OFFICE OF THE
FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF TENNESSEE

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February 8, 2016

Judge Kathleen Cardone

Re: Statement to the CJA Review Committee

Dear Judge Cardone:

I am the Federal Public Defender for the Middle District of Tennessee and have been since July, 1985. Prior to that I was in private practice in Nashville for ten years, with a diverse caseload in both federal and state courts, civil and criminal litigation and was an original member of the CJA panel. I have been reappointed by the Sixth Circuit Court of Appeals seven times since my original appointment. On two occasions of approximately eighteen months each, I simultaneously served as the acting defender, first in the Western District of Tennessee and later in the Western District of Michigan, while the Court selected a new federal defender.

I have been a member of the ABA, NACDL and the Tennessee Association of Criminal Defense Lawyers since becoming a lawyer. I have served on the Council of the Criminal Justice Section of the ABA, was a long time board member of TACDL and its President in 1985. I was the founding President of the Association of Federal Defenders and have served on its board for 20 years. I served on the Advisory Committee of the Federal Rules of Criminal Procedure from 1993 – 1999.

During my tenure as an FPD, I have served on the faculty on regional panel training programs, dozens of district panel training events across the country and, since the late 1980s have taught each year at the weeklong orientation for new lawyers hired in federal defender offices. I have served on the defenders training committee, now called Training Expert Panel and the federal defender advisory committee, now called Defender

Services Advisory Group. I started the federal defender death penalty committee, now called the Death Penalty Working Group, have been a member continuously and chaired the group for most of its existence. I now coordinate the Capital Habeas Unit Roundtable and discussion group, an ongoing discussion among federal defenders who have CHUs on common issues and policies.

In answer to a call from the Judicial Conference in approximately 1986, Circuit Courts which presided over states with death rows convened task forces to address representation issues. This lead to the creation of death penalty resource centers in many of the states, including Tennessee. I was on the 6CCA task force and chaired the Tennessee Death Penalty Resource Center board throughout its existence from 1988 until 1995. Congress withdrew funding for the resource centers effective October 1, 1995, closing most, including Tennessee's. I hired the staff of the resource center responsible for representation in federal court and assumed responsibility for the cases. That portion of my staff grew as we continued to accept appointments in capital habeas corpus cases in the Middle and Western Districts and is now called a Capital Habeas Unit. In the years since, we have lost four clients to execution, an equal number fell victim to the years of isolation and the haphazard correctional care for their mental and medical frailties. We have also seen several who were able to return to what was left of their families and to a productive life in the community. Although the CHU caseload is distinct from the trial unit, the two units have always considered themselves part of one office. Although the Defender Services Office segregates the budgets, I refused to allow that to result in unequal amounts of furlough during sequestration. The existence of the CHU has improved the quality of practice throughout the office. There is a lot of sharing of expertise, litigation strategies and brainstorming among all staff in the office regardless of assignment to the capital unit or the trial unit. All staff has grown professionally as a result of this interaction and cross pollination.

During the active tenure of the first CJA Review Committee (the "Prado Committee") I chaired the defenders' ad hoc committee with the responsibility to identify, articulate and advocate defender positions and proposals regarding the matters addressed by the that Committee. By the end of the Committee's work a significant majority of the defenders, including me, were unable to support the primary recommendations of the Committee regarding national and local structural changes. We felt that the separation from the Judiciary and the independence of the CJA programs would leave the program too vulnerable to political forces. At that time, we felt that the federal judiciary

considered the defender program to be a sacred trust, as evidenced by the re-allocation of judiciary funds to make up shortfalls in the CJA appropriation. In the years since, the federal defender program has improved and expanded its programs in significant ways. There are now federal public or community defenders in all but three judicial districts. We have become significantly more diverse in race and gender representation in staff at all levels, including heads of office. We have developed representation support projects covering sentencing advocacy, litigation support and capital litigation. Our training programs now make quality, focused training available at little or no cost on a national, regional and local level for defender staff and panel lawyers. Although the death penalty resource centers closed in 1995, victim of state and national politics, many were replaced by Capital Habeas Units lodged in federal defender offices. Quality of representation surveys regularly reported the services of federal defender lawyers to be the best to be found in federal practice.

My opinions about the structure of CJA administration have been and continue to be largely a product of my experience. The judges before whom I have practiced in the Middle District of Tennessee have been consistently supportive of the defense function and the CJA programs in particular. They have never sought to suppress vigorous defense advocacy and are more likely to be vexed by poor representation. Our CJA Panel is limited in size and selected on merit by a committee that includes the Chief Judge or designee, the FPD and two to five panel members. In my 30+ years as defender, the court has never tried to add an unqualified lawyer, nor remove an aggressive one. Throughout my tenure, we have offered CLE training for staff, the panel and judicial clerks. Currently that consists of monthly lunch and learn presentations and quarterly half day advocacy workshops. The topics and speakers are jointly selected by me and members of the panel. We host a monthly late afternoon roundtable brainstorming session to give panel lawyers, many of whom are solo practitioners, a chance to vet problems and ideas. We also host an annual business meeting to discuss resource and administrative developments and an evening awards banquet. My staff administers the panel, including assignment of cases, generally by rotation, and processing of vouchers for panel lawyers and their experts and investigators. We do not opine regarding reasonableness of vouchers unless asked by the court, which has been infrequent.

