No.

IN THE SUPREME COURT OF THE UNITED STATES

TONY GORDON. PETITIONER

- against -

UNITED STATES OF AMERICA, RESPONDENT

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

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Questions Presented

As matters of first impression:

> Whether a trial court violates the Sixth Amendment right to independent counsel in denying a defense application for necessary expert services pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(e), and then relies on the resulting dearth of evidence to impose a longer prison sentence?
>
> Whether 18 U.S.C. § 3006A(d)(2)-(3) – the subparagraphs of the Criminal Justice Act that give judges power over the defense function – should be stricken as what they are: unconstitutional?

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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 Tony Gordon. 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.

Filing Extension Due to Covid-19

This petition was initially due to be filed by May 5, 2020. Due to Covid-19 and its impacts on my practice, it was necessary for me to request an extension to July 6, 2020. I received, in response, a communication from the Clerk of the Court indicating that all filing dates had been automatically extended and that additional reasonable extensions would be granted in due course. I therefore requested, by letter application dated July 13, 2020, a final extension to September 3, 2020, in light of extenuating circumstances relating to the ongoing pandemic.

The Sixth Amendment to the Constitution guarantees individuals accused of crimes the assistance of counsel – a skilled and devoted lawyer by their side advocating for their interests. The right to counsel is the foundation of an adversarial system of justice that is truly fair to all, as opposed to one that is stacked against those without money and influence. For the past two years we, [Hon. Kathleen Cardone and Hon. Edward C. Prado,] along with 10 others, have had the honor of serving on a committee appointed by Chief Justice John G. Roberts, Jr. to study and report on the program that is responsible for delivering that fundamental right to roughly 250,000 people every year in federal courts throughout the country.

That program, with an annual budget of over a billion dollars, has been overseen by judges since its inception more than half a century ago. When Congress mandated the creation of a federal system of public defense by passing the Criminal Justice Act in 1964, the judiciary was considered to be a temporary home for the fledgling program. Over the years, with support from the judiciary, that program has grown and matured tremendously, but is still under the judiciary's control and, as a result, unable to fully accomplish its specific mission.

The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval. Our recommendation echoes the conclusion reached nearly 25 years ago by the only other committee to comprehensively review the Criminal Justice Act, which our Chair Emeritus the Honorable Edward C. Prado led. The call for independence in 1993 was highly controversial and ultimately rejected. While it is not without controversy today, much has changed in the intervening decades.

Today, a preponderance of defense attorneys, federal judges, and outside experts believe the time has come to create an independent entity with the same mission as frontline defenders. The judiciary as a whole and individual federal judges were never well suited to the role Congress gave them. There were problems from the start, and those problems – the result of a cumbersome administrative structure that fails to elevate the expertise of defense attorneys, meet their needs, or preserve their independence – have only worsened over the years while the number of defendants in federal court who cannot afford to hire their own attorney has increased significantly.[1]

[1] Preface to 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act, available at https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf (last visited August 12, 2020).

Statement of the Case

I. Case History

A. Trial

Petitioner Tony Gordon is a former hand-to-hand, downtown Los Angeles, California ("DTLA") petty drug dealer and admitted Broadway Gangster Crips ("BGC") gang member – and, in turn, former government informant – who got swooped up into this racketeering case based on activity for which he had already served time in connection with various state convictions. He is now serving a 30-year sentence in federal prison for that previously punished conduct – along with limited new conduct (a gun sale), which, as he explained on the witness stand at trial, he thought was part of his informant role.

After Mr. Gordon was removed from Illinois – where he had gone to escape Los Angeles gang life and work as a productive member of society – the case went to trial in the United States District Court for the Central District of California (the "Central District"). Over the course of a week, the government adduced no evidence of Mr. Gordon's relationship to any crime in furtherance of racketeering other than, arguably, his (very attenuated) historic prior convictions. Those past offenses occurred in DTLA – well outside BGC "heartland" territory in South Central Los Angeles – and appear to have comprised individual activity solely to benefit himself. The typical

features of RICO prosecution establishing a nexus between overt acts alleged in the indictment and a common enterprise remained absent from the trial.

A conviction became inevitable, however, as the District Court blew through various Constitutional protections, evidentiary principles and case law designed to help ensure a fair trial. And then, finally, at sentencing, the court denied a defense Criminal Justice Act ("CJA")[2] application for funds to retain an experienced psychologist to evaluate Mr. Gordon and endeavor to illuminate his life decisions, criminal conduct and rehabilitative capacity for purposes of mitigation.

Appreciating this ultimate denial-of-necessary-funds issue in context requires an overall view of how imbalanced the proceedings were throughout the case – especially at trial. First, notwithstanding a defendant's right to present evidence against criminal charges, the District Court stopped Mr. Gordon from testifying on his own behalf about: (1) why he joined gang life as a child after having been taken from his mother at a young age and subsequently kidnapped; (2) his history of drug use as it related to this case and his involvement; (3) a prior conviction (that was necessary to establish a defense line of inquiry in response to the government's case-in-chief); (4) a drug recovery program (which would have been relevant to Mr. Gordon's introduction to the BGC gang); (5) his source of income (other than drugs); and (6)

[2] 18 U.S.C. § 3006A.

his offer to plead guilty to the gun sale (while still contesting the RICO allegations) based on misapprehension of his permitted conduct as an informant.

