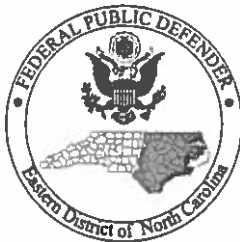


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December 22, 2015

The Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
the Criminal Justice Act Program
Thurgood Marshall Federal Judicial Building
One Columbus Circle NE, Suite 4-200
Washington, DC 20544

Re: Testimony of Thomas P. McNamara, Federal Public Defender, Eastern District of North Carolina

Dear Judge Cardone and Members of the Committee,

Thank you for inviting me to address the Ad Hoc Committee to Review the Criminal Justice Act ("CJA") during the January 11, 2016 Public Hearing in Miami, Florida.

By way of introduction I have been the Federal Public Defender for the Eastern District of North Carolina for the past 15 years. Previously I was in private practice concentrating on the defense of federal criminal cases and before then I served as the United States Attorney for this same District. I have been an attorney for 50 years.

I understand that the Committee is interested in the 14 issues that pertain to the CJA Program, and I will discuss some of those issues that pertain directly to our office, as well as other issues that make our office unique.

First I would like to briefly give you some information about our office. We serve 44 counties in Eastern, North Carolina which makes this a large geographic District. There are six District Judges and four Magistrate Judges in the district and they hold court in six different cities ranging from Raleigh in the west to Elizabeth City and Wilmington on the northern and southern coasts. Our clients are housed in county jails scattered widely across the district. As a result, our personnel routinely travel as much as six hours round trip to visit clients or appear in court.

Our main office is in Raleigh, NC and we have a staffed branch office in Greenville, NC. We have 55 employees, including 24 Assistant Federal Defenders. In FY2015 we opened 3,198 new cases, including 79 appeals, and assigned 430 additional cases to the panel attorneys due to conflicts in our representing those defendants. Our attorneys are extremely busy due mainly to our large caseload and the time consuming drive time to jails and court.

Issue (3)-Judicial involvement in the appointment, compensation and management of Panel Attorneys and Investigators, experts and other service providers; and

Issue (5)-The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA.

In addition to handling our own cases, our office is heavily involved in managing the panel. We are responsible for assigning cases to the panel and reviewing their vouchers before they are submitted to the court for payment. We are also tasked with training the panel. To this end, we offer biannual training seminars and provide case-specific assistance as requested. Overall, this system of panel management has proven very successful. Indeed, I believe it could be a model for other Districts to adopt so I think it might be useful to provide some additional detail about how our system works.

Our office is assigned all new criminal cases, including target letter cases if the defendant qualifies for court assigned counsel. We have a large number of Adam Walsh Act cases (18 USC Sec 4248) in this District and those civil cases are also assigned to us. I will discuss Sec 4248 cases later.

In general, we try to keep as many cases as we can. However, inevitably, for reasons of conflict and workload, some cases must be assigned to attorneys outside our office. To deal with these cases, we have a full time Panel Administrator and a part time Assistant Panel Administrator. They are tasked with contacting the panel attorneys and assigning to them the cases that we can not take. We have about 110 attorneys on our Panel.

We offer a variety of services to the CJA Panel. In FY2015 our office sponsored two one-day and one-two day federal criminal practice seminars for the panel attorneys. We also regularly publish our office newsletter for the panel and we have a District wide panel attorney listserv to serve as a vehicle for communication between our office and the panel attorneys on a wide variety of topics. Our attorneys, including myself, regularly meet with panel attorneys to assist them with federal criminal law issues and problems they have with their cases.

We also provide administrative support to the panel attorneys through our two Panel Administrators. When the panel attorneys complete their cases, they submit their vouchers, time sheets, and a justification letter to our Panel Administrator who reviews their submissions for technical and mathematical accuracy. She also makes sure they have the proper documentation for all expenses. Once this is completed, the Panel Administrator gives all of the vouchers and related paperwork to me for review and, in all cases where the fee request exceeds the statutory maximum, I write reasonableness reviews for all the Judges.

In these reviews, I provide a detailed breakdown of the panel attorney's work and my conclusion as to whether the claimed hours and charges are reasonable. I then provide a recommendation as to whether the voucher should be paid in full or reduced by some amount. Needless to say, this review requires considerable time on my part but I believe it benefits both the Judges and the panel attorneys. Because I have been a federal criminal trial attorney for 50 years, the judges trust my judgment as to what a particular case is "worth" and the great majority of the time accept my recommendation as to whether to pay or reduce a requested fee. The panel attorneys appreciate my reviews for the same reasons. Because of my experience and credibility with the Judges, they know if I recommend full payment, the judges are likely to concur and they also know that any cuts I might recommend are likely to be less than a Judge, reviewing the voucher without my input, would impose. I recently counted that I have written reasonableness reviews in 135 cases where the fee request exceeds the statutory maximum over the last three years.

