FEDERAL PUBLIC DEFENDER
Southern District of Florida

Michael Caruso
Federal Public Defender

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December 23, 2015

Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Re: Testimony of Michael Caruso, Federal Public Defender, Southern District of Florida

Dear Judge Cardone:

My name is Michael Caruso. I have been a lawyer with the Federal Public Defender in this district for nearly twenty years and have been the Defender for the last four. I would like to thank you for my invitation to speak and thank all the Committee members for your work on this project. Our program is at a crossroads and the Committee's work comes at an opportune time.

1. Description of the Southern District of Florida's practice.

Before I discuss the issues I believe are confronting the Defender program, I would like to highlight several factors that make the Southern District of Florida unique from an indigent defense perspective. Our district is fairly described as having a "rocket docket." During fiscal year 2014, the median disposition time for cases resolved by a guilty plea in this district was 5.4 months. Excluding the Southwestern border districts (CA-S, AZ, NM, TX-W, and TX-S), this disposition time lagged only VA-E and OK-W.

During the same time period, there were 137 jury trials in this district, by far the most in the country and more than many circuits. And, our district led the federal courts with the most trials lasting 3 days, 4 to 9 days, and for trials 20 days or longer. We trailed only NY-E and NY-S for trials lasting 10-19 days.

Despite the number, length, and complexity of these trials, the median disposition time for these cases was 10.3 months. In looking at the number and length of trials in this district, the Southern District of Florida best compares to NY-E and NY-S. But, in terms of median disposition time, there is no comparison. For jury trials, the median disposition time in NY-E and NY-S is respectively 25.7 and 23.9 months—more than 14 months longer than in our district.

A brief description of a few of our more complex cases this year will demonstrate the nature of our practice. Our office handled two fraud trials that each lasted approximately two months. In one case, involving allegations of a business opportunity scheme, the discovery provided by the government totaled three terabytes (approximately six thousand file cabinets) of information. The discovery response in the other case, an alleged real estate fraud, totaled more than one terabyte. The human and technological resources needed to defend these trial cases were immense.

A third case, estimated to take a month to try, was resolved by a misdemeanor plea the week before the trial was set to commence. This case involved voluminous electronic discovery that required proprietary and commercial software, as well as numerous additional pieces of hardware, to review. The raw data, approximately 464 gigabytes, included Exchange Database files for which the government had an entire dedicated team of experts using SQL, a special coding language, to write search queries. We initially attempted to load and view the EDB data; however, we did not have the manpower to code queries, nor did the lawyers have enough familiarity with the contents of the data to guide an expert to code our own searches. Ultimately, we had to purchase software to allow us to view the data without the help of an expert. Additionally, we were given raw data for an internal organizational system that was used by the company allegedly involved in the fraud. In order to view these documents, we spent hours mounting and attempting to view the hard drives. This again failed, and we had to coordinate with the creators of the system who fortunately agreed to provide to us the software to view the data on two separate laptops. The defense of this case severely strained our limited resources.

In all, last year the office opened a total of 2,636 cases with a mix of immigration, narcotics, fraud, and firearms cases comprising the majority of the matters handled. Moreover, many of our cases are multi-defendant cases where an AFPD assumes the responsibility of lead counsel and coordinates the defense.

Despite being assigned approximately 65% of the criminal cases in this district, we do not have a staffing level proportional with the United States Attorney's office (USAO). In fiscal year 2015, our office had an authorized staffing level of 47.88 assistants with 45.6 attorneys on board by the end of the year. At the same time, there were 221 assistants working at the USAO with 4 full-time special assistants. With only 25 AUSAs involved in civil work, the majority of the attorneys at the USAO are involved in criminal cases. Therefore, the USAO has a substantially larger pool of lawyers available to handle cases compared to our office of less than fifty lawyers.

2. Greater Defender Independence is Required to Fulfill the Promise of the Sixth Amendment and Less Judicial Involvement in the Selection and Compensation of Defenders Is Needed to Avoid the Appearance of a Conflict of Interest.

I will not use this space to set forth in detail the history of the Defender independence issue that has been simmering for the last 50 years. I will say, however, that this appears to be a particular low-point in the Judiciary and Defender relationship.

