The Need for Independence of Counsel for the Poor in the Federal Courts

Remarks by
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to the Ad Hoc Committee to
Review the Criminal Justice Act

Miami, Florida, January 12, 2016

Judge Cardone and other distinguished members of the Committee:

Thank you for your invitation to address the committee.

The most urgent issue facing the legal representation of poor people accused of crimes in the federal court is the lack of independence from the judiciary that is absolutely indispensable for the appearance of justice as well as the actual realization of the right to counsel and justice.

I agree with those who have previously discussed the need for independence and a new national agency, such as a Center for Federal Criminal Defense Services, to oversee national administration of the Criminal Justice Act. In particular, I agree with the testimony of E. G. "Gerry" Morris, president of the National Association of Criminal Defense Lawyers (NACDL), to the committee on November 27, 2015, in Santa Fe, and the analysis and conclusions in NACDL's comprehensive report, *Federal Indigent Defense 2015: The Independence Imperative* (2015). I agree that "[f]rom the national level to the individual district courts across the nation, * * * judges manage the nation's federal indigent defense system," *id*. at 24, and that the defense function is increasingly being treated as a "service to the courts" like clerks, marshals, and interpreters. I will make a few additional comments with regard to why this is incompatible with the right to counsel and the fairness and integrity of the courts.

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The lack of independence is contrary to the very first of the American Bar Association's *Ten Principles of a Public Defense Delivery System* (2002), and to the responsibilities of judges and defense counsel. Independence allows both judges and defense counsel to perform their very different roles without interference. As the members of this committee know, serving as a federal judge is a full-time job with enormous responsibilities in managing dockets and resolving cases. Management of a public defense program is also a full-time job requiring certain experience, knowledge and expertise. Judges lack the time and expertise to run public defense systems and the in-depth knowledge of all aspects of particular cases and clients necessary to micro-manage how they are defended right down to what experts will be retained, what testing will allowed, and what evaluations will be conducted. Such management may be to the detriment of the defendant and interferes with counsel's representation. There are also attorney-client privilege and work product complications when judges manage the defense.

When judges manage the defense, clients may receive less that the zealous representation guaranteed to them because some defense counsel will not do anything that might not meet the approval of a judge for fear of not receiving future appointments or some adverse consequence to the lawyer's office or program. Quite often those fears have a basis in fact, but even when they do not, the lawyer is still influenced by the perception that it matters. Representation of one accused should not include calculations of whether certain advocacy will have such an adverse impact.

I have observed this with regard to individual lawyers and public defender programs. Lawyers have told me that they cannot file certain motions – in one instance, a motion for continuance because the lawyer was not prepared for trial – because it will cost them future appointments by the judge and perhaps removal from the case. Independent public defender programs in Florida and Missouri took actions on behalf of their clients to limit their caseloads so that they could meet their legal and ethical obligations to their clients.[1] But lawyers in programs that are not independent cannot litigate these issues because it will cost them their jobs. As a result, actions on

1. *See Public Defender for Eleventh Circuit v. Florida*, 115 So.3d 261 (Fla. 2013); *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012).

behalf of their clients must be filed by independent organizations such as our office and the American Civil Liberties Union.[2]

When judges run the defense, clients are less likely to trust the lawyers assigned to them. The public is less likely to see the courts as credible and legitimate. Serious questions are raised when judges repeatedly appoint incompetent lawyers to defend the accused, arbitrarily reduce the compensation for appointed counsel, dismantle community defender offices in order to change public defenders, do not allow capital habeas units in the districts that need them the most, and micro-manage the defense of cases despite lacking the time and expertise to do so. In these and other instances, judges appear not to be holding "the balance nice, clear and true between the [prosecution] and the accused,"[3] but to be influencing the outcome of cases by making it difficult, if not impossible, for the defense to contest the charges and present a defense. This is particularly so in the highly politicized, ideological court system of today, where some judges are outspoken with regard to controversial issues of criminal justice.

It does not reflect well on the federal judiciary or the fairness of the system when a judge who is a strong advocate for the death penalty and has advised government lawyers engaged in capital litigation on how to expedite executions,[4] overrules district judges and severely cuts funding for experts in capital cases.[5] The same in true in a non-capital case when a judge not only refuses to pay experts for their professional services, but also, without notice or opportunity to be heard, orders them, under penalty of contempt, to

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2. *See, e.g.*, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (ACLU lawsuit to obtain counsel at arraignment and subsequent proceedings); *Heckman v. Williamson Cnty.*, 369 S.W.3d 137 (Tex. 2012).

3. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

4. *See* Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. BAR J. 850, 850-53 (1990); David Kaplan, *The Fryers Club Convention*, NEWSWEEK, Aug. 27, 1990, at 54.

5. For example, in the capital case of Elmer Garza in the Eastern District of Texas, the district court approved a budget of $187,000 for experts and investigators, finding that it was reasonably necessary for an adequate defense. The Chief Judge of the Circuit reduced the budget to $65,000. *United States v. Snarr & Garza*, 704 F.3d 368, 402-03 (5th Cir. 2013). This is only one of a number of cases in which defendants were severely disadvantaged because Chief Judge Edith Jones, with very little knowledge of their cases, cut funding for the defense.

continue to provide their services and testimony at trial.[6] Such treatment of experts, who have virtually no redress for deprivation of their services without just compensation,[7] is unconscionable. It also discourages experts from agreeing to being retained in other cases involving indigent defendants because they are, quite reasonably, reluctant to take on work for which they may not be compensated. Many simply cannot afford to take the risk.

Some judges appear more concerned about cost containment and administrative efficiency than insuring a zealous defense. For example, Judge Edith H. Jones sent a memorandum to chief judges and circuit executives about "cost containment" in complex cases, including capital cases.[8] Judge Jones cautioned her fellow judges against allowing "multiple, overlapping experts" such as "up to three psychiatrist/psychologist/neurologist-type experts" as well as "other *types* of experts," such as ones on culture.[9] She recommended placing "an outside dollar limit on all experts"[10] and "establishing guidelines for [the] general cost of representation" in capital cases.[11] However, because cases vary greatly in their complexity, these generalities are of no value in assessing the number and qualifications of members of a defense team required in a particular case.[12] And, because there

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6. *See Marcum LLP v. United States*, 753 F.3d 1380 (Fed. Cir. 2013) (describing chief judge's reduction of payment authorized by the district court and ordering a forensic accounting firm to continue work, including providing expert testimony, but holding that CJA precluded the firm from recovering $1.2 million it was denied for its services).

7. *See In re Marcum LLP*, 670 F.3d 636, 637 (5th Cir.2012) (holding that the only avenues of review of denial of compensation is a motion for reconsideration addressed solely to the chief judge or a mandamus action in the United States Supreme Court); *Marcum LLP v. United States*, *supra* (holding that the Court of Claims had no jurisdiction to consider the denial of compensation because jurisdiction would undermine the CJA's "self-executing remedial scheme for the review of fee awards").

8. Memorandum from Edith H. Jones to All Chief Circuit Judges, All Circuit Execs., & Gary Bowden 2-4 (Mar. 11, 2011) [hereinafter "Jones memorandum"] (appended).

9. Jones memorandum at 2-3 [emphasis original].

10. *Id*. at 3.

11. *Id*. at 3, 4.

12. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003), recognize that experts specializing in various subjects may be needed on the same case. *Id*.

is no limitation on what can be spent in *prosecuting* a case, limitations on defense expenditures may deny the defendant a fair trial that results in a death sentence.

Capital cases range from those involving a automobile hijacking with a single victim by a single perpetrator who is promptly apprehended close to the scene of the crime to enormously complex cases involving multiple defendants and multiple informants engaged in complex conspiracies that occur over a long period of time in numerous places that require hundreds of witnesses and scores of experts. Some, like the embassy bombings, occur outside of the United States and require extensive travel to other countries. Cases may be resolved with plea dispositions, trials that lasts a few days or weeks, and trials that last for many months.

As with the facts regarding guilt and innocence, issues regarding mitigation vary widely from one defendant to another, requiring different investigations, evaluations, consultations and expert testimony. For example, a number of experts may be required to assess a defendant who was born with fetal alcohol syndrome, subject to unconscionable abuse as a child, suffered severe brain damage, experienced trauma as a child and adult, and has symptoms of schizophrenia, bi-polar or some other major mental disorder. Cultural influences may be critical in understanding a client's behavior regarding an offense, interaction with law enforcement, understanding of judicial proceedings, demeanor in court, relationship to the defense team and myriad aspects of mitigation.[13] A cultural expert may be essential in providing the jury with an understanding of how the client saw the world and the context in which he made decisions.

