MARK WINDSOR

ATTORNEY AT LAW

1 SOUTH FAIR OAKS AVENUE, SUITE 401
PASADENA, CALIFORNIA 91105

Telephone
626 7926700

Facsimile
626 9568900

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Honorable Kathleen Cardone, Chair
Members of the CJA Ad Hoc Committee
Thurgood Marshall Federal Judiciary Building
Ome Columbus Circle NE, Suite 4-200
Washington, DC 20544
Via Electronic Mail

Re: Testimony of Mark Windsor before the Committee,
San Francisco, California, March 2, 2016

My name is Mark Windsor and I am a sole practitioner and member of the CJA trial panel in the Central District of California. I thank the Committee for giving me the opportunity to be heard on behalf of panel lawyers regarding the Criminal Justice Act.

I began my legal career in 1997 as a trial lawyer with the Federal Defenders of San Diego, Inc. In 2000, I joined the CJA Panel for the Southern District of California. In 2003, I joined the CJA Panel for the Northern District of California in San Francisco and Oakland. In 2005, I joined the CJA Panel for the Central District of California in Los Angeles, where I have served until the present time. During my 16 years as a panel attorney, I have been appointed to represent hundreds of clients and submitted several hundred vouchers.

THE NATURE OF MY PRACTICE

During the eleven years I have served on the Central District Panel, I have been appointed to represent defendants in numerous “mega-cases” on an almost continual basis, often representing defendants in more than one mega-case at any given time. These cases involve massive discovery and often long lists of codefendants, as fairly described in the submissions of other witnesses. As a result, I have not developed an extensive private practice since coming to Los Angeles, but have spent approximately 95% of my hours engaged in CJA Panel work. I always intended to devote a significant percentage of my time representing low-income clients who cannot afford to pay for representation, but this particular business model – a nearly exclusive CJA practice - did not develop by choice, but rather by necessity. The nature and complexity of the cases to which I have been continuously appointed have demanded a great deal of time and attention, and I do not believe I could have provided quality representation to these clients and raise my young family without foregoing the development of a more lucrative private practice. Over my years here I have turned down representation of many retained clients due to my commitments on panel cases, and I have done so with the belief that representing appointed clients should take priority due to the critical importance of the task.

While the work remains rewarding and meaningful, in recent years I have had to spend a significantly larger amount of my time obtaining and continuously justifying my funding requests and vouchers, while at the same time having to wait an ever-increasing amount of time to get paid on those vouchers. Recently, due to ever increasing administrative burdens placed upon our panel, there have been weeks when I spend more time justifying my work than actually performing it. Furthermore, many of the service providers I have traditionally relied upon for help in appointed cases have been less and less enthusiastic about working on CJA cases as a result of heightened barriers to obtaining funding and getting paid. These circumstances have combined to make my near-exclusive focus on CJA appointed work all but untenable.

For purposes of this hearing, I will discuss in detail one recent mega-case I was appointed to in the District Court in Los Angeles, and how my quest for resources and payment in that case has been handled. I believe the case well illustrates the current state of CJA practice in the Central District of California, and underscores the reality that attorneys like me will be less and less likely to serve in this capacity in the future. I also believe the case is an excellent example of how there is a huge disparity between the resources available to the prosecution, the federal defenders offices, and appointed CJA counsel. Finally, the case exemplifies why, if we are ever to overcome this pervasive issue in our criminal justice system, CJA oversight must be completely independent of the local judiciary, and substantially independent of judicial involvement on the whole.

THE CASE OF RONDALE YOUNG

In January of 2013 I was appointed to a case that included capital murder charges in connection with a broad RICO conspiracy involving a local African -American street gang, the Pueblo Bishop Bloods. Forty-one defendants were named in the indictment. I was provided initially with 35,000 pages of discovery along with approximately 412 hours of audio and video recordings. As is now customary, the government also produced thousands of pages of discovery in the months leading up to trial. In all there were approximately 47,396 documents, including transcripts of the relevant state and federal trials, that were produced by the government and 784.3 hours of media recordings either relevant to the case or produced by the government. During the course of my representation my defense team and I acquired thousands of additional documents that were reviewed in preparing the case for trial.

