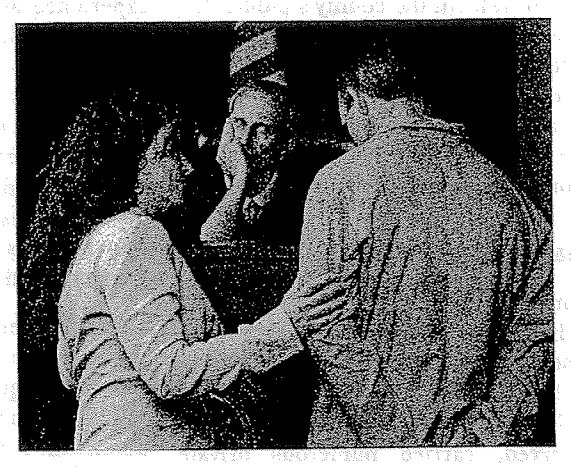
A Well-Grounded Fear:
Civil Reform of Criminal Justice

By Beth Colgan



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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.

of suffering any psychological harm, repeatedly asked for Murillo, and was unable to understand why he was not with his family. Yet the defender did not interview the child. He also informed the court that he lacked an understanding of the hearing to determine the ability of the alleged victim to testify. In preparation for that hearing, he spoke to no experts and planned to call no witnesses.

What the defender did do was allow Murillo to languish in jail. Jail visitation records show that the defender visited Murillo for the first time five weeks after his arrest and that he visited only one other time just before sentencing. In the interim the prosecution proposed a plea bargain. The defender testified that, in presenting the offer to Murillo, he overemphasized the defense weaknesses in the case and the potential damage of going to trial. Murillo entered a guilty plea on July 30, 2004. As part of the plea, the prosecution agreed to recommend sentencing at the low end, but the defender failed to obtain that agreement in writing. At sentencing, the prosecution recommended a midrange sentence, and Murillo was sentenced to a determinate 59-months' confinement. Only later did the Department of Corrections note that Murillo was required to serve an indeterminate sentence, at which point Murillo was resentenced to serve a minimum of 59-months and a maximum of life. The defender failed to tell Murillo that he could move to set aside the plea because he was improperly advised of its consequences.[10] He never even explained the new sentence to his client; Murillo first learned that he could serve life when plaintiff's counsel explained it to him on the day of his deposition.

How We Litigated *Best v. Grant County*

In April 2004 we filed *Best v. Grant County* in the Kittitas County Superior Court. The suit was premised on the claim that the Grant County public defense system deprived the plaintiffs of their constitutional right to effective assistance of counsel. The plaintiffs argued that Grant County officials were aware of the deficiencies in the county's public defense system and failed to act on the problems. Plaintiffs claimed that Grant County failed to establish and maintain an effective public defense system since it lacked, among others, professional qualification standards, caseload limits, oversight, adequate funding, and effective representation.

In pursuing this litigation we focused on accepted standards for public defense such as those endorsed by the Washington State Bar Association.[11] These standards are related to maximum felony caseloads, minimum qualifications for felony representation, administrative and investigative support, use of experts, client communication, defender compensation, handling of conflicts, and training and supervision of defenders. We took each of these standards and looked for objective facts that could not be disputed and that showed that the county was out of compliance. Data arose from a few primary sources: public defense contracts, a review of all felony case files from 2004 and the first quarter of 2005, jail visitation logs, county budgets, and deposition testimony of the key players in Grant County's criminal system.[12] The documents showed the key facts; the testimony revealed the details of just how things had gone so terribly wrong.

For example, the Washington standards set a limit of 150 felony cases per year. The county commissioners, however, expected each defender to handle at least 250 cases, if not more, per year. The defenders did not disappoint. The Washington Standards set forth minimum experience requirements for counsel representing indigent defendants and required that

[10]Murillo's conviction was overturned after the settlement of this case. See *In re Murillo*, 134 Wash. App. 521, 142 P.3d 615 (2006).

[11]See Washington Defender Association, Standards for Public Defense Services, www.defensenet.org/resources/WDAstand.htm (last visited May 25, 2007).

[12]Plaintiffs deposed every sitting judge, every active public defender, two former public defenders who had been disbarred, the county commissioners, and the lead and chief deputy prosecutors.

defenders undertake reasonable investigation of cases, use of experts, a vigorous defense, and meaningful communication between defender and client. Those qualifications and practice requirements were routinely ignored. The structure of the public defense contracts and financing of public defense were also in violation since the Washington standards required separate funding of investigators, experts, and conflicts counsel and parity in salaries with the prosecution. The comparison between Grant County's system and the accepted standards was less than favorable.

