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

Testimony of William J. Leahy, Director of the New York State Office of Indigent Legal Services (ILS) and former Chief Counsel of the Massachusetts Committee for Public Counsel Services (CPCS)

Dear Judge Cardone and Committee Members:

When I testified before Judge Prado's Committee in Boston in March, 1992, I spoke in favor of virtually complete federal defender independence from judicial oversight, based upon my then-recent experience as Chief Counsel of CPCS. Now, having served for nineteen years as CPCS Chief Counsel and having just embarked upon a second five-year term as ILS Director, I want to begin by reaffirming that the principle of public defender and assigned counsel independence is primary and essential and foundational. It was no accident that independence is listed as the very first of the *ABA Ten Principles of a Public Defense Delivery System* (2002): **"The public defense function, including the selection, funding, and payment of defense counsel, is independent."** The Commentary to the black letter elaborates by specifying that "[t]he public defense function should be…subject to judicial supervision only in the same manner and to the same extent as retained counsel."

My career as a public defender trial and appellate litigator (Massachusetts Defenders Committee 1974-1984) and public defense leader in Massachusetts (1984-2010) and New York (2011-present) highlights the fundamental importance of public defender independence; and it also illuminates how judges can play an appropriate and decisive role in fostering representation that is both effective and independent.

Take Massachusetts in the 1970s, for example. The Massachusetts Defenders Committee (MDC, established in 1960) and the Roxbury Defenders Committee (RDC, 1972), each directed by an

independent board, provided felony defense in the cities; but the vast majority of indigent criminal defense was provided by private lawyers who were subject to the approval of local judges for their assignments and their payment. Under this system of dependency, vigorous advocacy was often discouraged, and the quality of representation was poor. In about 1977, the Chief Justice of the Massachusetts Supreme Judicial Court, Edward Hennessey, commissioned a study of the quality and structure of the Commonwealth's indigent defense representation. The study, authored by SJC Associate Justice (later Chief Justice) Herbert Wilkins, concluded that while the quality of the representation provided to MDC and RDC clients was generally of high quality, the same could not be said of the assigned private counsel representation. The Wilkins Committee criticized as inappropriate the oversight of indigent defense representation by judges, and called for the creation of a comprehensive statewide public defense agency under the direction of an independent Board.

The Wilkins Committee Report led to the enactment in 1983 of Massachusetts General Law chapter 211D which established the Committee for Public Counsel Services (CPCS). A fair assessment of the success of CPCS may be found in chapter 8 of Norman Lefstein's 2011 book *Securing Reasonable Caseloads: Ethics and Law in Public Defense*. It is appropriate to applaud the Supreme Judicial Court's recognition that it is improper for judges to select counsel, or to review and reduce attorney's requests for payment; and to salute its recognition of the need for independent governance of indigent defense representation. It is equally important to highlight the Court's continued constructive involvement in supporting the new, independent CPCS following its creation. For many years (from 1984 until 2011), the SJC Justices appointed all of the members of the 15-member governing Committee, and even today they appoint a majority of its members. But the Court has scrupulously refrained from misusing its appointment authority to curb zealous representation in any way. In fact, throughout the successful history of CPCS, the SJC has been a source of high expectations and strong support of the agency's progress. The Massachusetts experience demonstrates that independence from judicial oversight does not necessarily require the judiciary's divorce from constructive assistance in the delivery of high quality representation to the indigent accused.

New York's history is different, as every state's is; but the lesson is the same: there is a role for judicial involvement that scrupulously avoids judicial interference with the professional judgment of indigent defense providers. New York chose in 1965 to delegate its responsibility for providing counsel in mandated representation cases to New York City and to each of the 57 counties outside the city. By 2006, the resulting multiplicity of programs and oversight mechanisms led the Commission convened by former Chief Judge Judith Kaye to issue its critical finding that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." (Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* [June 18, 2006], page 15).

