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SEP 6 1990

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Dear Board Member:

David Carroll of the 6<sup>th</sup> Amendment Project has asked that I respond with any changes to his 175 page draft report within a week. I will not dignify this distorted document with a reply to him. I will respond directly to you.

I enclose both my response and a copy of the Superior Court's response to the report. Please note, on page 4, the assistant Presiding Judge's "personal disappointment in the poor quality and lack of thoroughness and accuracy of this 'report'." He goes on, "...the findings of the Boston group as to this Court, are so devoid of fact and so absent of even a fundamental grasp of the courtroom, as to cause concern as to the legitimacy of any of their findings/recommendations... To have some outside entity perform a questionable evaluation (not even understanding the difference between a continuance and alleged veiled threat to delay a case, for example), and, then, have the audacity to offer "findings" and "recommendations" is personally and professionally offensive to all of us. They should be ashamed."

Thank you in advance for your careful review of both these materials.

Respectfully,



Larry Biggam

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Board of Supervisors  
Santa Cruz County  
701 Ocean Street, 5<sup>th</sup> Floor  
Santa Cruz, CA 95060

September 8, 2020

Dear Board Members:

After decades of respectful relations with your Board of Supervisors and County Administrative Office, I am saddened that I must now respond to the 6<sup>th</sup> Amendment Project report on defense services in our County. This group was selected by the same CAO who recently encouraged two critical grand jury reports on our office. He again got the report he wanted and the report he paid for (\$140,000). And like those earlier grand jury reports, this one too is biased, misleading, and often inaccurate. Rather than take the collaborative high road to a well resourced public Public Defender's Office, this report goes low.

It essentially claims that our office (and for that matter, our County) provides deficient and compromised defense services. Repeatedly using the language of United States v. Cronic<sup>1</sup> 466 US 648 (1984), the report suggests that we are not subjecting the prosecution's cases to "the crucible of meaningful adversarial testing" and are thus violating clients' constructive 6<sup>th</sup> Amendment right to counsel.

I can only conclude that the CAO and the 6<sup>th</sup> Amendment Project feel they must smear our office and our indigent defense contractual delivery model in order to take control and justify the nearly 100 new public pensions recommended in this report. And unlike my current contract status, a new Chief Public Defender would then report directly to the CAO.

<sup>1</sup> Cronic involved a criminal case wherein the defendant's lawyer pulled out shortly before jury trial. The Judge then appointed a young real estate attorney with no criminal or trial experience to represent the defendant. Even though the Government lawyers had been preparing the case for over four years, the Judge only gave the newly appointed lawyer 25 days to prepare.

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The authors of this report came in with a clear attitude against all contract defense delivery systems. They had no background in California law or local court practice. They were here for two visits. They cherry-picked their interview quotes from non-attributed sources. Several lawyers in my office told me that whenever they said something positive about our operation, their pens went silent. They gave me no notice or opportunity to respond to all the anonymous hearsay before they wrote their draft report. After negative scanning some court sessions in the Courthouse, they left town with their prejudgments seemingly confirmed.

As unfair and untrue as much of this report is, I do support the ultimate recommendation of creating a public model with pay and pension parity for staff. But let's be clear here: no indigent defense delivery system is perfect. A public model does not guarantee lower case loads, better staffing, or even higher salaries for all. Like a contract model, the public office also takes unlimited criminal case appointments each year. Some of California's best and worst public defender offices are, in my opinion, public models. This report even mentions the ACLU lawsuit against Fresno County for its failure to provide competent defense services. Fresno is a public office.

The quality of defense services depends less on the delivery system and more on its leadership, staff, resources, and political support. Yet that truism runs counter to the 6<sup>th</sup> Amendment Project's dogmatic belief that all indigent defense contracts are wrong.

The State Bar of California "Guidelines on Indigent Defense Service Delivery Systems" (2006) recognizes "there exists the potential for certain distinct advantages of each model of indigent defense delivery systems. Suffice it to state that there is likely to be a crucial potential role for all types of indigent defense delivery systems and these guidelines are intended to apply to each and all of them (emphasis added, p.3)."

Over 20 California counties fulfill their Gideon v. Wainwright 372 U.S. 335 (1963) responsibilities by contracting with private providers or non-profits. Although specific contract language can vary, all of these counties have chosen to contract away any management say, input, or control to the private providers. But of course the providers, not the counties, then assume the responsibility and liability for performing the services.

