

**OFFICE OF THE CIRCUIT EXECUTIVE**  
**UNITED STATES COURTS FOR THE NINTH CIRCUIT**

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Hon. Kathleen Cardone  
Chair, Committee to Review the CJA Program  
One Columbus Circle, N.E.  
Washington, DC 20544

Dear Judge Cardone and Committee Members,

Thank you for the opportunity to provide written comments in advance of my testimony at the public hearing in San Francisco on March 2, 2016. I previously provided a memorandum with input concerning the issues being studied and herein address only a few additional points.

Introduction

Prior to beginning my tenure as one of two case budgeting attorneys for the Ninth Circuit in May 2014, I worked for 17 years as a Death Penalty Law Clerk in the District of Arizona. In that capacity, I worked with district judges on both capital habeas and federal death penalty cases, and assisted in reviewing hundreds of CJA vouchers. After the Judicial Council of the Ninth Circuit adopted a policy requiring budgeting for all pending and future capital habeas cases, I helped implement a case management and budgeting plan for the district.

In 2008, I was appointed to the Ninth Circuit's capital case committee, which among other responsibilities reviews and makes recommendations concerning capital habeas case budgets to the Judicial Council. I continue to serve on that committee as a staff member of the Office of the Circuit Executive and estimate I have reviewed at least 150 budgets over the past seven-plus years, the majority from California district courts.

## Capital Habeas Representation

The number of qualified CJA attorneys willing to accept representation of a capital habeas petitioner has decreased over the past two decades. As a result, district courts within and outside the Ninth Circuit have had difficulty finding qualified CJA attorneys. The reasons include counsel's inability to obtain adequate resources in some districts or circuits, significant changes in the law rendering representation of habeas petitioners more challenging, and increased responsibilities associated with representing a condemned prisoner, especially after an execution date is set.

During my tenure at the District of Arizona, the Federal Public Defender's Capital Habeas Unit (CHU) grew large enough that CHU attorneys now represent the overwhelming majority of Arizona's capital habeas petitioners. With no disrespect to the CJA attorneys who have undertaken capital representation in Arizona, many of whom are excellent lawyers, the support and expertise provided by a CHU is unparalleled.

CHUs have full-time specialized fact and mitigation investigators, paralegals, and technology staff to support counsel. Paralegal assistance is particularly important given the extensive court records and counsel files in most capital cases, often numbering in the hundreds of thousands of pages. CHU attorneys are able to enlist expert service providers—and at higher hourly rates—than may be available to CJA counsel. They also regularly attend or present at training seminars and have the time, as salaried employees, to stay current on legal developments. CHUs provide continuity on a case, even if an attorney is substituted at some point during the litigation. CHUs are also better equipped to handle both changes in the law and execution-related litigation, the latter of which in recent years has required extensive knowledge and investigation concerning lethal injection drugs and dosages.

Habeas corpus is a highly complex and challenging area of law. It includes numerous procedural requirements that Justice Blackmun once dubbed a “Byzantine morass.” *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting), *holding modified by Martinez v. Ryan*, 132 S. Ct. 1309 (2012). And that was before adoption of the Antiterrorism and Effective Death Penalty Act of 1996 or the Supreme Court's monumental decision in *Martinez v. Ryan*, 132 S. Ct. at 1309. In addition to understanding this very specialized area of law, habeas attorneys must also wear the hats of trial, appellate, and state post-conviction counsel as well as investigator to examine the adequacy of representation provided by each.

To ensure that condemned inmates are provided a high quality representation and to provide more consistency in such representation nationwide, I urge the Committee to include in its recommendations that CHUs be expanded in all districts with capital habeas cases or that districts without a CHU be required to consider appointment of an out-of-district CHU in lieu of a CJA attorney if a CHU is available to accept the representation.