In recent years many defenders have come to question whether the leadership of the federal judiciary still considered the Criminal Justice Act programs to be a special trust. Three federal circuits, the Fourth, Fifth and Eleventh refused to

allow Federal Public Defender offices to house Capital Habeas Units, and at least one, the Fifth, has aggressively limited compensation and access to adequate resources for lawyers appointed in capital cases and arbitrarily limited the number of lawyers authorized for federal defender offices. Most alarming was the judiciary's budget leaders' failure to protect the CJA programs during recent national budget crises, resulting most dramatically in hundreds of lay-offs and thousands of hours of furloughed service for federal defender offices during sequestration and a reduction in the rate of compensation for panel lawyers. That was followed by a morale crushing, costly work measurement study that showed the Budget Committee to have woefully understated the needs and efficiencies of the defender program. Simultaneously, the federal judiciary stripped important jurisdiction from the Defender Services Committee resulting in short term chaos, the endangerment of confidential client records, and the inability of defenders to plan adequately to meet the uncertain staff and resource needs of a purely reactive agency. This apparent failure of stewardship on the part of the leadership of the federal judiciary leaves many defenders, including me, wondering if the judiciary provides the safe haven for this important program that it did for the first forty plus years of CJA programs.

I am more pragmatist than philosopher. I have no illusion that any proposal for change that the CJA Review Committee reports will be dealt with by Congress on principles rooted in the Sixth Amendment – rather the political interests of the majority will shape the result. Nor do I believe that an independent organization would be free from the tyranny and resistance to change of a bureaucratic hierarchy. I would support that structure most likely to provide a stable environment and one that provides adequate resources and discretion to the service providers – the defenders and their staffs and that can account for the variations in practice from district to district that will always occur in a provincial system.

I fear the long term effects of the current hyper emphasis on numbers in the determination of resources allocated to defender offices. I am particularly troubled since the recently adopted scheme of staffing formula based on the results of a work measurement study and case weights developed by the Rand Corporation because I do not believe this scheme accurately reflects the work that a federal defender office currently performs, nor the work that it should be doing. All the work measurement study measured was what staff members were doing during the short period of study. There was no way to measure that data against what each defender office needed to do to

provide effective representation, nor against any recognized or aspirational measure of what role an institutional defender office should play in the community and in the criminal justice system. Such measures are possible and are in fact utilized in measuring the adequacy of resources available to public defender agencies. The American Bar Association and its Standing Committee on Legal Aid and Indigent Defense has conducted studies of state and local defender offices using a Delphi model which adds to a work measurement study (conducted over many months, not just one as was done with FDOs) a statistically reliable analysis of what *should be done,* constructed using panels of experienced practitioners.

The Rand Corporation has just recalculated case weights and addressed many of the anomalies of the first iteration of the weights. However a system based primarily on average numbers can woefully underestimate the workload of certain categories of cases that can significantly disadvantage small offices, or offices whose case load tends more to complex cases rather than high volume cases. For instance a mail fraud case handled by an AFPD and me was opened in July, 2013, with a case weight of 4.81. Government discovery started with the provision of 51 discs of digital data and has since been supplemented with forensic images of around 20 computers, a file room full of cabinets and storage boxes full of documents which had to be stored and other materials that ultimately totaled 7 terabytes of material. We still have the case, with a July trial date that is likely to be extended. In addition to the AFPD and me, our only trial investigator, our chief investigator and one of two research attorneys are assigned to the case, all devoting considerable time on a regular basis just trying to review discovery and conduct our independent investigation. Since the case was opened in FY 13, it no longer figures into the calculation of our budget or the determination of our FTE allotment, and has not since October 1, 2014. While cases of this magnitude are somewhat rare, we most always have five to ten cases pending at one time of similar complexity and near the volume. Beyond that it is not at all unusual for cases to open in one fiscal year and not conclude until the second year following. Offices with high volume border crossings, or in districts with “rocket dockets” are more likely to have the majority of the cases worked on still contributing to the FTE and budget calculus. The rigidity of the newly implemented process does not account for these district specific differences.

The limitations I have described above will likely reduce the ability of this office, and of others similarly situated, to respond to the kinds of periodic sea changes I have seen on

numerous occasions during my tenure. Notably, the shift from discretion based sentencing to a strict guidelines regime and from presumptive pre-trial release to preventive detention, was handled appropriately by the judges of this district in large part because of the training made available to the staff of this office, and by this office for the private bar. Similarly, the "Booker revolution" and the series of drug sentence reduction measures have not had chaotic impact on the dockets of the courts. Nor have several years of 20-30 defendant drugs and gangs prosecutions, many with multiple death eligible charges caused the disruption of the mechanisms of justice in this district that would have occurred but for the staff and resources of this office and the strength of the CJA panel. I doubt seriously that under the current staffing and budgeting regime, my successor will be able to make similar claims ten, twenty or thirty years in the future. Nor do I have any doubt that the cost savings from limiting the resources available to this office will match the costs incurred by the courts by the loss in efficiency, nor the intangible cost to all involved in the diminished sense of fairness in the handling of cases.

Over the last thirty years, I doubt that there is another person who has spent as much time with as many federal defenders and assistant federal defenders in as many places around the country as I have. This exposure to the people doing the work paid for by the CJA appropriation has given me enormous respect for the strength and quality of this program. And for its durability. Regardless of the outcome of the work of your committee, I believe that this dedicated cadre will continue to set the standard by which all other systems providing representation to the indigent, anywhere in the world, will be measured. There are just too many passionate and creative lawyers, investigators, paralegals and others who have committed their careers to this cause and who will suffer personally rather than let the shortsightedness of politicians and bureaucrats endanger their clients for me to believe otherwise. If your committee's efforts can restore balance to the staffing and funding decisions of the AO, and if your work leads to a renewal of the judiciary's respect for the integrity of the CJA appropriation or to some more independent structure that can tolerate shifting politics, I will be forever grateful.

Sincerely yours,

*s/*HENRY A. MARTIN
Federal Public Defender

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