Although the court did permit Mr. Gordon to testify to his version of events as a general matter otherwise, exclusion of these aspects of Mr. Gordon's past could not have been more arbitrary. Consider, for example, *government* cooperating witness Tamicha Sawyer's testimony, which sailed right into evidence on direct:

> Q: Why did you join the gang?
>
> A: My mom was like she smoked crack, and my dad was an alcoholic, and one of my godbrothers, he was from Broadway. So one day he just came and picked me up from school, and I ditched with him, and I got put on that day.

Second, despite the limitations placed on cumulative and unduly prejudicial evidence by Fed. R. Evid. 403, the government introduced numerous incendiary photographs of gang members and graffiti that the defense repeatedly objected to as cumulative. Even the District Court admitted, "We're bordering on cumulative…" – though it did not stop the government from proceeding. Meanwhile, there was also cumulative testimony from various law enforcement officers, including, in one instance, an entirely repetitive witness. As just one example of how the court permitted this method of shock therapy on the jury, although Mr. Gordon was *not* charged with any specific act of violence, the government managed to elicit the word "murder" during law enforcement testimony over four dozen times.

Third, fairness and impartiality went out the window as the defense case proceeded. At one point, I sought a ruling on whether the government could cross-examine Mr. Gordon on his medical treatment (which the prosecutors had previously sought to exclude) and a video of him defending himself against an assault in prison during pretrial detention. I explained: "I have no intention of bringing up any of those issues, particularly the fight . . . but to the – I think it seems prudent that if the Government will be allowed to ask those, I would be able to address it first on direct, but I don't want to do that if there's no reason to."

The court declined to rule on the application. As a result, I was forced to preemptively address the subject matter in case anything I did later could be construed as having opened the door. The court, predictably, molded the contours of questioning to favor the government – and allowed the lead prosecutor to barrel into a desultory and seemingly interminable cross-examination, of which at least 23 pages of testimony focused on these ancillary lines of questioning. Contrast this latitude to the tourniquet that the court tightened around Mr. Gordon's direct testimony.

Fourth, the court permitted the government to call Mr. Gordon's handler, California Department of Corrections and Rehabilitation Special Agent Jason Marks, *as a rebuttal witness*. Mr. Gordon objected,[3] but, if the goal is a conviction, who cares?

[3] Citing *Faigin v. Kelly*, 194 F.3d 67, 85 (1st Cir. 1999) ("The principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case."), and *General Signal versus MCI Telecom Corp.,* 66 F.3d 1500, 1509-11

With the court's blessing, SA Marks fed the jury testimony concerning Mr. Gordon's termination as a confidential source in connection with the gun sale – while claiming a memory deficit on virtually everything else – thereby giving a last word to the prosecution with testimony that should have come out during the government's case-in-chief.

Fifth, the District Court charged the jury – at the government's behest – on vicarious liability under *Pinkerton v. United States*, 328 U.S. 640 (1928). In that case, of course, this Court held that criminal liability for substantive acts flows among co-conspirators. As Mr. Gordon argued below, however, *Pinkerton* was inapposite here because no substantive offense was charged against him.

Finally, there were Confrontation Clause problems that the District Court just swept under the carpet. One involved the general substance of a guilty plea by government cooperator Andre Williams' aunt – a BGC associate who had pleaded guilty *as a co-defendant in this case*; another occurred as the government was permitted to sneak in hearsay from uncalled government cooperator Aaron Shaw concerning a BCG murder. If there were any effective limits on what the government wanted to do, the record reflects none.

(9th Cir. 1995) ("[T]he record shows that [appellant] had significant time to examine [proposed rebuttal witness] on direct in its own case-in-chief, and that it squandered some of its cross time with irrelevant questioning." *Id.* at 1510.).

B. Denial of Necessary Criminal Justice Act Funding for a Mental Health Expert at Sentencing

As alarming as these deficits may seem, they pale in comparison to a more insidious problem: the failure of the United States District Court for the Central District of California, and, subsequently, the United State Court of Appeals for the Ninth Circuit, to respect the right to *independent* counsel under the Sixth Amendment that this Court has recognized.

Mr. Gordon sought to redress this deficit – which manifested throughout the case, only to be exacerbated by the foregoing trial errors – by pursuing a compendium of motions to dismiss, objections, and even an interlocutory appeal. The premise was always simple: judicial interference with the defense function comprises structural error, and, to be forthright, the smoke and mirrors in which the current federal indigent defense system operates are just that.

Our efforts were to no avail. In the end, the District Court extinguished the one aspect of the defense that would have made a difference in the case outcome – Mr. Gordon's application pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, for a professional psychological assessment to help us fathom this human being's life

choices, psyche and course of conduct – as related to sentencing mitigation. A necessary defense funding request if there ever was one.[4]

The District Court denied this application as if numerous references to psychological issues in the Presentence Report[5] – not to mention Mr. Gordon's own curtailed testimony at trial[6] – did not exist. And, not only that, the denial came *after* Mr. Gordon had advocated for systemic reform to ensure that the defense could achieve the foundation required for adequate legal representation.

