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April 14, 2016

Honorable Kathleen Cardone, Chair  
Ad Hoc Committee to Review the Criminal Justice Act Program  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle N.E., Ste. 4-200  
Washington, D.C. 20544

Re: Minneapolis Hearing for the Criminal Justice Act Review

Dear Judge Cardone:

I am the Federal Defender for the Eastern District of Michigan and have served in this position since 1995. From May, 1980 until becoming the Defender, I was the Chief Deputy. The Federal Defender Office is a community defender organization with offices in Detroit and Flint, Michigan. The office was established in 1972 as a separate division of the Legal Aid & Defender Association, Inc., and with a staff of 42 provides representation in the U.S. District Courts located in Detroit, Ann Arbor, Flint, Bay City, and Port Huron, Michigan. Douglas Mullkoff is the District's CJA representative. Mr. Mullkoff was selected by then Chief Judge Rosen in 2013. Mr. Mullkoff is a long standing CJA practitioner with a private state and federal practice. He is well respected by all members of the bench.

We are writing to give you input from our district concerning five aspects of the current federal indigent defense system. We have consulted with members of our local panel, and we have reached a consensus which is reflected in our comments below.

Finally, perhaps most importantly since it is the focus of the Minneapolis hearing, we will discuss remote detention, an area of great concern in this district.

**1. Judicial involvement in voucher review, including panel attorney fear of retaliation for zealous advocacy or questioning a judge's ruling.**

We do not believe that attorneys fear retaliation for zealous advocacy or for questioning a judge's ruling in this district. We believe that we have devised a system that sufficiently insulates panel attorneys from these kinds of concerns. Since the inception of this office, our panel selection process has taken place without any direct involvement of judges or magistrate judges. Every year, if there are panel vacancies, a review committee made up of individuals from the Federal Defender Office, a representative from each of the major county bar associations in our district, and a representative from the African American and Hispanic Bar Associations, is formed for the three separate Detroit, Flint, and Bay City CJA panels. All applicants are screened by the selection committee, and the names of the attorneys selected are forwarded along with the applications to the Chief Judge. Every three years, all CJA panel attorneys are required to re-apply. Applications from non-panel attorneys wishing to join the panel are also reviewed at the same time. Because no judges or magistrate judges are involved in this selection process, we have eliminated any problems related to the perception of judicial influence.

We strongly support continued judicial involvement in voucher review. While judges may not understand or appreciate all that goes on behind the scenes in a federal criminal representation, they are in a much better position to be aware of the individual attorney's work and commitment to the representation of the client. In our view, the worst change that could occur would involve the voucher review process being delegated to a non-criminal defense attorney employee of the court. We understand that despite our desire to see judges continue to perform the voucher review responsibilities, this may be a task the judges would like to delegate. It is our understanding that at least one district (Northern District of California) is employing an attorney who has experience representing defendants under the CJA for initial voucher review before turning the vouchers over to the judges for final review. If any delegation were to occur, this procedure seems to be the most appropriate way to have the vouchers reviewed by someone who has the needed skillset to evaluate a CJA attorney's voucher.

**2. Voucher review procedures and the impact of unwarranted voucher reductions on quality of CJA representation.**

It is our understanding that voucher cutting takes place in our district and that attorneys are not always given notice by the court of its intention to cut the voucher. We believe that notice of intent to cut voucher guidelines should be made mandatory, not merely a suggested best practice. Our attempt to get solid information from our CJA attorneys has been difficult. We believe that there is a stigma associated with being cut, and attorneys are not willing to self-identify. We believe that the statutory compensation maximums need to be raised from their current level since such a great percentage of representations these days go over the statutory maximums. We also believe that the justification for fees in excess of the statutory maximums should be broadened. Currently, counsel is required to show that the representation was “extended” or that the case was particularly “complex.” More and more, attorney hours will go beyond the statutory maximum because a particular defendant requires tremendous amounts of face time, counseling, and joint discovery review. Travel to remote detention facilities also increases time spent on a case. We are aware that the statutory case maximum amounts have risen over the years in proportion to the incremental increases in the attorney hourly rate. It is our observation that the complexity, difficulty, and time-consuming nature of these representations have increased markedly since 1964, when a federal court’s criminal docket looked much different than it does today. It seems to be the perception of many judges employing voucher cuts that the statutory maximums represent a fence they should not cross except in the most extraordinary circumstances. Since this mindset is likely to prevail and continue, the best practice would be to increase the maximums allowed without requiring counsel to file a motion for fees in excess of the cap.

**3. Expert services requests and approval process.**

In the event that positions are created using former CJA criminal defense attorneys to assist the court in reviewing vouchers, it would make sense to also allow these same individuals to assist in motions seeking funding for experts. It is our understanding that in the Northern District of California ex parte requests for experts are routinely referred to the CJA voucher review attorney for input to assist the trial judge in deciding what makes sense as far as budget and approval.

#### **4. Panel Administration.**

We believe that the best way to administer a panel is to do so with no judicial involvement. We explained above how we go about selecting and retaining CJA attorneys without direct input from the judges or magistrates. Frankly, we found it disturbing to learn that judges in federal districts around the country are routinely involved in decisions about the appointment of attorneys from the panel or retention of panel attorneys. Our Federal Defender Office for the Eastern District of Michigan employs an administrator who oversees distribution of cases to CJA panel attorneys. The system is designed to spread appointments across the panel evenly, with the flexibility to veer from that practice when good cause exists. In those exceptional cases I, as the Federal Defender, can identify special need situations to insure that CJA attorneys with special or unique skills will be matched with a client who will benefit from the attorney's expertise.