By the time of my appointment, the majority of the defendants in the case had already pled guilty, and six of the defendants had proceeded to trial, split between two separate juries at different times. I was therefore representing the sole remaining defendant in a 41-defendant prosecution, opposing two prosecutors and multiple federal agents who had been either overseeing the investigation or litigating the case for at least six years before I had even met my client. The case was delayed because my client, Rondale Young, had first been tried for first-degree murder in California Superior Court, where he was acquitted. That process took three-and-a-half years. Only then was he arraigned in federal court to face RICO and VICAR charges based in large part on the same murder. He now faced capital punishment, or in the alternative a mandatory life sentence.

It is easy to see why my client was acquitted in state court. The murder in question was alleged to be in retaliation for the murder of a Pueblo Bishop gang member. Rondale did not fit the profile of a hardened gang member by any stretch of the imagination: he had exactly one prior misdemeanor conviction for which he did one day in jail, he had a high school diploma, solid work history, strong family support, no tattoos and no obvious gang ties. There were two sets of conflicting post-conviction interrogation statements that were admitted at the state trial, but these did not amount to an actual confession. This was the rare gang RICO case where there actually was a defense to the enterprise participation element. Based in no small part on my prior experience with mega-case RICO prosecutions, I immediately recognized that the case was likely headed to trial and would take considerable effort.

Because the indictment alleged a capital crime, and given the clearly defensible nature of the case, I made efforts to obtain appointment of learned counsel to assist me and my client, pursuant to 18 U.S.C. § 3005. I filed two separate requests for such appointment with the Court. My first request was fairly cursory, as the statute requiring such appointment in death-eligible cases is clear and I assumed it was a formality given the charges filed. When that ex parte was immediately denied by the District Court Judge presiding over the case, I filed a second, more thorough request emphasizing the statutory language and the fact that the government had not filed notice it would not pursue the death penalty in the case. When my request for learned counsel was denied for the second time, I recognized that I would essentially be doing the work of two attorneys on this case if I wanted to represent Rondale properly, and within the time allotted.

In terms of parity of representation, had Rondale's case been appointed to the Federal Public Defender's Office, he would likely have been assigned at least two lawyers at the outset of the case, and likely those lawyers would have been permitted to curtail other assignments to focus on his case, without receiving a reduction in their salary or incurring up front expenses for necessary case preparation. These attorneys would have access to the advice and active participation of multiple veteran trial attorneys and supervisors in the office, who could provide this help and advice without considering whether they were being compensated for their time. Rondale would have received investigatory, paralegal, and electronic media assistance without his lawyers having to take time away from litigating the case to request funding from the Court, sometimes repeatedly. His lawyers would not have had to worry about what the ramifications would be of requesting, for example, funding for psychological exams from the District Court (which was clearly where these requests were going in this case), and then not producing or referring to the results of these exams in his defense. In short, Rondale would have been on a far more equal footing with the two Assistant United States Attorneys in the case, who appeared throughout the case to have unlimited resources at their disposal.

Although it is often directly contrary to my own personal and financial interests, I was trained early in my career at the Federal Defenders of San Diego to practice client-focused representation, as I know is common to federal defender offices, and consistent with ABA Guidelines. To that end, though I knew it would cost me earnings in the long run, I avoided taking other cases in the months leading up to the trial, did not interview potential retained clients, and worked to clear tasks from my other existing cases so that I could focus on this one. These were important steps to have taken when the court refused to grant any meaningful extension of the trial date (despite the agreement of the parties), which left me very little time to deal with late disclosures of new evidence by the government – evidence that ended up forming the heart of the prosecution's case at trial.

