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SOUTHERN DISTRICT OF WEST VIRGINIA

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March 25, 2016

Honorable Kathleen Cardone
Judicial Conference of the United States
Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Testimony of Federal Public Defender Christian M. Capece,
Southern District of West Virginia

Dear Judge Cardone and Committee Members:

I write in advance of my testimony before your committee next month in Philadelphia to introduce myself, describe the state of indigent criminal defense practice in my district, and offer my opinion on the question of how to best structure the Criminal Justice Act (CJA) Program.

I. Personal Background

My legal career began in October 2000 when, as a Marine Corps Officer and Judge Advocate, I was assigned as a defense counsel during a one year tour in Okinawa, Japan. I returned stateside and completed the remainder of my active duty career as a defense counsel and then senior defense counsel aboard Marine Corps Base Quantico in northern Virginia.

After leaving active duty in 2004, I spent a year as a law clerk in the Eastern District of New York near where I was born and raised in Queens. I then joined a Manhattan-based law firm and spent two years practicing in the commercial litigation department. During this time I longed to return to public service and criminal defense. My wife and I made the decision to de-camp from

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the New York-area and moved to Charleston in 2007, so that I could serve as an Assistant Federal Public Defender (AFPD) in the Southern District of West Virginia (SDWV).

Soon after arriving in West Virginia, I transferred my commission to the Air Force and West Virginia Air National Guard. I continue to serve on a part-time basis as the Staff Judge Advocate for the 130th Airlift Wing, also based in Charleston. After returning home from a deployment in late 2012, I left the Federal Public Defender's Office. During this brief stint in private practice, I served as a member of the SDWV's CJA Panel. I was then selected by the Court of Appeals for the Fourth Circuit in mid-2014 to serve as the sixth Federal Public Defender for the SDWV. I took office in November 2014.

II. Federal Criminal Defense Services for the Indigent in the SDWV

A. The Defender's Office

Our office is headquartered in Charleston. We have unstaffed offices in three other courthouses serving our district: Huntington, Beckley, and Bluefield. We are allotted 16.4 Full Time Employees, or FTEs, six of which are AFPDs. We will be at full-capacity by this summer with a new legal assistant starting next month and two interns scheduled to join our office in June.

Like many Defender offices located in rural districts, our attorneys and investigators spend a sizable portion of their work-week driving between the four district courthouses and several detention and Bureau of Prisons facilities. I estimate our attorneys and investigators spend an average of 8 hours per week driving to attend court hearings and client meetings.

Our annual case load of approximately 500 cases per year translates into approximately 25 active cases per attorney at any given time. The average caseload number was higher just a year ago when we had five AFPDs. Moreover, our district's caseload generally has dropped over the past year following the national trend. The majority of our cases involve drugs and firearm offenses. Until very recently, a large percentage of our drug cases involved small amounts of drugs, sometimes one or two prescription pain pills. The United States Attorney's Office (USAO) seems to have reversed this trend, however, and we are now seeing cases involving much greater amounts of drugs, in particular heroin and methamphetamine.

Finally, our office strives to work with the USAO, Probation Office, and the District Court on areas of mutual concern, such as reviewing cases in which clients may be eligible for relief under Johnson v. United States, 135 S. Ct. 2251 (2015).

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B. The CJA Panel

Our District has an exceptional group of 46 CJA Panel attorneys. Further, the Defender's office and the Panel enjoy a positive working relationship with our judges. The District's CJA Supervising Attorney manages the CJA Panel. She and I regularly communicate about issues of mutual concern. Our relationship is cooperative and collegial. We, members of the federal criminal defense bar, and a Magistrate Judge, constitute the CJA Panel Advisory Committee, or CPAC. The CPAC meets twice a year and recommends appointments to the CJA Panel to the District Court Judges, who have the ultimate say as to who may be a Panel member. All members must apply for reappointment every three years under the District's CJA Panel Plan, and are required annually to report having earned CLE credits specific to federal criminal practice. In addition to the CPAC, we have CJA Panel members serving as division liaisons in the four court divisions that make up the district. Division liaisons address division focused issues and co-host brown bag luncheons with our office to disseminate information and training for Panel members in their districts.

Each year, the Northern and Southern Districts of West Virginia take turns hosting a day and half seminar for our CJA Panel members. Our office is hosting this year's seminar, which will include an inaugural CJA Panel appreciation and award dinner featuring remarks by Sentencing Law and Policy blog host Professor Doug Berman. Additionally, our office updates and maintains a password-protected website devoted to providing resources to the Panel. Since 2015 we have recorded a monthly podcast, "In Plain Cite," (downloadable on iTunes) featuring discussions on developments in the law in the United States Supreme Court and the Fourth Circuit.

III. Structural Changes to the CJA Program

Having served as a Federal Public Defender for just 15 months, and having missed entirely the pain endured by Defenders during sequestration and the work measurement study, I am hardly in a position to strongly advocate one way or the other for altering the current structure of Defender Services Office (DSO) in order to become more independent from or within the Judiciary. I simply do not have the same historical perspective as my esteemed colleagues in other districts. Nevertheless, I do think that change may be needed. I will briefly summarize two experiences which contribute to my views on the issue of DSO's structure within the Administrative Office (AO) and address why I think judges should not approve CJA Panel vouchers.

