A Well-Grounded Fear: Civil Reform of Criminal Justice

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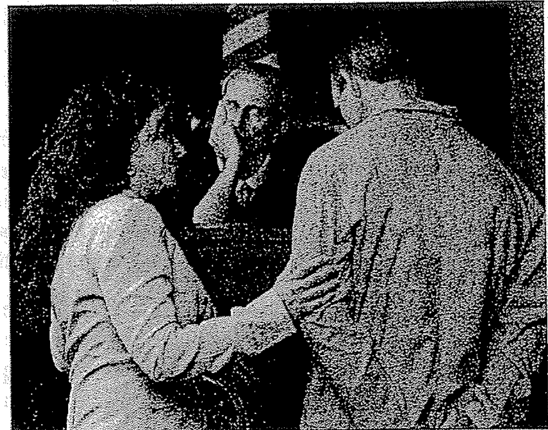

Does a person represented by an unqualified, inexperienced, untrained, undersupervised, understaffed, and overworked lawyer—a lawyer who must choose to allocate his fee between his own salary and the cost of experts and investigators for his client—have a well-grounded fear that his lawyer will not provide effective legal assistance? Although the answer should be obvious, it took a team of civil practitioners and four brave plaintiffs to ensure that in Washington State the answer would be "yes."[1]

Grant County is located in rural central Washington. Since at least the early 1990s, the county's public defense system was in shambles. Public defenders contracted with the county for $500 per case. From that fee, defenders were required to pay their own salaries, staff salaries, administrative costs, and, in all but cases deemed "extraordinary," they were required to pay for experts and investigators as well. As a result, the defenders largely went without administrative or investigative support, experts were rarely used, and few cases ever went to trial.

In the late 1990s a former public defender warned the county that the lead defender was soliciting money from clients, that caseloads were too high, and that the public defenders were not providing effective assistance of counsel. In response, the county renewed the contract of the lead defender, eliminated what little supervision had existed, cut public funding of indigent defense, and allowed the prosecuting attorney control over key aspects of the indigent defense function. The adversarial system contemplated in our criminal defense structure was effectively wiped out. Not surprisingly, a number of felony convictions in Grant County were reversed due to ineffective assistance of counsel.

Conditions became particularly dire after the Washington Supreme Court disbarred one public defender and announced that the lead public defender would also be disbarred, both on grounds that included misconduct when representing public defense clients. Despite this announcement, the county did nothing to plan for replacing the lead defender. As a result, the superior court judges were forced to conscript lawyers from Grant County and surrounding counties to serve as public defenders. When the issue of compensation arose, they were informed that there was no system in place to

[1]The plaintiffs in this case were Jeffery Best, Daniel Campos, and Gary Hutt, all indigent felony defendants with pending criminal cases as of the filing of the lawsuit, and Greg Hansen, a citizen taxpayer representative. A team of attorneys and staff from the Seattle law firms of Garvey Schubert Barer and Perkins Coie LLP and from the American Civil Liberties Union of Washington Foundation and Columbia Legal Services represented the plaintiffs.

compensate them.[2] The county's public defense system was in chaos.

It was in this context that in April 2004 we filed *Best v. Grant County*, a class action on behalf of current and future indigent defendants charged with felonies, in an effort to reform the county's public defense system.[3] What did we find, how did we do it, and what settlement did we craft to create a public defense system that would provide indigent defendants the representation to which they were constitutionally entitled?

What We Found

In our investigation of the Grant County public defender system, perhaps the most obvious problem we uncovered related to excessive caseloads. For example, the lead public defender, who was later disbarred, carried numerous private cases as well as approximately 40 percent of all public defense cases between 1995 and 2000 and later carried 554 felonies in a single year. Even the county's own expert witness had to agree that no attorney could deliver effective legal services with such an unreasonable caseload. Like the lead defender, other defenders maintained private caseloads along with excessive public defense caseloads.

Even the best attorneys cannot give proper attention to each case when juggling excessive caseloads. But Grant County's defenders were largely unqualified to handle felony cases. For example, one public defender was assigned to Washington's most serious felonies shortly after passing the bar. Another was assigned a full caseload including the most serious felonies even though the lead public defender agreed that he was not qualified to handle the cases. Many of the later-conscripted attorneys had limited criminal experience. And even after the conscription period the county contracted with attorneys who were unqualified for felony representation.

When attorneys who lack the requisite experience and familiarity with criminal law are allowed to handle felony cases with little or no supervision, they often make critical errors. In Grant County the effects of the defenders' excessive caseloads and inexperience were evident: defenders failed to file motions and pursue legal defenses, attend hearings, properly investigate cases, or even regularly communicate with clients.

The defenders filed no motions in 77 percent of cases in 2004 and 90 percent in the first quarter of 2005.[4] Where the prosecutor had alerted defenders that a defendant's statement was to be used at trial, the defenders did not file motions to suppress in 94 percent of 2004 cases and 99 percent of cases filed in the first quarter of 2005.

