

TESTIMONY OF
THE JUDICIARY OF THE VIRGIN ISLANDS

ON

BILL NO. 35-0336, AN ACT AMENDING TITLE 5 VIRGIN ISLANDS CODE, SUBTITLE
3, PART I BY ESTABLISHING THE OFFICE OF CONFLICT COUNSEL, GRANTING
PERSONAL IMMUNITY TO INDIVIDUALS PROVIDING LEGAL REPRESENTATION
OR SERVICES TO INDIGENT DEFENDANTS, AND MAKING AN APPROPRIATION TO
ESTABLISH THE OFFICE OF CONFLICT COUNSEL
BEFORE
THE THIRTY-FIFTH LEGISLATURE
COMMITTEE ON RULES AND THE JUDICIARY

ON

DECEMBER 12, 2024

Good Morning, Honorable Chair Capehart; Honorable Members of the Committee on Rules and the Judiciary; Honorable Members of the 35th Legislature present, Legislative staff, ladies and gentlemen. I am Paul Gimenez, General Counsel appearing on behalf of the Judiciary of the Virgin Islands.

A significant challenge facing our justice system remains the Government's obligation to provide effective assistance of counsel to indigent defendants as required by the 1963 decision of the Supreme Court of the United States, in *Gideon v. Wainright*, and guaranteed by the Sixth Amendment to the United States Constitution. While the Legislature created the Office of the Territorial Public Defender to represent indigent criminal defendants in the courts of the Virgin Islands, that office cannot do so in cases of an ethical conflict—which most commonly occurs when two or more defendants are charged together, or co-defendants or witnesses were former

clients of the office. Courts are therefore statutorily required to appoint members from the private Bar to represent those indigent defendants under an involuntary appointment system. However, the system of involuntary appointment neither considers the criminal law experience of the attorney subject to appointment nor their desire to be appointed to criminal cases.

Over the years the Judiciary has implemented various reforms to the appointment system, including the establishment of private attorney panels consisting of members of the Bar who volunteer to accept such appointments at a relatively low fixed hourly rate, which historically has been paid from the annual appropriations of the Judicial Branch. However, the number of indigent criminal defendants who cannot be represented by the Office of the Territorial Public Defender far exceeds the capacity of these volunteer attorneys, all of whom remain engaged in the full-time private practice of law at much higher billable rates. Even in the face of a rate increase, changes to improve timely payment of Attorney Compensation Vouchers, and the ability to request interim payments, both the history of payment delays and too many appointments to panel attorneys have resulted in fewer volunteer attorneys and several resignations from panels. Presently, there is just one Attorney on the criminal panel in the District of St. Croix and 2 on the criminal panel in St. Thomas.

Many jurisdictions face significant challenges with the availability of appointed counsel as well as the increasing cost of appointed counsel driven in part by increasing legislative mandates for the appointment of counsel. Some jurisdictions have addressed the challenges of providing appointed counsel and timeliness of appointment, by establishing a second public defender's office typically known as the Office of the Alternate Public Defender or Conflict Attorney's Office.

In fact, following the suspensions of jury trials caused by the pandemic, the Judiciary became laser focused on impediments to conducting trials. In direct response to repeated

frustration of Judges over case scheduling delays involving the availability of appointed counsel, the Supreme Court promulgated amendments to Rule 210 to establish a Standing Committee on Indigent Appointments to examine the issue and make recommendations to the Supreme Court for process improvements and rule changes. The Committee is comprised of the Chief Territorial Public Defender (or his or her designee), the President of the Virgin Islands Bar Association(or his or her designee), and 3 additional members appointed by the Chief Justice to staggered 3-year terms, and one member appointed by the Presiding Judge to a 3-year term. The Administrator of Courts, the clerks of the Supreme and Superior Court, the Chief Justice, the Presiding Judge, and the Chair of the Virgin Islands Access to Justice Commission are all ex-officio, non-voting members of the Standing Committee. The Chair of that Committee, Attorney Alisha Udwahni, is also present at today's hearing.

