

Law Offices of
GILBERT A. SCHAFFNIT
719 Northeast First Street
Gainesville, Florida 32601

CRIMINAL DEFENSE
PERSONAL INJURY
TRIAL PRACTICE

TELEPHONE: (352) 378-6593
FACSIMILE: (352) 374-4998
EMAIL: gaslaw@gmail.com

TO: Ad Hoc Committee to Review the Criminal Justice Act
Judge Kathleen Cardone
Judge Edward C. Prado
Reuben Cahn, Esq.
Judge Dale S. Fischer
Jeffrey A. Frensley, Esq.
Judge John M. Gerrard
Judge Mitchell S. Goldberg
Professor Orin S. Kerr
Neil H. MacBride, Esq.
Katherian Roe, Esq.
Dr. Robert E. Rucker
Judge Reggie B. Walton
Professor Jon Gould

DATE: January 12, 2016
Miami, Florida

SUBJECT: Testimony of Gilbert A. Schaffnit, Esquire
District Panel Representative for the Northern District of Florida;
Defender Services Advisory Group Representative for the 11th Cir. COA

I. INTRODUCTION AND BRIEF BIOGRAPHY

It is with great pleasure that I have accepted Judge Cardone's invitation to provide testimony at the Miami, Florida Hearing to be conducted in conjunction with the Ad Hoc Committee to Review the Criminal Justice Act. Having reviewed the previous reports available on the Committee's website dating back to the May 1963 report of then Attorney General, Robert F. Kennedy, I can attest to the need for a review of the CJA in 2015. While much has changed over the years, much has remained the same. As someone who has provided service to the Federal Judiciary in the area of indigent representation, I offer my thanks to the Committee for the work it is doing and I am confident that the Report that will be generated from the Committee's work will result in meaningful and long-needed changes to Title 18 United States Code, §3006(A).

My family moved from Connecticut to Florida in 1962 and I experienced firsthand conditions in the South with respect to the racial inequities, and the effect of those inequities, upon the administration of "equal justice under law" to the indigent and those of color.

I graduated from the University of Florida with a Bachelor's Degree in 1974 and received my J.D. from the University of Florida in 1977. In 1976 I tried my first criminal case as a senior intern with the Eighth Judicial Circuit of Florida Office of the Public Defender. I remained with the State Public Defender's Office for eight (8) years handling primarily juvenile and mental health cases. In 1979 my interest in federal cases was piqued when I participated in a bank robbery case as a second chair counsel. I became a member of the Northern District of Florida Bar in 1979.

In 1984 I entered private practice and immediately concentrated my practice in the areas of federal and state criminal defense. I became a member of the CJA Panel and started accepting appointments when rates of compensation for both in and out-of-court time were less than \$50.00 per hour.

In 1995 I was contacted by the Chief Judge of the District and asked to serve as the District Panel Representative for the Northern District of Florida. After accepting the appointment, I attended my first annual meeting of the Criminal Justice Representatives held in Crystal City at which time the main topics of discussion were the inadequacies of the hourly rate and the case maximum as well as judicial voucher-cutting. Sadly, those topics remain current as of the conference held in 2015.

As part of my duties as the Northern District Panel Representative, I participated in the revision of our CJA Model Plan back in 2000 and I currently serve on the Committee which is revising the National Model Plan. Once the National Model Plan has been completed, I hope to incorporate many of its updated features into our local Model Plan.

I also represent the Eleventh Circuit Court of Appeals as a member of the Defender Services Advisory Group (DSAG) to the Administrative Office of the United States Court (A.O.). I am currently serving my second term as the Eleventh Circuit DSAG Representative.

I am attaching hereto the most recent copy of my resume which includes the various types of criminal cases, state and federal, that I have handled over the past forty (40) years of practice. Also attached is a list of seminars and other conferences that I have attended and participated in since 2000.

II. ADMINISTRATION OF THE CJA IN THE NORTHERN DISTRICT OF FLORIDA

As I will expand upon in my live testimony, I have benefitted greatly from the perspective I have gained attending national Panel Representative conferences over the past twenty (20) years. Perhaps the most important thing that I have learned is that each District is unique and each District has its own issues that defy resolution through a national approach. The other thing that I have learned is that problems may appear and then disappear only to reemerge due to changes in the composition of either the Federal Defender's Office, the United States Attorney's Office, or the local judiciary.

