures are not readily available to the public, we know from a few brave souls who have shared their stories that the court has cut attorney work vouchers—and always, of course, after the work was performed. Losses to an attorney who diligently advocated on behalf of their client may reach into tens of thousands of dollars when a trial or other demanding litigation is involved.

And, to exacerbate the problem, no meaningful review or appeal for voucher decisions at the trial court level is available. Deference is paid to whoever made the cuts—which is done in most if not all instances, it appears, by an administrator acting at the court's direction.

Does it come as a surprise that Los Angeles CJA Panel membership has dwindled from 115 lawyers a few years ago to just 65 (at the time of this post)?

Putting aside whether lawyers with any backbone are left, one consequence remains troubling: At present, there would be insufficient attorneys to represent each defendant in one of the first large-scale racketeering cases typical of the district that I was appointed to in 2014, if that indictment came down today.

My Story: A Whistleblower

I challenged the state of affairs that I have just described by seeking dismissal of my indigent clients' cases.

My argument—that institutional biases have culminated in a failure to ensure equal justice—centered on five systemic deficits: (1) the judiciary imposes an unconstitutionally low standard on defense representation, (2) the budgetary appropriations process—which lumps the defense in with judges and then requires judges to balance competing funding requests—incentivizes the judiciary to diminish the defense function, (3) the defense is improperly excluded from its own administration and management, (4) the unduly burdensome record-keeping requirements that judges have created divert and suppress

defense advocacy, and (5) considered individually and overall, these problems operate to chill the defense.

On my clients' behalf, I submitted well over 700 pages of exhibits supporting these arguments and documenting as much as I could for the record.

The court responded by terminating me from the CJA Panel and freezing my attorney payment vouchers.

Now, I imagine that those in power would tell you the termination occurred because I was not "in compliance" with the rules, and the court was loath to appoint me to new cases since I perceived so many deficits in the system.

But here is the thing.

I had in fact complied with all the rules that had been in place when I first started on the Panel. It was the (seemingly endless) series of *new* protocols that my clients objected to as unconstitutional—and besides, I explained, I would come into compliance in the event that an appellate court upheld those requirements.

One other thing. The court wanted me to make a statement about providing effective representation. To be sure, the idea that I would throw my clients under the bus after putting my career on the line for their welfare was preposterous to say the least—but I did respond, citing an opinion from the National Association of Criminal Defense Lawyers concerning why the precise statement the court demanded may be unethical.

No dice.

It probably did not help my own personal cause that I'd pointed out how judges had failed to secure a much-needed $1.9 million for defense services—remember, our budget is currently their job—while somehow obtaining $133 million out of the same pot for judicial salaries and expenses.[5]

Nor, I imagine, were the court's CJA committee—comprising all judges—too thrilled that I had included for the public record some testimony from a rather explosive hearing in May of 2016. Here we have a Central

District CJA committee member's response to questioning by the Chair of a body called the Ad Hoc Committee to Review the CJA:

> *Hon. Kathleen Cardone: …We as a committee are hearing that there's a problem in your District . . . [Central District CJA Committee Chair, the Honorable Dale S.] 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 to 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.[6]*

(For context, the Ad Hoc Committee is another group lacking any CJA practitioners and comprising mostly judges. They are working on a comprehensive nationwide report, originally expected for release last April 2017 but still pending as of this post.)

Anyway. Back to my story.

I wrote a letter about the whole situation to the Chair of the Defender Services Committee—a component of the Judicial Conference of the United States, which is overseen by United States Chief Justice John G. Roberts, and has responsibility for policy-making that affects the federal indigent defense program. I wrote a letter to the Director of the Administrative Office of the United States Courts, the central authority in Washington, D.C. that oversees administration of the federal courts and the indigent defense program nationwide.

Both wrote me back saying that they could not do anything.

After holding out for as long as I could, I wrote another letter to the Chair of the Defender Services Committee. This time I asked him to imagine putting a roof on his house, replacing a bedroom ceiling damaged by a leak, and getting a new water heater—without having been paid for eight months.

Silence.

Finally, I wrote to the supervising CJA judge in the Ninth Circuit Court of Appeals (the appellate court that sits over the western United States, including the Central District), begging him to intervene. At this point I was out around $85,000 in work that I'd performed over the preceding year; so, I explained, legal services are how solo practitioners pay their law office expenses and earn a living.

At last the Central District budged. They released some of the funds owed for my services—though they withheld over $18,800.

Six months later, they still haven't provided clarification for the cuts.

Meanwhile, I continued fighting for my clients, and, I am very proud to say, achieved some wonderful results—for example, a sentence of one-day time-served in a large-scale fraud case, and a full jury acquittal at trial in an alleged marijuana-smuggling matter. I continue to represent prior clients whose cases are pending trial, and work on appeals for other CJA clients who pleaded guilty but maintained their objections to unfairness in the system.

