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The Honorable 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, D.C. 20544

Re: Testimony of Judge Nancy Gertner (Ret.)

Dear Judge Cardone:

I appreciate the opportunity to address this committee. I speak from three perspectives. First, I was a criminal defense (and civil rights) lawyer for 24 years before I became a federal judge. And during that time, I received appointments from the CJA list as well as from the state analog, the Committee for Public Counsel Services (CPCS). I also served on the board of CPCS for a number of years (the Massachusetts public defender service) in its formative years, becoming its chair shortly before I went on the bench. Second, I was a judge for 17 years, and was the liaison to the federal defenders at the end of my tenure on the bench. Third, I presently teach at Harvard Law School, and work with lawyers on the Massachusetts CJA list as well as lawyers for the Committee for Public Counsel Services. In addition, in my post-bench years, I have taken on criminal cases, as a consultant, and an innocence case and a compassionate release case, as a litigator.

To be sure, my testimony derives from my experience, and obviously not from a systematic review of the CJA system. I assume that that is what others will have brought to this Committee and what this Committee is seeking to do.

I am deeply concerned about the state of the federal defenders. Effective counsel is not an abstract concept. It is necessarily framed relative to the opponent, here the United States Attorney. As federal criminal prosecutions have become more and more complex, as more and more resources have been poured into prosecution and critically, as the punishment remain severe (notwithstanding recent reforms), the differential between the resources available to the government and that of the public defender becomes more and more stark and the constitutional guarantee of effective counsel more and more at risk. This is so not merely in the complex white collar transactions that make the headlines, but in the day to day work of most courts – the drug, gang, and gun cases.

I am also concerned about the impact of the level of resources allocated to public defenders on the communities that the defenders serve, namely poor communities and communities of color. With 90% of federal defendants eligible for public counsel, cost containment measures necessarily take place on their backs.¹ Just in one example, as I describe below, when a court discourages the use of psychological experts at sentencing, it has a disproportionate impact on these communities. When a young black male misbehaves in a public school in a poor neighborhood, it is likely to be treated as a discipline problem; when comparable misconduct occurs in a middle class or wealthy neighborhood, the chances are better that it will be dealt with as a psychological issue. Mental impairments will appear well established for the latter, and not the former.

Restrictions on CJA reimbursement affect the content of representation in numbers of ways – discouraging zealous and even creative advocacy (i.e. the judge who cuts bills for “excessive research”), encouraging perfunctory filings (i.e. the policies that encourage the filing of “standardized templates”). This is of particular concern to me given the onerous penalties to which defendants are subject in federal court. And it is also of concern to me given substantial changes in sentencing effected by the Supreme Court (Booker and its progeny), and in evidence (Crawford), changes which the most effective counsel would have anticipated.

And because of the length and depth of my experience, I want to put my concerns in context.

Change/Imbalance in criminal prosecutions: Over the course of my career, I watched federal criminal prosecutions dramatically change. In particular, I have watched the widening gap between the resources available to the U.S. Attorney and those available to public counsel, a gap which the current CJA payment system exacerbates. The government expends considerable resources, even in drug cases, with Title III taps, analysis of GPS information, cell phone data; more and more cases involve computer evidence, megabytes even terabytes of data. The government determines when to bring charges, which is when *it* is ready; when charges are brought the pacing of defense preparation is constrained by speedy trial rules (which may be waived) and independently, by the court’s docket. One side has had the leisure develop its case; the other does not. Given those pressures, resources and staff for appointed counsel are all the more important.

The scope of the defense is necessarily determined by the scope of the prosecution. While the Massachusetts CJA plan (November 14, 2013) acknowledged this, noting that “the nature of the legal services performed by defense counsel depends in large part on the actions taken by the prosecution and the Court itself, and that therefore counsel’s ability to control costs is at least somewhat limited, “ judges’ decisions about the allocation of resources to the CJA panel and even the federal defenders are not always consistent with these observations as I describe below.²

¹ Underfunded Justice: Sequestration and the Judiciary, Vera Institute of Justice, August 2, 2013, <http://www.vera.org/blog/underfunded-justice-sequestration-and-judiciary>.

² As an anecdote in my own recently reinvigorated practice, I was shocked at the amount of time and resources it took to arrange a visit at a Bureau of Prisons facility – phone calls, applications, waiting time, etc.

Extraordinary Punishment: The stakes of federal prosecution have changed dramatically over the years, making a robust public defender all the more critical. Before the Sentencing Reform Act's Guidelines and the various federal mandatory minimum statutes over 50% of the federal defendants received probation.³ Today that number is 7.2%.⁴ And the sentences which I was obliged to impose, and which continue to be imposed notwithstanding recent reforms, are staggering - life sentences for drug distribution, ten or fifteen years or twenty years for small quantities of drugs under circumstances. When this kind of punishment hangs in the balance, it is critical that there be zealous defense advocacy.

