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BY ELECTRONIC MAIL

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Honorable Kathleen A. Cardone, Chair
Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Committee to Review the Criminal Justice Act Program,
Philadelphia Hearings, April 13, 2015

Dear Judge Cardone:

Thank you for inviting me to participate in the Committee's hearings. The lawyers who staff the federal indigent defense program, both defenders and panel lawyers alike, consistently find ways to achieve just results notwithstanding a wide disparity in resources. I firmly believe that they are the unsung heroes of the criminal justice system and, as panel representative for western Pennsylvania, I am proud to be the voice for a small segment of them.

I. BACKGROUND

We are about eighty-five lawyers, most of whom work in or near Pittsburgh, serving Erie and Johnstown divisions, in addition to the one in Pittsburgh. We come from a wide variety of professional backgrounds: we are sole practitioners, members of small and large law firms, former defenders, prosecutors (state or federal) or JAG Corps officers. About a quarter of us live or practice outside the two urban centers where the larger divisions of the Court are headquartered. While our CJA plan requires a minimum of two years federal criminal experience, we found in our most recent selection meetings that most new members had at least five years of relevant experience. However, we are largely white and male: even after the last selection, in which we added women and minority applicants, women make up only 9% and African-Americans only 7% of our panel. Our judges, our defender and our panel review and selection committee are keenly aware of these numbers, and committed to the belief that diversifying the panel broadens the perspective that lawyers bring to their advocate's role and develops greater trust and confidence with clients. In panel work, we earn \$129.00 per hour, from which we pay overhead. We would like to have a raise that better reflects our true value.

There has been a flurry of administrative activity affecting the Panel in my district within the last year: in separate actions each effective at the beginning of

2016, the Court substantially revised the local CJA Plan and enacted “Policies and Procedures for Claims Submitted Pursuant to the Criminal Justice Act”.¹ Only a few months earlier, eVoucher was installed. In the beginning of 2015, anticipating a new emphasis in our CJA Plan, the Court reconstituted a panel selection and review committee, complete with judicial, defender and diverse panel involvement.

Under both our old and new Plan, the panel is managed by the federal defender, with whom we enjoy a strong relationship. We don’t always agree, but we always communicate, and I am happy to report that our defender vigorously supports the defense function in the adversary process. She administers appointments, coordinates and conducts local training and keeps the panel abreast of developments in law and in practice. Plus, when ethically appropriate and often on short notice, her staff is generally available as a sounding board to Panel lawyers litigating difficult cases. The lawyers who work in our defender’s office are leaders in the criminal defense bar, in every sense of the word, and we value them as colleagues. During the budget crisis at the beginning of this decade, one lawyer on my panel spoke in near-absolute terms, calling our federal defender’s office “probably the best bargain in the federal judicial system”.

¹The policies and procedures are linked here, <http://www.pawd.uscourts.gov/sites/pawd/files/CJAP%26PFinalEffective1-4-16Rev2-16.pdf>, while the revised CJA Plan is here: <http://www.pawd.uscourts.gov/sites/pawd/files/Signed2015CJAPlan.pdf>.

When there's an appointment to be made, the Court contacts an administrator from the Defender's office, who, in turn, identifies for chambers an available panel lawyer. The Magistrate or District Judge formally appoints the lawyer. As in other districts, appointments generally are made randomly, but the Defender may identify a panel member with particular skills that are valuable to defend a particular type of prosecution or to defend a client with some special need. All vouchers are submitted to the Clerk's finance office, electronically since summer, 2015, which reviews for mathematical and technical compliance and, since enactment of the new local Policies and Procedures, for compliance with the national CJA Guidelines. Consistent with §230.36(a) of the national CJA guidelines, the recently-adopted Policies and Procedures require notice to the lawyer of a proposed reduction and an opportunity to revise the voucher or to request reconsideration see Policies and Procedures Part III(B). However, there is no claim dispute mechanism in my district and the district court's order reducing a voucher is otherwise not reviewable.²