#### **5. Perception of Panel Attorney Quality.**

There seems to be a consensus that lawyers in the Federal Defender Office in our district have the highest level of skill in federal criminal defense among all practitioners. Their use of resources (experts and investigation) is more frequent and regular than most lawyers. A handful of private practitioners also are known to provide representation at the highest level. A high percentage of these lawyers' practices are made up of a combination of retained federal criminal cases and CJA cases. The general perception of CJA panel attorneys in our district is positive. The lowest tier of criminal lawyers working in our federal courts (perception-wise) are retained lawyers whose predominant practice is in the state court system.

#### **6. Remote Detention.**

The majority of clients detained in Detroit are housed at six remote jail locations: Sanilac County, St. Clair County, Monroe County, Midland County, Livingston County, and the Federal Detention Center in Milan, Michigan. The Sanilac and St. Clair County Jails are located approximately 178 and 120 miles round trip from Detroit, respectively; Monroe is approximately 78 miles round trip; Midland is approximately 250 miles round trip; Livingston is approximately 106 miles round trip; and Milan is 96 miles round trip. Up to several years ago, most of the Detroit detained clients were housed at the Wayne County Jail, located two

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miles from the Detroit office in the downtown area. The U.S. Marshal Service stopped using the local county jail, however, after an inspection revealed that this facility did not meet the standards required by the Marshal Service to house federal inmates.

Flint detained clients are also housed at a great distance from the Flint courthouse at the Clare County and Midland County jails. Clare County Jail is approximately 218 miles round trip from the Flint Office, and Midland County Jail is approximately 120 miles round trip.

Detaining clients at great distances from defense counsel presents several challenges to providing quality representation. It makes it more difficult to establish the trust necessary to gain the confidence of the client; it drives up CJA voucher expenses; and, given the number of remote jail facilities in this district and the continuous shifting of clients from one jail to another, it impedes continuity of health care.

Public defenders and assigned counsel have a unique challenge in establishing an attorney-client relationship with a client. Many clients coming into the federal criminal justice system have had negative experiences with appointed counsel, given the current crisis in Michigan indigent defense funding. Moreover, assigned counsel have not been selected by the clients. Consequently, both federal defenders and CJA counsel have the challenging task of building a working relationship. Frankly, this can only be accomplished by spending “face time” with the client. Given the distances of several of the detention facilities, defenders and CJA counsel often times have to devote a full day to visit one client.<sup>1</sup> This results in a practice that is fragmented and less efficient. Unfortunately, attorneys spend more time in travel than actually communicating with the client. We often have to schedule at least one day out of the office a week, which makes the attorney staff less accessible to our other clients and colleagues, and results in less cohesive work on our cases.

Distance is also an impediment to family visits, as client families do not have either the means of transportation or the money to spend for travel to remote

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<sup>1</sup> Defenders, CJA counsel, and experts have had the unfortunate experience of driving to a remote county jail only to discover that the client was moved to a different facility the morning of the scheduled visit.

detention facilities. This is compounded by the fact there is no public transportation to these facilities. In addition, the rules for visitation and communication vary greatly from jail to jail, which is a burden on clients' families since our clients are often moved to different facilities two to three times during the course of representation. This decentralized detention also creates logistical problems with respect to transfer of client property and prisoner funds. Distance impedes family member participation in case-related decision making as well, at a time when the client is often hesitant to make an important case-related decision without the input from a trusted family member.

In my capacity as Chief Federal Defender, I receive calls from CJA clients or their family members expressing dissatisfaction regarding CJA counsel who have not visited. As a result there has been an increase in substitute counsel appointed after first counsel has been removed by the district court judge. These substitutions increase overall case costs. On the other hand, I have also received complaints from CJA counsel whose vouchers risk being cut because a judge questions the large travel-related fees. This creates a disincentive for future client visits by CJA counsel.

Finally, for those detained clients who have serious health issues (both physical and mental), the continuity of their health care is compromised by the transfer from one remote jail facility to another during the course of the case. Each time a client is transferred she has to begin anew with requesting health services at the new facility. It routinely takes days to first meet with medical personnel and additional time before prescription medicine is ordered and obtained by the client. This results in clients spending days without medication. Additionally, the jail facilities are in different counties, which have different prescription and medical protocol. So, for example, clients receiving one type of psychotropic drug are not guaranteed to remain on that same drug during the course of the case. We have had instances where a judge adjourns a court hearing because of the gaps clients experience in receiving their mental health medication.

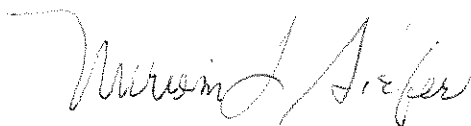
Our local Marshal's office has been very responsive to these issues. However, given that their only option is remote facilities and a limited number of bed spaces at each facility (which requires them to shuttle detained defendants between facilities), there is only so much that they can do to impact these problems.

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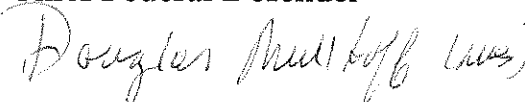
In conclusion, thank you for extending the invitation to testify at the hearing; I regret that I am unable to attend. Mr. Mullkoff and I appreciate the opportunity to communicate our thoughts on these important issues by way of this letter. If you have any questions or comments, please feel free to contact either one of us.

Sincerely,

FEDERAL DEFENDER OFFICE



Miriam L. Siefer  
Chief Federal Defender



Douglas Mullkoff  
CJA Representative,  
Eastern District of Michigan

MLS/KF