In the face of such evidence, the county made primarily three arguments in opposition. First, presenting a dual argument against class certification, the county stated that a plaintiff whose claim was resolved after the filing of the suit could not represent a class of indigent defendants because the criminal proceedings against him had been resolved and that resolution would moot his claims and remove him from the class. Similarly a plaintiff with ongoing criminal proceedings against him could not represent the class because, until his claim was resolved, his case would not be ripe—the harm would be merely threatened rather than inflicted. In other words, if criminal proceedings are pending, the claim is too early; if they are resolved, the claim is too late. The court rejected this and other arguments against certification and recognized that plaintiffs sought relief for acts that were "capable of repetition, yet avoiding review."[13]

Second, the county tried to convince the court that it must ignore everything that happened prior to the lawsuit. Understandably the county was eager to exclude from consideration the many years it had undermined public defense, the disbarments of its defenders, the conscription period, and the like. However, the court followed existing precedent and held that past occurrences were relevant to injunctive relief where such occurrences might show an ongoing or future likelihood of harm.[14]

Third, the county argued that plaintiffs should be held to the same legal standard as a person seeking to overturn a conviction as set out in *Strickland v. Washington*.[15] *Strickland* requires a showing that counsel was ineffective and that the defendant was prejudiced by that ineffectiveness. Yet again the court followed existing precedent and held that, because we sought only prospective relief, we needed only to meet the standard for injunctive relief: that plaintiffs have a well-grounded fear of immediate invasion of a clear legal or equitable right.

There is an old adage that when you have the law, argue the law; when you have the facts, argue the facts. We had both. Therefore, having gathered indisputable objective facts and convincing testimony, we sought partial summary judgment. In our briefing we set forth those facts as well as a few harrowing examples of cases such as Murillo's that we had identified. We utilized those cases to show how systemic flaws came home to roost in individual cases. We argued that the long history of undermining public defense had so eviscerated the adversary system that indigent criminal defendants in Grant County had a well-grounded fear that they would receive ineffective assistance of counsel. The court agreed. Noting that it viewed the facts as being "virtually uncontested," the court wrote: "The Grant County public defender system prior to [the filing of the lawsuit] suffered from systemic deficiencies and continues to suffer from problems after this action was filed...." The court directed that the trial would focus exclusively on the creation of a public defense system which would "eliminate the fear [of ineffective assistance] and prevent substantial harm from manifesting in actual ineffective assistance of counsel to the class defendants."[16]

[13]See, e.g., *Gerstein v. Pugh*, 420 U.S.103, 111, n.11 (1975).

[14]See, e.g., *United States v. Laerdal Manufacturing Corporation*, 73 F.3d 852, 857 (9th Cir. 1995).

[15]*Strickland*, 466 U.S. at 668.

[16]See Memorandum Decision, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. Oct. 14, 2005), available at www.povertylaw.org/poverty-law-library/case/56100/56120/56120F.pdf.

The Result

Shortly after the court issued its opinion and on the eve of trial, the parties announced a settlement in which Grant County agreed to maintain and operate a public defense system of effective counsel assistance and to comply with the Washington standards as well as standards established by the American Bar Association and the National Legal Aid and Defender Association. The settlement requires that the county do the following, among others:

- Limit public defender caseloads to 150 felony cases or less, with some felony cases accorded extra weight to reflect their difficulty.
- Assign cases only to qualified attorneys.
- Pay compensation and salaries on parity with prosecuting attorneys in a manner that rewards tenure and experience.
- Pay additional fees for trial time so as to remove the financial disincentives to trial.
- Provide funding for experts.
- Require defenders to retain support staff.
- Hire a supervising attorney, investigators, and interpreters.
- Require that defenders attend initial court appearances.
- Require defenders to satisfy National Legal Aid and Defender Association training standards.
- Require an adequate conflicts check system.
- Identify qualified and adequately paid conflicts counsel.
- Completely remove the prosecuting attorney from all matters pertaining to the operation of the county's public defense system.

To ensure that the county meets its obligations, the settlement put in place an independent monitor with wide-ranging powers to investigate, oversee, and direct the county's compliance with the settlement agreement over a five- to six-year period. The settlement also required the county to pay $1.1 million in attorney fees and court costs to the plaintiffs, with $100,000 of the fee award to be forgiven for each of the six years that the county fully complies with the settlement.

While this settlement will continue to be a work-in-progress over the next several years, its possible effect may be best summarized by a statement made to me by class representative Gary Hutt: "Before, poor people arrested in Grant County didn't have a chance. Now we've got a chance."