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DISTRICT OF VERMONT

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March 25, 2016

Honorable Kathleen Cardone, Chair  
Ad Hoc Committee to Review  
the Criminal Justice Act  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle N.E., Suite 4-200  
Washington, D.C. 20544

Re: Testimony of Michael L. Desautels, Federal Public Defender for the District of Vermont

Dear Judge Cardone and Members of the Committee:

I appreciate the opportunity to submit comments and to appear before the committee. I submit these after consulting, and in collaboration with, the CJA Panel Representative for the District of Vermont, Lisa Shelkrot.

**Perspective**

The Federal Public Defender (FPD) Office in Vermont was a branch office under the FPD for the Northern District of New York from 1999 until 2006, when it became a separate office. I have been the Federal Public Defender for the District of Vermont for 10 years, since March 2006. I have also practiced federal criminal defense in the Northern District of New York (including being on the CJA Panel) and in the FPD Office for the Southern District of West Virginia. In Vermont, I carry a full caseload and am a member of the CJA Committee, which reviews applications of attorneys for the panel and oversees CJA policies. From my review of the comments of other Defenders, it strikes me that my experiences in the District of Vermont are in many ways similar to the experiences of Federal Defenders across the country – despite significant geographical and cultural differences.

**Question of the Overall Structure of Federal Defender Organizations (FPDs and FDOs)**

To address a key point of this committee's inquiry, I support the establishment of Federal Defender Organizations as separate and apart from the Judiciary. As an alternative, I advocate for the Office of Defender Services being restored to a directorate within the Administrative Office, with the current DSO Chief position as a Director position. I know that I join the recommendations of many of my FPD colleagues in this. I also support greater autonomy of defense functions from the oversight and approval processes of the Judiciary – for both attorneys on the CJA panels and in Federal Defender Organizations.

I do not advocate for this independence out of “bad” experiences with judiciary oversight. Indeed, my experience in the District of Vermont is that the judges are acutely aware of the importance of a vibrant defense function and support the work of both the CJA Panel and FPD. However, I think that in order to have defense attorneys that are as strong and as well-equipped as are the U.S. Attorneys' offices, defense attorneys need to be able to more quickly and efficiently perform vital defense aspects, including hiring investigators and expert witnesses.

### **Some points about criminal defense practice in the District of Vermont**

Approximately 150-160 federal criminal cases are filed annually. 162 criminal cases were filed for fiscal year 2015. The district has roughly 620,000 residents. Although the district is smaller geographically than many federal districts, we still spend a lot of time traveling to courts and to meet with clients. This applies to FPD attorneys and CJA attorneys alike. Much of the travel stems from the fact that there is not a federal detention center in Vermont. As a result, the U.S. Marshals Service houses our detained clients in a few Vermont state facilities, as well as in two Bureau of Prisons locations in Upstate New York, in two facilities in New Hampshire, and even in a New York City area facility, MDC Brooklyn, a six-hour drive distant.

The Criminal Justice Act (CJA) panel in D/VT is made up of very seasoned attorneys – 47 on the panel and 9 attorneys on a Training Panel. There is not a history of widespread voucher cutting in the district, but CJA panel attorneys have had vouchers reduced. Also, CJA attorneys do sometimes “chafe” under the system whereby they must obtain advance approval to retain an investigator – whose work will be subject to a presumptive limit of \$2,500. CJA attorneys tell me that they also have difficulty at times getting approval for psychologists or other mental health professionals to evaluate clients and to issue reports needed to the defense. (My thoughts differ from the written comments of Jerry Tritz, Case Budgeting Attorney for the Second Circuit, in one regard: the CJA panel in Vermont did not have a culture of hostility regarding voucher review; thus, the case budgeting system and the push for more review of CJA expenditures by judges has not been a significant change in practice.)

My sense is that the CJA panel attorneys are experienced enough and fiscally aware enough to retain experts without having to be bogged down by awaiting judicial approval to secure investigators and psychologists and should be able to obtain other parts of the defense arsenal with greater autonomy. This requirement of judicial approval present several concerns.

One, this puts CJA attorneys in the position of having to explain case strategy – that is, the expected value of the information to be obtained – to the judge on the case and in an *ex parte* manner. Second, having to do this allows or even forces the judge to take a position on the value of the defense information sought before the information is obtained or the witness located. Third, this requirement puts CJA attorneys at a distinct disadvantage to the U.S. Attorney’s Office, and even to the FPD Office, in that neither of them is required to go through this approval process. Fourth, this process invites an improper dynamic between the judge and the CJA attorney in that the attorney could be dissuaded from doing her job properly out of fear that her work will either not be compensated, or worse, that there might be a negative effect in future cases (or even not being appointed to future cases).<sup>1</sup> Fifth, this requirement can be demeaning to the professionalism of the attorneys involved. Sixth, it is cumbersome and inefficient.