These critical mitigating factors are often not easily identified but require hours of painstaking work. An assessment of some severely damaged and mentally impaired defendants may require, among other things, development of an extensive, multi-generational social history; specialized

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at 958-59. *See also, e.g., Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 1999), *cert. denied*, 536 U.S. 951 (2002) (holding that, although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, they were ineffective in failing to consult a neurologist or toxicologist who could have explained the urological effects of defendant's extensive exposure to pesticides).

13. *See* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 38 HOFSTRA L. REV. 883 (2008).

psychological testing; magnetic resonance imaging (MRI); electroencephalograms (EEG); Positron Emission Tomography Scan (PET-scan or PET imaging); and/or computerized (axial) tomography (CT or CAT) scans. Attorneys, mitigation specialists and medical professionals who specialize in identifying mental issues, brain damage, the results of trauma and other mitigating factors and are dealing with the client, his family, and others familiar with him, are far more likely to correctly assess what is needed than a judge who does not have the time or expertise to make an evaluation or the circuit's chief judge, who is even further removed from the situation.[14]

As previously noted, these cost concerns and limits on evidence do not apply to the prosecution of capital cases, only the defense. Among the many examples of the unlimited budgets to prosecute cases is a capital case in Atlanta in which the United States retained one more "overlapping experts" than Judge Jones would approve – forensic psychiatrist Michael Welner, neuropsychologist Joel Morgan, neuropsychologist Bernice Marcopulos and psychiatrist Robert Trestman at a cost of $475 per hour for each. The total costs for the experts, who were not allowed to testify because the prosecution misled the judge regarding them, was $150,000.[15] It would have been far more had any of them testified. There was simply no limit on the prosecution's expenditures for experts.

Judge Jones's memorandum is remarkable for its entire focus on cutting costs without a single sentence about improving legal representation in complex and capital cases. It appears that Judge Jones has not circulated a similar document on improving representation despite the abundance of examples from the Fifth Circuit of ways that representation could be improved, starting with the very basic requirement that attorneys handling federal habeas corpus cases be sufficiently competent to file the petitions

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14. Judge Jones also discouraged hiring mitigating specialists who are attorneys and warned against allowing spouses and other "close relatives" to be part of the defense team. Jones memorandum at 2. But this is also too general to be helpful. It fails to take into account the individual characteristics, experiences and expertise of the people involved. Some of the very best mitigation work in the country is being done by people who are members of the bar but found their calling in investigating the life and backgrounds of people facing the death penalty. Similarly, some lawyers who go into practice with their spouses and/or children provide exceptional representation in all types of cases.

15. Bill Rankin, *Costs Questioned in Failed Death Penalty Case*, ATLANTA J-CONST., August 13, 2012.

within the statute of limitations. Surely lawyers who grossly neglect their obligations and fail their clients so completely should be referred to the state bar for disciplinary action and not be allowed to take additional cases. But this has not happened in the Fifth Circuit or anywhere else. A number of lawyers have missed the statute of limitations in more than one case.

Judge Jones also suggested that Chief Circuit Judges should have the power to prevent federal public defenders from one circuit defending capital cases in another.[16] This would give federal judges another major administrative task of assessing the representation needs in individual cases and the capacities of federal defender programs or capital habeas units within them. Preventing representation of a defendant by a public defender from another state would certainly have the appearance of depriving one facing the death penalty of adequate legal representation. Often it would accomplish just that. This is particularly so in states like Texas where post-conviction representation in the state and federal courts has been a disgrace to the state, the legal profession and the judiciary for decades with lawyers missing statutes of limitations, filing incomprehensive pleadings, and abandoning their clients.[17]

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16. Jones memorandum at 7. The federal government sends its prosecutors all over the country to represent the United States in capital cases, but Judge Jones did not express concern about that.