By recommendation of the Committee, and with funding initially secured through a State & Local Fiscal Recovery Funding grant, the Supreme Court further amended Rule 210 in 2022 to establish the Office of Conflict Counsel as an independent entity operating under the supervision of the Standing Committee on Indigent Appointments. The Committee, with the administrative assistance of the Judicial Branch Administrative Office, has spent the past year standing up and staffing the Office of Conflict Counsel (OCC) in both districts. The OCC, now headed by a Chief Conflict Counsel, began accepting appointments on June 3, 2024, and continues to bridge the critical gap that occurs in every instance where OTPD has a conflict, and/or private counsel requests withdrawal/recusal. OCC provides certainty and timeliness in the appointment process.

As of November 30, 2024, the Office of Conflict Counsel has been appointed in 50 cases, 25 resulting from the Office of the Territorial Public Defender requests to be relieved as counsel; 13 resulting from other appointed counsel requests to be relieved as counsel and 8 direct Family

case appointments. Additionally, of the 50 appointed cases, 29 involve major felony jury trials. This caseload is currently being managed by a Chief Conflict Counsel, with the recent addition of 2 Assistant Conflict Counsels (1 in each district) as well as an Administrative Officer. However, a full complement of staff must necessarily include the hiring of investigators, additional legal administrative support and at least one more attorney in each district. In short, legal practice, fully resourced and equipped, dedicated to indigent defense - A critical but missing spoke in the wheel of Justice until June of this year, and one which we look to this body to establish by Legislation with direct funding.

Funding

With regard to funding, in addition to securing grant funding to establish the Office of Conflict Counsel, the Judiciary included a request to fund the OCC in both its fiscal year 2024 and 2025 budget submissions without success. As stated, the Office of Conflict Counsel has office locations in both districts (No. 19 Norre Gade on St. Thomas and 39A Prince Street F’sted St. Croix), with digital network, utilities and other operational services established. Accordingly, the Judiciary now has actual expenses upon which to base projections for continued operations of the OCC with the full complement of staff mentioned at a minimum cost of \$1.8 million.

Additionally, it is important to note that, while a request for extension has been submitted to both the Governor and the Director of OMB to extend the period of performance under existing grant through December 31, 2026, the current grant obligation period is set to expire on December 31, 2024 and only covers the current filled positions, which means the additional staffing will depend on an appropriation.

As a bit of background, the Judiciary initially requested SLFRF funding for various projects including starting up the OCC in November of 2022. The grant award was not received and executed until October of 2023, and the funding was ultimately released in March of 2024, thus occurring during a period where allotment releases to the Judiciary were also significantly delayed. The Judiciary nonetheless forged ahead to ensure that its efforts to reduce trial backlogs would not be derailed or further frustrated by funding delays. However, reductions in the Judiciary's budget result in even greater challenges to financially and administratively absorbing additional and increasing justice system expenses.

A recent publication by the National Institute of Justice, canvassed *Gideon* at 60 years, and highlights how the expense of providing public defense services, coupled with a lack of understanding by policymakers of what constitutes effective system design, continues to play a significant role in failures to meet constitutional requirements. Additionally, a 2020 national survey traced branch assignment of the public defense functions and found that 33 states placed it in the executive branch, 11 housed it in the judicial branch, four left it branchless (with responsibility designated to local authorities), and two had a hybrid structure. The study concluded that among the available options, placement in the executive branch offers the most advantages but does not necessarily ensure adequate resources or independence. However, wherever the responsibility resides, what is true is that reforms should not be delayed until the failure of public defense becomes a crisis. Failure affects not just the accused, but courts, prosecutors, jails, executive officials, and other stakeholders.

In closing, while the Judicial Branch has taken the initiative to establish the Office of Conflict Counsel by court rule and applied for and is administering grant funding to support its establishment, the obligation to provide indigent criminal defendants with court-appointed counsel

in a manner that comports with *Gideon* ultimately belongs to the Legislature. There is no question that budget reductions and/or delays in funding continue to critically and negatively impact the operations of the Judicial Branch. This is amplified in areas such as this where the courts are obligated to step in to fill gaps in oversight and funding, where funding either does not exist or remains uncertain. The Office of Conflict Counsel is a necessary reform and must be funded by the Legislature. The Judiciary cannot absorb this responsibility within its current operational ceiling.

The Judiciary thanks Senator Francis for introducing this critical piece of legislation, and the members of the Committee on Rules and Judiciary for the opportunity to provide testimony in support of establishing the Office of Conflict Counsel.