In the 6<sup>th</sup> Amendment Project's eyes, we are "not accountable". But that is another way of saying that we are independent. And yes, we - not the CAO - control the manner and means of

delivering the contracted services. I should add that 12 not-so-shy Judges keep us accountable on a daily basis. And if we did not fulfill our contractual and ethical responsibilities, the County would not extend the contract.

The report loosely and misleadingly conflates our contract with the types of contracts prohibited in some other jurisdictions (p,121). In those contracts a decision to hire an investigator or an expert would clearly reduce the law firm's financial bottom line. That would de-incentivize zealous advocacy. Those contracts should be prohibited.

But that is not happening here in Santa Cruz. Seven investigators are required and included in our contract (we provide eight plus six to eight UCSC investigative interns). Requests for experts must be approved by the CDCP administrator and comes out of a separate budget bucket. We have an escape clause for those cases which require extraordinary time and expense. This escape clause includes, but is not limited to, special circumstance cases. In our contract, thoroughly investigating a case and using experts does not affect our bottom line.

Citing some no-name attorney from a no-name law firm, the report claims the fear of losing the contract chills the attorney's zealous advocacy (p.72,119). That's insulting me, my partners, and the courageous, hardworking attorneys in our office who speak truth to power on a daily basis. Of course, the authors cite no case or instance - because they cannot - when a BCM lawyer pulled a punch in a court proceeding to not jeopardize a contract renewal. Anyone who works or has worked in our office knows that we encourage law and motion practice and jury trials. I urge you to ask the judges who will confirm that.

The report continues the fearful theme stating that the law partners compromise our clients' rights by not negotiating forcefully enough for fear of "jeopardizing their own operations" (p.119). Put another way, we let the County Administrative staff take advantage of us during contract negotiations. (They obviously have not witnessed any of our past contract discussions with CAO staff). Yet just a year ago, the Santa Cruz County Grand Jury on page 1 called the contractor a "highly skilled professional negotiator" who cost the county "millions" in unnecessary defense costs (Santa Cruz Co, Grand Jury June 27, 2019).

Defending poor people accused of crime has never been popular. The job everywhere is steeped in controversy. So I probably should not expect consistent criticisms. But in Santa Cruz neither attack is true.

Through the years our negotiations with the County were spirited for sure, but data driven and respectful. We religiously provide quarterly statistics to the CAO. We discuss trends in caseload and new laws affecting our workload. Both sides can estimate future staffing and overhead needs. But given our many years developing relationships and trust with the County, when something unexpected comes up, on either side, we have returned to the negotiation table mid-contract to work it out. This has occurred, for example, in the past when new court calendar changes triggered the need for more lawyers. It has also occurred when the County was in an unexpected financial bind, such as the 2008 recession, and the CAO asked us for financial concessions which we gave.

The report seems to resent the fact that we are independent contractors controlling the manner and means of service. Rather than speculate about hypothetical or potential problems with our contracted delivery system, let's talk about real results.

In our 45 years of high volume indigent criminal practice, we have not suffered a single wrongful conviction law suit. Yet expensive exoneration law suits are increasingly common in our Nation, and other California counties, including those involving public defender representation. Separating the innocent from the guilty is the primal role of any justice system. This fact alone is evidence that we do subject the prosecution's cases to "the crucible of meaningful adversarial testing".

Nor has our firm had a criminal case reversed for ineffective assistance of counsel. We have also rebuffed prosecution attempts to impose the death penalty. Santa Cruz has not had a death verdict in over 40 years. That does not happen with compromised and conflicted defense lawyers. Our local systems of checks and balances has worked well here

These facts were communicated to the 6<sup>th</sup> Amendment Project authors when they interviewed me. But they were not contained in their report for it doesn't further their negative narrative.

If they truly cared about the quality of defense services, they could have interviewed lawyers at the 6<sup>th</sup> District Appellate Program who review criminal transcripts from Santa Clara, Monterey, San Benito, and Santa Cruz Counties. Or they could have interviewed the Honorable Mary Greenwood, the Presiding Judge of the 6<sup>th</sup> District Court of Appeals who recently praised our office at a Santa Cruz County Bar function.