While the Kaye Commission's call for an Indigent Defense Commission and a statewide Public Defender Office went unheeded, in 2010 New York enacted Executive Law sections 832 and 833, which established the Office of Indigent Legal Services (ILS) and the Indigent Legal Services Board (ILSB). The nine-member Board is chaired by the Chief Judge of the Court of Appeals. Two members are appointed directly by the Governor. The six additional members are appointed by the Governor upon recommendation by the state Assembly (1), the state Senate (1), the state Association of Counties (2), the state Bar Association (1), and the chief administrator of the state court system (1). The consistent support of our diverse and independent Board for high quality indigent defense representation has been an indispensable factor in the progress we have made to date in improving the quality of mandated representation in New York. For example, when our then-ten person office was invited in October, 2014 to implement the settlement between the state and the plaintiffs in the class action litigation *Hurrell-Harring v. The State of New York*, our Board gathered in emergency session and voted unanimously to support our request for the additional staffing and funding that would be required to implement the historic settlement.

New York is unusual in that two judges are members of the Board, and one is Chair. This structure could be problematic, but in practice it has not been, for two reasons. First, every member of the Board bears an equal responsibility, and acts accordingly. Every member is dedicated to the statutory goal of improving the quality of representation in every corner of the state, and every member speaks with equivalent force. Second, Chief Judges Judith Kaye, Jonathan Lippman (Chair of ILSB through 2015) and Janet DiFiore (Chair since January, 2016) have emulated the example of Massachusetts Chief Justice Edward Hennessey in their adherence to the principle of independence for the defense function. Each Chief Judge and Board Chair has been a champion for both public defense independence and for high quality representation.

My experience in Massachusetts and New York thus teaches not only that independence is the foundational principle of an effective public defense system, but also that fundamental principles may find fruition in a myriad of structures. My experience during thirty-two years of state public defense leadership has demonstrated not only the dangers of judicial interference, but also the benefits of appropriate judicial support.

The emergence during the past two decades of a new generation of extremely capable and highly principled Federal Defender and CJA lawyer-leaders who know their own federal district systems as well as I know my state structures is a dramatic change from the landscape of 1992. Their constructive and realistic proposals afford this Committee a much more meaningful opportunity to eliminate excessive judicial interference and promote constructive judicial support for strong, independent public defense representation than was considered achievable in the 1993 Report of

the Judicial Conference on the Federal Defender program. It is an opportunity that this Committee should not waste.

For example, I have read with great interest the impressive proposals that have been submitted by Miriam Conrad, Federal Public Defender for the Districts of Massachusetts, New Hampshire and Rhode Island (March 29, 2016); by Marianne Mariano, Federal Public Defender for the Western District of New York (March 31, 2016); by David Patton, Executive Director, Federal Defenders of New York (March 25, 2016) and by Jessica Hedges, CJA Board Chair for the District of Massachusetts (March 25, 2016). Furthermore, the emergence before your Committee of such dedicated and accomplished AOUSC veterans as Steve Asin, Bob Burke and Richard Wolfe (Asin and Wolfe, March 25, 2016; Burke, April 13, 2016) has enriched your committee's discussion even as it has expanded my comprehension of how defender independence might more fully be honored within or without the federal judicial branch. The thoughtful proposals based on personal experience that these esteemed federal public defense experts have submitted for your consideration are deserving of your most serious consideration and adoption.

In particular, with respect to the fundamental issue of the structure under which federal public defense representation would best operate, you have been presented with three plausible options in section II of David Patton's paper, at pages 4-7. You have also the specific proposal submitted by Marianne Mariano to elevate the independence of federal public defense within the judicial branch, by creating an Office of Defender Services whose increased stature within the Administrative Office would honor the fundamental principle of independence, as the current structure does not. I have not much practiced in the federal courts, and do not presume to have an opinion superior to theirs as to which specific reform is superior. What I do know and can say is that reform along the lines they propose is essential.

I do specifically propose that the time has come, indeed it is long past, for federal judges to refrain from selecting the leaders of federal defender offices and the lawyers for CJA panels, and to abstain from any involvement in the review or approval of vouchers submitted by lawyers. All of this was accomplished in the comprehensive Massachusetts state system thirty years ago, with no impact save dramatically improved representation by the defense bar, and a welcomed ability for judges to concentrate their time and energy on judging. These intrusive practices are relics of a bygone age; perhaps understandable when public defense was in its infancy and was thought to require judicial oversight; but for a long time now neither appropriate nor tolerable.

Thank you for the opportunity to add my state-based perspective to your important deliberations. I look forward to the chance to speak with you on Monday in Minneapolis. Kindly note that the letterhead is for informational purposes only. The views expressed herein are my own.

Respectfully submitted,

William J. Leahy