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Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the CJA
Attn : Arin Melissa Brenner

Re: Statement of Eric Alexander Vos, Chief Federal Public Defender
District of Puerto Rico

Dear Judge Cardone:

Introduction

In all, I have trained thousands of CJA panel attorneys and federal defenders, traveled to dozens of districts, and been exposed to an extraordinary range of issues which effect CJA attorneys. For the first 15 years of my federal defense career I was an Assistant Federal Defender in the districts of Eastern Pennsylvania and Maine. For the next five years I was an Attorney Advisor in the Training Division at the DSO. As a trainer, I traveled around the country educating both CJA panel attorneys and federal defenders. When I was not traveling, I was responsible for designing training and supporting panel members and defenders on a wide range of federal defense matters. I am now the Chief Federal Defender for the District of Puerto Rico. Presently, I am on the CJA Panel Committee in Puerto Rico, responsible for designing and implementing local training, and my office dedicates significant time and resources to supporting the local panel.

While the Ad Hoc Committee is reviewing fourteen specific areas, I wish to address two. First, judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers. Second, the adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA.

Recommendation

I urge the Ad Hoc Committee to consider recommending significant changes to the manner in which the CJA panel attorneys are selected, managed, trained, and ultimately compensated. Presently, the courts have immense power over the management and compensation of over 13,000 panel attorneys in a manner which, at the very least, has the appearance of impropriety. Since the inception of the CJA Act,

there has been open and consistent concern with the impact of judicial involvement on the appointment and compensation of panel attorneys and the professional services these attorneys request. As Judge Stephanie K. Seymour, a former Chair of the Committee on Defender Services, observed, “[i]t is uncomfortable and a bit unseemly for the very judges before whom the criminal defense lawyer must try his or her case to participate in the selection of that lawyer or to decide his or her compensation.” This concern is only heightened when the judiciary exercises no similar control over either the prosecution or the activities of privately retained counsel.

While the concerns have been around as long as the Act, they now take on a new sense of urgency since the Judicial Conference recently communicated their belief that the defense function expenditures negatively impacts both the Court’s salaries and expenses. Hence, the Court believes that panel compensation and the judiciary are competing for the same slice of budgetary pie. With this view of competition, the Judicial Conference has clearly outlined a dire need to “contain,” or cut, the expenditures of criminal defense. In conjunction with the Judicial Conference’s call for action, Chief Justice Roberts has succinctly warned that budget issues are the Court’s most pressing issue and unless there is a fiscal change the Court’s future is “bleak.”

On a micro level, the District of Puerto Rico, as with many districts, has seen court management which involves reducing panel compensation and attorneys’ use of third party professional. Interestingly, as these issues seem to compound in our district, local sentencing statistics, when compared with national averages, show that clients prosecuted in Puerto Rico’s district court may expect to fare significantly worse during sentencing. One must question whether the cuts made by the court have resulted in clients receiving harsher sentences. Additionally, nationally, 14% of the panel attorneys employ third party professionals during their court appointed representation. Alternatively, in Puerto Rico only 5% of the panel matters employ third party professionals.

As the Committee is asked to consider alternative ways to manage panel attorneys, it is vital to recognize that local FDOs have proven to be excellent stewards of resources, financial and otherwise, and are superbly situated to handle all aspects of panel management. It has long been recognized that local FDOs are the “gold standard” for federal criminal defense and that this expertise should be utilized in selecting, managing and reviewing panel compensation. This is not a novel or new idea. Recently, my office surveyed my fellow Chief Defenders asking them if they managed their panel and if so, to what degree? Most local FDOs have some degree of involvement in panel management. However, in the districts of Washington, DC, Eastern California, Alaska, Western Oklahoma, Northern California, Kansas, Wisconsin, Tennessee, Western Washington, South Carolina, Nebraska, Minnesota, Oregon, Northern West Virginia, Mississippi, Northern Indiana, and Louisiana Middle, almost all panel management, including voucher review, is handled by the local FDO. Since my inquiry was informal, I am confident this committee, upon investigating, will find even more local FDOs who handle panel administrative tasks.