I think elevating the position of DSO within the AO is desirable. My military experience leads me to believe that DSO should be led by a Chief Federal Public Defender and Chief Administrative Officer. The former's duty would focus entirely on protecting and advancing the Sixth Amendment right to counsel on a national level, whereas the latter's portfolio would be to continue to provide administrative support to FPD organizations and CJA panels. I defer to the expertise of my active duty colleagues from the military (who are scheduled to testify before this

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Committee) as to the benefits and drawbacks of a chief defense counsel position. I can attest, however, that when I served on active duty it was my impression as a junior officer and defense counsel that the independence of the Chief Defense Counsel of the Marine Corps was never in doubt and that the officer serving in that role was solely concerned with developing Marine Corps-wide policies to help ensure the best possible defense for Marines facing criminal charges. The current structure of DSO and its position in the AO gives the impression that our clients' interests and the interests of FPDO employees and CJA panel members are subservient to other interests within the AO.

I offer two examples from the perspective of a new Defender of what I think may be a foundational weakness in how DSO is currently structured within the AO. Last May I was invited to DSO's headquarters for a new Defender orientation. DSO's very capable staff provided two days of training on topics such as how to correctly fill out travel vouchers and prepare our office for an assessment. These are important topics and vital to any organization receiving and spending hard-earned taxpayer dollars. But I came away wondering, why was there no presentation on how to best lead an office of smart and aggressive defense counsel to ensure our clients' rights are upheld against often overwhelming odds, or training on the politics and best practices for dealing with prosecutors, probation officers, federal law enforcement agencies, and yes, even judges, when I, as the chief defense counsel in my district, face policies and decisions that cause me to think that my clients are being treated unfairly and their fundamental right to counsel and due process rights are threatened. Such advice and guidance were absent from my orientation, which boiled down to an introduction to the myriad administrative challenges of being a Defender.

The second example arose a couple of months after I became Defender. Our District Court Judges and the USAO were interested in addressing the issue of protecting defendants who cooperate from retaliation. Faced with a similar issue as a Judge Advocate I would have communicated my concern to the Chief Defense Counsel. I was not aware of an equivalent source within DSO who could provide guidance on this kind of issue. I sent an email to my Defender colleagues seeking their advice. Within hours I received a flood of responses. I was grateful so many Defenders took time from their busy schedules to send me, "the rookie," substantive, detailed comments. What I also realized, however, is that Defenders differed significantly on how to approach the issue. There was no common, national position. Finally, after several back and forth discussions it emerged that Defender Services Advisory Group (DSAG) was tackling the issue of cooperator retaliation and they did reach a consensus position. This was the guidance I had sought. My point here is that I had to sort through a number of different positions from my colleagues concerning an important non-administrative issue. In short, I think DSO and Defenders across the

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country could benefit from appointing an independent policy-maker analogous to a Chief Defense Counsel.¹

To be certain, since becoming Defender I have enjoyed significant support for our office's mission from the AO and DSO. I am confident that any person stepping foot in our office or encountering any member of my staff in court (or out) would know we are well-trained, well-prepared, and enjoy an abundance of resources thanks in large part to the support given to us from the AO and DSO. I think, however, that elevating DSO and giving it greater independence will do more to help Defenders meet our obligation to be ready, willing, and able to stand alone when advocating for and fighting for our clients.

Finally, as previously mentioned, the Panel members in our district enjoy a positive relationship with the District Court Judges, as well as the CJA Supervisory Attorney, the Clerk of District Court, and the Clerk's Office staff, who perform vital administrative functions essential to the smooth running of the CJA Program. Vouchers, especially now that they are digitally processed, are paid quickly with little push-back. Panel members report positive experiences with our circuit's Budgeting Attorney, who fortunately, has experience as both a CJA panel attorney and in a FPD organization. One of his roles is that of "first level review" of all excess vouchers submitted to the circuit, and his perspective as a former federal criminal defense attorney has benefitted the CJA panel since he has an intimate understanding of what is "reasonably incurred" on a CJA voucher. There is, however, still no mechanism beyond a "request to reconsider" available to challenge any cuts that may ultimately be made to a voucher by the chief judge as final reviewer.

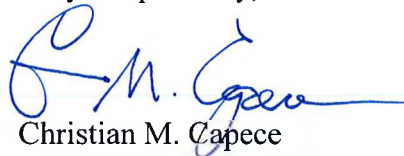
Moreover, the current process of having the trial judge decide whether the defense lawyer is paid for completed work and whether the defendant gets the expert he/she needs for an adequate defense is flawed. Defense counsel should not have to seek approval from the trial judge for the work they think is necessary to effectively represent their clients, especially when the USAO is excused from such oversight and restraint by the same judge. The CJA Supervisory Attorney (in such districts like ours where the Defender does not manage the Panel) is fully capable of exercising the judgment and discretion to approve vouchers and expert requests. There is no reason why, when there is a close call, the CJA Supervisory Attorney could not consult with the Defender and the CJA Panel Representative for guidance. Even in a district as highly functional as the SDWV, the current structure contains the seed for future conflict and discord.

¹ To be precise, if I needed guidance on a particular issue I would first speak to my Regional Defense Counsel. Defense services in each military branch are led by a chief defense counsel with subordinate regional defense counsel who supervise defense offices within a specific geographical area.

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Thank you for the opportunity to address this Committee on an important issue for those of us who dedicate our lives to the defense of the indigent. Indigent criminal defense work is a vital ingredient to American civic life and the health of the CJA Program is a key measurement of how well our nation reveres and respects liberty and due process. I look forward to meeting with Your Honor and the Committee in Philadelphia next month to further this discussion.

Very Respectfully,

A handwritten signature in blue ink, appearing to read "C. M. Capece", with a long horizontal flourish extending to the right.

Christian M. Capece
Federal Public Defender
Southern District of West Virginia

/CMC