The panel attorneys are, as a whole, pleased with the process and procedures we follow in this District, with one exception. Here, as in many districts, the panel attorneys must request permission from the Judge before hiring investigators, experts, or other service providers in their cases. Sometimes these requests are denied or so curtailed by the Judge that the panel attorney is left without the expert assistance he believes is necessary to properly represent his client. By contrast, our office does not require the approval of the Court before retaining experts or investigators. As a result, the panel attorneys see our attorneys as being able to provide more effective assistance of counsel to our clients because we have better access to these investigators, experts or service providers. And, indeed, it is difficult to argue that this system does not create an uneven playing field or, at least, the perception of one.

It seems to me that this problem could be solved by giving our office an opportunity to give the Judge a recommendation as to whether we believe a panel attorney should be allowed to employ an investigator, expert, or service provider and how much money should be made available to pay this person. It is true that we have our own investigators, but we employ many interpreters, psychiatrists, psychologists and other service providers and we certainly have a good understanding of which cases need these services and how much money should be allotted to pay these service providers. Such a review and recommendation might not be possible in those cases where the attorney represents a defendant whose interests are adverse to a client of ours. However, where such conflict does not exist and we can weigh in, it seems to me that the Judges would benefit from our input as they often do not know which case needs these service providers and how much it should cost.

Such a change would make sense because our office is already involved in other expert-related issues pertaining to the panel. Our office reviews the bills provided to the panel attorneys by experts the Court has allowed them to employ and we forward these bills to the Judges. This system, as with the overall voucher review process, works well. So allowing the Federal Defender to have some participation in the initial expert approval process would be a logical extension of these duties and would address the one aspect of the current system that is most troubling to the panel attorneys

In addition to training and panel management and voucher review, our office is also involved in the selection and composition of the panel. I serve on the CJA Panel Committee for the District and our office receives all panel attorney applications. I interview each applicant and write a memo to the Judges discussing each applicants qualifications and give my recommendation as to whether they should be allowed to join the Panel. When an attorney applies for the Panel I make sure they have been on the Training Panel long enough and have shadowed experienced federal criminal defense attorneys sufficiently so that they are knowledgeable enough about federal criminal practice to join our District's Panel. When the CJA Panel Committee Members meet to discuss the applicants they always have followed my recommendations. My memo to the Committee is sent on to the District Judges and they vote on the applicants. As a rule the Judges also follow my recommendations, therefore the selection of panel members is basically left up to me. I know these attorneys better than the Judges and therefore have considerable input into deciding who becomes a panel attorney.

Issue (6) - The quality of representation under the CJA

The clients represented by our office and the panel attorneys receive outstanding representation. The CJA attorneys in this District are very dedicated to their work and work long hours. I am able to speak with more authority regarding the attorneys, paralegals, and investigators in our office. I see them return to the office late in the afternoon after driving long hours to see our clients in jails or attend court. Our personnel then will stay in the office working into the night and are often here working on weekends. We have a large caseload for only 24 attorneys. In addition to the regular felony cases, we have a large misdemeanor practice with cases coming from five military bases and the National Seashore Park on North Carolina's outer banks.

We are also unique in that, as a result of FCI Butner's location within our district, we handle a high volume of litigation pursuant to the Adam Walsh Act, 18 U.S.C. § 4248. A 4248 proceeding commences upon the government filing a certificate alleging that an individual is "sexually dangerous", as defined by statute. See 18 U.S.C. § 4248(a). If deemed "sexually dangerous" by the court, an individual is detained at FCI Butner beyond the period of incarceration prescribed by the individual's original criminal sentence for an indefinite period of civil commitment.

The representation of a client throughout the 4248 civil commitment process is vastly different than the typical representation contemplated by the CJA. In every meaning way, 4248's are civil cases. As such, our lawyers and the panel attorneys that represent 4248 clients have, by necessity, learned to be civil practitioners, in addition to their consistently demanding criminal practices.

A 4248 scheduling order will contain twelve initial discovery deadlines. Discovery is always voluminous, averaging between 2500 and 4000 pages per case. Multiple forensic experts and the corresponding depositions of those experts are required in every case. Interrogatories, Request for Production and Request for Admissions are also standard components of the 4248 discovery process. At the conclusion of the long and arduous discovery process is, in most cases, a bench trial before a United States District Court judge.