Fifty years of “unseemly” Court oversight, years of excellent management by FDOs entrusted with handling the panel, DSO’s excellent stewardship of tax dollars, and all while providing the federal courts with a gold standard of defense must lead us to but one conclusion – the FDOs should be handling panel management and not the courts.

Why the Court Should Not Manage the CJA Panel

Recently, the Judicial Conference outlined how it intended to curtail defense function spending when they targeted “Major Areas of Cost Containment.” The Judicial Conference clearly warned that funding which goes to Defender Services, which includes both FDOs and panel attorneys, “will be at the expense of the Salaries and Expenses account and by extension, *the Court*. Thus, the judiciary must re-focus its efforts to achieve real, tangible cost savings in [the Defender Services] program.” (Emphasis added).

This belief, that the Court is competing with the CJA panel attorneys for dollars, dovetails with the sentiments of Justice Roberts, who in his 2013 annual year-end Report on the Judiciary, warned that “the budget remains the single most important issue facing the courts.” While Justice Roberts opined that “our federal court system has become the model for justice throughout the world,” the Court warned that funding issues could result in a judicial system where “[t]he future would be bleak.” It is in this competitive, and possibly “bleak,” environment that district court judges are determining the appropriate level of expenditures for panel attorneys. Judge Stephanie K. Seymour’s view, that the court’s power over panel attorneys is “unseemly,” rings true like never before. This appearance of impropriety is only heightened when one considers that the judiciary exercises no similar control over either the prosecution or the activities of more affluent defendants.

When lawyers request judicial recusal, more often than not, they take issue with an appearance of impropriety and not merely evidence of impropriety. At the very least, how can one argue that panel management and compensation by the Court is not “unseemly” and demands the Court’s recusal in these matters? With the total DSO funding being at a little over a billion dollars, and almost 40% of that funding going to panel expenses, voucher cutting would appear to be a rich target for a Court who believes a dollar cut from the panel is a dollar gained in judicial salaries and expenses. Undoubtedly, there are judges who will scoff at the idea they would ever look to enrich their budget through voucher cutting and yet, it is impossible to avoid the unseemly appearance of impropriety.

And even if you could somehow remove this notion that a dollar saved on vouchers is a dollar earned by the Court, judicial economy looms even larger. What better way to address Justice Roberts’ concerns than to mitigate the Court’s burden by lessening the time-consuming efforts of panel attorneys? Few courts, starved for resources, celebrate the news of dispositive motions and/or news of a trial. There simply may be no denying that a burdened and under-budgeted Judiciary will be prejudiced when considering ways in which to curtail the time-consuming efforts of panel attorneys, and there are few things more effective than the power of the purse.

There may be no denying the articulated budgetary prejudices, the bleak future Justice Roberts warns of, the Court’s immense power over the panel compensation, and the dire environment in which the Court is called upon to determine panel expenditures. To claim that these prejudices do not impact upon the quality of the defense function is an impossible conclusion. Instead, we must question to what degree these prejudices influence and shape the outcome of cases. With this, I urge the Ad Hoc Committee to recommend an alternative—using the FDOs in place of the Court when managing and compensating panel attorneys.

Federal Defenders' Ability to Handle CJA Management

In response to the Judicial Conference's directive to "contain" the costs of the FDOs, the Judicial Resource Committee (JRC) developed a "comprehensive work-measurement based staffing formula for federal defender organizations." Thus, starting in 2013, the Human Resources Office (HRO) of the AO conducted an exhaustive Work Management Study of the local FDOs with an eye on cost containment.

HRO's staff of 14 people performed workforce analysis for the Study as they had done for numerous other studies. For this particular study, a group of 20 employees from all specialties found in FDOs, and a steering group of 12 federal defenders, provided guidance, expertise, and assistance throughout the process. Because this study was the JRC's first effort to impose formulas on FDOs, and because of the political sensitivity the study, the JRC and the Committee on Defender Services established a joint subcommittee, consisting of each committee's chair and two additional judges, to oversee the process and provide additional guidance. The structure imposed by the JRC ensured that no one group had an opportunity to exert undue influence over the outcome of the Study.