From the perspective of most Panel lawyers in my district, the pressing problem at the moment is delay in payment resulting from implementing eVoucher and expanding the Finance Office's responsibilities under the new Policies and Procedures, at roughly the same time. A single deputy clerk in the finance office

²Compare Landano v. Rafferty, 859 F.2d 301, 302 (3d Cir. 1988)(voucher decision non-final administrative order; leaving open whether mandamus available) with United States v. Tillman, 756 F.3d 1144 (9th Cir. 2014)(granting mandamus in CJA voucher matter).

has been responsible for reviewing all vouchers (including a steadily increasing number of interim vouchers) and for eVoucher training. As I draft this statement, I believe that vouchers submitted near the end of 2015 are being reviewed and the Court has recognized the need to add staff in the Finance Office to help to reduce the backlog.

II. HISTORY

We began to notice stricter scrutiny of CJA vouchers in 2013, shortly *after* the controversy over legislative sequestration of funds appeared to be resolved, within a few weeks of when Judge Bates announced a temporary rate cut for panel lawyers.³ Until then, I had considered the Criminal Justice Act to be remedial, an enabling device allowing accused persons lacking financial resources to compete in our adversary system of justice. Even if the Act did not level the playing field against powerful government adversaries, it vindicated the principle of “equal justice under law” by giving lawyers the tools to bring the same level of skill, commitment and service to publicly appointed clients as they do to privately retained ones. I had come to believe that enabling private lawyers to provide indigent litigants with top-quality representation was one of the real strengths of the legislation, and experience in my first 15 or so years on the panel led me to conclude that our district judges saw it the same way.

³ See Honorable John D. Bates, August 22, 2013 Memorandum regarding Reduction in the CJA Panel Attorney Hourly Rates.

However, voucher decisions in my district over the last three years indicate that at least some of our district judges have begun to stress the Act's limits instead of its critical role in achieving justice.⁴ It may be misleading to state that stricter voucher scrutiny is *prevalent* at this time among all the judges in my district.⁵ However, faced with an increasing number of discovery-laden, administratively burdensome, multi-defendant conspiracy prosecutions, there is definitely a trend toward construing as plenary the Act's grant of authority to review vouchers and emphasizing the role of the judge as regulator.

Voucher actions in my district are premised on the historically dubious claim (in standard voucher-cutting language) that the Criminal Justice Act “developed out of a pro bono system pursuant to which attorneys volunteered to

⁴ See e.g. Strickland v. Washington, 466 U.S. 668, 685 (1984)(“right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. . . .Because of the vital importance of counsel's assistance, . . . a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. . . .That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair”)(citations omitted).

⁵There are seven active district judges in the Western District, five senior judges and five magistrate judges. Two nominees for three vacancies on the District Court have been “reported out of” the Senate Judiciary Committee; a third awaits Committee action.

represent such individuals”.⁶ Unlike other districts I’ve heard about, where vouchers are cut according to a standard percentage chosen by an individual judge, judges in my district have taken several different approaches. The most troubling one is to lay claim in extended or complex cases to unfettered discretion under the Act, then to assess “reasonableness” under the CJA by comparing one lawyer’s voucher to those submitted by one or more other lawyers in the same case, without performing an individualized assessment, either of the client’s culpability, the objective of the representation or other factors identified at §230.23.40(c) of the national CJA Guidelines.⁷ Often, voucher actions purport to be in line with the national CJA guidelines, but are grounded in hyper-technical (e.g. *infra*, n.10), disputable constructions of Guidelines that are necessarily intended to be flexible.⁸

⁶Compare Cheshire, *History of the Criminal Justice Act*, Federal Lawyer (March 2013, pp.46-48) [Criminal Justice Act was intended to displace *pro bono* system that had grown up following *Johnston v. Zerbst*, 304 U.S. 458 (1938,)] with *United States v. Mosley*, 779 F. Supp. 2d 398, 404 (D.N.J. 2011) citing *United States v. Diaz*, 802 F. Supp. 304, 307 (C.D. Cal. 1992)(“spirit of the statute is lost once the CJA representation of indigent defendants loses its essentially *pro bono* nature”). See also *United States v. Hunter*, 394 F. Supp. 994, 997 (D.D.C., Bazelon, J.)(failure to award adequate compensation to experienced and competent counsel lowers the quality of representation, deters lawyers from accepting complex cases and discourages young attorneys from pursuing a career in criminal litigation).