Even the most recent Grand Jury Report admitted:

“For years the County has not seen a need to do anything other than fund the public defense contractors because, by all accounts, they are very good at what they do. No concerns about the quality of public defense contractor services have come to this Grand Jury’s attention. No concerns about the quality of public defense contractor services are reflected in the reports of five previous Grand Juries. At least in Santa Cruz County, giving public defense counsel total freedom to do their jobs has worked.”  
(p.47)

I want now to address additional information in the report which is incorrect and/or reveals bias. The report is incorrect when it says “In most cases any indigent defendant whose case is not resolved by a guilty plea at arraignment on the complaint will be represented by a different attorney and perhaps a series of different attorneys, at the next proceeding in the case” (p.93). Our juvenile, misdemeanor, and serious felony caseloads are all vertical; this means a client has a single attorney throughout the Court process.

It is also wrong when it repeatedly says that a BCM attorney “begins representing the (conflicted) defendant through the remainder of the arraignment on the case proceeding whenever the appointed institutional provider does not have an attorney in the courtroom” (p.87,93). We do not represent clients with whom we have a conflict. That would be unethical.

The report misdescribes BCM’s technology (p.59) with repeated errors. Yes we have Wi-Fi. Yes we provide computers to all attorneys, support staff, investigative interns, and law clerks. Yes, we provide external hard drives whenever asked for. Yes, we install on computers the necessary software that’s required and compatible with discovery needs such as .pdf files, audio, video, etc. Should a file arrive that is not compatible, we will research and provide the appropriate program to the computers. And yes we have a case management system. As with all else in this report, I have no idea where their misinformation came from.

The report mentions the “high rate of turnover among associate attorneys” (p.113). Public Defenders everywhere face busy, stressful caseloads. It’s unfortunately an occupational hazard in our profession. The job is not for everyone. We, as well as the DA’s Office and the Courts, have also lost staff to Santa Clara County, one of the highest paying counties in the Nation.

But here is the data: the average stay for an associate lawyer in our firm is nearly 9 years.

Recently elected Judge Nancy de la Pena stayed 32 years; Judge Stephen Siegel stayed 15; and Judge John Gallagher stayed 9 (7 as an attorney and 2 as a law clerk).

With respect to salaries, we have been able to recruit 13 of our current lawyers from other public agencies with its pay, benefits, and pension package, including several from nearby Monterey County. People don't come here from other public offices and stay nine years because we pay poorly. As a private independent law firm, it's appropriate that we don't divulge personal salaries. I should add that the County does not require that information from the large civil law firms County Counsel hires to defend the County in law suits. Individual staff members are free to share their compensation with anyone they choose. I will not.

Other than to suggest, without data, that the law partners of all three firms are exploiting staff, the 6<sup>th</sup> Amendment Project had no logical need for current salaries. They were supposedly hired to assist the County in developing a new public Public Defender Office. Once caseloads are clear and staffing needs are established, the salaries would then mirror those of the District Attorney which are public and readily accessible. From that, the County can project future public defender labor costs.

Our contract calls for 21 lawyers. We now provide 27. If we really just wanted to maximize profits and exploit people we could have met our contractual obligations with 6 fewer lawyers and 1 fewer investigator.

I now want to address the report's criticism of the CDCP program. This program was modeled after the successful Independent Defense Counsel's Office (IDO) program in Santa Clara County. It removed appointment of 4<sup>th</sup> party conflict lawyers from the judges and opened up opportunities for more lawyers to receive appointments from the program administrator, Ms. Tamyra Rice.

With its typical hypothetical and harmful spin, the report criticizes Ms. Rice because she is conflicted. She is not. The report leaves out the fact that an attorney, if Ms. Rice denies one's request for a particular expert, can then get a rehearing and make a record in front of a judge for that expert fee authorization. This judicial "backstop" negates any alleged conflict. But our office has never needed to use this procedure because Ms. Rice has granted relevant requests supported by thorough attorney affidavits. She is accessible and responsible for the success of the CDCP program.

Here are some other topics which reveal the 6<sup>th</sup> Amendment Project's less than fair and balanced reporting on our office.

After the Watsonville Courthouse was built, we lobbied the County and your then CAO agreed to lease a nearby office for our services. It is now a vibrant office housing our juvenile lawyers, investigators, administrative staff, interns, and paralegals. We run Clean Slate clinics out of the office. It provides 6<sup>th</sup> Amendment access to counsel for South County residents. Rather than comment on its value or importance to the community, the report gives this office and its programming a ho-hum one sentence "...the BCM law firm is also required to maintain staff at the County-provided Watsonville office location" (p.58). It's critical that the County maintain this office going forward.