17. *See*, *e.g.*, Lincoln Caplan, *The Death Penalty in Texas and a Conflict of Interest*, NEW YORKER, Dec. 3, 2015 (describing the failure of a Texas lawyer to raise an issue because of a conflict of interest); *Holiday v. Stephens*, 136 S.Ct. 387 (2015) (Sotomayor, J., dissenting from the denial of certiorari) (expressing the view that new counsel should have been appointed after Texas lawyers abandoned death-sentenced inmate); Brandi Grissom, Condemned man's lawyers stop helping, cite 'false hope,' DALLAS DAILY NEWS, Nov. 16 2015 (describing lawyers who abandoned death-sentenced inmate and then opposed efforts to get other lawyers); *Perez v. Stephens*, 745 F.3d 174 (5th Cir. 2014) (describing Texas lawyer's failure to file a notice of appeal after district court denied habeas petition challenging Texas conviction and death sentence), *id*. at 182 (Dennis, J., dissenting) (Attorney "egregiously breached her duty to Perez as his attorney by abandoning him without notice and causing him to lose his right to appeal."); Lise Olsen, Lawyers' late filings can be deadly for inmates, HOUSTON CHRONICLE, March 22, 2009 (describing failure of Texas lawyers to file within the federal statute of limitations in several cases); Maro Robbins, *Convict's odds today may rest on gibberish*, SAN ANTONIO EXPRESS-NEWS, Aug. 24, 2006 (describing incomprehensible pleading filed on behalf of Texas inmate shortly before his execution).

The presence of more Capital Habeas Units in federal defender offices would go a long way toward ensuring representation by lawyers sufficiently competent to file their papers on time. And, beyond that, they would represent their clients competently by employing lawyers, mitigation specialists and others with an expertise in capital habeas representation that result in competent representation and, over time, economies of scale. Such units are long overdue in Texas and other states that condemn large numbers of people to death. Where demand is great enough, new programs should be created so that the condemned are not represented by lawyers who are not capable of handling capital habeas cases.

I encourage the committee to investigate the lack of capital habeas units in some of the jurisdictions where they are most needed, such as the entire Fifth Circuit. A capital habeas unit was established in one district in Florida only after it came to light that Florida lawyers had missed the statute of limitations in at least 34 capital habeas corpus cases.[18] Throughout the country, lawyers assigned to represent condemned inmates had missed the statute of limitations for filing federal habeas corpus petitions in at least 80 cases by mid-November, 2014,[19] depriving their clients of any review of their cases by federal courts. The clients are executed, but the lawyers are not sanctioned in any way. Many of the lawyers have been assigned to other cases and missed the statute of limitations in them as well. This is a deadly game of roulette, not a system of justice. The judges who manage the system of representation bear much of the responsibility. Independent programs at both the district and national level are urgently needed if there is to be any hope of justice in these life-or-death cases, as there should be.

Accordingly, I urge the full independence from the judiciary of all programs for providing counsel to poor people accused of crimes and the creation of a national agency, such as a Center for Federal Criminal Defense Services, to oversee national administration of the Criminal Justice Act.

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18. *Lugo v. Secretary*, 750 F.3d 1198, 1212-13 (11th Cir. 2014), *id*. at 1216-18, 1222-26 (Martin, J., concurring) (listing 34 capital cases in Florida in which lawyers missed the statute of limitations).

19. Ken Armstrong, When lawyers stumble, only their clients fall, WASHINGTON POST, Nov. 16, 2014.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM

TO: All Chief Circuit Judges
All Circuit Executives
Mr. Gary Bowden

FROM: Edith H. Jones

DATE: March 11, 2011

RE: Cost Containment in "Complex" CJA cases, including federal capital prosecutions and state and federal capital habeas cases

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Dear Colleagues:

For over a year, I have been reviewing the CJA applications in the above types of cases after they have been approved by the district court and preliminarily reviewed by the staff working under supervision of our Conference Attorney, Mr. Joe St. Amant. The vouchers have presented some unusual circumstances that I think warrant collegial discussion and/or standardized practices and procedures. Several of the anomalies I noticed tend to lead to cost increases that are probably unnecessary and that could be eliminated without harm to defense efforts. Others are matters of district court, circuit council, and even national procedure that are necessary to cost control. Any or all of these comments apply irrespective of a circuit's decision to retain a Case Budgeting Attorney to review CJA fees in general.

The importance of ensuring value for CJA representation can hardly be understated. The FJC Study on the CBA position notes that recently 2.6% of the CJA representations accounted for 33% of all vouchers paid, while 10% of the CJA representations accounted for 57% of the total costs. Margaret S. Williams,

Federal Judicial Center, Circuit CJA Case-Budgeting Attorney Pilot Project Evaluation 1 (Dec. 20, 2010). Chief Judge Kozinski's 9th Circuit materials reflect awareness of cost control. Finally, the 2010 update of the Spencer Report on federal death penalty prosecutions acknowledges the importance of controlling defense costs while ensuring high-quality representation.

