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REPLY TO: BUFFALO

March 31, 2016

Honorable 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

Re: Testimony of Marianne Mariano, Federal Public Defender, Western District of
New York

Dear Judge Cardone:

Thank you for the opportunity to testify before the Committee to Review the Criminal Justice Act (CJA) Program. I have watched much of the testimony before this Committee and reviewed several written submissions. You have already heard from Rodney O. Personius, our National CJA Representative, in San Francisco, so I will not restate the details of the practice in my district here. His 18-page written submission provides the Committee all it needs to know about the outstanding practice of the CJA Panel and Defender Office in our district, and the support we enjoy from our Court.¹ Instead, I will briefly introduce myself and turn directly to what I believe should be the structure of the national CJA Program.

BACKGROUND

I am the Federal Public Defender for the Western District of New York (WDNY). Our office opened its doors in 1992 and I have worked here since 1995, when I was hired as an Assistant Federal Public Defender. In 2008, I was appointed by the Second Circuit to be the fourth Federal Public Defender for our district. Over the past 21 years it is been my privilege to do this important and rewarding work, first serving clients individually and then, for the last eight years, globally as the manager of our law office. I have also contributed to the Defender program nationally. From May 2001, until May 2002, I was detailed from the WDNY to Washington DC. I spent the first six months serving as Special Counsel at the United States

¹ Available at <https://cjastudy.fd.org/sites/default/files/hearing-archives/san-francisco-california/pdf/rodpersoniussan-franall.pdf>

Sentencing Commission and the last six months working as an Attorney Advisor in the Legal and Policy section of the then-Defender Services Division (DSD). I returned to Buffalo after my detail and was placed on the Federal Defender's Sentencing Guidelines Committee and have remained a member of that committee for 14 years. From 2012 to 2016 (otherwise known as "the sequester and work measurement years"), I served as the representative of the First, Second and Third Circuits on the Defender Services Advisory Group (DSAG), and I am currently the liaison for the Federal Defender community to the Criminal Law Committee.

The FPD Office for the WDNY has an office in both Buffalo and Rochester and employs 31 people. This includes 11 Assistant Federal Public Defenders (AFPD), three research and writing attorneys, an administrative officer, two investigators, two investigator/paralegals, two computer systems administrators, a CJA administrator and nine other members of our administrative and support staff. Two additional research and writing attorneys will soon join our office, bringing the total to 33.

As detailed in Mr. Personius' testimony, the WDNY boasts a collaborative and supportive relationship between the Defender's Office, CJA Panel and the Court. Both our District Court and the Second Circuit place high value on top quality indigent defense. Indeed, it was the Honorable Michael A. Telesca, then-Chief Judge who, in 1992, pressed for the establishment of the Federal Public Defender's Office in our district. Our Court remains supportive of our office and committed to protecting every defendant's Sixth Amendment rights. It respects our independence and my authority to manage this office without interference, insuring we represent our clients at the highest standard of our profession. When our office was devastated by sequestration, which resulted in every member of this office being furloughed without pay for 11 days, the Court flexed its own schedule to accommodate ours. It was painful to implement "No Federal Defender Fridays," as this district prides itself on having an outstanding Defender Office, but it was necessary and the Court could not have done more for us during that troubled time. I remain grateful for its support.

But the Committee has heard this from so many. Although not a universal experience, you have been told by many Defenders and Panel attorneys that, at a local level, the relationship between the Court and Defender Office is supportive and at an arm's length. Within the Administrative Office of the U.S. Courts (AOUSC), however, it has always been a different story. It would be easy to suggest that the sequester caused a rift between our program and the Judiciary, and to be sure the unfounded accusations of mismanagement and the statement that our program needed to be "reined in" in the immediate aftermath of the sequester cuts did not help. Being told that Defenders would undergo a work measurement study and that, unlike every other program within the Judiciary, our study would be expedited, also did not help the relationship. After suffering furloughs and layoffs (our office ultimately lost 10% of its staff, including a talented AFPD and an experienced investigator), the expedited work measurement study felt like a slap in the face. But the sequester only brought into the light a tension that has existed for many years: the oversight of our program within the AOUSC and the need for Defender and CJA Panel attorney independence. This observation is not meant to ascribe malice in any way. On the contrary, I have worked with many good people in the AOUSC over the years, both as a detailee and on various committees. I have found all to be dedicated,

hardworking public servants who are committed to ensuring the success of our system of justice. But their role in supporting the Judiciary, *i.e.*, supporting the work of Judges and the Courts, can be at odds with the goals of the Defender program.

This tension notwithstanding, I believe our program should remain within the Judiciary for several reasons and, as addressed below, believe several changes can give us the independence necessary to fulfill our constitutional mission. My primary concern is adequate funding for our program. Although Congress has proven responsive to our needs, even granting our program an anomaly during the sequester, I think if we are a small, stand-alone agency or not-for-profit corporation, we open ourselves up to political risk. I believe we fare better before Congress as part of the Judiciary. I think we also expose ourselves to financial chaos if we are not a part of the Judiciary, for instance when there is a government shutdown or even a continuing resolution.