Another example of biased reporting concerns our firm's clothing program for jury clients. Jack Alcantara, our Chief Investigator, has collected a large selection of appropriate clothes for our clients to wear in court. Clothes matter. They humanize our indigent clients; they support self-esteem; and they promote the presumption of innocence. Here's how they described Jack's initiative

"The BCM firm's garage is filled with clothes purchased over the years for appointed clients to wear to court. (The BCM firm does not have to pay for these clothing items, as the CDCP approves up to \$200 for the purchase of court clothing for each indigent client.)"

The truth is we have saved the County money by not charging them \$200 for every jury client. Only when we need an odd size do we purchase clothes. We launder/dryclean and reuse our clothes. Many of the clothes were donated by the public, including lawyers. This report can't even give us kudos for the clothes program.

And then there's the "hallway speech". Because the collateral consequences for even minor misdemeanors can affect job opportunities, housing, licensing, and immigration, our misdemeanor lawyers encourage people in the court hallway, before the courtrooms open, to ask for a Public Defender if they cannot afford a lawyer. We do this in English and Spanish. If anyone should appreciate these efforts at outreach, it should be the "6<sup>th</sup> Amendment Project". Here are the entirety of their remarks



**“The “Hallway Speech.”** Each morning at 8:15 a.m., prior to courtroom doors being unlocked at 8:30 a.m., one of the BCM law firm attorneys assigned to the misdemeanor departments of court appears in the hallway outside of the courtrooms and makes a loud announcement to everyone standing in the hall. The BCM attorney explains that he is the attorney of the day and urges that all defendants should consult with an attorney before disposing of their cases. The BCM attorney offers the financial affidavit form that defendants use to apply for appointed counsel. Of course, only out-of-custody defendants are standing in the court hallways, so in-custody defendants do not hear this hallway speech, and even out-of-custody defendants may arrive after the hallway speech has been given or may not comprehend English.”  
(p.80)

Again, the speech was in English and Spanish. But the report contains no positive comment or observation on our efforts to expand access to counsel. Their silence belies their claims of objectivity.

In my view, the authors twist facts, omit evidence, and shade the truth because we are a private defense model which actually works. We demonstrate our daily commitment to the 6<sup>th</sup> Amendment in actions, not just words.

Although this Boston-based organization was hired to assist the County in creating a new generation of indigent defense services, 90% of the report focused on criticizing us and not building a future office. I do not see how this report helps anyone get closer to our shared goal of a well run public office in the future.

The report talks of the justice system as a three-legged stool, “criminal and juvenile justice is often referred to metaphorically as a three-legged stool, relying on judges, prosecutors, and defense attorneys in equal measure. Each leg of the stool has different responsibilities, but the structures, policy decisions, and procedure of each affect the others...” (p.20)

In the best of times, with peoples’ lives and liberty at stake, it’s dangerous to remove and then try to replace that leg on this criminal justice stool. It’s also dangerous to make important policy decisions based on anonymous hearsay and name-calling. One needs to proceed slowly and mindfully. If that stool falls, people will get hurt. And the system itself will experience delays, dysfunction, and consequent jail overcrowding.

But these are not the best of times. COVID has created a crisis, the likes of which I have never witnessed in our courts. The system needs deadlines to do deals (i.e., firm trial dates). With no trials because jurors are understandably reluctant to come in, cases are constantly continued. The backlog is building. We are running from an avalanche of cases, some very serious, with few exit ramps. And yes, caseloads are building for defense lawyers, prosecutors, and judges.

These are now the worst of times. As you well know, the COVID crisis has caused serious financial strain on the County which our recent fires have only exacerbated. Replacing one leg of that stool now, without careful consultation with local stakeholders and all affected parties could be disastrous. This report has made the transition more challenging, not less.

It needlessly created an adversarial situation when we all wanted to reach the same goal: a (public) Public Defender's Office for Santa Cruz County. We should have worked together in cooperation, collaboration, and trust, built on our 45 years of dedicated service to the clients, courts, and County. But here we are.

After all these years, it's not easy or pleasant writing this letter. In closing, in spite of everything I have written or felt, Jerry, Jon, and I will continue working with the Judges and CAO staff to assist in a transition. Our clients, staff, and the Courts deserve that.

Very truly yours,

  
Lawrence Biggam