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December 22, 2015

VIA E-MAIL: CJAstudy@ao.uscourts.gov

The Honorable Katherine Cardone
United States District Court Judge
Chair-Committee to Review the Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Miami Public Hearing Testimony for the Criminal Justice Act Review

Dear Judge Cardone and Committee Members:

I write to provide you with a summary of my thoughts regarding the matters referenced in the correspondence received from the Committee addressing the "Scope of CJA Review".

Initially, I would like to inform the Committee that I am a small firm practitioner. I have a single partner. We concentrate primarily in the areas of complex civil litigation, bankruptcy and federal criminal litigation. I have been practicing in the above-referenced areas since 1991. Federal criminal cases constitute approximately 20% to 30% of my case load and require approximately sixty percent of my time. I have been a member of the CJA Panel for the Eastern District of North Carolina (the "Panel") since the early 1990s. I have handled all types of cases, to include ordinary drug conspiracies and complex terrorism matters. In the past, I served approximately two terms as the Panel Representative for the Eastern District of North Carolina.

With regard to the issues referenced in the scope of review, I will comment on those matters which directly affect me as a member of the Panel and my dealings with the Court as a representative of the Panel.

- The adequacy of compensation for legal services provided under CJA, including maximum amount of compensation and parity of resources, has always lagged behind the market. Historically compensation lags far behind that which is necessary to pay the overhead necessary to operate a small firm. It is my understanding that the CJA hourly rate is approximately \$127.00. The rate falls short of the standard billing rates applicable to litigation practice. Litigation rates range from \$300.00 to \$400.00 per hour for experienced counsel. Overhead generally approaches fifty percent of the hourly rate/earnings. There is always room to improve with regard to compensation rates and maximum amounts of compensation paid to Panel members. The rate does not have to meet the market rate, but needs to be somewhat competitive to attract good members. An increase in the rate should likewise require an increase in the maximum allowed per case.
- It has been my experience that ordinary cases can be concluded within the maximum limits established by the CJA program. However, on many occasions, I am unable to comply with the maximums and my vouchers do in fact require judicial approval and review. These reviews are generally driven by the size of our district, which requires significant travel, and the general competency of the clients that I am appointed to represent. It is common for my clients to have an I.Q. significantly below average. As a result of the competency related issues, it is difficult to convince a defendant to make the appropriate choice based upon the facts and law that applies to their particular case. In addition, the government's method of charging these individuals with conspiracy and exposing them to the maximum sentence allowable by law in almost every applicable case accelerates the costs. Lack of parity between state and federal sentences drives this lack of understanding. The defendant generally does not understand why he goes from serving six month sentences, to looking at twenty to twenty five years.
- Resources are not in parity. Unfortunately, the vast and unlimited resources possessed by the government dictate the difference in appointed and retained cases. The government leverages all of its resources prior to indictment or charge. Almost all of my Panel cases are assigned post indictment or charge. There is little room left for controlling a case after indictment or charge. That said, in all of the cases that I have handled, I generally have been allowed the expert services requested so long as supported by the appropriate motion. I have handled a number of complex cases, to include terrorism related trials, and have been pleased with the scope expert services requested and allowed.

- The adequacy and fairness of billing, voucher review and approval process related to compensation, is somewhat lacking in my opinion. I have a number of vouchers reduced each year, some with and some without explanation. Generally, the explanation for the voucher reduction is lacking with regard to reason or rational. That is not to say that the fee reduction is not addressed, the reasons simply do not take into account the representation of the individual defendant. I understand that there are budget issues with regard to representing the indigent; however, all of the time necessary to deal with Panel cases is not necessarily compensated. I do not receive compensation for writing letters of explanation and documenting vouchers. I think it is important to remember that each case involves a different individual and representation must be tailored to fit that particular individual. Another words, the cookie cutter maximum does not always fit. The vast majority of judges in my district do contact me when there will be a reduction of voucher either by phone call or letter. Unfortunately, some vouchers continue to be reduced without any explanation whatsoever.
- With regard to presentation and calculation of vouchers, I do not self-reduce my vouchers. I include all time spent on a case. I think it is a better practice to maintain proper time records and I have informed the Panel in the past not to self-reduce vouchers. Self-reduction results in an arbitrary figure with regard to the true amount of time necessary to handle a case. Regardless of my position and advice, I do know that lawyers in our district and other districts regularly reduce vouchers prior to submitting them for purposes of payment and approval.
- Adequacy and fairness of billing with regard to legal and expert services does not create any problems or issues to my knowledge. I cannot recall a situation in which I have been denied an appropriate expert when supported by proper motion.
- I believe that the quality of representation of the Panel for the Eastern District of North Carolina is reasonable. We have driven our Panel size to approximately double the size it was when I first started. I voiced objection to the increasing size of the Panel unsuccessfully. The Panel was increased from approximately 60 to 80 lawyers, to 110 to 120 lawyers. It is my understanding that the Panel has grown too large and Panel members may very well have to rotate on or off the Panel. Rotation on or off the Panel does not appeal to me. If removed for the above reason, I do not think I would return. I believe that a Panel attorney needs to handle somewhere between 7 to 10 cases a year to remain proficient. As the Panel grows the number of cases are reduced accordingly. I used to handle approximately 8 or more cases almost each and every year before the Panel size increased. The size of the Panel has an impact on the number of cases

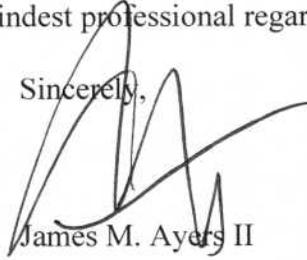
and the competency of counsel. The more cases you handle, the more proficient and knowledgeable you become with regard to the facts and law.

- The Defender Services Office (DSO) has always provided excellent services to our Panel. I regularly received and sent information forwarded by the DSO to members of the Panel. I tried to provide information received from the DSO in electronic format so that the Panel could access information as needed.
- I am not aware of any Panel member requiring additional representation for reasons related to contempt, sanctions and ineffective assistance of counsel and/or malpractice claims. That is not to say that it has never happened. I am simply not familiar with any of the above having happened. I have dealt with, as a Panel representative, individuals having to be removed or added to the Panel. I have advised the Court of my opinion with regard to the practice and habits of counsel when needed. I believe that the method of review by the Federal Defender and Judges is more than adequate.
- In our district, I have never known there to be a lack for qualified counsel necessary to resolve large and/or multi-defendant cases.
- The timeliness of appointment of counsel in my district appears to be almost immediate upon indictment/charge or withdraw by the Federal Defender's office.
- The availability and effectiveness of training services provided to the Panel, in my district, is more than sufficient. In my district, we have a number of seminars each year that are helpful with regard to addressing current facts or law. I have on many occasions requested assistance from the Federal Defender's office and my questions have been answered. In addition, the DSO has been more than helpful in securing information with regard to experts and certain other matters, to include budgeting of large or complex cases. I have not had to budget many cases, save and except a terrorism case, but the budgeting process was assisted by a budgeting attorney from another circuit. The terrorism case that I had to budget the Court approved the budget, timely paid invoices and allowed expert services as requested. Our circuit has recently appointed a budgeting attorney and I have spoken with him on a number of occasions with regard to cases that may approach or exceed the maximum.

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Thank you for your time and with kindest professional regards, I remain

Sincerely,

A handwritten signature in black ink, appearing to read 'James M. Ayers II', written over the word 'Sincerely,'.

James M. Ayers II

JMA/rca