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March 25, 2016

The Hon. Kathleen Cardone, Chair
Judicial Conference of the United States
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 the opportunity to testify before the Committee to Review the Criminal Justice Act (CJA) Program. I do not write on a blank slate. The Committee has heard from many others who have testified eloquently about the essential role of defense counsel and the challenges facing our program in the 21st century.

I have been asked to address the “structure and organization” of the Criminal Justice Act Program. No one can feel entirely comfortable with the current structure that has the indigent criminal defense system managed by the judges who preside over the litigation. At best, the system can be justified as an awkward compromise due to the unavailability of any other politically feasible administrative option.¹ This awkward compromise is impeding the delivery of indigent defense services and, ultimately, justice.

The current CJA Program has great strengths. Many defenders, administrators and judges have worked tirelessly to produce an indigent defense program deserving of confidence. However, our program cannot continue to operate with integrity without structural change to allow for greater independence, including (1) separating our program from the Administrative Office of the U.S. Courts, (2) assuring defender representation on any governing body and in the preparation and presentation of our budget, and (3) allowing Criminal Justice Act attorneys to receive payment and authorization for contract services without requiring approval of a judicial officer.

¹ Indeed, the Prado Committee Report (1993) acknowledged that Congress requested periodic reviews of the CJA because of concern about the “appropriateness” of the judiciary’s oversight of the indigent defense program.

My Background

I have been the Federal Public Defender for the District of Maryland for over 15 years. I served as an Assistant Federal Public Defender (AFPD) for 5 years. Prior to joining the Office, I served as an Assistant State Public Defender where I litigated felony trials, appeals and capital cases throughout Maryland's state courts.

Serving as the Federal Public Defender is easily my greatest professional accomplishment. I work with an incredible, diverse array of attorneys who embody the highest standard of our profession. They are dedicated to the Office's mission and serve as "the (indigent) accused's counselor and advocate with courage and devotion."² Our staff is committed as well to the Office's mission and each other. This is extraordinarily hard work. The federal sentencing system is severe and unforgiving. The lawyers and staff who do this work well care deeply about their clients and inevitably take on much of our clients' and their families' pain themselves. Lawyers and staff are only able to sustain our high standards because of their commitment to our clients, our mission and each other.

During my tenure as Defender, I have had the privilege to work on national issues facing our program. My work has primarily focused on three areas: budget, capital defense and training. I have planned and served on national, regional and local training programs, across the country, including capital programs and the orientation program for new AFPDs. I currently serve on the Training Expert Panel (TEP). I am the Defender Liaison to the Budget Subcommittee of the Defender Services Committee (DSBS), the Chair of the Capital Trial Expert Panel (CTEP) and a Member of the Death Penalty Working Group (DPWG).

I have also previously served on an embarrassing number of other committees with an extraordinary number of convoluted acronyms. I have chaired the Death Penalty Working Group (DPWG), served as a member of the Performance Measures Working Group (PMWG), and served as a representative on the Defender Services Advisory Group (DSAG). I was a proud – often very frustrated – member of the Defender Work Measurement Steering Group.

All of these experiences have given me a deeper understanding of our national program and have shaped my perspective on the reforms needed in our CJA program.

Comments on Structure

The structure of the CJA is flawed and in need of change to allow for greater independence from the Administrative Office of the U.S. Courts and the judiciary. The CJA Program has much to be proud of. We have attracted very talented and committed lawyers and staff. We have some

2 The ABA Standards for Criminal Justice, Defense Standard 4.12, can be found at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_bk.html#1.2.

of the finest training programs in the nation. In most districts, we inevitably serve as the first responders and trainers for the entire defense bar in coordinating litigation based on changes in the case law. Important examples include, *Johnson v. United States*, ___ U.S. ___, 135 S.Ct. 2251 (2015),³ *Descamps v. United States*, 570 U.S. ___, 133 S.Ct. 2276 (2013), and changes in DOJ policy or the sentencing guidelines. While our work is far from done, we have made important progress in diversifying our offices and have served as a role model for other governmental agencies and indigent defense organizations.

Much of our success is because of the judges who have worked tirelessly on our behalf. In many districts, including, my own, the delivery of indigent defense services, while not without flaw, is very good. However, in order to maintain these accomplishments and to continue to fulfill its constitutional mission with integrity, the program needs independence. Our indigent defense program cannot rely, as it does now, on an almost totally discretionary system for funding and administration based on the degree to which individual judges understand and value the defense function.

Flaws

Most judges, certainly those from the District of Maryland, are committed to appointing good lawyers and funding them properly. They understand the magnitude of the sentences they are imposing and refuse to do so without the defendant being well-represented. In contrast, at a training where I was presenting years ago, the Chief Judge of one of the largest Circuit Courts of Appeals in the nation asked, “where in the Constitution does it require a good defense?”⁴ This contrast in perspective fuels the disparity that diminishes our program and threatens its integrity.

Even in my district, with the support from the Court we have, the systemic problems are apparent. There is simply an uncomfortable conflict that comes with an indigent defense program run by the judiciary. CJA lawyers report that they routinely “self-cut” thousands of dollars in valid billings because they are reluctant to submit the request to the judicial officers who review vouchers in the District of Maryland, or at the Fourth Circuit Court of Appeals, and risk denial of funding or delays in payment. Some, when expressing concerns to me or to CJA representatives

3 For example, my office has offered multiple trainings to CJA attorneys on the impact of *Johnson*. We will file over 600 225 petitions and successor petitions by June 26, 2016. We do this unanticipated work with no additional staff by working nights and weekends, every weekend.