Even more breathtakingly, at sentencing, the District Court seized upon this lack of explanation for Mr. Gordon's acts – yes, the very absent explanation that Mr. Gordon had sought funding to obtain an expert opinion to provide – and, as justification for imposing the 30-year sentence, that is, *an incarceratory period six times longer than the mandatory minimum previously reflected in a tragically unsuccessful plea offer from the government*, the District Court twisted the mystery of Mr. Gordon's motives into a basis for extended prison time:

> You are a complex person, Mr. Gordon. ***It's very difficult for this Court to understand precisely your thought process.*** I do note that you had a very difficult upbringing, and you moved at various times between foster homes,

[4] Please note that this request was a *second* mental health expert funding application – following an earlier submission seeking adequately compensated expert psychological services for a competency-to-stand evaluation, discussed *infra*.

[5] *See* Reasons for Granting the Writ, § V.

[6] Discussed *supra*.

> before being adopted by a parent, according to the information contained in the [Presentence Report], was abusive. You ran away so many times that it was too many times to count, but the number that is reflected is about 250 times where you ran away under foster care.
>
> During your childhood you had no relationship with your birth father, and you had limited relationship with your birth mother. And at the age of 14, you had numerous interactions with law enforcement as a juvenile. So at the very earliest ages you were raised pretty much in the street, having to fend for yourself.
>
> And because of all this, I think it has impacted certainly your view of the world, and your sense of what's right and wrong and sense of ethics is very different from most people. At the same time, it's easy for the Court to understand the predicament that you find yourself in because of your life history here. It seems to the Court that you have been incarcerated so many times that you may have achieved a comfort level in custody that many others would not achieve. ***I'm a little bit perplexed as to what motivates you.***

Sentencing Transcript at 15-16 (emphasis supplied).

At this juncture, I would urge the Court to read the entire report of the Ad Hoc Committee to Review the Criminal Justice Act,[7] which was underway at the time of Mr. Gordon's trial, released on a limited basis around the time of his sentencing, and available to the public during the pendency of his appeal. By way of background, as reflected above, the Committee were tasked by the Chief Justice with studying the quality of public defense in federal courts nationwide. Their 340-page report vindicates arguments Mr. Gordon has been making all along, including in relation to his expert funding requests:

[7] Excerpted from the Appellate Record and included in the Appendix to this petition. For online access, *see* fn. 1.

> Disparity in resources, between the panel and government attorneys or between the panel and federal defenders is most obvious when reviewing the use of experts or other service providers. Testimony showed the extensive use of experts by the government in the preparation and presentation of cases, from forensic experts employed by federal law enforcement agencies to private psychiatrists and neuropsychologists, whose rates for their services are "substantially greater than what would be approved under the CJA." As a magistrate judge described his experience as a former assistant U.S. attorney, "in my prosecutions, I always had a primary case agent, and routinely supplemented his/her expertise with a financial analyst/accountant and other experts like medical doctors, chemists, finger print analysts, etc."

Ad Hoc Committee Report at 149.

"Many witnesses [at the ad hoc committee's hearings] focused on the fundamental unfairness of the judge deciding how much to pay one side," the Report observes, "while the other side is unencumbered by this kind of judicial control. One judge, [then-Chief Judge Raner Collins,] for example, testified, 'I think a system that the judge who presides over the case, determines what experts have been hired, how much someone is paid – I think that's a system filled with problems.'" *Id.* at 89.

The prejudice that flows from this quagmire is widely recognized and cannot reasonably be disputed:

> Assistance of other experts is essential in many cases. A panel attorney offered the Committee a succinct explanation for expert use:
>
> > [First, they can] assist a lawyer in understanding the facts [of a case]. Second, an expert can help determine why a defendant acted as he or she did . . . . Third, an expert may be instrumental in providing the defense attorney information about the defendant that supports a reduction in the charges or a lesser sentence because of the history and characteristics of the defendant . . . . The bottom line is: using an investigator and expert more often than not makes a difference in the outcome of the

> case. The prosecution is more likely to negotiate a reduction in the charges or to agree to a lesser sentence or not oppose the defense request for a lesser sentence.
>
> *Experts are especially valuable at sentencing in the wake of the Supreme Court's decision in* United States v. Booker. *Now that the federal sentencing guidelines are advisory and not mandatory, "psychiatric or psychological experts may be the only way to individualize the defendant, to demonstrate" that a sentence is sufficient but not greater than necessary, as required by 18 U.S.C. 3553(a).*

Id. at 150 (footnotes omitted) (emphasis supplied).

C. Appeal

The Ad Hoc Committee's Report accords with the premise Mr. Gordon has argued, over and over, from the trial level onto appeal: "This problem is structural." *Id.* at 92. Indeed, as the Committee has observed:

> In every case in which a panel lawyer is appointed, the judge will need to step out of his or her role as judge and become the defense's paymaster. In requiring this, the CJA risks diminishing or distorting the defense attorney's single-minded focus on the client's interests.
>
> It is as if at some point in every baseball game, the umpires would take leave from their primary roles and assume for only one team the manager's duties of determining strategy, selecting players, providing equipment, and then return to umpiring the game. In every game, the players, i.e., the lawyers, know that this will happen in the next case and the next case and the next. And if they want to stay on the team – if they want to play, and be paid to play, and get the proper equipment to play – they know they better not challenge the umpire's calls.[8]

[8] That last bit was prescient stuff. As reflected in the record, the Central District terminated me from its Criminal Justice Act panel in response to this and similar litigations in various other CJA cases. Tellingly, the Central District finalized this termination shortly after I won a full acquittal at trial for another CJA client (notwithstanding withheld voucher payment and all the rest). Think about that.