⁷See e.g. *United States v. Bush*, (Cr. No. 12-92, W.D. Pa. March 1, 2016); *United States v. Anderson* (Cr. No. 13-59, Document No. 183) (W.D. Pa., December 3, 2014).

⁸See e.g. *United States v. Teddy V. Davis*, [Cr. No. 08-204, Docket No. 183](W.D. Pa. December 8, 2011)(involving, *inter alia*, judicial “audit” of six legal pads full of lawyer notes).

Earlier decisions simply refused to make the “extended or complex” finding, reducing an excess claim to the case maximum.⁹

Another troubling voucher practice stretches CJA Guidelines §230.56 (the so-called “substitute counsel” rule) to defer payment even when appointed counsel is substituted for by *retained* counsel, on the speculative grounds that CJA funds *might* need to be allocated between the lawyer being terminated and another appointed lawyer *if* the retained lawyer does not complete the representation. This first came to my attention in fall 2013, in a case ultimately involving delay of eleven months on a sole practitioner’s voucher of \$4,500, less than half the CJA maximum, for a lead defendant in a large marijuana prosecution.¹⁰ Another lawyer, appointed to represent a lead defendant in a cocaine prosecution, was replaced by retained counsel (also around fall, 2013) and waited *nearly three years* for his voucher to be reviewed. In both cases, retention of private counsel was unanticipated, and, after learning that the Court intended to defer review, each panel lawyer sought a finding that the representation was “extended or complex”, so that vouchers could be promptly reviewed in compliance with §230.56. In each case, the number of defendants, the potential culpability of the particular client and

⁹ United States v. Tillman, 2010 WL 2245033 (W.D. Pa. 2010); United States v. Tray, Cr. No. 06-260, 2009 WL 82228 (W.D. Pa. 2009); United States v. Dequillarae Zellous, [Cr. No. 10-187(10), Document No. 397](W.D. Pa. January 11, 2012).

¹⁰ When the court finally considered this voucher, it cut the claim nearly twenty percent by denying or reducing twenty-five distinct time entries (only three of which exceeded a .5) totaling 7½ hours, awarding fees for 1.2 of these hours.

replacement of counsel itself plainly supported the finding, but the request was denied in both. In the second case, a change in judges led the panel lawyer to renew the interim payment motion. It was granted by the second judge, but, by that time, voucher review was caught up in the bottleneck resulting from simultaneous implementation of eVoucher and “Policies and Procedures”.

The trend toward stricter voucher scrutiny is accompanied by a thirst for increasingly substantive disclosures to justify balancing interests against payment, a practice which threatens client confidentiality. In my district, it is also reinforced by the new Policies and Procedures, which create a series of “special compensation rules”, emphasize the judicial obligation to the federal treasury, place a duty on the panel lawyer to self-audit (lawyer should exercise “billing judgment as to reasonableness”) and warn lawyers that “(r)epeated submissions for unreasonable expenditures of time may result in removal from the CJA Panel”, see Policies and Procedures, n. 1, supra, pp. 8, 30, 31. The members of our panel selection and review committee have not discussed this language since the Policies and Procedures were enacted, and I have reason to hope that a lawyer’s claim history will be a minor factor in assessing ongoing eligibility, and that removing a panel member based upon claim history would be reserved for extreme cases. Still, whether intentionally or not, the language fails to recognize the lawyer’s duty to provide zealous advocacy and chills the exercise of that duty.