Moreover, the FDO Study collected data across an eight-week period, resulting in 150 million data points, which dwarfed any other study the HRO had conducted. All FDO offices participated in the study and 100% of the available FDO employees provided data. Thus, the Study had nearly perfect accountability; rather than relying on a sample, the Study relied on the complete data of the entire employee base.

The resulting FDO staffing formulas produced the **only HRC recommended staffing increases**, except for staff attorneys in the courts of appeals, in the last five years. Alternatively, HRO studies since 2011 have imposed reductions on pro se law clerks; death penalty law clerks; bankruptcy clerks' offices; district clerks' offices; probation and pretrial services offices; and the clerks' offices, circuit executives' offices, librarians, bankruptcy appellate clerks, and mediators of the circuit courts of appeals.

While the Judicial Conference may have labored under the belief that FDOs were poor stewards of tax dollars, in need of cost containment (cuts), the Study's conclusion found that FDOs were impressively frugal when delivering excellent client representation. Thus, while the JRC set FDO staffing levels at 3,600 FTEs for FY 2015, the Study's formulas concluded that the FTEs should be appropriately increased by 288 (8%), above 3,600 level, for FY 2016. Moreover, during March of 2014 the FDOs were suffering the brutal effects of sequestration and barely surviving with only 3,058 FTEs.

Given the above, there may be no doubt that FDOs are excellent stewards of ODS funding and remain frugal while delivering the gold standard of federal criminal defense. With the FDOs' economical approach and standard of excellence, who would be better situated to manage panel matters and determine the appropriateness of submitted attorney vouchers? Who better understands the function, needs and appropriate level of work required for a federal defense attorney? Who has fewer clear prejudices when managing and compensating panel attorneys? As stated above, in over 15 districts local FDOs already manage almost all panel activities, including voucher review. Thus, the FDOs come to the task with the least of prejudices, an understanding of excellence in federal defense, and tested history

of being impressively cost effective.

Micro Effect of Court Management on Puerto Rico's CJA Panel

On a micro level in the District of Puerto Rico, I implore the Committee to listen to, and later review, the testimony of Puerto Rico's testifying CJA panel attorneys. Your review of written submission and testimony will certainly help the Committee focus on our district's issues which I highlight below.

The voucher issues which appear to trouble our district the most are concentrated in the areas of voucher review, voucher cutting, voucher averaging, and panel attorneys gaining court approval when seeking to hire third party professionals. At the very least, the Court's local involvement, as with all other districts, is "unseemly" and has a strong appearance of impropriety when played against the backdrop of the Judicial Counsel's and the Chief Justice's concerns of budgetary competition and the warnings of a bleak judicial future. And even if there was no competition for the budgetary pie, there can be no ignoring the immense incentive the Court labors under as the judges are forced to do more with shrinking budgets. What better way to curtail an attorney's expenditure of court time, a limited and expensive resource, than to greatly limit the compensation provided to struggling sole practitioners?

The Court's practice of cutting panel vouchers, produces two distinctly different qualitative levels of representation, one being panel representation and the other being FDO representation. This difference is not the fault of the panel attorney. Rather, FDO clients simply are not forced to limit their defense while under the obvious disadvantages which panel clients must endure.¹