Id.

No matter. The adjudicating panel of the United States Court of Appeals for the Ninth Circuit ignored this Constitutional problem – and cast aside thousands of pages comprising the record – by positing that judges "are not free to rewrite a valid statutory text." *Unpublished* Panel Opinion[9] at 2 (quotation marks and citation omitted). As to the need for a psychological assessment at sentencing, the panel decided, well, you know, the former competency evaluation prior to trial – which focused exclusively on that question and had nothing to do with mitigation at sentencing – would just have to suffice.

To this intellectual blackhole they added a Catch-22 – one that Courts of Appeal tend to trot out whenever attorneys bother appealing denials of CJA funding at all:[10] Aha! Regardless of reason and putting everything else aside, Mr. Gordon has failed to show the prejudice that he needed an expert to establish in order to show that he needed an expert in the first place! *Id.* at 3.

Seriously? LOL.

[9] Included in the Appendix hereto.

[10] Such challenges rarely, if ever, arise, presumably due to the collateral effects on lawyers' CJA practices and resulting damage to their careers, as described in fn. 7.

II. Context: CJA Administration in the Central District of California

To fathom how we got here, in what was intended to be a Constitutional Republic with checks and balances and individual protections against an overpowerful federal government, let's review the CJA and its administration in the Central District – beginning with the CJA itself.

A. The CJA

Although each federal district is responsible for adopting and implementing its own CJA plan, 18 U.S.C. § 3006A(a), national CJA-related policy is established by the Judicial Conference of the United States (the "Judicial Conference," or, simply, the "Conference").[11] "The Judicial Conference is the national policy-making body for the federal courts,"[12] and its membership comprises the Chief Justice of the United States as the presiding officer, the Chief Judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each judicial circuit.[13] The Conference handles the "business" of the federal courts: "[O]perat[ing] through a

[11] *See* http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines (last visited August 13, 2020).

[12] *See* http://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last visited August 13, 2020).

[13] *See* https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited August 13, 2020).

network of committees created to address and advise on a wide variety of subjects," the Conference deals with matters "such as information technology, personnel, probation and pretrial services, space and facilities, security, judicial salaries and benefits, budget, defender services, court administration, and rules of practice and procedure."[14]

Court-appointed representation falls under the aegis of "defender services." In this regard, the Conference "promulgates policies and guidelines for the administration of the CJA, formulates legislative recommendations to the Congress, and approves funding requests and spending plans for the defender program as a whole and, through its standing Committee on Defender Services, budgets and grants for each defender organization."[15] Meanwhile, another body, the Administrative Office of the United States Courts, is charged with overseeing funds appropriated by Congress, administering the federal defender and CJA panel attorney program nationally, and providing training related to representation under the CJA.[16]

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[14] *Id.*

[15] *See* http://www.uscourts.gov/services-forms/defender-services (last visited May 25, 2016).

[16] *Id.*

With respect to policy at the national level, the Judicial Conference has put forth Volume Seven of the Guide to Judiciary Policy,[17] which lays out general policies and procedures for the administration and operation of the CJA (the "CJA Guidelines"). The CJA Guidelines do not create an enforcement mechanism, however, the appendix does contain a "Model Criminal Justice Act Plan" and a "Model Plan for the Composition, Administration and Management of the CJA Panel."[18]

At the Circuit level, apparently the Judicial Council of the Ninth Circuit (the "Judicial Council") is responsible for establishing various regional-specific CJA policies, including, but not limited to, presumptively maximum defense expert compensation rates. Like the Judicial Conference, the Judicial Council comprises a variety of committees, including a relatively recent "CJA Oversight Committee." Although the activities of the CJA Oversight Committee and the Judicial Council as a whole with respect to the administration of the CJA Committee remain somewhat obscured, their goals apparently include cost management and facilitating judicial control over cases and court dockets. *See*, e.g., Ninth Circuit 2014 Annual Report[19] at

[17] Available at http://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines (last visited August 13, 2020).

[18] *See id.* (containing links).

[19] Available at https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2014.pdf (last visited August 13, 2020).

27 ("The [court's new electronic payment voucher] system produces many different kinds of reports, providing judges with information needed to help them manage their cases. It is also highly flexible, allowing courts to individually design their internal workflows."); *see also* Ninth Circuit 2011 Annual Report[20] at 30 (containing section entitled "eVoucher System Helps Courts Control Costs" and noting that system reports include "number of cases assigned to an attorney and how much cost has been incurred, both in terms of dollars and hours worked on each representation").

At the District level, the Central District administers the CJA through a committee (the "CACD CJA Committee"). The CACD CJA Committee are cloaked in secrecy. Committee membership is not made publicly available – nor are the decision-making structure and governance, if any.

The CACD CJA Committee episodically issues memos from the committee's Chair to the court's CJA "Panel," a group of attorneys qualified to receive appointments representing indigent individuals in federal criminal cases. It is the CACD CJA Committee, presumably, that is responsible for the court's CJA Trial Attorney Manual (the "Manual")[21] – a 67-page document consisting of various memos

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[20] Available at https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2011.pdf (last visited August 13, 2020.