Since 2004, the Defender Services Office (DSO), charged with providing support to Defenders and CJA lawyers, had been a "distinct high-level office" within the Administrative Office (AO). The status of DSO within the AO reflected the uniqueness and importance of our mission. In 2013, however, the AO demoted DSO to one of many "program services" like probation and pre-trial services that exist to serve the Court. But, unlike probation and pre-trial services, we exist to serve individual clients. Through this demotion, the AO severely undermined the authority and independence of our program and our new, at the time, Chief.

Another blow to our independence occurred when the Executive Committee of the Judicial Conference voted to strip the Defender Services Committee (DSC) of ultimate staffing and budgeting authority for our program and transferred that authority to the Judicial Resources Committee. As this Committee knows, the DSC long possessed this ultimate authority. My understanding is that this action was taken without any prior input from DSO or the Defender community. When we

learned of the decision, DSO asked the Executive Committee to reconsider but ultimately the initial decision stood. Both the substantive decision and the lack of communication and inclusivity were very troubling.

Subsequently, and prior to sequestration being imposed, the Executive and Budget Committees grew more involved in micro-managing the Defender Services account. During sequestration, Defenders were forced to furlough and lay off employees, and panel attorneys faced delayed payments and rate cuts. The allocation of sequestration cuts seemed particularly unfair to Defenders.

In the aftermath of the budget debacle, Defenders were subject to increased micro-managing and a staffing study being conducted on the orders of the Executive Committee. Many Defenders perceived the unnecessarily expedited staffing study imposed on our offices—while we were still reeling from sequestration—as an attack and not an attempt to improve our program. Only through the sheer dedication and focus of all Defender offices did we make the study a success and objectively demonstrate that we have effectively and prudently managed our program.

These events were very concerning as they indicated that the Defender program did not have an inclusive relationship with the Judiciary. A recent report issued by NACDL, "Federal Indigent Defense 2015," depicted a more antagonistic and dysfunctional relationship.

In the report, a former DSC chair told the NACDL Task Force that "'the judiciary acts in its own self interest'" and views "'a dollar into defense services [as] a dollar not into the clerk's office' or other agencies.'" A federal judge noted, referring to a conference call where Defender and CJA funding were being discussed, as a "'broken process'" because no defense representative was included.

Given the long identified need for more Defender independence and these recent events, this Committee should reexamine the relationship between the Judiciary and the Defender program and recommend that changes be made. I am a firm and devout believer in the Defender program; our Defender and CJA programs provide superior representation for indigent defendants charged in federal court. But, we can do better with a stronger and more independent structure.

There are a number of options that the Committee should consider to make the Defender program stronger. This Committee should evaluate, as did the Prado Committee, whether the Defender program would be more successful if

reconstituted using a Federal Judicial Center or United States Sentencing Commission model. Another option, of course, is to recommend that the current model and structure be reconfigured to give Defenders more autonomy and control.

At a bare minimum, this Committee should recommend that DSO's position as a distinct high-level office be restored. In addition, DSC should recover the ultimate budget and staffing authority that the committee traditionally deployed. And, DSC should be recomposed to include voting participation by Defenders.

Within the AO, Defenders should be permitted to exercise more control over our self-governance. For example, my understanding is that the AO has limited the composition of the Defender Services Advisory Group (DSAG) as well as the number and location of the meetings that DSAG may conduct. As to composition, the AO has decided that the Eleventh, Fourth, and District of Columbia Circuits should share a single representative. These Circuits contain 4 of the 12 most populous states in the country, and about 20% of the country's total population and not surprisingly have very different indigent defense issues and concerns. There is simply no good reason why Defenders themselves cannot determine how DSAG membership should be constituted to best reflect the diversity of our issues.

The Defender program also needs to be allowed to develop policy and legislative priorities. A cursory review of the Department of Justice (DOJ) website demonstrates that we are severely outmatched in this area. DOJ seemingly has the following "agencies" that are devoted to policy and legislative work in addition to those employed directly in the Criminal Division: the Bureau of Justice Statistics, National Commission on Forensic Science, National Criminal Justice Reference System, Office of Legal Policy, Office of Legislative Affairs, Office of the Associate Attorney General, and Office of the Deputy Attorney General. I do not believe that complete parity with DOJ is achievable but we do need to tilt the playing field a little closer to level. Not only would a robust policy and legislative branch allow us to provide better representation for our clients but it also would allow us to compartmentalize this work and achieve a significant economy of scale.