One of the changes that was made to our Northern District Model Plan in 2000 was intended to address the large geographical area comprising the Northern District and the problems associated with recruiting and retaining competent Panel lawyers in each of the four (4) Divisions of the District: Pensacola, Panama City, Tallahassee, and Gainesville.

When the Model Plan was revised in 2000, the judges authorized the creation of what is known as the Panel Oversight Committee. As the Northern District Panel Representative, I serve as chair of that Committee along with a Panel Member from each of the other Divisions of the District who serve as my Sub-Representatives. The Federal Defender, Randy Murrell, is also a member of the Panel Oversight

Committee. The Clerk of Court is an *ex officio* member but does not participate in the Panel attorney selection process.

Due to the large geographical size of the District, the Panel Oversight Committee meets quarterly through a telephone conference call initiated by the Federal Defender. Each member of the Panel Oversight Committee is furnished with applications forwarded through the Federal Defender's Office. The application, which is also in the process of revision, seeks to encourage lawyers with existing federal courtroom experience and there is an emphasis on recruiting younger lawyers as well as minorities.

As part of the application process, lawyers are asked to furnish the names of state or federal Judges as references. Federal Public Defender Randy Murrell seeks the input of those judges and reports his findings to the full Committee. It is often the case that an applicant may be known to one of the members of the Committee who practices in the same Division as the applicant. This Sub-Representative is able to furnish the full Committee with more detailed information about the applicant including an observation of the lawyer's local reputation and courtroom presentation. After discussion of the applicant's qualifications, the Committee considers the number of existing Panel Members in that Division and compares the number of existing Panel Members with the most recent statistics concerning caseloads for that Division. If the applicant is qualified, and there is room on the Panel, the Committee votes to recommend that the applicant be added to the list of lawyers who are appointed CJA cases on a rotational basis from a list maintained by the Federal Defender in Tallahassee.

Although no Judges serve as members of the Panel Oversight Committee, the decisions of the Panel Oversight Committee are in the form of recommendations to the District Judge assigned to handle criminal cases in the Division where the applicant would serve. As Chair, I am responsible for forwarding information about the applicant, including any materials accompanying the application itself to the Judge of the Division, and the Chief Judge, along with the non-binding recommendation of the Panel Oversight Committee. Routinely, the Judges adopt the recommendation of the Panel Oversight Committee.

As will be addressed in greater detail in my live testimony before this Committee, perhaps the most challenging problem confronting the administration of the Criminal Justice Act in the Northern District of Florida in 2015 is the composition of the Panel itself. Despite a concerted effort to recruit younger lawyers, as well as lawyers of color from all different ethnic and social backgrounds, the composition of the Panel remains disturbingly older, white, and male.

Most of the lawyers comprising the Panel in the Northern District of Florida have backgrounds similar to my own. Most grew up in the 1960's and possess a deep sense of commitment to social justice. The overwhelming majority of the lawyers on the Panel have robust privately retained caseloads and virtually no one on the Panel derives any major portion of their annual income from CJA work.

The advantages of having a stable Panel of seasoned lawyers are obvious. No matter what the nature of the case to be assigned, there are always a substantial number of lawyers on the Panel who have experience handling that type of case. Most of the lawyers currently serving on the Panel, like myself, served on the Panel back in the 1980's when multi-defendant drug cases and continuing criminal enterprise cases were commonplace. Many of the lawyers on the Panel have handled complex white-collar cases and cases involving large volumes of discovery. As a result, the quality of representation

provided by Panel lawyers in the Northern District of Florida would generally be considered to be exceptional.

Unfortunately, there are a number of downsides to the current composition of the Panel, including the fact that many of the lawyers on the Panel are reaching retirement age and, in the years where vouchers were being cut and sequestration resulted in the suspension of payments on vouchers, many current Panel lawyers are finding it increasingly difficult to justify what amounts to *pro bono* representation in a challenging economic climate.

The trend toward increased electronic discovery disclosures, e-filings, and e-voucher payments will accelerate the attrition of the existing Panel of seasoned lawyers. Most of the lawyers on the Panel are not comfortable receiving discovery solely in an electronic format and rely heavily upon younger, more tech-savvy, legal assistants to file pleadings and submit electronic vouchers. The overwhelming majority of Panel lawyers in the Northern District are “lone wolf” practitioners. Many practice in small offices with legal assistants that have served for the entire time the lawyer has been practicing. Many of the legal assistants are themselves resistant to the changes which are necessary to the increased efficiency of the administration of the Act.