[21] Available at https://www.cacd.uscourts.gov/sites/default/files/documents/CJA-Trial-Attorney-Panel-Manual.pdf (last visited August 13, 2020).

and case-related travel and payment "voucher" guidelines. In lieu of elucidating specific policy guidance on a primary practical function of the CJA – that is, compensation in CJA cases – the Manual is premised upon administration by fiat and vagary, incorporating by reference, without specificity, various case law, the Guide to Judiciary Policy, and the American Bar Association and California Rules of Professional Conduct.

So far as it appears, at no point in the foregoing process – not nationally, not regionally in the Circuit, and not at a district level in the Central District of California – is any lawyer or representative from the CJA Panel allowed to participate in voting, decision-making or promulgation of policy and procedures affecting the administration of the CJA and the defense function.

B. Issues Affecting the Administration of the CJA in the Central District of California Throughout Mr. Gordon's Case

Numerous issues have affected (and continue to affect) the administration of the CJA in the Central District of California, creating an imbalance in individual cases and the administration of justice generally. As one example, in connection with the competency-to-stand-trial question I've already mentioned, to provide some further detail, the court denied my application for the authorization of expert services that sought parity in treatment under the CJA. At the direction of the Court, I had applied for the appointment of an experienced psychiatric expert to address competency. The

requested rate of expert compensation – $450 per hour – was commensurate with the rate at which the government would have retained a similarly qualified expert; however, the court denied the request because the maximum rate under CJA policy was lower.[22]

Meanwhile, other examples of practices utilized by the Central District include a series of instances throughout 2015, the year before Mr. Gordon's trial, in which the court's CJA Office interfered with my choice of a computer/information technology expert for the defense in another CJA matter. Specifically, the court's CJA Supervising Attorney informed me that she, the Supervising Attorney, had an "issue" with a particular expert that the defense had proposed. I subsequently received a letter from the Honorable Dale S. Fischer, then Chair of the CACD CJA Committee (the "Fischer Letter") – and, ironically, a member of the Ad Hoc Committee to Review the CJA[23] – attempting to interfere with the defense litigation of that case, which was pending before another District Judge. Among other things, the Fischer Letter stated that "threatening" case-specific litigation – which, assuming the accuracy of that

[22] This denial precipitated a motion to dismiss, which was, of course, denied.

[23] I say ironically because I moved to recuse Judge Fischer from another CJA matter based on conflicts of interests that she overruled at the time – only to learn later on that substantially the same arguments I had made on that client's behalf appeared throughout the Ad Hoc Report – which her Honor co-authored as an Ad Hoc Committee Member. Notably, the word "conflicts" appears 82 times in the Report.

characterization *arguendo*, would be an entirely ethical and appropriate act for a lawyer – was "unacceptable."

In addition to its chilling effects and impact on my ability to vigorously represent all my clients – including Mr. Gordon – within the bounds of ethics and the law, the Fischer Letter is notable for four other reasons. First, it embodies the unilateralism that has infected (and continues to pervade) administration of the CJA in the Central District of California. Lacking the transparency of an impartial inquiry beforehand, the letter subordinates defense advocacy on behalf of the client to CJA Office efficiency and demands CJA policy compliance "without complaint."[24]

Second, the Fischer Letter reflects a variety of ways in which the court has endeavored to chip away generally at legal representation for indigent defendants by determining – via unreviewable fiat – that various defense services are not compensable. Of note are voucher reductions for communications with the CJA Office, even when, as here, they were necessary for follow-up on the underlying request, or initiated, or requested, by the CJA Office itself.

Third, although the court's CJA Office would appear by name to be a resource, if not an advocate, for the defense function in general, the Fischer Letter implicitly

[24] Here it bears observing that, in the relevant instance, I had been attempting to focus and reduce expert costs under the CJA.

discourages communication with CJA Office personnel, who operate on the defense function with impunity. *Id.*

Finally, even putting aside these concerns, the Fischer Letter remains most troubling for its very premise: the operative presumption that services in connection with the defense function require some sort of "justification" that the court will weigh and determine without any articulable standards or ballasts.

Hence the fundamental problem here.

With respect such judicial abuses of powers, I am not alone, and this imbalance at the expense of the defense has become known throughout the nation's legal community. Indeed, the state of affairs around the time of Mr. Gordon's trial is forever memorialized in a testimonial colloquy between the Honorable David O. Carter, who served on the CACD CJA Committee, and the Honorable Kathleen Cardone, who chaired the Ad Hoc Committee to Review the CJA, at an Ad Hoc Committee hearing in San Francisco:

> Hon. Kathleen Cardone: …We as a committee are hearing that there's a problem in your District . . . 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.[25]

Judge Fischer has since been relieved of her CJA fiefdom following two successive terms at the helm. But, alas, the system of judicial control she established was in operation here, throughout Mr. Gordon's case, and it remains in place. Sadly, the long-term effects of judicial power free of Constitutional restraint should trouble any American: at the beginning of my brief tenure on the CJA panel for the Central District – before I was terminated in retaliation for this litigation on behalf of Mr. Gordon and similar efforts for various other CJA clients, as described above – there were around 115 lawyers serving on the court's panel. There are now 62.[26]

Perhaps it bears noting – with everything going on today – that only a handful of those 62 lawyers are women or people of color. But, be that as it may, we must save the discussion for another day and proceed to why this Court is now needed

[25] *See* "Panel 5 – Views from Judges," available at https://cjastudy.fd.org/hearing-archives/san-francisco-california (last visited August 18, 2020).

