Testimony of Magistrate Judge Paul M. Warner
United States District Court for the District of Utah
Before the Ad Hoc Committee to Review the Criminal Justice Act Program

I would like to thank the Committee for this opportunity to submit testimony, as well as allowing me to appear in lieu of my esteemed colleague Chief District Judge David Nuffer. My testimony regarding mega case budgeting issues is offered in the context of a recent mega white collar fraud case in our district, involving millions of documents and five defendants, all requiring CJA counsel, investigators, paralegals, and expert witnesses. Chief Judge Nuffer was the presiding District Judge, and I was the referred Magistrate Judge.

By way of background, shortly before this case was filed, in light of tight budgetary constraints, the judges in our district were becoming increasingly concerned about rising expenditures occurring under the Criminal Justice Act. We had a few CJA panel attorneys who were abusing the system and using the panel as their primary source of income. Our judges did not believe this was appropriate, inasmuch as a limited number of lawyers could participate on the panel. And, we did not want to be accused of providing them a comfortable income while not allowing other attorneys to even participate on the panel.

The Tenth Circuit and/or the Administrative Office of the Courts directed our district, as well as other districts, to make significant efforts to control CJA panel costs. As a district, we implemented procedures to ensure more accountability and equality with respect to services under the CJA. Consistent with the *Guide to Judiciary Policy, Vol. 7: Defender Services* ("*Defender Guide*"), the District of Utah issued its *Protocol: Criminal Justice Act Payment and Review Process* ("*Protocol*") on July 17, 2012, to "promote consistency and to maximize available judicial resources." The judges in our district were cognizant of protecting indigent defendants' rights to an adequate, competent, and professional defense, while at the same time exercising fiscal responsibility. As I occasionally remind defense counsel who appear in front of me, "Defendants are entitled to a good Chevrolet defense, but not a Cadillac

one." In other words, defense counsel must be sensitive to cost effective methods of providing professional services, rather than assuming that an unlimited budget for defense costs is available. Most panel members understand this, and do an excellent job of providing their services accordingly. However, there are always some who require close scrutiny to avoid running up unnecessary expenses. As an example, one panel member routinely sought approval for an investigator and a paralegal, regardless of the type of case or the complexity of the issues involved.

The court is in a tough spot on mega cases under the CJA: on the one hand, the defendant is entitled to a competent and adequate defense; but on the other hand, because CJA funds are limited, it is simply impossible to provide every defendant with the "Cadillac defense" they may want or their counsel seeks to provide. Many white collar defendants have had their assets frozen and thus rely upon CJA appointed counsel. Because of their (previous) wealth and affluence, they are often expecting the best defense money can buy.

We implemented the measures under the *Protocol*. Our district informed the panel attorneys about the new policy and the court's expectations of them. As expected, we received a lot of resistance from the panel members as they were used to submitting vouchers and getting the proverbial rubber stamp. Now we were requiring them to justify their requests with greater detail, and to justify in advance and obtain approval before expenses were incurred. Previously, counsel routinely exceeded established budget limits, and merely sought approval after the fact when the case was completed.

I provide this background to help illustrate the issues that arose in this mega case. It was originally filed in mid-2011 as a one-count indictment for Mail Fraud (18 U.S.C. § 1341) against one defendant. The prosecution indicated, however, that it expected to be filing a superseding indictment. The superseding indictment added 4 defendants and 85 counts. The defendants were charged with Conspiracy, False Statement to Bank, Wire Fraud, Bank Fraud, Participating in Fraudulent Banking Activities, Conspiracy to Commit Money Laundering, Money Laundering, and Aiding and Abetting.

Based on the nature of the case, I knew that it would have voluminous electronic discovery involving millions of documents and emails, and likely require a great deal of attorney time. As provided in the *Protocol*, and consistent with the *Defender Guide*: "Unless otherwise ordered by the court, case budgeting will be required in any case in which it reasonably appears that: (1) attorney hours are expected to exceed 300 hours; or (2) total expenditures per defendant are expected to exceed $30,000." Thus, given the large volume of discovery in this case, and with the above-mentioned budget considerations in mind, I concluded that case budgets were necessary and ordered counsel to submit them.

