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

Re: Written Testimony of Leigh M. Skipper, Chief Federal Defender
Federal Community Defender Office for the Eastern District of Pennsylvania
Philadelphia Hearing April 12, 2016

Dear Judge Cardone:

I thank the Committee for inviting me to testify and for receiving my written submission. I welcome the opportunity to share my views.

I speak from twenty-five years of experience in the federal defender system, having worked as a line Assistant Federal Defender, supervisor of the Trial Unit, and, for the last seven years, as the Chief Federal Defender. I currently serve on the National Performance Measurement Working Group and the Community Defender Organization Working Group. I chair the Eastern District of Pennsylvania’s CJA Panel Selection Committee. I also currently serve as the president of the National Association of Federal Defenders (NAFD) and was one of its original founding members in 1995. The NAFD seeks to preserve and protect the right to counsel, both within the federal defender community and through outreach, by identifying and addressing issues confronting the federal defender system and the right to indigent counsel as guaranteed by the Constitution.
Overview

We, as federal defenders, love our work. We are committed to the principle and goal of equal justice for all and to our constitutional role in obtaining that result. We are passionate about what we do, and we take pride in striving to provide the best representation for federal criminal defendants and habeas petitioners. We are defense lawyers, and we embrace our constitutional and ethical duties to our clients. We also welcome our responsibilities and opportunities to assist the courts in related matters as appropriate, such as with CIA panel support and training and criminal justice initiatives. We undertake massive projects, such as retroactive crack reductions, drug minus-two Guidelines reductions, and the review of cases under the Supreme Court’s decision in Johnson v. United States. On these and other local and national matters of criminal practice that have arisen over the years, we have established efficient and effective working groups with the United States Attorney’s Office and Probation and Pretrial Offices, and we have received the cooperation and the approval of the court to do so. Our efforts have benefitted our clients in direct and tangible ways while saving considerable judicial and executive branch resources. Indeed, I suspect that if the Administrative Office’s General Counsel had not issued an adverse opinion preventing us from representing our clients on clemency petitions, the clemency review process would have been far more timely, efficient, and effective. In short, our office enjoys a very cooperative relationship with our bench and related agencies, based on a history of practice at the highest level and mutual respect.

I have witnessed tremendous positive growth in our delivery of defense services over the years. We have obtained a form of parity with other governmental agencies, making our work a competitive career option. We have been able to recruit many of the best and brightest who are dedicated to our work. Training and resources have, for the most part, met our office needs. Yet I am challenged every day with resource allocation decisions that impact both attorney caseloads and clients. Nevertheless, I appreciate the support and efforts of the Administrative Office, and specifically the Defender Services Office, over the years.

That said, on a national level, in the past few years, I have seen a transition to heightened hostilities toward defense services that threatens our resources and the commitment to the quality services that we provide. The backlash of sequestration, during which our program was disproportionately targeted for funding cuts, coupled with subsequent events – the loss of DSC’s jurisdiction and the demotion of DSO – have crystallized my strong concerns for our future. While some defenders have different views as to how best to administer our defender program, the majority of us clearly agree that basic changes must occur. Defenders and panel members must have direct representation on a national governing body. The national governing body must have jurisdiction in areas such as budget, staffing, resource allocation and data management.

I strongly believe that our program is best served with an operating structure that provides for our direct input and control, while remaining within the judicial branch. Annual audits and periodic assessments are necessary and welcome, yet critical decisions about the dedication, distribution, and use of resources should be left to defenders. Frankly, such a
structure would provide the necessary funding protections and infrastructure, but it also would recognize our unique and independent function of representing individuals. Specifically, a structure similar to that of the Sentencing Commission and Federal Judicial Center should be explored. See, e.g., 28 U.S.C.A. § 620 (creating the federal judicial center as part of the judicial branch).

The Community Defender Office for the Eastern District of Pennsylvania

The CDO for the Eastern District of Pennsylvania of the Defender Association of Philadelphia was created in 1972 and was modeled after one of the original federal defender CJA structures. A grant was provided to the local non-profit state public defender entity, the Defender Association of Philadelphia, which provided state indigent representation in Philadelphia. The federal grant for CJA representation created a separate office and division within the parent entity. The funding, office location, and representation services provided were distinct and separate. This original model also existed in the Eastern District of Michigan (Detroit) and the Eastern and Southern Districts of New York. The Eastern District of Michigan is now the only other CDO operating under this one-entity model.

The CDO model was enacted with the specific objective of creating a necessary distance from the judiciary. The Board of Directors was entrusted with the responsibility to oversee the office and provides extensive guidance and oversight. The structure has worked very well in my district. It has allowed me to manage my office effectively without intrusion by the local judiciary. Nevertheless, from a practical standpoint, I work closely with our district and circuit courts to ensure a cooperative and productive working relationship. I invite and value suggestions and feedback from the court, and I am most appreciative when my input is sought on court matters that may impact my clients.

The Eastern District of Pennsylvania is comprised of a total of thirty-six Article III judges, the majority of whom hear criminal cases, and twelve magistrate judges. We staff courthouses in Philadelphia, Allentown, Easton and Reading. In the northern tier, we now appear before four district court judges, as well as a magistrate judge in Allentown. Most often, our clients with cases assigned to the northern tier judges are held in detention facilities in Lehigh or Berks counties, all of which are more than sixty miles from Philadelphia. Thus, our northern tier cases require frequent trips to both the local prisons and courthouses.