[26] *See* https://court.cacd.uscourts.gov/cacd/CJA.nsf/Western+Division?OpenView (last visited August 3, 2020).

where Congress has failed to act for many decades, and systemic corrosion has ossified to a point that may already be irrevocable.

Reasons For Granting the Writ

I. The Sixth Amendment, Article III and the Criminal Justice Act Are So Exceptionally Important.

If an issue that warranted the Chief Justice convening an ad hoc committee of a dozen members – comprising, principally, federal judicial officers – to travel around our nation, study the ongoing problems and inherent conflicts in the federal indigent defense mechanism, and, ultimately, produce a 340-page report memorializing the crisis does not reflect an issue of the utmost exceptional importance, then, quite frankly, I cannot imagine what would. The right to counsel under the Sixth Amendment to our Constitution – including the ability to retain necessary defense experts and operate with some degree of independence – forms a bedrock principle on which the American system of justice depends.

Nor may we consider the responsibility that Article III carries any less fundamental. One might think that laying groundwork for an alternative form of government – as the Ninth Circuit did here by deferring to a statute at the expense of our Constitution – would be radical enough. But please recall, also, that the adjudicating panel further elected to leave this case in an alternate reality where basic logic – which would recognize the difference two different things, *i.e.*, a competency-to-stand-trial evaluation and a psychological assessment in connection with mitigation at sentencing – disintegrates. Punishing Mr. Gordon for not receiving necessary

funding that he asked for because he didn't receive the funding in order to show why he needed it is just absurd.

II. All Else Has Failed; This Court Must Exercise Its Supervisory Powers.

We should be eons beyond where we find ourselves at this juncture, as the Ad Hoc Committee recognized three years ago – noting, furthermore, that their predecessor committee arrived at the same conclusion 25 years before that – and there is no excuse for languishing in such a Constitutionally deprived place.

> While considering the 1970 amendments to the [Criminal Justice] Act, which gave districts the option of creating federal defender offices, a Senate report characterized placement in the judiciary as an "initial phase" from which the program should grow and evolve. The legislative history makes clear that Congress saw the judiciary as a temporary home for any defense program:
>
> > Clearly, the defense function must always be adversary in nature as well as high in quality. It would be just as inappropriate to place the direction of the defender system in the judicial arm of the government as it would be in the prosecutorial arm. Consequently, the committee recommends that the need for a strong independent administrative leadership be the subject of continuing congressional review until the time is right to take the next step.

Ad Hoc Committee Report at 14-15 (quoting S. Rep. No. 91–790, 91st Cong., 2d Sess. at 18 (1970)).

> The needed course of action is clear: Congress should create an autonomous entity, not subject to judicial oversight and approval. [This Ad Hoc Comitttee] recommendation echoes the conclusion reached nearly 25 years ago by the only other committee to comprehensively review the Criminal Justice Act, which our Chair Emeritus the Honorable Edward C. Prado led.

Ad Hoc Committee Report at X.

And, yet, here we are.

Congress has failed to act. The judiciary have failed to act. We as defense lawyers have failed to catalyze action. The Constitution itself has failed.

Well, I suppose there are always the Executive branch and celebrities to rumble in and save the day…

Or maybe not.

III. If Nothing Else, Consider the Constitution.

A. The Right to Counsel

The Sixth Amendment right to counsel is 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.").

These principles are echoed in the current edition of the Criminal Justice Standards for the Defense Function ("Defense Function Standards"), published by the American Bar Association (the "ABA"). As the ABA's website states:[27]

> For forty years, the ABA Criminal Justice Standards have guided policymakers and practitioners working in the criminal justice arena. When the initial volumes were issued in 1968, Chief Justice Warren Burger described the

[27] *Accessed at* http://www.americanbar.org/groups/criminal_justice/standards.html (last visited June 8, 2016).

> Standards project as 'the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.'

"[I]ntended to provide guidance for the professional conduct and performance of defense counsel,"[28] the Defense Function Standards recognize the importance of ensuring an environment for independence and zealousness in indigent defense. At heart there is an 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).

[28] Standard 4-1.1(b).

B. Due Process

Due Process rights have been articulated in the context of both the Fifth and Fourteenth Amendments to the United States Constitution. The visceral notion of "fundamental unfairness" provides a ballast that guides Due Process analysis. *See Dawson v. Delaware*, 503 U.S. 159, 179 (1992) (We have made clear, in particular, that when a state court admits evidence that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.") (internal quotation marks and citation omitted); *Wainwright v. Greenfield*, 474 U.S. 284, 291 (1986) ("…breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires…"); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) ("It is also established that the Fourteenth Amendment forbids fundamental unfairness in the use of evidence, whether true or false.") (internal quotation marks and citation omitted).

C. Structural Error

"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). 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 relies is the principle that the defense shall remain independent and free from interference by the government – or a court. *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); and *United States v. Stein*, 541 F.3d 130, 152 (2d Cir. 2007).

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).