The attorneys submitted proposed case budgets. I determined that it would be beneficial to have an experienced defense attorney appointed as a consultant to independently review the submitted budgets. My intention was not necessarily to limit CJA counsel but, in order to maximize judicial resources, I wanted to ensure that their efforts were not being duplicated, and that the requests were legitimately necessary. While I am an experienced prosecutor, and did three years of defense work as well, I wanted the input of an experience defense counsel to aid me in making determinations as to the necessity and reasonableness of requests. Of course, there was push back from defense counsel in this case for appointing another attorney on the CJA panel (who also happened to be the CJA panel representative) to "nickel and dime" them as perceived by the CJA attorneys on this case. I assured counsel that the consulting attorney would not be making final budget determinations; he was appointed only as a consultant, he would not be approving or denying claims or proposed budgets. In addition, because this case involved millions of electronic documents, I authorized an e-discovery coordinator for the defense. Every sixty to ninety days I held a status conference. And every ninety days I reauthorized the budgets. The initial ninety day budget was $82,760 for each defense team.

Unfortunately, this case was rife with problems. Both the first and second set of attorneys for the lead defendant had to withdraw from the case due to conflicts, and a third (and final) team was appointed. Discovery issues continued to multiply. There were problems getting all of the discovery

processed and uploaded onto the defense database in a searchable format. Defendants repeatedly asked for continuances, which were granted for months on end, but eventually we did set a trial date because it became clear that defendants would always seek more time to prepare. I then told them while they did not get more time, they could get more help.

As this case was gearing up for trial last spring, I attended the Tenth Circuit Judicial Conference and met the Tenth Circuit Case Budgeting Attorney, Cari Waters. I sought her help with the budgets in this case. Ms. Waters began working directly with counsel on budgets. She is a very experienced defense counsel in the federal system, so she was quite capable of assessing the necessity and legitimacy of the various defense budget requests. There was a large discrepancy among the submitted budgets. The budget requests through trial ranged from a low of $284,587 for the lead defendant's team to a high of $1,131,129 for an attorney who was originally retained, but, when his client's money ran out, I appointed him under the CJA for continuity's sake. His request reflected the "Cadillac defense" mentality of a private practitioner where money is no object. In addition, the total amount billed for a 20-month period for the lead defendant's first attorney was $313,867 compared to $20,386 for his second counsel who was on the case for two and a half years. However, with Cari Waters's input and guidance, we were able to reduce and consolidate the defense budgets. The total approved budget for each defense team through trial was around $187,000 not including the joint banking expert cost of $35,000. The defense shared financial experts, as well as the aforementioned e-discovery coordinator. Counsel was instructed to utilize investigators, paralegals, and associates where possible. In fact, after discovering that one defense team had exceeded their budget in part because lead counsel was performing paralegal duties, I ordered that if they continued to perform paralegal duties, they would be paid at paralegal rates.

This case consumed an enormous amount of judicial resources. I held 19 status conferences regarding discovery and budgeting issues. The lead defendant went through three sets of highly skilled criminal defense attorneys, each having to get up to speed on the case and expending vast resources in

the process. Ultimately, that defendant elected to proceed pro se, with standby counsel only, a month before trial began.

The same previously retained counsel who submitted the large budget request continually complained about being required to stay within his budget. In fact, he used this complaint as one of his arguments in support of a motion for a bill of particulars. The court issued the following in response to that argument: "And, finally, this court is not persuaded by Defendants' argument that requiring counsel to stay within their budgets necessitates a bill of particulars. As counsel is well-aware, this court has repeatedly approved budgets and requests for additional funding. The most recent budget orders were carefully drafted in conjunction with the Tenth Circuit's Case Budgeting Attorney. They have been reviewed and approved by this court, as well as by the Tenth Circuit. They are fair and adequate budgets, and they provide ample resources for counsel to zealously represent their clients. That said, if counsel for Defendants are not capable of doing the job within these budgets, the court will find counsel who can."

We don't yet have the final numbers for this case. However, I'm sure the total bill will be staggering. While this case presented a multitude of problems and issues, I believe that with case budgeting and the help of Ms. Waters, we were able to control the final cost. The real turning point in this case came once Ms. Waters got involved and began working directly with defense counsel on coordinating the budgets. Because of her expertise, Ms. Waters had the confidence of both the court and defense counsel. Of particular importance, after I approved the proposed budgets, Ms. Waters was able to secure approval of them from the Chief Judge of the Court of Appeals for the Tenth Circuit as well. Thus, defense counsel received what they needed along with some reassurance that they would be paid for their services. And the court could be confident that the services defendants were receiving were necessary and fair, as well as reasonable.