I guess it makes sense to mention that, despite what happened in Los Angeles, I was renewed for service on the CJA Panel in the United States District Court for the Eastern District of New York (in Brooklyn), and have been working on cases there since then.

And I should also note that I have now complied with Central District CJA protocols—over objection—including ones that my clients had challenged.

But no matter.

The court—which had told me to reapply once I got back into "compliance"—nevertheless rejected my reapplication to serve.

How Long Has This Been Going On?

Prior to the current Ad Hoc Committee, the most recent comprehensive nationwide study of the CJA was conducted in 1993. That review group —which, incidentally, also lacked any solo CJA practitioners as members—was chaired by the Honorable Edward C. Prado. They found the same set of problems that persists today.

You can read the Prado Committee's report here.[7] The tl;dr is that they perceived perennial funding shortfalls for the defense, potential for—if not actual—judicial interference with the defense function, and, overall, insufficient independence for defense counsel pursuant to the Sixth Amendment.

One dimension of the report bears examining for a minute: the committee found that the Congressional appropriations process for the CJA program was "opaque."[8] Specifically, after describing the Byzantine funding maze the program goes through, the committee made an observation that still rings true today: "This process is largely closed to the scrutiny of the public, bar associations, federal defenders, panel attorneys and others who are directly affected by the priorities set and the funding decisions made."[9]

Why does it matter?

Well, as the Prado Committee acknowledged, "the work, needs, and interests of the CJA program are presented as part of a complex and, in recent years, fairly competitive quest for funds."[10] The "burden" of balancing these requirements against the entire federal judiciary is "increasingly complicated, onerous and frequent, and it begs for attention."[11]

(Remember, these statements are from 1993, yo.)

And thus we reach the crux of the issue, which the Prado Committee were already identifying a quarter of a century ago:

> *The important point is that the current system creates a serious problem of perception and provides the opportunity for abuse, particularly in light of*

> *the fact that the current system of oversight has the inherent potential for conflict in the judiciary's management function at the national and local levels with no prophylactic measures to identify and remedy any actual conflicts which undermine CJA representation.[12]*

To understand the depth of the problem here, recall what I said earlier about the federal judiciary failing to secure $1.9M for the CJA program, while obtaining an additional $133M for themselves from the same budget.

Also, remember the 2013 sequester? CJA Panel attorney compensation rates were reduced by 12% for a period of six months (and defender organizations around the country lost 400 positions, or more than 10% of their workforce, including 145 defense lawyers).[13] There was no corresponding cut to judicial salaries.

Please pause—even if just for a second—and ruminate on whether any federal judge may sit as an impartial officer within the current system.

And what about the checks-and-balances structure of our government?

With regard to the Central District in particular, I would feel remiss if I did not mention that, in the period between the Prado Committee's study and the Ad Hoc Committee's current efforts, the federal government built two new courthouses in downtown Los Angeles—the more recent one at a cost of $400M,[14] or, for comparison, 40% of the budget for the entire defender services program (including federal public defender offices) throughout the entire country in 2017.[15]

Who Cares?

I think there are four principles to bear in mind here.

1. Everyone detests criminal defense lawyers—until someone in their family needs a good one. Sometimes it is a question of establishing innocence for a client wrongfully accused. Other times the work focuses on achieving the correct sentence when the government is being unreasonable. At all times it's about defending Constitutional rights we often take for granted, but would be naked and vulnerable without—for if those rights are weakened for any of us, no matter the circumstances, we all are compromised.

2. Do we really want panels of defense lawyers pandering to court desires and judicial predilections? When I moved to dismiss my clients' cases, many lawyers cheered me on and told me how much they admired my efforts. But when I asked, "Hey, why don't you join the motions?", they shrank away in shame. "Self-preservation!" one of them wrote to me in an e-mail. (Ironically, he was later terminated from the panel, too.)

3. Is it really so preposterous to point out that the integrity of a tripartite system of government with checks-and-balances falls into jeopardy when the judiciary become an arm of the Executive? An impartial judicial officer should not be controlling defense purse strings, management and administration—especially while the government retains its independence on the other side of the courtroom. It's just unseemly—not to mention unconstitutional.

4. All these problems amplify when you factor in what the judicial confirmation process has become. We are all aware from the most recent debacle in the Supreme Court of the United States that whichever party controls the Senate now controls whether a justice will be seated—and of course this danger flows down to the federal appellate and trial courts as well. In an American republic that functions for all citizens, can we not all agree that judges should be qualified, level-headed individuals who play it down the middle—and whom political parties "across the aisle" can live with?

Is it not corrosive for society that any political force—conservative, liberal or otherwise—can screw with the fair administration of justice?