IV. Sentencing: Racial Dimensions Highlight the Need for the Defense Psychological Expert Input That the Defense Sought.

As a preliminary matter, surely we can all agree that the drug law framework operating on this case – and others across the country – is flawed. As the United

States Sentencing Commission noted 15 years ago in the context of the predecessor statute that underlies today's federal drug sentencing scheme:

> …Congress expedited passage of the 1986 [Anti-Drug Abuse] Act. Because of the heightened concern and national sense of urgency surrounding drugs generally and crack cocaine specifically, Congress bypassed much of its usual deliberative legislative process. As a result, there were no committee hearings and no Senate or House Reports accompanying the bill that ultimately passed (although there were 17 related reports on various issues).

United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, at 5-6 (May 2001) (footnotes omitted).[29] It is all the more troubling that this haste lingers in fallout today because, as Sen. Charles Mathias observed at the time of passage,

> Very candidly, none of us has had an adequate opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate. The committees are important because, like them or not, they do provide a means by which legislation can be carefully considered, can be put through a filter, can be exposed to public view and public discussion by calling witnesses before the committee. . . . [T]his bill is a moving target. . . . You cannot quite get a hold of what is going to be in the bill at any given moment. We have had drafts of different portions of the bill circulating around the Senate corridors within the last 24 hours.

132 CONG. REC. 26,462 (daily ed. Sept. 26, 1986).

[29] Available at http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (last visited August 18, 2020).

Now, with respect to race, our society at last recognizes that the unconstitutionality of this system disproportionately affects African-Americans, such as Mr. Gordon, in particular:

> The impact of the drug war has been astounding. In less than thirty years, the U.S penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase. The United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, even surpassing those in highly repressive regimes like Russia, China, and Iran. In Germany, 93 people are in prison for every 100,000 adults and children. In the United States, the rate is roughly eight times that, or 750 per 100,000.
>
> The racial dimension of mass incarceration is its most striking feature. No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid.

Michelle Alexander, The New Jim Crow, The New Press, Kindle Edition, at p. 6 (footnotes omitted).

> More African American adults are under correctional control today – in prison or jail, on probation or parole – than were enslaved in 1850, a decade before the Civil War began. The mass incarceration of people of color is a big part of the reason that a black child born today is less likely to be raised by both parents than a black child born during slavery.

Id. at p. 180 (footnotes omitted).

> We, as a nation, seem comfortable with 90 percent of the people arrested and convicted of drug offenses in some states being African American, but if the figure were 100 percent, the veil of colorblindness would be lost. We could no longer tell ourselves stories about why 90 percent might be a reasonable figure; nor could we continue to assume that good reasons exist for extreme racial disparities in the drug war, even if we are unable to think of such reasons ourselves. In short, the inclusion of some whites in the system of control is essential to preserving the image of a colorblind criminal justice system and maintaining our self-image as fair and unbiased people.

Id. at pp. 204-205.

> Once convicted, due to the drug war's harsh sentencing laws, drug offenders in the United States spend more time under the criminal justice system's formal control – in jail or prison, on probation or parole – than drug offenders anywhere else in the world. While under formal control, virtually every aspect of one's life is regulated and monitored by the system, and any form of resistance or disobedience is subject to swift sanction. This period of control may last a lifetime, even for those convicted of extremely minor, nonviolent offenses, but the vast majority of those swept into the system are eventually released. They are transferred from their prison cells to a much larger, invisible cage.
>
> The final stage has been dubbed by some advocates as the period of invisible punishment. This term, first coined by Jeremy Travis, is meant to describe the unique set of criminal sanctions that are imposed on individuals after they step outside the prison gates, a form of punishment that operates largely outside of public view and takes effect outside the traditional sentencing framework. These sanctions are imposed by operation of law rather than decisions of a sentencing judge, yet they often have a greater impact on one's life course than the months or years one actually spends behind bars. These laws operate collectively to ensure that the vast majority of convicted offenders will never integrate into mainstream, white society. They will be discriminated against, legally, for the rest of their lives – denied employment, housing, education, and public benefits…

Id. at p. 186 (footnote omitted).

> Furthermore, with regard to Mr. Gordon's role as a parent:
>
> [t]he public discourse regarding "missing black fathers" closely parallels the debate about the lack of eligible black men for marriage. The majority of black women are unmarried today, including 70 percent of professional black women. "Where have all the black men gone?" is a common refrain heard among black women frustrated in their efforts to find life partners.
>
> The sense that black men have disappeared is rooted in reality. The U.S. Census Bureau reported in 2002 that there are nearly 3 million more black adult women than men in black communities across the United States, a gender gap of 26 percent. In many urban areas, the gap is far worse, rising to more than 37

> percent in places like New York City. The comparable disparity for whites in the United States is 8 percent.

Id. at p. 179 (footnotes omitted).

The import of these societal factors, particularly in the context of sentencing for individuals coming from Mr. Gordon's background and framework of life experiences, cannot be overstated:

> [T]he better wrongdoers fit the "depraved nigga" stereotype the more they stir the retributive urge for blame and punishment. The more wrongdoers stir the retributive urge, the easier it is for Americans to deny a causal connection between the specific criminal acts of poor black wrongdoers and general macro-level social facts like racism and joblessness. And the easier it is to deny that macro-level social forces cause criminal wrongdoing, the easier it is to deny our collective accountability for the criminal consequences of being broke, black and hopeless in post-civil rights America.
>
> …
>
> *If the urge to blame and punish "niggas" loses its footing in logic and fairness, then judges, jurors, and others will be able to see black wrongdoers not as radically "other" moral monsters to be damned, but rather as social facts to be deplored and, if necessary, incapacitated and, if possible, rehabilitated – never, as now harshly punished in the name of retribution, retaliation, and revenge.*

Jody Armour, *N*gga Theory*, LARB Books, Kindle Ed., at pp. 70-71 (emphasis supplied).

