

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
701 CLEMATIS STREET
WEST PALM BEACH, FLORIDA 33401

WILLIAM MATTHEWMAN
UNITED STATES MAGISTRATE JUDGE

(561) 803-3440

December 22, 2015

Members of the CJA Ad Hoc Committee
Wilkie D. Ferguson U.S. Courthouse
400 N. Miami Avenue
Miami, FL 33128

RE: Miami Public Hearing for the Criminal Justice Act Review
Proffered Written Testimony--January 12, 2016

Dear Members of the CJA Ad Hoc Committee:

I have been involved with the Criminal Justice Act since the 1980's. Previously, I was a CJA panel member, a CJA District Representative for the Southern District of Florida, a CJA Circuit Representative for the Eleventh Circuit, and a National CJA Representative. In my current position as a United States Magistrate Judge, I often appoint CJA attorneys and the Federal Defender to criminal cases and observe those appointed defense counsel in action. I am also a member of the CJA Committee in our district.

The Southern District of Florida is a very large, diverse and busy district. In the year ending September 30, 2014, our district had 2,324 criminal defendant filings. The great majority of these defendants are indigent. Our district could not function without the hard work of the Federal Defender's Office and CJA counsel.

Multi-Defendant Cases:

Multi-defendant cases involve unique challenges, concerns and issues. There are initially issues involving conflicts of interest. The Federal Defender's Office is often appointed to represent the initial or lead defendant, and then the Court must rely upon CJA counsel to represent the balance of the indigent codefendants. It is a fact of life that most defendants in multi-defendant cases in our district are deemed to be indigent. We have a list of CJA attorneys who are on duty each week of the year in each division of our district, and it is our normal practice to go down the list of on-duty CJA attorneys and appoint them as each indigent codefendant appears before the Court. The idea of having such a list of on-duty CJA attorneys is, in my view, a good one and it works quite well in our district. The CJA attorneys know when they are on duty, and they are expected to quickly make themselves available to visit newly-arrested defendants to prepare for bond/detention hearings and other potentially urgent matters.

Some ways to avoid unnecessary expenditure of CJA attorney's fees in multi-defendant cases are to require prompt initial discovery from the government by way of a Standing Discovery Order, preclude unnecessary boiler-plate motions by defense counsel, and encourage professional and cooperative behavior between government and defense counsel without sacrificing zealous advocacy. In my experience, the sooner that full discovery can be provided, the sooner the case can be resolved, whether by guilty plea or trial. And in general, I think that criminal cases that drag on unnecessarily due

to discovery problems or other reasons often result in larger CJA vouchers. Defense motion practice should also be coordinated to the extent possible so as to avoid the filing of duplicative motions by similarly-situated codefendants.

In multi-defendant cases, the use of defense experts, especially investigators, can also create certain issues. To the extent that there is no legal conflict or ethical prohibition, defendants may be able to share investigators to some degree to minimize costs. Further, codefendants may be able to share certain forensic experts such as computer experts, forensic pathologists and audio experts, thereby minimizing costs and expenses. Of course, such cost savings measures should only be utilized when they do not threaten zealous and effective representation.

E-Discovery:

E-discovery represents a rapidly growing area. The United States Attorney's Office increasingly relies upon e-discovery in criminal cases, and the Department of Justice will be implementing a national policy mandating encryption on all "removable media" from U.S. Attorney's Office computers on January 15, 2016. Defense attorneys must receive training in the handling and review of e-discovery so as to facilitate effective review of such discovery by defense counsel and their clients. Further, in appropriate cases, e-discovery experts and/or forensic experts may be needed by defense counsel to fully investigate their clients' cases. As mentioned above, sharing of such experts among similarly-situated codefendants, to the extent legally and ethically permissible, can serve to provide both effective representation to a defendant and to minimize CJA costs.