One consequence of the trend has been to enhance tension between bench and bar in a district where that relationship had been a model of collegiality. In one case, a judge vilified a veteran panel member who had met with an undisputedly first-rate forensic computer analyst merely to get a quote for putting a large volume of electronically stored information in a searchable, reviewable format. Awaiting the quote before seeking authorization, the lawyer wrote the judge as a courtesy to anticipate the need for the service. The judge responded, accusing him of “jumping the gun” by not getting formal authorization before the quote meeting:

I acknowledge that they (the consulting firm) do fine work”, “but it is my decision whether such a service provider will be made available to the defense. . .and what person/entity will be engaged. . .I will not authorize the use of scarce CJA funds for a fishing expedition of voluminous electronic evidence, all of which you will undoubtedly seek compensation for reviewing.

Directly copying the consultant on the response, the judge ordered any forensic work to cease, and imposed a duty upon the lawyer to contact the federal defender to find a less expensive expert, or to negotiate with the first-rate expert a fee comparable to what a less skilled analyst might charge. The judge closed the letter, reserving the right to “address additional deficiencies” once the CJA 21 and supporting documents were submitted.

I am concerned about the quality of our panel going forward. Again, while not prevalent, a few veteran lawyers have either left, are threatening to leave or have reduced the number of appointments they accept. A few others have told me that they decline appointments in cases if they learn that a judge with a reputation for unreasonable voucher cuts is assigned. One committed, talented lawyer, grappling with whether to continue to accept appointments, expressed the opinion that stricter voucher scrutiny adds administrative burdens on the practicing lawyer, increasing overhead and making it harder for a lawyer to accept an appointment if he or she knows that the fight for reasonable compensation is going to be as hard or harder as the fight for the client. Courts, this lawyer said, should be finding ways to make it easier for lawyers to accept appointments, not harder.

III. COMMENTARY

(A) Independence of the Bar

The committee's invitation, as I understand it, is to consider the indigent defense program on a clean slate. I join those who believe that in the current climate, steps are necessary to guard against encroachments to the independence of the criminal defense bar. It is undeniably true that judicial involvement can be productive and constructive. The CJA system in place works well when the parties understand and respect one another's distinct roles and the lines of communication between lawyers and judges remain open. The limits on how much

communication can occur before those distinct roles become blurred, can be achieved only by self- or institutional restraint. Unfortunately, the conditions I've described, while not prevalent, reflect an increasing absence of either variety.

However, as difficult as the last few years have been in my district, I would not favor or recommend abandonment of local control. Locally, the goodwill built up between the Panel and the defender's office, owing largely to its role in managing the panel, is too valuable a resource to abandon, as is the involvement of judges committed to furthering the goals of the Act. Plus, federal practice often piggybacks onto local traditions and "reasonableness" is often defined by conditions that occur locally. Things as simple as knowing the distance between two travel points without looking at a map allow voucher review to be conducted more efficiently when it is local instead of centralized.

From a local vantage point, one solution might exist right under our noses. The non-profit community defender organization, conceived in 18 U.S.C. §3006A(g)(2), heretofore been considered as an alternative to a federal defender in smaller districts, could easily be adapted to serve side-by-side a defender as a panel administrator with responsibilities to include service as appointment clearinghouse, voucher review and approval, and service provider authorization and payment. It would be modeled, to an extent, on the Northern District of California's approach, and it's board of directors, who would serve at the policy-making level (but not

involved in individual cases), could, and should, include the defender, at least one district judge interested in furthering the goals of the Criminal Justice Act and others committed to the defense function.

This suggestion does not address DSO's situation, and I leave to others to consider whether the possibility that a central, quasi-judicial agency could effectively address national concerns. Recognizing, too, that the Committee may be involved in "the art of the possible", and that even modest adjustments to the Criminal Justice Act may not be achievable, the Judicial Conference should, at minimum, endorse a claim resolution process outside of regular judicial review to provide predictability and uniformity to voucher decisions. In addition, I believe that the Guidelines—in commentary or elsewhere—should make clear the existence of certain "first principles" regarding the operation of the Criminal Justice Act.