Gang cases, such as this one, are especially fraught:

> [B]ecause crackdowns on gangs that disproportionately affect black gang members also reduce gang-related crime, Black People may be *helped* more than niggas *hurt* by such racial disparities.

> …When the interests of these two subdivisions collide, the moral and legal principle that should settle the conflict, according to Good Negro Theory, is the welfare principle – the principle that laws are good if they increase the satisfaction of law-abiding Black People more than the increase the frustration of niggas. Utility matters more than compassion, mercy, forgiveness, or individualized justice. From this perspective, even if judges, jurors, voters, policymakers, and the rest of us impose draconian punishments on black wrongdoers, as long as these laws and other social practices *help* law-abiding Black People more than the *hurt* Bad Negroes, they are cost-justified and desirable, no matter how much they ignore extenuating and mitigating factors in a person's life. This utilitarian approach creates and perpetuates vast injustice…

Id. at pp. 80-81 (emphasis in original).

These complexities – and their manifestation in the extreme sentence that resulted here – are precisely why I sought an expert to assist the Court, and, perhaps even more rudimentarily, myself as counsel, in understanding the psychological factors at work. For, ultimately, it is not only Mr. Gordon who would have benefited from being able to address the Court's concerns, but, rather, all of us:

> [T]he more we view wrongdoers as wicked and depraved, the more they stir the retributive urge for vengeance and retribution, the easier it is for us to conclude that their voluntary wrongdoing breaks the causal chain between earlier factors and their crime, shifts responsibility for crime entirely to them, and absolves us as a nation of accountability for the abundantly foreseeable results of our own social forces and currents.

Id. at 87.

V. This Court's Intervention Is Necessary to Avoid Ineffective Assistance of Counsel Litigation That the Courts Below All But Ensured.

The Ninth Circuit's abdication of responsibility for adjudicating the unconstitutionality of the CJA provisions at issue here has all but ensured future ineffective assistance of counsel litigation.

Sure enough, during the appeal, even the government admitted that I had failed to obtain court authorization for a psychiatric expert in connection with mitigation at sentencing, notwithstanding evidence from the trial and Presentence Report that Mr. Gordon suffers from mental health issues. As reflected throughout this petition, the government is correct; and the outcome – a 30-year sentence where, again, plea negotiations had previously contemplated a five-year mandatory minimum – remains not only tragic, but, moreover, vastly different than what it would have been had I proven effective.

The need for a psychiatric expert could not have been clearer. Title 18 U.S.C. § 3553(a) directs a sentencing court to consider the defendant's personal history and characteristics. And, as the Presentence Report notes:

- As a child, Gordon was diagnosed with ADHD and bi-polar disorder. After having stopped taking prescribed drugs at the age of 14, Gordon self-medicated with illicit drugs.

- At the age of 15, Gordon experienced depression on a daily basis. His depression started again after he was arrested for the instant offense. After taking prescribed medication, he felt better. He stopped taking the medication

in July 2016. He is hopeful that he can obtain mental health treatment in the future.

- At the age of 11, Gordon began drinking alcohol. He continued to drink, mostly beer and cognac, on a daily basis throughout his life. He would drink, usually until he got drunk, on most days when not incarcerated. Since moving back to Illinois, his daily alcohol use slowed down to approximately a six-pack of beer and did not interfere with his job.

- Beginning at the age of 11, Gordon also began smoking marijuana on infrequent social occasions. At the age of 20, he began using the drug on a daily basis in conjunction with crack cocaine. He last smoked marijuana in 2012.

- From the age of 20, and continuing until March 2012, Gordon smoked crack cocaine on an almost daily basis when not incarcerated. He noted that he would smoke about five marijuana cigarettes with crack cocaine a day and that the drugs helped him focus. He has not used these drugs since his March 2012 arrest in Los Angeles.

- In 2008, Gordon experimented with ecstasy.

- Gordon is willing to participate in a drug treatment program.[30]

And, yet, here we are.

Now recall that – in addition to denying CJA funds necessary to flesh out the impact of this heartbreaking background and bring it to life in mitigation – the Court had also stopped Mr. Gordon from testifying at trial about these aspects of his personal experience. One could therefore argue that I failed to do my job as defense counsel – monumentally. To the extent that any ethical obligation to advocate on Mr.

[30] Presentence Report at ¶¶ 131-37.

Gordon's behalf requires me to fall on my own sword in the face of such a colossal shortcoming, I shall consider doing so a privilege.

VI. Conclusion

For the foregoing reasons, the writ should be granted. The remedy here will be simple: this Court should remand for resentencing and hold the subparagraphs of the CJA that give federal judges power over the defense function through control of the purse strings – 18 U.S.C. § 3006A(d)(2)-(3) – as what they are: unconstitutional.

Peace out.[31]

August 19, 2020

s/ Zoë Dolan
Counsel for Petitioner

[31] After trying to get these issues before the Court multiple times, I must now move on with my life. It has been an honor.