The following observations and suggestions are intended to stimulate discussion and research, and ultimately, to create transparency in cost-accounting that will enable circuits to better evaluate their standards.

1. Practices of Defense Counsel

a. Hiring close relatives as paid members of the defense team. A couple of separate instances of these practices have occurred in this circuit. Because the spouses used different surnames, we only recently became aware of the situations. Nepotism should be avoided.

b. Retaining investigators or mitigation "experts" who are also attorneys. This practice should be discouraged, as it in essence increases the number of attorneys on the defense team. It can easily increase the costs by multiplying the conferences and coordination necessary among multiple counsel—*i.e.*, those labeled attorneys plus the investigators/mitigation experts. This practice also leads to conflicts of interest within the defense team, as it becomes advantageous to counsel who wear two hats—as "experts" and attorneys—not to constrain costs or encourage efficient use of the experts' time that will ultimately be paid by CJA funds.

c. Authorizing multiple, overlapping experts. In some cases in this circuit, counsel have retained up to three psychiatric/psychologist/neurologist-type experts in pursuit of various *Atkins* and mitigation claims. The cost for each,

whether or not a testifying expert, has ranged up to $50,000. (In contrast, when our Judicial Council authorized full psychological workups of Judges Kent and Porteous in connection with their purported disabilities—a means to fend off their ultimate impeachments—the finest experts in Houston charged $10,000 for services of them and their entire staffs.) It's also not unusual for the defense to request up to five or six additional types of experts. In the last year, for example, I have reviewed requests for experts in Mexican culture, tattoos, and jury consultants, to name a few. Courts should vigilantly scrutinize these requests and, preferably, place an outside dollar limit on all experts, leaving it to defense counsel to manage the budget to the defendant's best advantage and consistent with CJA guidelines of reasonableness and necessity.

d. Over-estimating expert costs. When counsel's budget for a particular expert is approved but exceeds what is ultimately needed, a ratchet effect may occur. In the next case, the budgeted amount, not the CJA voucher total, becomes the floor for that type of expert. I have seen budget requests premised only on the prior authorizations, without considering the lower CJA sums actually needed. This mistake should be avoided.

e. Appointing entirely new counsel to handle the appeals of federal death penalty cases from the district court. The Fifth Circuit's CJA implementation rules provide that, in all but the most unusual cases, trial counsel are expected to remain responsible for their client's case on appeal. *But see* 7A Guide to Judiciary Policy § 620.40 ("Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial."). Substitution of counsel, however, may dramatically increase the costs of representation.

f. Billing in tenths of an hour is required by the voucher instructions. Not enforcing this rule invites counsel and experts to overcharge for their services by using a larger minimum increment.

2. Administrative Practices of Circuit Councils and District Courts

a. Implement a Judicial Council resolution establishing guidelines for general costs of representation in capital prosecutions and capital habeas cases, such that CJA vouchers exceeding the minima must be approved by the Chief Judge or his/her designate. Non-capital cases already have presumptive maxima imposed by statute and the Guide, as do expenditures on experts and other service providers in capital cases.

b. Implement a Judicial Council resolution enabling the Chief Judge or his/her designate to approve a budget for federal capital and capital habeas cases whenever counsel anticipates that the costs of CJA representation will exceed the circuit's prescribed standards. *See generally* 7A Guide to Judiciary Policy § 640 (discussing desirability, purpose and scope of case budgets).

c. Armed with prescribed general cost standards, the Chief Judge, or designate, and presiding district judge should work together to fashion the budget and insist on compliance unless unusual circumstances warrant a deviation. In at least two cases, a district judge recommended, and I agreed, to a budget authorizing over 1000 hours per attorney for each of two defense counsel on a federal death penalty case. The expert budgets were capped at about $85,000 per case. These are not niggardly amounts.

d. The district courts must insist that their clerks' offices effect holdbacks of about 20% after the CJA minimum payments have been made on any case.