## Case Budgeting

The role of a case budgeting attorney in the Ninth Circuit differs in one significant way from that of my counterparts in the Second and Sixth Circuits, both of whom also will be testifying in San Francisco on March 2. Specifically, unless requested in a particular matter, neither I nor my colleague Blair Perilman conduct preliminary review of attorney and service providers vouchers that are in excess of statutory maximums and require circuit approval. Rather, we focus our efforts on working with appointed counsel to develop budgets in the district courts as early as possible in mega non-capital and capital cases.

The budgeting process is usually initiated by either a panel attorney or the district court, who will order counsel to contact Ms. Perilman or me to develop a budget. We meet with counsel to assess case management needs, including electronic discovery issues and forecasting case expenses. In multi-defendant cases, we try to identify ways counsel can share investigative, expert, paralegal, and electronic discovery management resources. The budgets we develop encompass both estimated attorney hours and service providers needed for multiple stages of litigation, and we assure counsel that a budget can be supplemented or amended if circumstances change.

We prefer to budget in stages because counsel frequently have difficulty estimating time that will be spent, for example, preparing for trial one or more years out. In addition to providing more focused case management, staged budgeting pairs well with submission of interim vouchers, allowing a court to accurately monitor expenditures for each budget stage. We recommend that courts require attorneys to submit vouchers for a respective budgeting period before a new budget is created. This provides real-time data on case expenditures as opposed to waiting months or even years to get the bills. Although interim vouchers increase the number of vouchers to process, we have found that judges and CJA staff find it easier to audit for technical compliance and reasonableness when the vouchers are shorter in page count and closer in time to when the services were provided.

After we have provided our input to counsel regarding a proposed budget, counsel submits the budget to the district court for consideration. In most cases, Ms. Perilman or I will follow up with the court to answer any questions about the proposed funding request and will draft a budget authorization order based on the court's directives.

Our goal in any case is to ensure that counsel has the resources necessary to provide a high-quality defense but in the most cost effective manner possible. By budgeting a case, we in essence serve as mediators between defense counsel and the court, saving time for both sides by reducing the need for multiple resource requests, ex parte hearings, and discovery-related litigation. We relay to defense counsel any concerns a court may have about costs and discuss with the court our views as to the reasonableness of funding requests.

In our brief tenure, Ms. Perilman and I have observed the following:

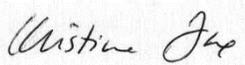
- Budgets help defense counsel plan ahead and think through strategies and potential expenditures on a case;
- Budgets remove the “sticker shock” some judges feel when vouchers are submitted at the conclusion of a representation and help eliminate unwarranted voucher reductions;
- Having a budget approved up front usually makes voucher review easier and faster;
- Most judges appreciate our objective expertise and advice on funding issues;
- Most judges would prefer not to be involved in either authorizing CJA expenditures or reviewing payment vouchers;
- Individual judges have widely varied approaches to voucher review;
- Individual judges have widely varied views on what resources or tasks are reasonably necessary for the representation of a defendant;
- Numerous panel attorneys lack the necessary technology skills, as well as support staff, to handle vast amounts of electronic discovery;
- More locally-based discovery training for panel attorneys and support staff is needed in many districts;
- Panel attorneys are at a significant disadvantage in terms of resources and support staff compared to both federal defenders and prosecutors.

As noted in my earlier memorandum, I encourage the Committee to consider alternatives to the current system wherein the presiding judge decides whether to authorize investigators, experts, and other service providers in CJA-represented cases. Similarly, I recommend that the Committee look at alternative approaches to billing, voucher review, and payment authorizations.

Vesting these responsibilities in an administrator, a commissioner, or a separate CJA administrative unit within a federal defender’s office working on behalf of an entire district or multiple districts would provide more consistency, decrease the imbalance between CJA panel attorneys and federal defenders, and eliminate potential conflicts for the presiding judge.

Thank you again for inviting me to participate in the hearing. I look forward to further discussing these issues.

Best regards,



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