These problems are, for the most part, due to the relatively rural nature of the practice in the Northern District. Gainesville and Tallahassee are university towns with relatively small, non-student populations. Pensacola is primarily known for its military presence. Panama City is known as an alternative resort destination affectionately referred to as part of the “Redneck Riviera”.

As a result, most of the students graduating from law schools in 2015 tend to choose more urban settings to start their practice. The District is not known for having cities that support large law firms and, aside from the State Capitol being in Tallahassee, the majority of young graduates gravitate toward private sector, non-governmental employment in other areas of Florida and the Southeast.

To make matters worse, most of the recent graduates considering a practice in the Northern District of Florida graduate from law school with considerable financial debt and are not in a position to accept court-appointed cases where the hourly compensation is a fraction of what is paid on the private level. Moreover, increasingly larger firms are unable to justify allowing an associate to accept court-appointed work given the financial pressures of running a larger law firm with ever-increasing overhead expenses.

Having seen this problem coming on the horizon for many years, I have attempted as the Panel Representative to reach out to the minority legal communities and bar associations in an effort to attract newer and more diverse applicants to the Panel. As part of my role as an adjunct professor at the University of Florida Levin College of Law, I have attempted to identify and recruit individuals who might possess an interest in serving as a Panel lawyer. Unfortunately what I have found is that most recent graduates are not interested in the practice of criminal law generally and, specifically, have no interest in practicing at the federal level.

For the time being, the problem is manageable for two (2) reasons. First, the number of cases indicted in the Northern District over the past several years has declined significantly, thereby placing less pressure on the time and resources of the existing Panel members. Second, most of the existing Panel members are not quite at the retirement age and are willing to continue to serve until someone with the same passion that they have applies to take their place. However, the long-term prospect for a younger, more diverse Panel in the Northern District of Florida seems bleak.

In attending the national conference for the last twenty (20) years, I am struck at how fortunate we are to have an active and engaged Federal Defender to assist in the administration of the CJA in North Florida. In addition to the work Randy Murrell's staff does in processing applications and in the assignment of cases, Randy's Office is in the forefront of increasing the knowledge-base of the Panel through monthly "brown bag" luncheons where video presentations on areas of criminal practice are shown free of charge. Randy's Office routinely sends out information on pending cases of interest as well as publishing a periodic newsletter.

In the hybrid system created by the Criminal Justice Act, Randy's Office strives to maintain the appropriate ratio of cases retained by his Office as opposed to those referred for appointment under the Act. During the challenging period of the economic downturn it was easier as a Panel lawyer to justify bearing a greater share of the burdens associated with sequestration in order to ensure that the Federal Defender's Office survived with the least amount of damage from budget cuts.

III. CHALLENGES AT THE NATIONAL LEVEL

Perhaps the greatest challenge to be addressed by this Committee concerns the structure of the Defender Services Office and the degree to which the administration of the Criminal Justice Act continues to be under the umbrella of the judiciary. Having served as a Panel Representative for twenty (20) years and as a DSAG Representative for over five (5) years, it is my belief that there is not consensus amongst either the Federal Defenders or the CJA Panel Representatives as to whether the Defender Services should remain under the arm of the judiciary or whether the defense function should exist on an island as an independent organization. It is my belief that most Federal Defenders and Panel Representatives prefer leaving the administration of the Act under the auspices of the judiciary while at the same time allowing less judicial interference into the system of compensation set up by the Act. During various meetings of Panel Representatives and others where the topic has been discussed, most seem to favor a hybrid system based on either that set up for the Federal Judicial Center, the Sentencing Guideline Commission, or a military-style model.

It is my personal experience that most Federal District Judges prefer to not have to be involved in the voucher review process and many believe that it presents potential conflicts of interest when they are being asked to review the voucher of a lawyer in a difficult case where the lawyer and the Judge might have gone "head-to-head" over various legal issues. That being said, there are some Judges who have the mistaken notion that voucher monies come out of the allotment provided to the judiciary. Many Judges feel it is their obligation in tough economic times to balance the budget on the backs of CJA Panel lawyers. However, increasingly, there are fewer and fewer Judges who believe that CJA representation should be provided on a *pro bono* basis. Locally, voucher cuts have become less commonplace.

