

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
U.S. COURTHOUSE  
DETROIT, MICHIGAN 48226

CHAMBERS OF  
**PAUL D. BORMAN**  
UNITED STATES DISTRICT JUDGE

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April 29, 2016

Honorable Kathleen Cardone  
United States District Judge  
Chair, Ad Hoc Committee to Review  
the Criminal Justice Act Program  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20544

Dear Judge Cardone:

Thank you for inviting me to address the Ad Hoc Committee to Review the Criminal Justice Act in Minneapolis on Tuesday, May 17, 2016 at 3pm. In advance of this hearing, I have reviewed the submissions and testimony from many of your hearings, and “booted up” my recollection of the initial Prado Committee and my 37 years of experience with the Criminal Justice Act.

I must begin by stating how impressed I was by the quality of the submissions to your Committee by the Federal Defenders around the United States. Although they have experienced the most drastic impact of sequestration in 2013, and even today on a daily basis experience the continuing devaluation of the role of the Judicial Conference’s Committee on Defender Services Committee, their submissions maintain a constructive attitude in addressing the critical Criminal

Justice Act issues before this Committee.

I will offer this Committee two different perspectives on the operation of the Federal Criminal Justice Act over the past 37 years. From 1979-1994, I served as the Chief Federal Community Defender for the Eastern District of Michigan. In 1994, lightning struck, and I became the first Federal Defender to ever be appointed directly to the Article III Federal Bench. (Since then, more Defenders have followed this direct path, including the first Federal Defender to a Court of Appeals Judgeship – Judge Jane Kelly of the Eighth Circuit) I have served as an Article III District Judge in the Eastern District of Michigan for the past 22 years, and have chaired that Court’s Criminal Law Committee since January 2009. This Court has 15 active Judges and 8 Senior Judges. Eighteen District Judges are located in the Detroit Federal Courthouse, two in Flint, and one each in Ann Arbor, Bay City and Port Huron.

The Federal Community Defender Office for the Eastern District of Michigan (FDO) presently employs 22 Defenders and 3 Research Attorneys in representing indigent defendants in all five Court locations. There are also robust panels of defense attorneys appointed to represent indigent defendants under the Criminal Justice Act (CJA). The FDO manages the appointments of CJA Attorneys. Applicants for CJA attorney panels must fill out a work-history questionnaire, and then be screened/selected by a Blue-Ribbon Committee that evaluates trial practice experience, competence, and knowledge of Federal criminal law and procedure and the Sentencing Guidelines. The Blue-Ribbon Screening Committee is composed of experienced Federal Court defense attorneys, and includes representatives from the FDO, and traditional and diverse bar associations. One CJA panel serves the Detroit, Ann Arbor and Port Huron Courthouses; separate CJA panels serve the Flint and Bay City Courthouses. CJA Panels are

created every three years: existing panelists must reapply. Notice of upcoming panel screenings are placed in legal publications. Federal Judges are not involved in the CJA attorney selection process. The Blue-Ribbon Screening Committee sends its recommendations to the Chief Judge. I cannot recall a Judicial veto of any attorneys on a Blue-Ribbon Committee-submitted list.

In my experience as the Federal Defender and as a District Judge, I have not heard of many CJA voucher cuts by our Judges. I firmly believe that today local CJA attorney voucher reduction concerns are fewer because the Sixth Circuit has an outstanding Case Budgeting Attorney, Robert Ranz, who does budgeting with CJA Attorneys in death-eligible cases, and in mega/complex cases requiring interim vouchers and/or over 300 hours. All District Court vouchers must be approved first by the District Judge and then by the Court of Appeals. Mr. Ranz reviews all CJA attorney District Court voucher petitions for excess compensation requests that exceed CJA maximums.