As of December 10, 2015, in the Eastern District of North Carolina, the government has sought indefinite civil commitment for 154 individuals. To date 87 of the cases have been tried. The courts ruled in favor of the respondent (defendant) 40 times and in favor of the petitioner (government) 47 times. The remarkable success rate speaks to the tireless dedication of the assistant defenders and panel attorneys to learn and master an entirely new area of the law.

The government efforts to civilly commit individuals at the conclusion of their criminal sentences pursuant to 4248 are unyielding. We continue to receive and assign new cases each month. Additionally, if a client loses at trial and is civilly committed, the client has the right to file for a challenge hearing every six months for the remainder of his commitment. If the client instead opts for treatment with the Bureau of Prisons, a three to four year period, the representation continues throughout the treatment phase. As such, this practice area is truly unending.

In addition to representing 4248 clients civilly committed for sexual dangerousness, our office represents the vast majority of individuals civilly committed pursuant to 18 U.S.C. § 4246. Similar to 4248, in the majority of cases, the certification that initiates proceedings under 4246 occurs at FMC Butner, located in the EDNC. Our office is appointed to every case where a 4246 certification is filed from FMC Butner¹.

The process for our office begins when the government files a Certificate of Dangerousness. This may occur when a defendant's sentence is about to expire, or pre-conviction if a defendant has been determined to be incompetent pursuant to 18 USC § 4241. The government files the "Certificate of Dangerousness," along with a forensic evaluation supporting their position. At that point, we are appointed to represent the defendant (called "the Respondent"). The court then authorizes our office to hire an independent forensic evaluator to conduct an evaluation. Based on the evaluator's findings, we have the option to call the evaluator as a witness at the 4246 hearing. The hearing is conducted via video conference with the prosecutor in the courtroom in Raleigh, and the AFPD and client located in a hearing room at FMC Butner.

In reality, once a Certificate of Dangerousness has been filed, most clients wind up being committed. Pursuant to the statute, 180 days after commitment, the client may request a hearing to challenge their continued commitment. The facility housing the client is also required to file a yearly forensic report for each committed individual. Unfortunately, the social worker staff at the federal facilities are often understaffed and overworked, so we sometimes use a challenge hearing to draw the court's attention to a lack of progress for conditional release planning. Tragically, clients sometimes have met the criteria for conditional release for one, two or even three years, but are unable to be released because the social workers are unable to secure satisfactory conditional release placement.

Regardless of where a client is moved after certification, we continue to represent him and need to travel to the different facilities to conduct hearings. Once a client is released we continue to represent

¹For male defendants, as FMC Butner only houses males.

them until unconditionally released, and we oftentimes need to represent them on a revocation of conditional release if necessary.

In 2014 we had 16 hearings for new clients and in 2015 we had 13 hearings for new clients. Overall, we have 176 current/active clients. The average representation of client committed pursuant to 4246 is approximately ten years. Throughout this process, our lawyers are the sole advocate for these individuals and, frequently, the main point of contact with the outside world. Bearing this much responsibility for mentally incompetent individuals is emotionally taxing and very time consuming for the lawyers who do 4246 work.

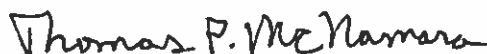
Besides the 4248 civil cases and 4246 cases we receive from FCI Butner, we are also appointed in many felony cases from that institution complex which has five separate prisons. Over the last several years we have also been appointed in several thousand cases arising from the Fourth Circuit's watershed decision in *United States v. Simmons* whose impact fell almost exclusively on the three North Carolina Districts. Our office has also had one of the largest volumes in the country of crack cocaine amendment and drug minus two cases. We are now dealing with a large number of cases arising from the Supreme Court's decision in *United States v. Johnson*.

Despite this very heavy caseload our exhausted attorneys thoroughly enjoy their work and seem to thrive under all this pressure. My job as Federal Public Defender is the best job I have had in my 50 years as an attorney. I say this mainly because I am very fortunate to work with such a dedicated group of attorneys and others in this office. Our attorneys believe strongly in giving our clients the very best quality of representation. We of course have some unhappy clients when they receive very long sentences, but our attorneys have worked long hours to give them the best representation. We also receive many more communications from other clients who write us after the sentencing hearing to say how pleased they are with the services of our attorneys and other personnel.

As Federal Public Defender I believe our office has been an excellent steward of the government money. We are frugal in what we spend but at the same time give excellent representation to our clients. We have had some very difficult cases such as three terrorism cases, several serious kidnaping and torture cases, many fraud cases which are always time consuming as well as the usual gun and drug cases. Our attorneys and staff are amazing to me. They consistently are very diligent, serious and dedicated to their work.

Thank you for giving me the opportunity to address the Committee with my presentation.

Very truly yours,



Thomas P. McNamara
Federal Public Defender