Regardless of the model that the Committee chooses to recommend, there is a lot to be said for the concept of an experienced "CJA Administrator" for each District. Such an Administrator should be a veteran lawyer who has preferably handled court-appointed cases and is familiar with the practical and ethical problems arising out of CJA work. Such a CJA Administrator should be able to perform an independent audit of a voucher free of judicial restraints.

In addition to the issue of independence, as I have noted above, a number of the problems which were in the forefront in 1996 continue to this day. The biggest problem in attracting a high level of experienced

Panel lawyers is the stagnant rate of case compensation increase. Panel lawyers have never received the amount of hourly compensation authorized by Congress, which, as of 2015 should be at approximately \$149.00 per hour. For the past several years, Congressionally authorized increases to the hourly rate of compensation have fallen victim to the budgetary process, the stagnant economy, and sequestration. Although rates of inflation relating to office overhead have risen significantly since 1995, the rate of compensation has increased from \$75.00 per hour to a mere \$127.00 per hour. In a Memorandum received from the A.O. dated December 29, 2015, the rate of compensation for 2016 will be increased by just \$2.00 to \$129.00 per hour. To make matters worse, case maximums which were woefully inadequate in 1996, remain woefully inadequate in 2015 and result in the vast majority of multi-defendant cases exceeding the cap and requiring approval at the Circuit Court level, which is often not forthcoming or delayed.

As noted in Fifth Circuit DSAG Representative John Convery's letter to the Committee dated November 9, 2015, a combination of inadequate case compensation, artificially low case maximums, and unwarranted voucher cutting places the CJA Panel lawyer at a decided disadvantage in attempting to attain equal justice for his indigent client. Moreover, the inequities of the voucher cutting problem are exacerbated by the fact that there has never been a system to report the degree to which voucher cutting exists at the District or Circuit level. The net result is that many, including those serving upon this Committee, are hungry for statistical data to support the claims of Panel lawyers that their vouchers are being unfairly cut and that there is a lack of meaningful due process when it comes to defending against judicial voucher cutting.

Finally, perhaps the most vexing problem associated with handling CJA cases comes from the lack of a level playing field vis a vis the United States Attorney's Office. Routinely, CJA Panel lawyers must spend inordinate amounts of time and energy attempting to obtain the services of qualified experts willing to handle CJA appointments at hourly rates which are non-competitive in the private sector. To make matters worse, these forensic auditors, private investigators, computer analysts, and social scientists are being asked to assist lawyers in an environment where the lawyer cannot assure the expert that they will receive the compensation requested. Accordingly, in *ex parte* documents filed under seal, CJA lawyers are required to disclose significant amounts of information revelatory of trial strategy in order to convince a Federal Judge to authorize the appointment of an expert. Oftentimes, it becomes problematic when the expert whose services were authorized by the Judge ends up not testifying because the expert's opinion is not supportive of the defendant's theory of defense. It is unknown the degree to which Judges consider the failure to call an expert whom the Judge has authorized to be compensated when the defendant is convicted and facing sentencing by that same Judge.

The Government is not burdened by this problem in that they are never asked to reveal the amount they spend on their expert witnesses to the extent that they are not already government employees paid by their public employers. The problem also doesn't exist for defense lawyers who are privately retained and who are free to consult with as many experts as they choose, utilizing only those whose opinions support their theory of defense.

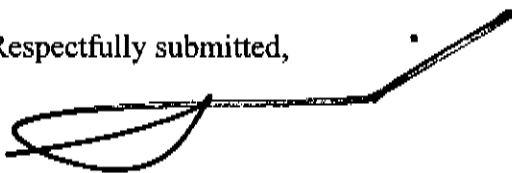
A partial solution to the problem noted above would be to either remove the judiciary from the process of appointing and compensating CJA experts or, at the very least, allowing *ex parte* applications for appointments of experts to be ruled upon by a Judge other than the Judge presiding over the case itself.

At the end of the day, the reality is that financial resources often drive a result in a given case. In an ideal world, there would be parity between the financial resources available to criminal defendants

whether they be indigent or not. However, the reality of the financial constraints imposed upon the defense function as it currently exists indicate that the ideal will probably not be reached in the foreseeable future.

This Committee has a unique opportunity to enhance the quality of the representation that indigent defendants receive on a nationwide basis and to propose changes in the management and administration of the CJA which will provide greater independence to the defense function and improve its performance for years to come.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized loop on the left, followed by a horizontal line, and then a diagonal stroke extending upwards and to the right.

Gilbert A. Schaffnit, Esquire