Third Party Professionals

It may be argued that the government attorneys use expert services and non-legal support in 100% of their criminal prosecutions. The federal prosecutors have agents, technicians, scientists, experts, etc. working on each and every case they indict. In FY 2014, nationally, 14% of the CJA cases included the use of third party professionals. During the same time period, only 5% of Puerto Rico's CJA cases employed third party professionals. While the local panel spent approximately \$100,000 on professional services in FY 2014, the local FDO spent \$325,000 on experts alone in FY 2015. This does not include the FDO's expenditures on seven fulltime investigators, research and writing attorneys, paralegals and a fulltime interpreter. Thus, while the panel was billing approximately \$100,000 for third party services, the local FDO was spending over a million dollars in these areas. This incredible 1,000 %-plus differential took place while the FDO was representing between 60-70% of the indigent federal defendants. I would suggest the Committee review Attorney Juan E. Milanes's submitted written comments which speak of the hardships panel attorneys face when attempting to hire third party professionals. Additionally, I would ask the Committee to focus on those testifying before you who are practicing panel attorneys in the District of Puerto Rico and to engage these witnesses on their attempts to get court approval for third party professionals and the chilling effect this may have on the quality of criminal representation.

¹ Nor can one say that Puerto Rico's FDO is wasting resources. On the contrary, the HRO Work Management Study's formulas found that our office was operating with 25% less staffing than the formula otherwise called for.

The importance of experts, investigators, interpreters, etc., when mounting a credible criminal defense, cannot be overstated. Even if all other things were equal, the differential between the FDO's use of third party professionals and the panel's creates an unacceptable and unconstitutional two-tier system. One tier receives the "gold standard" and the other tier receives representation which risks falling below what is required by the Constitution. Simply put, you will not find a panel attorney who does not envy the resources which an AFD may avail themselves of. These "resources" are not an indication of waste or luxury but rather, are the resources necessary to delivery constitutionally mandated representation. True justice cannot allow for this two-tier system. All clients in federal criminal matters must be entitled to the same level of representation, regardless if they are represented by a private attorney, the FDO, or a panel attorney.

Voucher Averaging

In Puerto Rico, we have many cases which include more than 100 co-defendants. This has led some judges to determine the level of attorney compensation based on voucher averaging. Voucher averaging assumes that all defendants, and their cases, are created with equal issues. This assumption is woefully inaccurate. What if the client has mental health issues? What if the client is remotely located? What if the client refuses to accept a plea offer until days before trial? What if the client is the seventh named defendant and there are far less culpable co-defendants named at the bottom of the 100-defendant indictment? Given the uniqueness of each defendant and their individual circumstances, how can we impose voucher averaging without risking an unconstitutional level of representation?

Moreover, the Court's approach to averaging takes place on a rolling basis. Thus, the first 20 vouchers submitted in a hundred-person indictment may very likely involve clients who have quickly entered their pleas or had far more straight forward matters. Yet, as the more complex vouchers roll in they may be subjected to scrutiny using an average based on a sampling of far less complex matters. If the initial lower average is used to reduce every subsequent voucher there will be an "average" which is not statistically correct and is instead based on a sample which does not necessarily represent the entire population. In a world where there is an artificially low budget set for each client's representation, we risk forcing panel attorneys to deliver that which only may be expected in the simplest of matters despite the complexity of the case. The sky is never the limit but there should not be an unrealistic average.

Puerto Rico is laboring under the harshest of economic realities and there are very few attorneys who are not struggling to make ends meet. Most of the panel attorneys are sole practitioners who simply may not afford to absorb thousands of dollars, per case, in lost revenues. There may be a multitude of reasons the Court involves itself in voucher cutting and yet, the appearance of impropriety, during this "unseemly" practice, may not be ignored.

Voucher Issues: A Stark Example

I would urge the Committee to closely review the comments submitted of Juan E. Milanes. In his comments, Attorney Milanes speaks of being appointed to a multi-defendant matter where his client, along with others, endured a 17-month trial with a 5-year pre-trial period. Only after the attorneys had

repeatedly requested interim vouchers, and after 8 months of trial, did the Court relent to allow for a fraction of the attorneys' time to be compensated. Yet, the Court refused to consider paying the attorneys for anything other than time spent in the courtroom at trial.