A recent example illustrates this need. For the last year, Congress has been developing a "once in a generation" criminal justice reform package. Despite the obvious Defender interest in this legislation, we simply did not have the resources needed to devote to this project. Instead of having staff dedicated to this work, Defenders and others in the program have worked "part-time" on these issues in addition to the other work that is required to be performed. But, this type of

legislative work is too important and time-consuming to be handled on an ad hoc basis.

Although for the last few years Defenders have had AFPDs "detailed" to Congress, this is not sufficient to address our needs. And, even this detailee program is limited. Very recently, the AO denied a bipartisan congressional request for the extension of an AFPD's detail to assist on legislation that would benefit our clients. Defenders should be able to make these types of decisions.

In addition to staffers devoted to legislative and policy efforts, the Defender program requires a deputy-level position committed to data analytics. We learned rather quickly during the work measurement study that we need a dedicated expert to analyze our data in real-time to allow us to make more informed and better decisions.

Outside the AO, there are a number of changes this Committee should consider in redefining the relationship between the Defender offices and their respective Circuits:

- If appointment and reappointment power remain with the Circuit, then there should be a presumption that a Defender who is performing well will be reappointed. Currently, when a Defender position is advertised, the Circuit makes clear that there is no presumption that the incumbent will be reappointed. Presumably, this language is included to encourage qualified individuals to apply for the position. The language, however, creates uncertainty over the future direction of the office that has a potentially destabilizing impact.

- The Circuit should make recommendations as to the number of lawyers a Defender should employ but should not exercise the ability to "cap" the number. There is an actual or apparent conflict of interest when the Circuit is able to limit the number of lawyers who a Defender may employ to litigate in that same court. The "cap" is simply not necessary in light of the adoption of the work measurement formula.

- The Defender's salary should, at a minimum, be equal to that of the United States Attorney.

- The Defender should not have to obtain approval of the Circuit for non-case related travel outside the district, and reimbursement for the travel. The Defender is capable of instituting internal controls and employing a standard auditing process for this type of expense.

- The Defender should have the ability to "opt-out" of the Circuit's Employment Dispute Resolution Plan and be able to enact a Plan that best suits the Defender office's needs. Circuit Judges and Defenders have very different employer-employee relationships. A Defender may wish to expand protections to the Circuit's basic plan to attract diverse employees and match the benefits offered by private employers.

3. Judicial Involvement in the Appointment, Compensation, and Management of Panel Attorneys and Investigators, Experts, and Other Service Providers Should Be Eliminated or Reduced.

Consistent with my beliefs regarding the need for Defender independence, I likewise believe that judicial involvement in the administration of the Criminal Justice Act panel should be eliminated or sharply circumscribed. The actual or apparent conflict of interest that exists between the presiding judge and court appointed counsel with regard to panel selection, appointment to a particular case, and approval and reimbursement of fees and expenses warrants a modified system that removes this issue.

This Committee should recommend that the selection and retention of lawyers to serve on a panel be accomplished by the local panel selection committee without express judicial involvement. With regard to case assignments, while a judicial officer would make the determination as to whether an accused should receive appointed counsel, the local administrator would review the case and assign appropriate counsel. The local administrator would make voucher determinations regarding compensation and expense reimbursement. Similarly, the local administrator also would review and approve the hiring and payment for experts, investigators, and all other non-lawyer service-providers.

4. Compensation for Legal Services Provided under the CJA are Inadequate and Contribute to the Lack of Parity in Relation to the Prosecution.

CJA panel lawyers should be fully and fairly compensated for their work. Although the hourly rate has increased over the last ten years, the rate is staggeringly low. As a point of comparison, a recent local survey revealed that the average associate billing rate in South Florida is upward of $250 per hour.

5. Billing, Voucher Review, And Approval Processes Relating to Compensation For Legal And Expert Services Provided Under The CJA Should Be Clearer and More Uniform.