Other factors combined to make this a challenging case from a practical and financial point of view. Several of my funding requests were denied at least once before being funded, and some were never granted. When the requests were denied, I usually received no explanation other than: "per [the District Court Judge on the case]: Denied." It was therefore clear that the District Court Judge presiding over the trial was making direct decisions on funding requests for defense services (not the usual procedure in our district). Having to constantly reapply for funding without knowing the basis of the initial denial was not only a distraction, it was a waste of precious time in the lead-up to trial. It was also something the prosecution, who had twice as many lawyers assigned to the case, never had to deal with.

In the years leading up to my appointment in this case, the CJA Committee of the District Court was exhibiting ever greater hostility and mistrust toward the CJA Panel, as is well described in the submissions of my colleagues, Phillip Trevino, Anthony Solis, and Marilyn Bednarski. In the past, we could be confident that funding for obviously necessary defense services, such as investigation in a capital murder case headed to trial, would eventually be funded - so work could continue uninterrupted even if the funding had not formally been approved. In this new environment of hostility and mistrust, however, my defense team and I knew that they would likely not be paid for work done after previous funding had been exhausted but before funding for future work was authorized, and increasingly that authorization was taking far more time to process and was less certain to come through. Therefore, a denial of funding, even a denial that was granted upon reapplication, required my investigator or my paralegal or expert to stop work on the case until the matter was resolved, or risk never being compensated for their work. The constant denials of funding, the uncertainty surrounding whether funding for essential services would ever be granted, and the detailed justifications the District Court seemed to require were severe hindrances to providing quality representation in a murder case that was forced to trial on an expedited basis.

As for my own payment, I submitted vouchers on a monthly, then on a quarterly basis, as the interim billing policies in the district changed. After the trial, but before sentencing, the CJA Supervising Attorney requested a written explanation for why I had spent so many hours reviewing documents, with specific requests regarding individual entries in my billing. This was an unusual step, but understandable given the number of hours I had worked on the case. I responded with detailed letter explaining the nature of the case and many of the reasons it required so much of my time to prepare for trial. The CJA Supervising Attorney reviewed and approved my letter of explanation and my voucher was paid.

At the end of my representation, after my client was convicted at trial and sentenced to a mandatory life term, I submitted a final bill. By this time my total billing in the case was very high – possibly the largest bill I have submitted, though I only have access to data back to about 2009. As is now required, I submitted a detailed letter of explanation in lieu of a CJA 26, addressed to the Ninth Circuit Judge who currently reviews final vouchers for our district. This Judge, apparently deciding he could not determine the reasonableness of the total bill based on my letters previously submitted, referred the final voucher back to the District Court Judge who had presided over the trial, and requested the preparation of a "reasonableness review" of my entire billing on the case.

THE DISTRICT COURT'S REASONABLENESS REVIEW

About five months later I received a report from from the District Court Judge, forwarded by the CJA Supervising Attorney, declaring that half of my hours billed under section 16 b of the voucher form, "Obtaining and Reviewing Records," were unreasonable, and concluding that my total billing should be slashed by an amount in excess of $44,000. As my final unpaid bill on the case was about $16,000, the decision contemplates that I effectively be denied payment of my last bill and fined approximately $28,000, despite the multiple levels of review that my previous billing on the case had already been subjected to. While this finding and the reasoning behind it was shocking and disturbing, I was confident that if I took the time to carefully explain the flaws in the Court's reasoning, either the District Court Judge or the Ninth Circuit Judge would see reason and rectify the error. This confidence was misplaced.