First, it is historically and legally inaccurate to assert that the Criminal Justice Act has roots in a *pro bono* system, n.6 supra. The legislation was enacted to take flight from a system that depended upon whether often unqualified, uninterested, unpaid lawyers would be called upon—often cajoled—to accept representations they were not equipped to handle. To the extent that there is residue of a *pro bono* system, the Guidelines should affirm that the *pro bono* component is found in the substantially reduced hourly rate that panel lawyers are

paid for their work. This straightforward recognition should not in the least detract from the commitment to public service of lawyers who populate the panels in the 94 federal districts. As Chief Justice Roberts recently wrote in dissent:

Federal prosecutors, when they rise in Court, represent the people of the United States. But so do defense lawyers—one at a time. In my view, the Court’s opinion pays insufficient respect to the importance of an independent bar as a check on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant’s chosen advocate strikes at the heart of that significant role.

Kaley v. United States, 134 S. Ct. 1090, 1114 (2014)(Roberts, C.J. dissenting).

Second, the Act implements the constitutional right to counsel in federal criminal court, but the rights it affords are greater than what the Sixth Amendment guarantees. Strickland itself recognized that “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system,” but simply to ensure that the accused receives a fair trial, 466 U.S. at 689. The Act is intended to exceed the Constitution’s minimum standard, and to actually improve the quality of representation in federal criminal court.

At least two consequences flow from this recognition:

(a) the deference or leeway afforded in Sixth Amendment review of attorney performance is likewise applicable in review under the Criminal Justice Act. Voucher review for reasonableness should be subject to an abuse of discretion

standard, consistent with use of the term “reasonable”, for the same reasons that performance review under Strickland is entitled to deference. As it stands however, deference is tossed out the window when a court, considering whether to pay for the lawyer’s performance, strictly construes the identical term —“reasonable”—under the Criminal Justice Act in derogation of its remedial purpose. A lack of deference to counsel’s choices during representation is probably the single factor that most threatens the independence of the defense bar. Yet, as courts have recognized in other contexts, discretionary review has teeth in appropriate cases, and could be invoked when the Treasury is genuinely threatened.¹¹

(b) those holdings limiting payment based upon an after-the-fact subjective assessment of an amount minimally necessary “to provide indigent defendants with adequate representation in the federal courts,” United States v. Troy Anderson, supra, p. 5, would draw back the Act, perhaps even to a standard beneath the constitutional one. When the Criminal Justice Act is strictly construed, an action that the Constitution requires a lawyer to take under a deferential standard in order to be effective is increasingly likely to be one that a judge, acting under the Criminal Justice Act, will find to be unreasonable and will refuse to pay for.

Third, to achieve its remedial purpose, the Act requires an assessment of “reasonableness” primarily in light of the client interests, and only secondarily upon the needs of the federal treasury. The Guidelines as currently written imply as much, by recommending that “(v)ouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances”, §230.33. But it is evident that this language only invites a more circuitous route to achieve a voucher cut. The Guidelines should use

¹¹ See Davis, Discretionary Justice: A Preliminary Inquiry (University of Illinois Press, 1971).

stronger language to stress that, as in performance review under the Sixth Amendment, client interests should be the focus of the analysis.

(b) Miscellaneous Proposals

(1) The “Substitute Counsel” Rule, §230.56

Section 230.56 of the Guidelines should be modified or clarified. It invites courts to allocate the statutory case maximum between lawyers appointed sequentially during litigation, unless the judge makes a finding of “extended” or “complex”. Careful study shows that §230.56 is an outlier to CJA principle; in every other context the Criminal Justice Act and the CJA Guidelines approach case maximums on a per attorney, not on a per case basis.¹²

The indigent client, to whom the Sixth Amendment right belongs, is most adversely affected by the §230.56 aberration. With life and liberty on the line, and having just lived through a subjectively difficult experience with a lawyer, the client is now faced with the prospect of being represented by another lawyer who is trying to execute a representation with financial hands tied behind his/her back. New counsel enters the case, if at all, knowing only that another lawyer has a claim