District Judges can consult with Mr. Ranz if they have a concern about a particular voucher submission. My understanding is that every Circuit, except one, now has a Case Budgeting Attorney. It is not surprising that CJA vouchers in many cases are increasing, because the amount of paper discovery documents and audio and video tapes are increasing as many indictments involve multi-defendant gang RICO cases, and complex fraud cases, because additionally, CJA Attorneys in every case involving a detained client must drive long distances to visit their clients, and then spend more time at the jail going over discovery.

As the Detroit Chief Federal Community Defender at the time of Prado I, I strongly opposed separating the Federal Defender Program from the Federal Judiciary. I reached this conclusion because during my 15 years as Chief Federal Defender, the Judicial membership of

the Defender Services Committee consistently strongly endorsed the importance of a strong and independent Federal Defender system in its presentations to the Judicial Conference of the United States. Thereafter, members of the Judicial Conference testifying before Congress carried forward the Defender Service's Committees Third Branch's strong support of the critical role of Federal Defenders and CJA Attorneys in the Federal Criminal Justice System.

I can recall that over my fifteen years as Chief Defender, the Defender Services Committee (DSC) was composed of Federal Judges from different backgrounds, including some who were not initially on board with the concept of a strong, independent and adequately funded Federal Defender System, but who all came to understand and then firmly endorse the sacred mission of federal criminal defense counsel under the Sixth Amendment. Time and again, the members of the DSC recognized that this Federal criminal defense mission requires not only sufficient funding, but also independence from direct control by the Federal Judiciary. Specifically the critical point of emphasis then was – and now – should be that counsel representing indigent defendants are serving as their lawyers, and are not support employees serving the Federal Judiciary, like Probation Officers.

Federal Defenders and CJA counsel lawyers whose legal and ethical obligation is to represent their indigent clients. Often, the role of the Defender/CJA is, and should be at odds with the Federal Judge, e.g. arguing a motion to suppress, requiring evidentiary hearings before trial and sentencing. I firmly believe that today, the Defender Services Committee, chaired by Judge Catherine Blake, stands ready to continue to implement its sacred mission of protecting the Sixth Amendment right to counsel. My great concern is that now the Defender Services Committee is being hamstrung from doing so by the Judicial Conference of the United States.

As a Federal District Judge, and as Chair of my Court's Criminal Law Committee, I am well aware of the recent traumatic impact of sequestration on the Federal Judiciary in general, and in particular the more devastating impact it had on Federal Defenders and CJA attorneys. During 2013-14 sequestration, every Federal Defender Office in the United States, except for two, had to either furlough/lay off staff (no pay) or terminate them. Also, during sequestration, payment of CJA Attorney vouchers was delayed. At the same time, during sequestration, United States Attorneys did not suffer budget cutbacks: no lay offs or terminations. In fact, many U.S. Attorney offices received additional funding for new hires. The result was not a surprise: more U.S. Attorneys bringing more cases; fewer Defenders available to deal with the higher caseload of indigent defendants, necessitating the appointment of additional CJA attorneys who cost more to handle a case than a Federal Defender.

Some might say, in response to these realities during the sequestration period in 2013-2014: "that was then; get over it." But it was not just then. Although CJA funding has increased since sequestration and the daily trauma over layoffs, furloughs, and staff reductions is over, Federal Defenders and CJA attorneys are not just experiencing PTSD with regard to the present role of the Defender Services Committee within the Judiciary. Today, the Judicial Conference is continuing its diminishment of the role of the Defender Services Committee that began during sequestration, and also transferring critical Federal Defender Attorney support programs to the Administrative Office of the U.S. Courts.<sup>1</sup>

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<sup>1</sup> The testimony of Federal Public Defender Maureen Scott Franco, (W.D. Tx) at this Committee's hearing in Santa Fe with regard to the Administrative Office of U.S. Courts consolidation of the Federal Defender IT system into the A.O.'s IT function clearly highlights the problem:

[W]hat happened with the consolidation of the IT has become especially

Today, the Judicial Conference Committee on Defender Services, and its oversight of and advocacy for the Defender and CJA Programs continuing to be marginalized by the Judicial Conference's appointment of non-DSC Judges, and A.O. and Judicial Conference employees, with no prior experience on the Defender Services Committee to control the lifeline and resources of the Federal Defender and CJA programs. I believe that this does not make sense from a management situation. I believe that it demoralizes the Defender Services Committee membership, and the Defenders and the CJA attorneys. I believe that this amounts to a present day Judicial Conference-imposed sequestration impacting solely its Defender Services Committee. Incredibly, this Judicial Conference imposition of second class citizenship on the Defender Services Committee comes at a time when the Administrative Office's recent work management-time measurement study established that Federal Defenders have been required to work significant amounts of overtime on their cases, and the study recommends adding new defender positions.

I respectfully request that this Blue-Ribbon Committee recommend to the Judicial Conference and Federal Judicial Center that they add training programs sessions for new judges, and indeed present judges, to explain the mission of the Criminal Justice Act, that Defenders and

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troublesome and really needs to be addressed immediately. . . . [O]ur IT system was separate from the AO's IT function. . . . [T]he AO decided to consolidate for costs reasons, they decided to take over our IT system . . . they moved the Defender Services IT into the AO. This created a very difficult situation, if not an ethical situation. . . . [D]efenders continue to be concerned with the AO's access to client information and we should be concerned . . . For example, one AO IT manager at the highest level explained that he had top secret clearance and thus we defenders should not be concerned if he had access to our data. He did not understand that having access to our data when he is not a defender employee violates the duty of confidentiality owed to our clients. . . . [T]he issue of the independence of our IT function is of extreme importance.

CJA attorneys are not court-support employees, and make them aware the availability of the services of Circuit Criminal Case Management Attorneys. Such training should also educate Federal District Judges and Magistrate Judges on the importance to the defense function of funding CJA attorney requests for critical expert and investigative services.

## CONCLUSION

The concept of establishing a separate stand-alone independent Federal Criminal Justice Act agency, similar to the Legal Services Corporation, to house the Federal Defender Program, with a “Defender General” in charge was a “non-starter” when the Prado I Committee Report was issued, and continues to be a “non-starter” today as I respectfully address this Blue-Ribbon Prado II Committee.

First, the reality is that today many of the strongest supporters of the Criminal Justice Act/Federal Defender/CJA Programs are members of the Federal Judiciary, who day-in and day-out recognize and value the outstanding performance that Federal Defenders and CJA attorneys render in providing outstanding representation to their indigent clients, as mandated under the Sixth Amendment.

Second, as a political junkie, albeit non-partisan, I have yet to detect an interest by a majority in either house of Congress to fully fund an independent Federal stand- alone \$1 billion dollar taxpayer-paid program to represent those individuals who are indicted for very serious federal offenses. As Professor Barbara Creel explained to this Committee in her testimony in Santa Fe: “We represent unpopular people.” Further, you can be sure that any such independent billion dollar program would carry with it stringent oversight controls and regulations, that are not presently imposed on the Third Branch.

Finally, while I have read about Congressional discussions of eliminating some mandatory minimums sentences, and lowering some Guideline ranges, compassionate release programs, and cutting back on the Federal Prison population, what I see on a daily basis in Detroit is an increase in the number of serious jail time mega-defendant indictments, increasing mega-complex caseloads, and more defendants being detained pending trial. I have yet to confirm on the political radar, a move to champion the rights of federal criminal defendants by increased funding of the CJA an independent Criminal Defendant type Legal Services Corporation.

My hope is that this Blue-Ribbon Committee will consider recommending the elimination of the Judicial Conference's diminishment of the role of the Defender Services Committee, and the restoration of the Defender Services Committee to it's rightful place within the Judicial Conference, and allow it to assure its role as the Guarantor of Sixth Amendment protections to the underclass of indigent Defendants in the Federal Criminal Justice System.

Thank you again for allowing me to testify.

Judge Paul D. Borman  
U.S. District Court  
Eastern District of Michigan