There needs to be greater clarity and transparency, in the voucher review process, regarding the difference between the hours the CJA lawyer actually worked on the case, and the hours the court believes were reasonably expended. I believe this issue arises, in part, because a judge does not have to provide an hour-by-hour analysis in reviewing a voucher. Rather, a judge may make an across-the-board cut in assessing a voucher. While the latter approach is more efficient, the result is that CJA lawyers often are left without a clear explanation as to why a voucher has been reduced. If voucher review remains in the judiciary, perhaps there is a middle ground that will allow a judge to conduct the process expeditiously but also give the CJA lawyer an explanation for the reduction that will guide him or her in future cases. Finally, I believe that there should be a uniform "appeal" process by which CJA lawyers may seek a reconsideration of a voucher reduction.

6. The Availability of Qualified Counsel, Including for Large, Multi- Defendant Cases is Generally Excellent but Investigative and Paralegal Support Is Lacking.

The Southern District of Florida is fortunate in that we have a large pool of qualified counsel to handle these types of cases. The issue that arises in these cases, however, is the availability and utilization of investigator, expert, and paralegal support. The discovery in fraud, national security, and even long-term historical narcotics cases, can be astounding. There should be a greater willingness on the part of the judiciary to adequately fund CJA lawyers with these resources on a case-by-case basis. The judiciary also should promote the use of both CJA discovery coordinators as well as CJA budgeting lawyers. By using these resources, CJA lawyers will be able to more effectively use technology and litigation support vendors to organize, search, review, and analyze large volumes of discovery, in both paper and electronic form.

7. The Timeliness of Appointment of Counsel Is Generally Sufficient.

In this district, counsel is appointed after a pretrial services officer interviews and prepares a report for the magistrate judge who conducts the first appearance hearing. While in the majority of cases this does not present an issue there are cases where this procedure has a negative impact on indigent defendants.

For example, a pretrial services officer may ask whether the person has current or past gang affiliation. While arguably relevant for bail purposes, an

admission or a false denial may have an adverse impact as the case moves forward. Certainly, if the person is convicted, this information will be imported from the pretrial services report to the presentence investigation report. As such, the information may be used by the prosecutor and the presiding judge in determining the person's sentence.

A similar problem exists for those accused of committing financial crimes. Ordinarily, there is a lengthy discussion of a person's personal assets during the pretrial services interview. Again, admissions or material omissions made by the person may be used to increase his or her sentence.

8. The Provision of Services or Funds to Financially Eligible Persons for Noncustodial Transportation and Subsistence Is Inadequate.

As a border and magnet district, a number of our clients who have been released on bond do not reside in our district. The issue of payment for travel and subsistence for these clients is an ongoing source of frustration. Courts have held that 18 U.S.C. § 4285 does not provide the authority to order the Marshals Service to provide lodging and subsistence during a court proceeding, or for travel costs back to the client's place of residence.

In these situations, we often have had to "pass the hat" to actually pay or help defray the costs to the client. Shifting the burden from the government to the person's court appointed lawyer to pay for a hotel room or food during trial, or an airplane or bus ticket back home is clearly not fair.

9. The Availability And Effectiveness of Training Services Provided To Federal Defenders And Panel Attorneys Is Excellent.

For many years, federal criminal practice has been exceedingly complex. Although no definitive count exists, experts believe there are currently 4,500 existing federal criminal statutes. Furthermore, there is widespread agreement by all participants in the federal criminal justice system that cases are becoming more complex for a variety of reasons. First, discovery is routinely voluminous and increasingly technical. Second, relevant legal rules are changing and ambiguous. Third, the adversarial nature of the federal criminal defense practice generates difficulty whether negotiating a just resolution of the case, trying the case to verdict, litigating sentencing issues, perfecting an appeal, or pursuing collateral relief. To provide effective representation, indigent defense counsel require training at least equal, if not more, than federal prosecutors receive.

A successful indigent defense program should have two training tracks: (1) basic federal criminal training for newer lawyers; and (2) advanced training for all lawyers. The Defender program has been remarkably successful in providing both tracks through national and local training.