There are no guidelines that I know of regarding how this process is supposed to work, or what the basis or standard of such a reasonableness review would be, or what process is available for review of adverse decisions of this kind. In the many memos detailing the new responsibilities and restrictions on funding for the CJA panel that have been produced in recent years, there is exactly one that refers to document review. That memorandum states: "The presumptive maximum rate for general document review is 60 pages per hour; some types of documents may take substantially less time to review. Certain limited types of documents may require additional time." *Memorandum of the Chair if the CJA Committee for the Central District of California*, June 19, 2013 (also reproduced as pages 26-27 of the CJA Trial Attorney Panel Manual). Given this maximum, and limiting the analysis to just the documents produced by the government and contained in trial transcripts (47,396 pages), my presumptive cap for review of these documents was 789.9 hours. My actual billing for review of these enumerated documents was 353 hours - or 436.9 hours short of the presumptive cap by the end of the case. My total hours billed for review of documents and media files (both of which I placed under section 16 b of my voucher - and which included thousands of additional defense-generated documents and files) was 743 hours.

In his report on the reasonableness of my voucher, the District Court did not review the substance of my billing entries, but rather concluded that my billing on document review was unreasonable for essentially the following reasons:

- My bill for document review was significantly higher than those of other defense attorneys whose clients went to trial on earlier occasions in the case.

- My client was less culpable in the murder (he was the driver of the car) and less involved with the gang than other defendants, so much of the discovery I reviewed could not have been relevant to my client.

- The government provided 28 pages of "targeted discovery," and an index that should have allowed me to significantly reduce my review of discovery.

- While I "zealously defended [my] client, and should be reasonably compensated," I employed a "scorched earth" approach to the case, engaging in more litigation than was appropriate and spending time on motions that, in the opinion of the trial court, would have been better spent on other tasks.

- The only other similarly situated defendant's attorney spent far less on "discovery review" than I did.

After I received the reasonableness report, I spent several weeks reviewing my vouchers in the case and preparing a detailed response to the District Court's report, with the generous help and support of colleagues who also spent hours helping me craft and edit the document. This review made clear that much of the District Court's analysis was based on misinformation.

While I submitted a detailed response to every one of the District Court's issues, I'll limit my discussion here to the similarly situated counsel analysis. The Court found that the most similarly situated defendant to Rondale was the only other defendant in the case charged with the murder, a Mr. Gabourel, who went to trial before I was appointed to Rondale's case. The Judge focused his analysis on the 16 b hours billed by Mr. Gabourel's counsel, and observed the following: "[This other counsel] expended 219.5 hours reviewing discovery, while counsel [for Mr. Young] expended 758.6 hours reviewing discovery, a difference of 539.1 hours. This is equivalent to 13.5 full 40-hour weeks worth of work over and above another co counsel in an analogous position to Counsel." This was clearly the crux of the Court's analysis, as at no time did the Court analyze the substance of my billing, but limited itself to a numbers comparison.

I pointed out to the Court in my request for reconsideration that there were two important problems with this reasoning. The first was that my billing in this category was not limited to review of discovery, as the Court suggested, but was in fact a category I used for billing time for reading or reviewing documents of any kind, whether they were discovery or not, as well as hours spent reviewing media files. This was an important consideration because I had no way to determine whether other counsel on the case billed in a similar fashion in this category, and there was no evidence that the Court had engaged in such analysis. The Court in fact observed in the report that one co-defendant's counsel who proceeded to trial on the case billed a total of 14.5 hours under 16 b for the entire case. This lawyer drafted a letter at my request and explained that he only bills for reviewing docket items in that category, and bills for discovery review in a separate category entirely. The lawyer also explained that his billed time for discovery review in the case actually totaled 568 hours. I attached the letter as an exhibit to my request for reconsideration.

The second problem was that counsel for Mr. Gabourel had actually been originally appointed to represent Mr. Gabourel in his state murder case, which went to trial and, like the separate trial of Mr. Young, resulted in acquittal. This lawyer, who was not a CJA panel attorney, then made his appearance in the federal case on a *retained* basis. It was not until nine months later and *12 days* prior to his trial that Mr. Gabourel's attorney applied to the District Court for appointment under the CJA. His appointment was not nunc pro tunc. Therefore, counsel for Mr. Gabourel's 219.5 document review hours reflected his work from 12 days before the trial through sentencing, having already represented the client in a prior jury trial concerning the same murder that formed the heart of the government's case against him in federal court. I assumed that once I pointed this out the District Court would agree that counsel for Mr. Gabourel's hours were of limited, if any probative value in this analysis.