At the conclusion of the case, the courts may approve or disapprove the final 20% payments consistent with CJA standards. In this circuit, some clerks' offices have not been attuned to their duties with regard to holdbacks, or there has been insufficient coordination with judges who had obtained budgets from counsel. Note that holdbacks for attorneys in capital cases have to be required by the circuit, as the Guide provides for them only in connection with interim payments to experts and other service providers in these cases.

e. When counsel's representation is subject to a budget, counsel should be required on each payment voucher for themselves and their experts to provide a running total of how much of the budget for that item has been consumed if the voucher is approved. This will eliminate the problem that judges, after having required a budget, are not as readily capable of monitoring compliance with it, or that a judge who becomes involved in the middle of the case may be wholly unfamiliar with the budget. It will also make much less likely an emergency request for more funding on the eve of trial.

f. District courts should not delegate the review and/or analysis of these types of vouchers to a Federal Public Defender office, where the incentive for cost control will not be as pressing. Nor should the vouchers, much less budget matters in general, be delegated to "death penalty law clerks," except for ministerial assistance. Such law clerks by definition have even less expertise in assessing fees and expenses than do district and circuit court judges.

g. District courts must be encouraged to insist that the DOJ make a timely and not dilatory decision whether to prosecute a case as capital or non-capital. The updated Spencer Report reveals a dramatic difference in CJA costs between authorized and non-authorized federal capital cases. Holding

open the possibility of capital prosecution forces the court to act as if it is overseeing a death penalty case, including the necessity of hiring two attorneys, who will expect higher hourly rates. In conjunction with this, district courts should advise counsel that while they are encouraged to conduct investigation and preparation in order to persuade DOJ not to prosecute a case for the death penalty, it is expected that the costs thereby incurred will not be duplicated in later trial preparation.

3. Recommendations for National Policies

a. Consider whether and to what extent full or partial CJA reimbursements should be paid to organizations or their individual employees whose function is to represent defendants charged with or convicted of capital crimes. The premise of CJA is to provide some payment for counsel to reimburse them for according Sixth Amendment rights to defendants. CJA is not intended to be fully remunerative of counsel's services. That is why we always thank CJA counsel when they appear for oral argument in the Fifth Circuit, because they have selflessly assisted the justice system. In the case of capital defense, however, outside organizations are run and funded precisely to provide representation in this highly specialized area. They gather funding from supporters who enjoy tax deductions for their contributions; law schools also allow such organizations access to their students through clinics that provide research at no cost. Clients' cases are therefore being subsidized outside the CJA process. There is no "opportunity cost" for these organizations, which CJA payments would offset. There is at least an argument, then, that professional advocacy organizations are providing counsel to these defendants, who are

therefore not deprived of representation and are in the same position as those who retained counsel with their own funds.

Even if CJA reimbursements are appropriate, these organizations are also particularly likely to be using very junior lawyers in addition to experienced people. CJA payments should be reduced to reflect the use of inexperienced lawyers.

b. Do not allow Resource Counsel who are on contract to the AO through the Defender Services Committee also to serve as CJA counsel in death penalty cases. In this circuit, Resource Counsel see it as part of their job to file affidavits in court as "experts" attesting to attorney fee and cost requests by CJA counsel. Then, in other cases, they themselves request reimbursement as CJA counsel. The conflict of interest is obvious and need not be permitted.

c. Allow Chief Circuit Judges to approve or disapprove the practice of moving FPDs from one circuit to another to assist in the defense of capital cases. Currently, only a notification to the Chief Judges is required. This notification-only practice has three disadvantages. First, although notice is available, cross-circuit assignments obfuscate the FPD staffing needs in both transferor and transferee circuits, which is properly the province of each circuit court. Second, the Chief Judge of the receiving circuit often has a good vantage point from which to determine whether out of circuit assistance is really necessary to furnishing representation to a defendant. In this circuit, for instance, it made little sense for a district judge to "import" a California AFPD to handle a capital habeas case when capable counsel existed in Texas; the transportation costs from California were much higher, and there was no showing that the California AFPD was familiar with applicable Texas criminal

law and procedure. Third, transferring AFPDs among circuits appears to disguise (as well as potentially increase) the costs of representation and misdirect resources to the extent that extra monies are then allocated to the transferring office to support the out of circuit effort. See, *e.g.*, the Defender Services proposal with respect to the Arizona FPD office for extra compensation due to cases pending in Ohio.

d. Make available within the judiciary the CJA costs of capital cases, both federal death penalty and capital habeas cases, on a circuit by circuit basis, so that research can be done to facilitate standards and practices that will control costs efficiently and fairly. Judges and their staff could use information about what is happening nationally – and recently – in similar cases to inform their decisions. Apparently, Resource Counsel can now receive from the defense community (or maybe Defender Services) information on high-cost cases to justify budget requests, but judges are very limited in their ability to look more broadly.