One area in which the program can do better is follow-up training. At our national and regional seminars, we are exposed to either general or focused training. But, if we are not currently working on a case that involves those topics, the efficacy of that training may be diminished. To enhance the training experience, there should be periodic follow-up training conducted at the national or local level. For example, if at the national seminar there is a DNA presentation, there could be a follow-up training that worked through a cross-examination of a government expert, a direct-examination of a defense witness, or other specific areas that may arise in connection with the issue. Locally, this training could be done in-person, and nationally through video conferencing.

10. Large, Multi-Defendant Cases Require More Resources.

As noted above, the Southern District of Florida has a significant number of multi-defendant cases. Generally, the FPD takes the first appointment in the case and is assigned the lead defendant. In these cases, the AFPD assigned to the case is expected to be the "laboring oar." Given this role and the nature and complexity of these cases, the time and resources needed to provide effective representation is enormous.

A "hidden" cost issue that arises in the context of multi-defendant cases is the USAO and Bureau of Prison's (BOP) practice of imposing separation orders in many of these cases. When a client is detained, the lawyer will provide notice to the detention center to arrange a visit. Ordinarily, a lawyer will arrive at the detention center and wait a period of time before being admitted to the visiting room. Only when in the visiting room is the lawyer told that his or her client is not present because another lawyer is seeing a co-defendant with a separation order. Efforts to work with BOP to solve this problem, which causes an undue waste of time and money for both AFPDs and CJA lawyers, have been unsuccessful.

11. The Advisory Nature of the Guidelines, Prosecution Trends, and Emerging Technologies Have Substantially Increased the Costs of Experts.

There have been a number of factors that have raised the costs of experts in recent years. First, the advisory nature of the Guidelines and 18 U.S.C. § 3353(a)'s command that the district court impose a sentence sufficient but not greater than necessary has made mental health evidence more relevant. An unfortunate number of our clients suffer from severe mental health problems and the defense has an obligation to present this information to the court for sentencing purposes.

Second, the explosion in financial fraud and child pornography cases also has driven up the cost of experts. In child pornography cases, those costs typically include forensic computer work in addition to mental health experts. The primary driver in fraud cases are forensic accounting experts who analyze and summarize financial transactions. In securities fraud cases, we often require experts to analyze and interpret market data. The costs for these types of experts are astonishing.

Third, emerging technologies, including location-based tracking techniques such as GPS and cell-site tracking data, frequently require expert review. Finally, in national security cases that involve discovery in Arabic, Pashto, or Urdu, the costs of interpretation add up very quickly. If the discovery happens to be classified, those costs are magnified.

12. International Cases Are Becoming Increasingly Common and Present Significant Defense Obstacles in Terms of Time and Resources.

In the past few years, our office has handled cases where the criminal conduct alleged in the case occurred in Afghanistan, Pakistan, South Korea, Liberia, Somalia, Kenya, Saudi Arabia, Haiti, the Dominican Republic, and most countries in South and Central America. Not only do these cases require large expenditures of funds if travel is required, but they also strain the time of the attorneys and investigators on the case.

Obviously, the Defender program does not operate on a level playing field with DOJ with regard to obtaining evidence that may be located in foreign countries. First, DOJ has the luxury of time. Under 18 U.S.C. § 3292, a prosecutor can obtain a three-year extension of the statute of limitations to pursue evidence in a foreign country. Our only recourse is to request an appropriate continuance from the presiding judge. When we defend a case that has an international component,

there often is simply not sufficient time to pursue the leads that may be present in the foreign country.

Second, there is not an efficient and reliable method for criminal defense lawyers to obtain evidence in a foreign country. Mutual Legal Assistance Treaties (MLATs) are limited to law enforcement officials involved in criminal investigations. Access to evidence though an MLAT is, therefore, restricted to prosecutors, and governmental agencies that investigate criminal conduct. Criminal defense lawyers are constricted to using letters rogatory, a much less effective method, to secure evidence located abroad. Due process dictates that each side in a criminal case have the ability and opportunity to access the same information. This is lacking.

In closing, I again want to thank the Committee for your work on these important matters. I look forward to talking with you in Miami.

Very truly yours,

Michael Caruso