An important issue in e-discovery is defendant access to that e-discovery. When defendants are on pre-trial release, it is relatively easy for defense counsel to allow client access to e-discovery in the attorney's or investigator's office. However, when defendants are incarcerated pre-trial, certain difficulties may arise, such as a lack of client computer access in the jail or detention center, or the inability of defense counsel to view voluminous e-discovery with their clients. These issues need to be addressed on both a systemic basis by insuring that the defendants are permitted to view such e-discovery in the jail or detention center, and on an individual basis by insuring that CJA counsel are making such e-discovery available to incarcerated defendants.

Extra-Territorial Discovery:

Although certainly not a routine occurrence, requests for extra-territorial discovery have arisen in our district. Such requests include leave to take depositions outside the United States under Fed.R.Crim.P. 15(c)(3), subpoenas pursuant to Fed.R.Crim.P. 17(e)(2) and 28 U.S.C. 1783, and letters rogatory pursuant to Fed.R.Civ.P. 28(b), Fed.R.Civ.P. 4(f)(2)(B), 28 U.S.C. 1651 and 28 U.S.C. 1781. These requests can involve great expense in CJA cases, including travel and lodging expenses, costs associated with the procedure, and attorney time expended on litigating the request, pursuing the discovery and attending the discovery procedure. When the case is a multi-defendant case, additional expense and logistical problems may arise due to requested participation by codefendants' counsel. In my view, the court needs to carefully scrutinize these requests to insure that they are legally justified, reasonably necessary to insure the fair trial and due process rights of the defendant, and designed to elicit admissible testimony or evidence. I think that judges should take an active role in the approval and management of extra-territorial discovery in order to minimize costs and expenses.

Use of Experts in Criminal Cases:

In criminal cases, the expert used most frequently by CJA counsel is the private investigator. Such experts are useful to defense counsel in both the guilt phase and the sentencing phase of the case. Defense investigators are utilized to, *inter alia*, locate and interview potential witnesses, obtain copies of police reports and criminal records of convictions, engage in background investigations of potential witnesses, photograph crime scenes or areas relevant to criminal allegations, meet with the client and his family on certain issues, and provide other valuable services to defense counsel. It is fairly common in our district for CJA counsel to request appointment of defense investigators. Typically, when authorizing a defense investigator, the court places parameters on both the hourly rate of the investigator and the total amount authorized, as required by the Criminal Justice Act. In my view, defense investigators are often quite useful and necessary in assisting defense counsel to zealously represent their clients. I think it is wise that the Criminal Justice Act authorizes the use of such investigative experts; however, the committee may wish to look into the hourly rate and statutory cap permitted for defense investigators under the Criminal Justice Act, as in my view they are both set too low and prevent some investigators from taking CJA cases. I think it may be time to consider raising both the CJA hourly rate and the statutory cap for CJA investigators.

Other experts occasionally utilized by CJA counsel include psychological, psychiatric, mental health, and medical experts, depending on the facts of the case. In the appropriate case, such experts are necessary to assist defense counsel to effectively represent the defendant. Such experts may be used in the guilt phase and/or the sentencing phase of a federal criminal case and should be authorized when appropriate. However, as with other experts, courts should carefully review such expert requests to insure that CJA money is not wasted on a frivolous, unnecessary or legally unsupportable request.

The final main area of expert usage is in the area of forensic experts. Such experts can include computer forensic experts, forensic pathologists, fingerprint, DNA, blood spatter and other such experts. These experts are not routinely requested. They can be necessary when the facts of a given criminal case require the defense to investigate certain forensic evidence to either rebut the government's case or support a defense.

Conclusion:

In our district, I have found the assistant federal public defenders and CJA counsel to be some of the best and brightest attorneys who appear in our courts. They serve a very important and vital function. In fact, I do not believe that our criminal courts could operate without their efforts and advocacy. The Criminal Justice Act is important and wise legislation, and it should be improved or modified as necessary to continue to insure that indigent defendants receive effective representation.

Thank you for soliciting my testimony and comments. I am happy to answer any further questions you may have.

Sincerely,

William Matthewman
U.S. Magistrate Judge