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Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review the CJA Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Miami Public Hearing Testimony of Mark A. Jones, CJA Panel Attorney in the Middle District of North Carolina, Western District of North Carolina, and the U.S. Court of Appeals for the Fourth Circuit.

Dear Judge Cardone and distinguished members of the Committee,

Thank you very much for the invitation to testify and for this opportunity to share my thoughts regarding the efficacy of the Criminal Justice Act in the district where I practice. I am Mark A. Jones and I am a director with Bell, Davis & Pitt, P.A., a law firm with offices in Winston-Salem and Charlotte, North Carolina. I am also a board certified specialist in Federal and State Criminal Law. Since 2011, I have been a member of the CJA Panels for the Middle and Western Districts of North Carolina and the U.S. Court of Appeals for the Fourth Circuit. Before joining Bell, Davis & Pitt, P.A. and becoming a member these CJA Panels, I was an Assistant United States Attorney for the Western District of North Carolina in Charlotte.

I would like to focus my comments on judicial involvement in the appointment, compensation, and management of investigators, experts, and other service providers. Specifically, I intend to discuss how such judicial involvement appears to amplify the disparity between the indigent defense attorney's resources and government prosecutor's resources. This judicial involvement, I believe, also increases the disparity of resources between indigent defense attorneys on CJA Panels and those serving in the Federal and Community Defender's Offices. In my practice, these issues frequently arise regarding the retention of investigators and e-discovery paralegal support.

Doubtless, the rise of e-discovery is a growing challenge for both the government and indigent defense attorneys. Cases with 50,000+ pages of electronic documents, few of which will be designated complex, are now commonplace in many districts. The challenges of reviewing and managing e-discovery are felt most acutely by CJA Panel attorneys, nearly all of whom are solo or small firm practitioners. The U.S. Attorney's Office for the Western District of North Carolina, for example, routinely prosecutes cases with tens of thousands of pages of discovery. Only a handful of these cases will be designated as complex. The government reviews and manages its copies of ESI (electronically stored information) through Ipro, or a similar digital discovery platform. For the CJA Panel attorney, however, the discovery usually arrives on multiple discs containing hundreds and/or thousands of unnamed files. Rarely is an index included and seldom is there any discernable structure to the data. And in multi-defendant cases, simply identifying and separating the documents relating to your client can be a monumental and time-consuming task. Few CJA Panel attorneys are able to afford to license large-scale e-discovery review platforms, whose licensing fees often exceed \$1,000 per month.

A paralegal with e-discovery experience is a valuable asset to any attorney, and their use in document-intensive criminal cases is incredibly cost-effective. A paralegal, working under the direction of an attorney, can often triage the discovery and separate the critical data sets much more quickly than the attorney alone. Moreover, this document review usually can be performed by a paralegal in a fraction of the time and expense it would take the attorney to perform the same initial review of the discovery. Judicial approval, however, is required before a CJA Panel attorney can expend funds on a paralegal. In my experience, motions for the services of an e-discovery paralegal are usually not granted. The result is that the CJA Panel attorney must spend significant time simply weeding through the haystack of electronic discovery to find the needles of relevant documents and/or files.

The time spent simply organizing and indexing the discovery can, and for many CJA Panel attorneys does, constitute the majority of their time in the case. It is then extremely disheartening for the CJA Panel attorney, who requested and was denied the services of an e-discovery paralegal, to then face the threat of having his or her voucher cut because of the time spent reviewing and managing e-discovery. Without judicial recognition of the vast

scope of e-discovery being produced today, and of the difficulty for solo and small firm practitioners in affording critical e-discovery review platforms, the disparity between the government and the indigent defense attorney's resources will only increase.

Judicial involvement in obtaining, managing, and compensating defense investigators also appears to be increasing the disparity between the government and the indigent defense attorney's resources. In contrast to the Western District of North Carolina, the U.S. Attorney's Office for the Middle District of North Carolina seems, in my estimate, to predominantly charge offenses involving controlled substances, firearms, robberies, child pornography, and immigration issues. I believe that at least 80% of the defendants in the Middle District of North Carolina are represented by attorneys from the Federal Defender's Office or from the CJA Panel. At the beginning of a typical CJA case in Middle District of North Carolina, an indigent defense attorney often needs an investigator. The need is most common where the client and the government's versions of the facts vary.

By the time the Indictment is returned, the U.S. Attorney's Office will already have assigned one or more case agents, all of whom have already spent considerable time with the facts and the witnesses. These case agents remain available throughout the case to obtain follow-up information and assist in preparing witnesses for trial.¹ An indigent defense attorney, if working for the Federal or Community Defender's Office, is likely to have an investigator on staff to assist in contacting and interviewing witnesses. The CJA Panel attorney, however, has no readily accessible investigator. Though moving quickly to speak with relevant witnesses is often critical, the CJA Panel attorney must obtain prior approval from the presiding Judge before funds can be expended on an investigator. Accordingly, this valuable resource, readily available to the government and the Federal and Community Defenders' attorneys, is seeming inaccessible and thus underutilized by the CJA Panel attorneys.

¹ By practice, a government attorney will generally not meet with a witness for fear of becoming a witness should a dispute regarding the witnesses' statements subsequently develop.

Critically, at the early stages of the case, it is often difficult to identify with specificity how an investigator is necessary to adequately represent your client and prepare the defense. Historically, and admitted anecdotally, motions for funds to engage the services of an investigator were so frequently denied that most CJA Panel attorneys have now abandoned even seeking authorization to hire an investigator. If, however, an investigator does no more than simply confirm the witnesses' statements, that fact often makes a tremendous difference to the defendant when deciding whether to proceed to trial. I have also found that in the long run, using an investigator—whose hourly rates are often less than half of the CJA hourly rate—is decidedly more cost effective.

I believe that the disparity between a CJA Panel attorney's resources and the government prosecutor's resources is greatest when it comes to the investigative manpower that each side can bring to bear. While judicial involvement in obtaining, managing, and compensating defense investigators—or the legacy thereof—appears to play a role in maintaining this disparity, I am hopeful that CJA Panel attorneys can work with the Courts to utilize the services of investigators at least at the same levels as utilized by our colleagues in the Federal and Community Defender's Offices.

My sincere thanks again to Judge Cardone and to the members of the Ad Hoc Committee to Review the CJA Program for allowing me this opportunity to be heard regarding just a few of the relevant issue concerning the efficacy of the Criminal Justice Act in my districts.

Sincerely,

BELL, DAVIS & PITT, P.A.



Mark A. Jones