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February 8, 2016

The Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review the CJA Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Judge Cardone and Committee Members:

Thank you for the invitation to testify before the Ad Hoc Committee to Review the Criminal Justice Act and for the opportunity to share my thoughts.

Currently, I serve as the CJA Panel Representative for the Middle District of North Carolina and as the Defender Services Advisory Group Representative for the 3rd, 4th, and DC Circuits. I have served as the CJA Panel Representative since 2001 and was elected to DSAG in 2015. I am also a board-certified specialist in state and federal criminal law and appellate law.

By way of background, I began practicing law in Winston Salem, North Carolina in 1987, and was hired by a small firm as an associate, specifically to work with one of the criminal defense attorneys. In November of 1987, he handed me a federal indictment and a sentencing guidelines book and asked me to tell him what sentence our client (who had just been charged with drug conspiracy) faced. This was the first case indicted in the Middle District of North Carolina under the new United States Sentencing Guidelines, and my first federal case. After second chairing several cases with my boss, I decided, with his encouragement, to apply to be a member of the CJA panel, and was accepted on the panel in 1990. Since then, I have handled more CJA cases than I can count. I consider it an honor to serve on the CJA panel. It inspires me and challenges me to be at my best.

In 2001 and 2002, I was asked to attend a national CJA representative conference as a substitute, and I became the CJA representative in 2003. As a panel representative, I've met representatives from all over the country and learned of the disparities that existed (and still exist) nationally in terms of voucher cutting, access to resources, and the respect shown to panel attorneys. I realized then, as I do now, that we have it pretty good in the Middle District of North Carolina. I believe that our judges have respect and appreciation for the work of the panel.

In 2014, a new CJA Plan was implemented in the Middle District of North Carolina. The plan limited the panel size and established criteria for service on the panel. It also created a set time period for application, notification and service on the panel. Additionally, all attorneys had to reapply for panel membership. The panel was then divided into thirds, with the goal of panel members having to re-apply for membership every three years. A CJA Advisory Committee was established to provide some oversight. Ultimately, panel membership decisions are made by the judges, but the Advisory Committee makes recommendations, which I believe are given great weight by the judges. We have an excellent panel, and have no problems attracting experienced attorneys to serve.

The CJA Panel enjoys the support of the Federal Public Defender, Louis Allen. He is always available to discuss any issue that arises. His office provides an excellent CLE for the panel, and all of the attorneys in his office are available to panel members as a sounding board, or to answer questions.

In preparation for this hearing, I have thought long and hard about the issues of interest to this Committee. In the Middle District of North Carolina, we have had only two capital cases, so I cannot comment about those types of cases. I can address the issues of independence and judicial involvement in compensation and approval of experts. In my district, we do not have problems with voucher cutting. Our biggest problem with vouchers is the delay that some panel members experience in receiving the fee. I am hopeful that e-voucher, which has just been implemented, will resolve this issue.

I am, however, aware of issues with the approval of experts in CJA cases in my district. After the Miami hearing, I learned that the CJA Panel in the Middle District of North Carolina has the lowest use of experts nationally and I am not surprised by this news. To begin with, the process to request and obtain expert assistance is unwieldy at best. In past National CJA Conference, speakers have strongly encouraged CJA panel representatives to go to their panels and encourage the use of the \$800.00 available for experts without having to ask a judge. One of the speakers at the conference told us that the \$800.00 was like a "blank check" to be used for experts. In the post-*Booker* age, we are told to focus on mitigation for our clients and that mitigation/sentencing experts should be used in our cases. As a result, I strongly encouraged my panel to use this money available for experts. Several months after the last time I spoke to the panel about using more experts, I received a call from a panel attorney. She told me that she hired a sentencing expert to assist in a couple of her cases with mitigation at sentencing. In each case the expert charged around \$400.00. The CJA-21 was submitted, and the judge in each case refused to authorize the payment of the vouchers. The reason given was that the expert services were "not necessary," and that the attorney should have done the work herself. The attorney had to pay the expert out of her pocket and has not used an expert since. Of course, that has a chilling effect, not only on that attorney, but on the entire panel. I've stopped encouraging panel members to use the \$800.00 for experts. I can't blame anyone for not wanting to be stuck with paying an expert out of pocket.

If an attorney does not want to risk being on the hook for by using the \$800.00, they have the option of filing a motion for expert fees below \$2,400.00. Many attorneys do not want to do that because of the time it can take for the judge to rule on the motion. We have a "rocket docket" in the Middle District of North Carolina, and motions to continue are strongly disfavored. If the

expert is going to cost more than \$2,400.00, the circuit court has to get involved, taking even more time. Additionally, requesting an expert may require an attorney to reveal trial strategy to the judge, and also face possible consequences should they choose not to use the expert.

In North Carolina, we have a Capital Defender that oversees state capital cases. When you have a capital case, and need an expert (which is more likely than not), you fill out a request form and fax it to the Capital Defender's Office. They usually respond within 24 hours. I've never had a request denied. If there was a question about my request, I am sure that I would get a call from the Capital Defender's office, requesting more information, or maybe suggesting a reasonable alternative, instead of a flat denial. With CJA cases, that dialogue does not take place. It's either yes or no. Attorneys are not asking for experts as a way of gaming the system, or because they are frivolous with money. They ask for experts because they need them to provide effective representation for their clients. Only CJA panel attorneys have to go through this ordeal if they want an expert to assist with their case. The US Attorney's Office has seemingly unlimited resources for experts, and the Federal Public Defender's Office does not have to go to a judge to procure their experts.

I believe that expert requests and voucher payments should be managed by a panel administrator working out of the Federal Public Defender's office. The panel administrator should be an attorney who is familiar with panel work, and who can provide assistance with experts and other panel issues. Additionally, the panel administrator can review and approve vouchers. I think that this change would benefit panel attorneys enormously. Panel attorneys should be able to count on reasonable access to experts and to timely and full payment for their work.

It is my hope that the Committee after reviewing all of the comments and listening to the testimony will consider the issues related to independence and parity and will make recommendations that will resolve them.

Thank you for your time and attention.

Sincerely,

/s/ Lisa S. Costner

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