Instead, the District Court summarily denied my request for reconsideration in its entirety. I was then told that my request for reconsideration would be forwarded to to the Ninth Circuit Judge that oversees our panel. Nine days later the Ninth Circuit Judge sent a brief email to the CJA Supervising Attorney, who forwarded it to me. In it, the Judge did not discuss any of the issues I raised, stated he had reviewed the documents, that he agreed with the District Court, and ordered me to pay back $44,787.74 of the money I had previously been paid for work done on this case.

It does not appear that there has been any meaningful review of the District Court's initial report concerning the reasonableness of my billing in this case. Nor do I know whether the District Court or the Ninth Circuit Judge consulted with the CJA Committee or others before taking the actions they took in this matter, but there is no indication that any such consultation took place. Further, most of the hours in question had already been approved and paid by CJA staff, if not by the District Court Judge himself (who clearly was involved at an early stage in monitoring the expenses in the case, based upon early denials of funding that came directly from him).

The presiding District Judge in Mr. Young's case has therefore retroactively moved to rescind a large percentage of my earnings with minimal opportunities for and seemingly no review of that decision. The immediate result is a profound chilling effect on my practice and the obvious conclusion that I now must begin a transition away from panel work – or at the very least away from representing clients in mega-cases. I would imagine the effect has been similar on those of my colleagues who are aware of what has happened to me on this case. I can no longer assume that the Court will not attempt to demand a portion of their money back in the event the Trial Judge is not pleased with the *manner* of my representation, separate and apart from its quality. It is quite difficult to contemplate aggressive defense tactics or extensive litigation under these conditions. Furthermore, I have spent considerable time in responding to the Court's action. Even if the decision of the District Court were reversed tomorrow, the process will have cost me tens of thousands of dollars in lost earnings. These circumstances make it close to impossible for me to run even the very modest business model I currently employ.

PROPOSED SOLUTIONS

First, as I believe my example shows, when it comes to oversight and management of funding and payment of vouchers for lawyers in cases before them, District Courts are at least sometimes wholly unequal to the task - whether because of preoccupation with more pressing duties, animosity toward the attorneys involved, or fundamental lack of understanding of the defense function and the practical realities of criminal defense. Furthermore, overly burdensome procedures or delayed processing of funding requests and vouchers by the court can put clients of CJA attorneys at a significant disadvantage relative to the prosecution and federal defender clients. Therefore, all issues of defense funding should be placed under the authority of individuals or entities that are entirely independent of the local judiciary, who are dedicated professionals whose duty it is perform such functions, and who have extensive experience with and deep understanding of the defense function.

Second, any administration of panel compensation, funding, case assignment and panel membership should be transparent and clearly explained to the panel in question, and should involve only experienced criminal defense attorneys in positions of authority and decision making . There must also be a clearly articulated, fair and impartial procedure available to panel attorneys to challenge adverse decisions of any such administration. In the event judicial influence on these panel functions persist, there should nonetheless be no input or influence whatsoever by a District Court Judge presiding over the case in question in such deliberations.

Finally, any "reasonableness review" of a panel attorney's billing should not employ the analysis currently used in our District - which appears to be under an "adequate but not better than necessary" standard. The analysis should be whether the work performed was reasonably necessary to provide the client with "high quality representation," consistent with ABA Guidelines. Any Federal Defenders Office, and certainly the office here in San Francisco, Los Angeles and San Diego, would demand that their line attorneys conform to such a standard. It is irrational, and frankly immoral, to slash an attorneys bill - and in fact demand repayment of his or her compensated earnings - for attempting to rise to a similar standard.

Thank you for this opportunity, and for your time and consideration of my testimony,

/s/

Mark Windsor
February 22, 2016