The defenders regularly failed to appear at critical hearings despite such a failure being per se inadequate representation.[5] The defenders also failed to investigate their cases properly despite their duty to do so.[6] They rarely used investigators without seeking funds from the court, and they did not request funds in 96 percent of cases in 2004 and 97 percent of cases filed in the first quarter of 2005. The same problem occurred with respect to experts. The defenders failed to request funds to hire experts in 98 percent of 2004 cases and over 99 percent of cases in the first quarter of 2005.

There was a dearth of communication between the defenders and their clients. Few had phones where a client could

[2]The county fought just compensation but ultimately lost. See *State v. Perala*, 132 Wash. App. 98, 130 P.3d 852 (2006).

[3]*Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. April 4, 2004) (Clearinghouse No. 56,120), available at www.povertylaw.org/poverty-law-library/case/56100/56120

[4]This analysis was limited to superior court felony filings where arrests were made. Pleadings that were not included as "motions" for this analysis were notices of appearance, appointments, withdrawals or substitutions, discovery submissions, speedy trial waivers, furlough requests, prose motions, motions for funding for experts or investigators, appeals from district court, fugitive complaints. Motions to suppress confessions were analyzed separately and therefore excluded.

[5]See, e.g., *United States v. Cronic*, 466 U.S. 648, 659, n.25 (1984).

[6]See *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

leave a message or assistants to answer calls. Many refused to accept collect calls from clients. The defenders had only limited access to translators, and some used other inmates to translate privileged discussions with their clients. Jail records showed long periods when defenders rarely visited the jail.

The gross underfunding of public defense caused and exacerbated each of these problems. Funding on public defense lagged well behind both the huge increases in caseloads and even larger increases in funding for prosecution. In 1991 the county spent 46 cents on felony defense for every dollar that the county spent on prosecution. By 2003 the county's relative spending on defense had plummeted to just 30 cents for every dollar spent on prosecution. As the civil deputy prosecuting attorney put it bluntly, "[w]hen it comes down to it, a lot of people talk about rights and so forth, but the bottom line is, it's all about money."[7]

The prosecution was not just better funded; it also had control over public defense. The prosecutor participated in contract negotiations with public defenders and drafted public defense contracts, had discretion to approve certain payments for public defense, drafted resolutions governing public defense, and advised the county on virtually all aspects of the public defense system. Public defenders were beholden to the prosecutor—leading to a complete breakdown of the adversarial system. For example, one defender failed to object when a prosecutor compared his client to Adolph Hitler in his closing argument.[8]

The myriad problems with public defense in Grant County are illustrated in the case of Ramon Murillo. On April 27, 2004, Murillo was arrested and charged with the rape of his 4-year-old stepdaughter. Notwithstanding that the detective had been warned that Murillo spoke only limited English, the detective gave him *Miranda* warnings and interrogated him in English. Murillo repeatedly denied any sexual contact with the alleged victim in the tape recorded portion of the interrogation, but the detective wrote a report in which he insisted that after he turned off the tape recorder Murillo made a series of incriminating statements. Five weeks later, the detective drafted another version of the report that added even more incriminating details to this alleged off-the-record confession. Murillo's defender would later testify that he had no recollection of investigating whether Murillo knowingly and voluntarily waived his *Miranda* rights or even of discussing the alleged confession with Murillo. According to Murillo, his defender never asked; had Murillo been asked, he would have informed his defender that he did not make the unrecorded statements. The defender did nothing to explore the veracity of the detective's changing reports of the allegedly unrecorded statements because the defender thought it was immaterial and the defender "really didn't care."[9] Because the defender and the detective were close personal friends, the defender accepted the detective's version of the interrogation without question. Compelling evidence that Murillo did not offer any confession (much less a voluntary one) went unrecognized.

The two remaining pieces of evidence against Murillo were an inconclusive medical report and the child's statements. The child's initial statements were allegedly made to a woman who has a record of criminal fraud, whose own children were taken from her by Child Protective Services, and whose boyfriend might have been the actual perpetrator. The defender did not bother to interview the woman or her boyfriend. Further, the 4-year-old's account was vague and lacking in detail. During the detective's interview, the child gave no indication

[7]See Plaintiffs' Motion for Partial Summary Judgment Regarding the County's Public Defense System After April 4, 2004, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. Aug. 29, 2005), available at www.povertylaw.org/poverty-law-library/case/56100/56120/56120C.pdf.

[8]*State v. Roberts*, 96 Wash. App. 1056 (1999). This and other cases are described in depth by Seattle journalist Ken Armstrong in an investigative series available at http://seattletimes.nwsource.com/news/local/unequaldefense/.

[9]See Plaintiffs' Motion for Partial Summary Judgment Regarding the County's Public Defense System After April 4, 2004, *supra* note 7, at 33.