As Attorney Milanes describes, after 5 years of representation, and 8 months of trial, the Court finally agreed to pay only 80% of the time billed for "in-court" hours. The Court went so far as to direct the attorneys to remove their lunchtimes from the in-court hours billed. Given that most panel attorneys are sole practitioners, it is easy to imagine the devastation such voucher cuts and delays have on attorneys who agree to assume representation. As Attorney Milanes writes, the trial alone cost him one client who represented 35% of his law office's revenue. One can only imagine the devastating impact of losing a client which represented a significant source of firm income, closing down their practice for 17 months after 5 years of pre-trial work, and only getting paid for 80% of the "in-court" time. Yes, the attorneys would later submit final vouchers after years of absorbing expenses, but this sends a chilling message to any panel attorney who is assigned a case: invest little, ensure the client stays far away from going to trial, and rush to a matter's conclusion. Otherwise, risk financial ruin.

The financial hardships experienced by the Puerto Rico panel likely reduce the ability of panel attorneys to mount the same defense clients might receive in other districts. This lack of resources may translate into harsher sentences than would otherwise be expected in other jurisdictions. Simply put, resources kept from the panel members means resources not spent on comprehensive sentencing packages.

According to the United States Sentencing Commission, almost 54% of the sentences imposed nationwide were below Sentencing Guidelines recommendations. By contrast, in Puerto Rico approximately only 31.4% of the imposed sentences were below the prescribed Guideline Range. This indicates that average sentences imposed in Puerto Rico are significantly harsher than the national average. In 2014, the USSC found that *Booker* accounted for 17.4% of the Nation's below-Guideline sentences. But in Puerto Rico, *Booker* accounted for only .8% of below-Guideline sentences! From a statistical perspective, Puerto Rico's sentencing practice exists as if *Booker* was not the law of the land.

In 2014, nationally, 21% of the defendants received a sentence of 5 years or greater. During the same year in Puerto Rico, 36% of the defendants received a sentence of 5 years or greater. Nationally, the mean sentence was 51 months and the median sentence is 30 months. The same statistics in Puerto Rico were 72 and 61 months.

While there may be other reasons why the District of Puerto Rico experiences far harsher sentences for defendants, voucher cutting, averaging, hardships in obtaining professional services, and payment delays undoubtedly impacts how effective an attorney may be when handling court appointed cases. This handicapped representation has a qualitative effect on the level of work of attorneys and results in clients suffering outcomes which are not endured by wealthier clients and clients represented by the FDO. This structure all but promises a level of representation which is unconstitutional.

Conclusion

During my first federal criminal trial, after hearing the forewoman say "guilty," the late Judge Charles

Weiner told the jury “while our system is certainly not perfect, you have just contributed to the most just system known to mankind.” Justice Roberts correctly reported “our federal court system has become the model for justice throughout the world.” I, like most informed citizens, take the greatest of pride in our nation’s system of federal justice and yet, there is much work to always be done as we move towards perfection. There can be no dispute—FDOs and panel attorneys take to this task with great pride, skill and with impressive economy. As Justice Roberts pointed out in his 2013 report, the entire judiciary budget, of a little over 7 billion dollars, only represents less than two-tenths of one percent of the total federal outlays. At a little over one billion dollars, the DSO budget is but a rain drop in the national budget. For this very small investment, the defense function provides critical support and powerful meaning to the Constitution. Imagine a federal criminal system without this gold standard. Imagine this system if we risk creating a two tiered system of defense.

Law and order is not won by brute force. Instead, it is based greatly on citizens’ respect for the legal system, which is nothing less than the backbone of law and order. We cannot expect citizens to respect our legal system if we insist on unconstitutional ineffective representation for the indigent citizens charged with federal crimes. Like the future of the Court, the future of law and order will be bleak if only the well-heeled get constitutional representation. I strongly urge the Committee to recommend a system of panel management which is other than “unseemly,” is not subjected to an appearance of impropriety, nor risks legal representation which is woefully unable to maintain our “gold standard.” Simply put, I respectfully ask this committee to urge for the establishment of a system of panel management which protects the law and order we so desperately rely on.

Sincerely,

S/ Eric A. Vos

Eric A. Vos
Chief Federal Defender
District of Puerto Rico