4 The Committee has heard a similar perspective from the Fifth Circuit Conference Attorney who describes a modest, far from vigorous defense function. “It is the government’s responsibility to identify and arrest the perpetrator, marshal the proof of guilt and organize the case for presentation. The defense is a quality control check on this process, which unquestionably can and does go wrong from time to time. A disparity of resources should neither surprise nor concern anyone”. See, Memorandum from Joseph L.S. St. Amant, dated February 12, 2016, submitted with Judge Marcia Crone’s testimony.

about how a matter has been handled, request anonymity because they are reluctant to hurt their reputation before the court who appoints them and presides over their cases.

From an abstract, more philosophical perspective, an indigent defense system run by the judges whom the lawyers and clients must appear before has always been less than ideal. For many defenders, the abstract became terribly real during the sequester and other recent budget battles. While the Defender Services Committee, led by its very effective Chair, Chief Judge Catherine C. Blake, continued to advocate for defenders, a less than popular cause, the judiciary's budget leaders failed to protect the CJA Program, resulting in hundreds of layoffs and hundreds of thousands of hours of furloughs. That disaster was followed by the demoralizing and burdensome Work Measurement Study that intentionally removed any staffing reserve and, as a result, the defender's ability to respond quickly to dramatic swings in caseload due to changes in case law, or Sentencing Commission reforms. Simultaneously, judiciary leadership stripped important budget jurisdiction from the Defender Services Committee resulting in even more budget and staffing uncertainty at a time of program vulnerability and the endangerment of confidential records.⁵

To borrow a phrase from the Sentencing Guidelines, our program suffers from "unwarranted disparity" in the delivery of indigent defense services. The Committee has heard weeks of testimony from judges, CJA lawyers and defenders, many of whom acknowledge the disparity throughout the nation in how defender offices are staffed, and, perhaps more importantly, how CJA counsel and their cases are funded. In my experience with Defender Committees trying to support districts where defenders or CJA lawyers are underserved, it has been apparent that there are "haves" and "have nots" in terms of the funding available to the defense in federal courts. Too often, the appointment⁶ and funding decisions are based upon the individual judge's understanding and commitment to the defense function. Geography seems to be a determining factor, although there can be significant disparity within circuits, and within districts, based upon the assigned judge.

The most dramatic demonstration of the real impact of our current system of relatively standardless, decentralized judicial funding in CJA cases comes from the capital context. A recent study commissioned and endorsed by the United States Judicial Conference Committee on Defender Services notes an undeniable connection between the outcome in capital cases and the disparity in the funding of those cases. The study revealed that "defendants in the lowest cost (cases) are twice as likely to be sentenced to death." See Update on the Cost and Quality of

5 See written testimony of Steve Kalar, submitted on February 17, 2016 that thoroughly addresses this important issue.

6 Indeed, even in those coordinating litigation practices I described above as one of the strengths of our program, there is disparity. In some districts, the courts refuse to appoint counsel to review and advocate for relief under *Johnson*. Thus, whether clients receive corrected sentences based upon Supreme Court case law turns on the willingness of judges to appoint counsel.

Defense Representation (September 2010) (“Spencer Report Update”).

“During the period of this study, defendants who received the least amount of attorney and expert time, and whose defense representation thus cost the least, faced a higher probability of receiving a death sentence at trial. . . individuals whose defense cost less than” [68 percent of the mean] “in combined attorney and expert assistance – the lowest one-third of federal capital trials – had a 44 percent chance of being sentenced to death at trial. Individuals whose total representation costs were above that amount – the remaining two-thirds of defendants – had a 19 percent chance of being sentenced to death. Defendants in the low –cost group thus were more than twice as likely to be sentenced to death,” (emphasis added).⁷

This seems like one of those studies that confirm our obvious intuitions. Of course, the cases, capital and non-capital, that better fund experts, investigators and support services result in better outcomes. However, the study highlights the wide disparity in how cases are funded in different districts and how that impacts outcomes and the quality of justice we provide our most vulnerable citizens.

Remedies

The Committee will soon hear from the entire Defender community with more specific recommendations. From my perspective, it is imperative that the program have greater independence in how it is administered nationally, including defender representation on any national governing body. My preference is that the indigent defense function be placed in an independent federal agency similar to the Public Defender Service in Washington, D.C. However, if the Committee recommends some other model, including reform of the existing structure, that model should include defender representation. Any reform must also create a system that allows CJA attorneys to receive payment and authorization for contract expert services that does not require approval of a judicial officer. Too often in the current system, there are wide disparities in how cases are funded from one district to another based solely upon the perspective of individual judges.

Any reform to the system has to impose standards in the current virtually standardless discretionary system. There are many published standards from defense and other legal entities over the years. Under the circumstances, the ABA Standards for the Defense Function may be the most appropriate. Whatever the source, we can no longer tolerate the lack of standards and review that comes with the awkward compromise of the CJA. The lessons of the Spencer Report Update, and the unwarranted disparity revealed in the testimony to this Committee, make clear that the current funding and administrative structure diminishes our system of justice.

⁷ See Spencer Report Update at p. 44.

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Conclusion

This Committee has worked tirelessly to analyze the complex challenges of funding an indigent defense organization, with the independence that is essential to its role – within the government. On behalf of my defender and CJA colleagues who do this work with passion and reason, we thank you for your devotion to your mission. We encourage you to support an independent indigent defense system worthy of the devoted public servants who work in it.

I look forward to further discussion of these matters in Philadelphia.

Sincerely,

/s/

James Wyda
Federal Public Defender

JW:sdf