The alternative that I favor is of an independent attorney in a court staff position to review and act on these requests rather than on the judge presiding over the case. (Jerry Tritz, the Second Circuit’s Case Budgeting Attorney, also suggested this in his written comments to this committee.)

**Addressing Specific Aspects of the Committee’s Inquiry**  
**(As numbered on page 3 of Judge Cardone’s February 25, 2016 letter)**

*(13) An examination of the national structure and administration of the defender services program under the CJA.*

**Support of Federal Defender Offices Being Housed outside of the Judiciary**

I support moving the FDOs to an organizational place outside of the umbrella of the Judiciary; that is, separate from the Administrative Office of the U.S. Courts to an independent stand-alone organization. I am cognizant of the advantages that exist in the current “location” of FDOs as part of the DSO under the U.S. Courts, especially in that the budgets of the CJA attorney program and Federal Defender organizations theoretically are somewhat protected from attack by some in Congress who might not realize the importance of a viable defense. However, in the balance, I support the separation.

Over the last 10 years, I have seen FDOs and the CJA panel systems buffeted by assaults on their funding. This includes the cutting of CJA hourly rates, routine “continuing resolutions” with restrictions on hiring to fill vacancies, budget cuts, and sequestration. These have occurred despite being under the protective umbrella of the Courts. Throughout all this, CJA attorneys and FDO offices have “soldiered on.” They have demonstrated that they do not need oversight and questioning of their defense strategies with regard to hiring experts or pursuing investigative avenues.

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<sup>1</sup> This is not a concern that has been realized in the District of Vermont, but reports of this occurring in other districts have been discussed by other FDOs and CJA attorneys.

The funding problems have demonstrated that being situated under the judiciary does not safeguard the defense function from efforts to reduce defense funding. Thus, there seems to be an upside to situating FDOs and the CJA panel program on their own, and not a clear downside. Still, I realize that the question of “What would the new proposed FDO structure look like?” will require much thinking and discussion. Accordingly, I suggest a more immediate alternative.

**In the Alternative, Support of the Defender Services Office Being a Director Level Department Within the Administrative Office of the United States Courts**

***Defender Services Office (DSO) – Restoring DSO to a Director level Department***

Until 2014, The Office of Defender Services (ODS) was a directorate level office within the AO organization. Now as just one division within the Department of Program Services, the ability to directly support and impact the FDO offices has been diluted and diminished. I join in all of the arguments of my FDO colleagues who have advocated in their written and spoken comments for this change. In short, because the defense function is a constitutional mandate of the Sixth Amendment, there should be a “stand-alone” Office of Defender Services with a mandate to solely support the representation of those indigent individuals in the criminal justice system.

*(3) Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers.*

I have a concern about the present requirement of judicial approval in the funding for expert witnesses within capital cases. My office was involved in a capital case, *United States v. Jacques*. (I was one of the attorneys on the case along with two appointed “learned counsel.”) Our FPD Office decided to manage the funding of the expert witnesses needed – rather than submitting to the District Judge a request for each expert. The process of doing this required us to prepare a case budget and present it to the Defender Services Budget Subcommittee. Throughout the case my office had to re-configure our expert budget, re-submit it to the subcommittee, and answer inquiries of the subcommittee about our need for experts. We were never turned down in our requests, but the process of repeatedly making these applications was time-consuming and slow.

If judicial approval is to be kept in place, I think that a better process would be for an FDO to first have the overall case budget approved and thereafter be allowed the discretion to allocate funds within the overall case budget to whatever experts are needed. (I note that the judges with whom I dealt on the subcommittee were courteous, prepared and supportive of our needs.)

*(7) The adequacy of support provided by the Defender Services Office to federal defender organizations and panel attorneys*

I think that DSO does a very exemplary job of supporting FDOs and panel attorneys.

Regular, high caliber training events are produced and offered. A website, [www.fd.org](http://www.fd.org) , is maintained with a wealth of information. The DSO supports FDOs in providing training information that FDOs can use to produce training events in their own districts. However, I do think that the fact that CJA attorneys have to pay for their own transport to the training sessions places an unnecessary burden on these attorneys.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael L. Desautels". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

MICHAEL L. DESAUTELS