I am also concerned that the creation of national and local boards will lead to national management of what are now relatively independent law offices - - purposely designed to be locally tailored to address the immediate need of indigent defendants in a particular district. Although Defenders have worked hard to find consensus on many issues over the years, we do so while respecting the very different needs of our clients and practices in our individual offices. I believe a national center will ultimately be filled with political appointees resulting in top-down management at the expense of local governance.

Finally, insuring the constitutional right to counsel is a concern Defenders share with the Judiciary. Defenders' overall experiences of support and collaboration with our Courts at the local level evidences our mutual commitment. We are jointly stewards of this precious right and I believe it is best protected if our program remains within the Judiciary.

STRUCTURE

I believe the Defender program can remain within the Judicial branch and still achieve necessary independence. To accomplish this, it is incumbent upon the Judicial Conference of the United States (JCUS) to elevate the Defender program and make clear that the program is different from others within the AOUSC. Defenders must be permitted to represent our own interests before the JCUS, Congress and within the AOUSC. The most clear lesson of the sequester for me is that Defenders are not only capable of speaking thoughtfully -- and critically -- for our program, we are the only ones who should do it. Independence can be accomplished within the Judiciary with the following changes:

- (1) The Office of Defender Services (ODS) should be restored and elevated. It should be a Directorate that is overseen by the Office of the Director and the JCUS without intermediaries. The truth is that our program was not actually a Directorate for very long. When I did my detail in 2001/2002, it was a Division (DSD) -- under what umbrella, I could not tell you. It was only in 2004, that it became a Directorate, but even that relationship was

troubled. The program's status has to be that of a stand-alone office within the AOUSC, like the General Counsel's Office and Office of Audit (*see* Revised Organizational Chart, **Attachment A**). ODS should be responsible for handling the administrative concerns of our program and with staffing the Defender Services Committee (DSC). It would continue to have Legal and Policy, Training, and Program and Budget departments. ODS must have control over all of our data. All of our technological oversight and needs would be handled by ODS. In addition, we need a Special Deputy of Operational Analytics and Information Management, as outlined in DSAG's August 21, 2015, letter to Cait Clarke.² However, as a matter of economic efficiency, ODS and the Defender program would continue to be supported by the AOUSC human resources, pension and benefits, and payroll departments.

- (2) The Defender Services Committee (DSC) of the JCUS must have full jurisdiction over the Defender program, and the DSC should be reconstituted to include direct Defender and CJA representation. Minimally, there should be a representative from a FDO, CDO, and the CJA Panel with the Chair of DSAG as liaison. Defenders should elect their representatives to ensure that those who serve have the support of their constituents and can speak for those in the field on matters of national importance. DSC, with Defender representatives as members, should control the program's budget request, which should be forwarded to Congress through the JCUS without interference within the AOUSC. DSC should be permitted to communicate directly with Congress about budget and other legislative issues.
- (3) DSAG should be expanded to include a representative from each Circuit and an at-large CDO representative (although no doubt there will be Executive Directors of CDOs who serve as circuit representatives). Everything should come through the advisory system, without exception. This was the practice in the past, but recent events lead me to believe DSO is inconsistently invoking the advisory system. Take, for example, the recent data debacle outlined in my colleague Steve Kalar's testimony (link available at footnote 2). Had the changes proposed been implemented without DSAG review, as DSO planned, it would have been catastrophic for our program. The crisis would have been completely averted had the issue been sent to DSAG for review before any decisions were made.
- (4) CJA voucher and expert requests should be reviewed and approved by a local Case Budgeting Attorney(s) (CBA) who works for the Circuit Case Budgeting Attorney. The Circuit CBA can provide a quarterly accounting

² *See* Testimony of Steven Kalar, San Francisco hearing, Exhibit A, available at <https://cjastudy.fd.org/sites/default/files/hearing-archives/san-francisco-california/pdf/stevenkalarsan-franwrittentestimony-need-add-attachments-and-check-figures.pdf>.

to the Circuit and District Court to insure judicial oversight, but not direct judicial review of vouchers submitted by a party appearing before the Court.

These proposed changes will not require amending our enabling statute and can be readily accomplished within the current structure of the AOUSC and JCUS. A stand-alone structure within the Judiciary will allow our program to function independently, while working collaboratively with the AOUSC and JCUS to support our mutual commitment to ensuring the Sixth Amendment right to counsel.

I thank the Committee for its incredible work on behalf of our program, and our clients, and look forward to continuing our discussion of this important issue in Philadelphia.

Respectfully submitted,

Marianne Mariano
Federal Public Defender

Administrative Office of the United States Courts

Executive Offices (EXC)