Changes in Criminal Law and Criminal Punishment: The law governing criminal prosecutions and criminal sentencing has been changing rapidly; effective counsel today should be creative, anticipating arguments that may well resonate if not in the lower courts than in the circuit courts and the Supreme Court. Crawford, Booker, Alleyne, Johnson, Miller and Roper, to name a few, are cases that creative counsel raised, challenging evidentiary rules, the Guidelines, mandatory minimums, encouraging proportionality review, etc. Zealous advocacy requires understanding the case, as well as understanding where the law is, and where it may well be going.

But rather than encouraging creative lawyering, some CJA rules seem to devalue it. For example, the 2013 District of Massachusetts rules indicate that “the court encourages the use of standardized templates for pleadings.”⁵ United States District Court, District of Massachusetts, Guidelines for Claims Submitted for Reimbursement Under the Criminal Justice Act, ¶ 1.16 (November 14, 2013). While the First Circuit regularly dismisses arguments that were not preserved, or not sufficiently preserved, yet when counsel work to preserve even the innovative arguments, their vouchers may be cut for what one judge described as “excessive research.”

Pleas and Judicial information: Since 97% of the federal docket comprise pleas of guilty, it may well be difficult for the trial court to fully understand what work laid the groundwork for the plea it hears. The Guideline structure – points for “acceptance of responsibility” which too often means pleading guilty as soon as possible – creates a disincentive for counsel to file motions. While the Court has the obligation to disapprove claims for compensation “that are unreasonable or otherwise excessive,” much of the work of counsel may well be hidden from view. Judges who have never practiced criminal law, or who have only done so in the context of the United States Attorneys’ office – as is most of the bench – may well find it difficult to evaluate counsel’s work.

Focus on cost containment not excellence: The recent focus of the judiciary’s review of CJA vouchers is more on cost containment than excellence. This was especially the case during the 2013 sequestration. Indeed, the language of some judicial officer made it appear as if funding the defenders and funding the courts was a zero sum game, as one document noted: “If such increases are provide [in the defender services program], it will be at the expense of the Salaries

³ See Bureau of Justice Statistics Sourcebook, 1994, table 5.27. See also U.S.S.C. Annual Report 1989, table B-7 (providing rates of imprisonment from 1984-1989).

⁴ See U.S.S.C. 2015 Sourcebook of Federal Sentencing Statistics, Figure D.

⁵ While this section suggests that standardized templates are “particularly” for “routine motions (such as motions to continue)” but the admonition is more broadly phrased.

and Expenses account and by extension, the courts. Thus the judiciary must refocus its efforts to achieve real tangible cost savings in this program. “⁶

There were no comparable pressures on the United States Attorneys’ offices. While it may have felt the need to cabin its expenditures, it did so on its own, balancing and weighing its needs with considerable independence. And just as the pressures on the respective participants in the criminal justice system, were not comparable, the cuts in services were not comparable.

Disproportionate Impact on Race: In the District of Massachusetts the Court fixed the presumptive rates for expert services to those paid by the state defender, CPCS. Massachusetts Guidelines, ¶ 4.6. But the CPCS rates do not remotely compare to the rates paid by the United States Attorney. CPCS is chronically underfunded; its rates do not reflect what effective counsel should receive but what a hard pressed state legislature would grudgingly provide. The critical comparison is with the resources paid to experts by the United States Attorney, which, as I understand it, is double or more the rates for the defenders. If experts are regularly underpaid when they work for the federal defenders, or private counsel on the CJA list, they will not take the work (several have already indicated that they will no longer be available for defender work), or if they do, their efforts will be perfunctory.

I am especially concerned about the use of psychiatric or psychological experts in sentencing. ¶ 4.8 discourages seeking the services of a psychiatrist or psychologist “as a routine matter,” limiting such testimony to instances where there is a “genuine issue of serious mental impairment that may have a material effect on matters of criminal responsibility, sentencing, or the conditions of confinement. Massachusetts Guidelines, ¶ 4.6. In a post-Booker world, psychiatric or psychological experts may be the only way to individualize the defendant, to demonstrate the kind of sentence that will comport with 18 U.S.C. § 3553(a). And the test of “genuine issue of serious mental impairment” has a disproportionate effect on minorities and poorer defendants. Counsel does not know whether there is such an issue until he or she seeks the services of the expert. Rarely does one find a preexisting mental health record for the poor defendant who started to misbehave in the 10th or 11th grade. More often, misbehavior is treated as a disciplinary problem not a psychological one, or an issue of addiction or even cognitive disability.

In conclusion, the only way to reform the CJA appointment and resource problem is to a) either create an algorithm by which CJA resources are pitched to that of the United States attorney, requiring parity for each dollar spent, or b) create an independent agency to review CJA vouchers, staffed by experts in the field.

Sincerely,

Judge Nancy Gertner (Ret.)

⁶ “Four Major Areas of Cost Containment,” Memo, Circuit Chief’s meeting, 3/11/2014.