¹²See e.g. 18 U.S.C. §3006A(d)(2)(case maximums shall not exceed specified amounts “for each attorney in a case”); CJA Guidelines §230.23.10[“(a)All compensations limits apply to each attorney in each case”]; §230.23.10(f) (limitations apply separately to each attorney in difficult cases in which the court finds it necessary to appoint more than one attorney); §230.50(d) (separate vouchers should be submitted, and separate maximums applied when one lawyer appointed to represent multiple defendants).

against the case maximum, but not what part of the maximum remains to be allocated or how the Court will approach the allocation decision. A serious incentive exists to resolve the case based upon economic considerations, not the client's best interests. The position creates ethical, economic and a myriad of other incentives for panel lawyers to solve the problem simply by refraining from accepting substitute appointments. See comment to Rule 1.8(e), Pennsylvania Rules of Professional Conduct (discussing financial stakes in the outcome of litigation). Withdrawing counsel, too, risks an inordinately long wait for an already-reduced payment, after being terminated usually on short notice, and expending substantial efforts, often on behalf of an unappreciative client.

The preferable route would be to align §230.56 with the entire scheme and apply the case maximum in substitution situations per attorney, not per case. In the deliberation leading to the adoption of the new Policies and Procedures, some judges acknowledged these difficulties and stated that they either disregard §230.56 or liberally find that the a case is extended or complex to avoid the allocation entirely. At minimum, the rule should recognize something like a presumption that in most cases substitution itself complicates the case, warranting the “extended or complex” finding.

(2) The Appellate Panel

According to Third Circuit local Rule 109.1, trial counsel is “expected to continue on appeal absent extraordinary circumstances”. Chapter 1 of the Circuit’s CJA Plan nonetheless contemplates a separate appellate panel in or for each district.¹³ The Circuit maintains “the sole and exclusive responsibility to select counsel” for appellate matters, but with the onset of the budget controversy, the Circuit began to appoint federal defenders’ offices to cases in which lawyers from the districts, whether panel or defender—were granted leave to withdraw. This approach apparently satisfies the 75%-25% ratio with lawyers continuing their representation from the district courts.

My concern is that Model CJA Plans, the Vera report and perhaps Judge Prado’s report, as well, recognized that a panel should be sized so that lawyers “maintain proficiency in federal criminal defense work, and thereby provide a high-quality of representation”. Respectfully, the Circuit’s approach discourages appointment of panel lawyers upon another lawyer’s withdrawal. While meeting the ratio, the Circuit’s policy is not believed to meet the proficiency standard. It is respectfully submitted that this Committee should evaluate the Circuit’s policy and recommend ongoing compliance with the Circuit’s Chapter 1 or other ways to keep panel lawyers proficient.

¹³<http://www.ca3.uscourts.gov/sites/ca3/files/cjaplan.pdf>

IV. CONCLUSION

In my district in 2015 alone, something like two-thirds of indictments were defended by appointed lawyers or defenders. I venture to guess that the opposite was true thirty years ago. Historically, factors such as stricter forfeiture rules and the shift in federal prosecutions away from business and upper-level organized crime, toward street-level drug and firearm offenses fulfills a prophecy that government action would lead to the “demise of the system of private criminal defense” representation.¹⁴ This Committee’s deliberations could determine whether the corollary to this prediction—that the shift to a system of public defense unavoidably invades the traditional independence of the defense bar—is also true, and I look forward to participating in the dialogue leading to an answer that preserves the strengths of our adversary system.

Sincerely,

/s/Patrick M. Livingston
Patrick M. Livingston

c: Arin Brenner (by electronic mail)
Autumn Dickman (by electronic mail)
Richard Wallach (by electronic mail)

¹⁴See e.g. Gershman, The New Prosecutors, 53 U.Pitt. L. Rev. 393, 404 (1992); Kaley, supra; Caplin & Drysdale v. United States, 491 U.S. 617, 650-51 (1980)(Blackmun, J. dissenting).