No Really—Who Cares?

The final point I want to make about why all this stuff matters is cost to society.

Our country currently represents just 5% of the world's human population, but has 25% of the world's prison population. We leave every other country in the dust.

Our federal sentencing Guidelines—the main benchmark for judges in determining people's fate after a conviction—are absurd. An eye-opening article in the Harvard Law and Policy Review by the Honorable

James S. Gwin—a United States District Judge in the swing state of Ohio—found that *minimum* Guidelines sentence recommendations exceeded community sentiment by *approximately four-and-a-half times*. [16] So, on average, where you might think someone should receive a five-year sentence as punishment for a particular crime, the Guidelines would typically recommend something like at least 22-and-a-half years. [17]

And then there's money. The most recent figures I've seen calculate the average cost of incarceration for a federal inmate at $31,977.65 per year.[18]

Do you, as a taxpayer, want to be paying for any sentence that is even one day ($87.61) longer than it should be?

Solutions

Perhaps I feel more passionate about these issues than I ought to. If so, here is the reason: On May 11, 2001, I was on the Queen Boat, a floating discotheque on the Nile in Cairo, when Egyptian State Security Police conducted a raid and arrested 52 men for the crime of being gay. They took a friend of mine, whom I have neither seen nor heard from since.

That summer, I avoided going to the court hearings because, even though I wanted to support my friend, I did not want to be associated with the case. I did not want to get in trouble or go to jail (I was still in a male body myself at that time). I did not want to risk my freedom.

I was afraid.

After I got back to the United States and thought about everything that went down, however, I acknowledged that I had made a terrible mistake.

In my heart, I promised myself that, if I were ever granted the chance to stand up to injustice again—because, really, how often does that opportunity arise?—then I would.

And so here we are.

In the appeals I mentioned, I have proposed an interim solution of striking the two paragraphs of the CJA that give judges power over the defense purse strings. I can think of no more elegant way to handle the problem right now—just as I can think of no principled objection to such a proposition that seems so basic to fairness and balance.

That measure would buy some time while we figure out and implement a way to protect the Constitution in the longer term.

On that note, the Prado Committee proposed legislation with various features to help ensure independence, health and sustainability for the defense function.[19] And, as recently as last year, David Patton, the Executive Director of the Federal Defenders of New York (in New York City), published an extensive overview resuscitating and improving upon that proposal in the Cornell Law Review.[20]

Will we seize the moment, or wait until it's too late?

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Thank you for reading. Please share widely.

For more information about me, please check out my website. This New York *Times* profile provides an overview of the work I do.

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[1] *See* "Federal Indigent Defense 2015: The Independence Imperative," a report by the National Association of Criminal Defense Lawyers, at 16, available at https://www.nacdl.org/federalindigentdefense2015/ (last visited November 26, 2017).

[2] 18 U.S.C. Section 3006A.

[3] S. Rep. №91–790, at 18 (1970).

[4] One option would have been to remove or suspend the handful of lawyers under investigation and call for an Inspector General of the United States Courts, a much-needed position that Congress has failed to create as recently as 2009, 2011 and 2013.

[5] *Cf*. Judiciary FY 2017 Congressional Budget Summary, available at http://www.uscourts.gov/sites/default/files/fy_2017_federal_judiciary_congressional_budget_summary_0.pdf, at 8, 16 and 17 (last visited November 7, 2017), *with* S. Rept. 114–280, at 59–60.

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

[7] https://cjastudy.fd.org/sites/default/files/Previous-CJA-Studies/Prado%20Committee%20Report%20%28Jan%201993%29.pdf ("Prado Report") (last visited November 26, 2017).

[8] *Id.* at 46.

[9] *Id.*

[10] *Id.* at 47.

[11] *Id.* at 50.

[12] *Id.*

[13] *See* http://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel (last visited November 27, 2017).

[14] *See* http://www.gao.gov/assets/290/280735.html (last visited November 27, 2017).

[15] *See generally* S. Rept. 114–280.

[16] Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 Harv. L. & Pol'y Rev. 173, 191 (2010), available at http://harvardlpr.com/wp-content/uploads/2013/05/4.1_9_Gwin.pdf (last visited November 26, 2017).

[17] For the judges I've raised this argument to, it is apparently of no moment that Congress directed the authority responsible for promulgating the Guidelines to consider community sentiment. It's like talking to a wall.

[18] *See* https://www.federalregister.gov/documents/2016/07/19/2016-17040/annual-determination-of-average-cost-of-incarceration (last visited November 27, 2017).

[19] *See* Prado Report, at 101–19.

[20] *See generally* Patton, David, *The Structure of Federal Public Defense: A Call for Independence*, 102 Cornell L. Rev. 335, 375–411 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886877 (last visited November 26, 2017).