Our office is comprised of two main units, a traditional Trial Unit (TU) and a Capital Habeas Unit (CHU). Our staff total consists of 131 employees as follows: 50 TU employees, including 20 AFDs, and 81 CHU employees, including 30 AFDs. The TU staffs approximately 70% of the CJA cases in our district. The CHU handles habeas cases for both state and federally death-sentenced prisoners within our district and in several district and circuit courts throughout the country.

The traditional Trial Unit is comprised of a trial, appellate and non-capital habeas unit. In addition to their trial work, TU trial AFDs participate in two district court programs: a
relatively new mental health court treatment program and the well-established and highly successful re-entry court program. The mental health court treatment program handles a discrete class and limited number of cases, in which defendants suffering from severe mental illness receive the benefit of intensive supervision monitored by a magistrate judge. The Eastern District of Pennsylvania’s re-entry court program has become a national model for successfully transitioning clients back into the community. This has been accomplished through job and training opportunities, and by providing assistance in areas such as housing, treatment and counseling. The success of reentry court is the product of extensive cooperation and dedication of resources among all the participants in the court community: the court, the CDO, the U.S. Attorney’s Office, and the Probation Office. The scope of services provided through the program has led to a low rate of recidivism and an almost full employment rate in the program, with some outstanding jobs for our top participants. The success of the reentry program, with its low recidivism rate, has saved “the system” millions of dollars.

In 2014, we formed a Non-Capital Habeas Unit to serve those indigent defendants with viable habeas claims. Since its formation, the unit quickly began to receive appointments from the district court pursuant to 18 U.S.C. § 3006a to represent petitioners in non-capital proceedings under 28 U.S.C. § 2254 and 28 U.S.C. § 2255.

Our Appeals Unit handles all appeals arising from cases in which our office was appointed to represent the defendant in district court; appeals for defendants whose CJA trial attorney is no longer available; and appeals in cases originating in other federal judicial districts within the Third Circuit in which the local federal defender office has a conflict of interest. Finally, our office is occasionally appointed to represent on direct appeal capital defendants sentenced in other federal districts. Our Appeals Unit attorneys are active on the national front, providing input on issues of national concern and leadership in Supreme Court advocacy assistance through the Defender Supreme Court Resource and Assistance Panel and the Amicus Committee of the NAFD.

As the Committee has heard, after Congress defunded capital resource centers in the early 1990’s – yet another reminder of the unpopularity of defense services – CHUs were created in a number of defender offices. Pennsylvania’s Eastern District CHU was one of the first in the nation; it was funded and began operations late in 1995, providing representation to one of the largest death rows in the nation. Originally the only CHU in the Third Circuit, the CDO’s capital habeas attorneys represented state-sentenced death-row inmates throughout Pennsylvania; later, with the approval of the Defender Services Office, it began to represent some state-death sentenced prisoners in Delaware as well. CHUs were subsequently formed in the Middle and Western Districts of Pennsylvania in FY 2004, and, more recently, in the District of Delaware. The CHU filed its first post-conviction petition in a federal death penalty case in 2005.

The CDO’s CHU now has a national practice. It currently represents fourteen federally death-sentenced prisoners and has completed representation of a fifteenth. The CHU also represents a post-conviction petitioner in a military death sentence case. In addition, with the
permission of DSO, the CHU has received appointments to represent capital inmates in section 2254 proceedings in a number of other circuits, where the need has arisen.

As with the majority of defender offices, sequestration had a devastating impact on personnel in FY 2013. The office was forced to lay off five employees permanently (one TU Assistant Federal Defender, one TU Branch Administrative Assistant, two CHU Paralegals and one CHU Clerical Assistant) and was unable to backfill open positions during the sequestration period. A few employees were required permanently to reduce their work schedule by 20%. We also developed a plan to implement ten mandatory furloughs days for all remaining employees. Fortunately, as a result of the cumulative efforts of many, we received two supplemental funding disbursements from the Executive Committee of the Judicial Conference, which obviated the need for the furloughs. Some employees volunteered to make personal sacrifices to mitigate the effects of sequestration on their co-workers once the severity of the budget situation was apparent. Those sacrifices included volunteering for unpaid leave, reducing their work hours with the understanding that our budget might not allow them to return to full-time status, and combining health insurance with spouses or other family members to help hold down the office’s spiraling health care costs. Had our employees not been willing to make such generous personal sacrifices, the effects of sequestration would have been worse. The need to continually streamline and defer our expenses created an additional level of stress and tension for all staff.

Today, fortunately, much of the damage done by sequestration has been rectified.

**CJA Panel Structure**

I chair the Eastern District of Pennsylvania’s CJA Panel Selection Committee, which is comprised of seven diverse practitioners, including our CJA Panel Representative. The committee is charged with reviewing applications, investigating applicants, and making recommendations to the court. The court reviews these recommendations and votes as a body to accept or reject each applicant.

CJA Panel members serve on the panel for three-year, staggered terms. The panel membership capacity is two hundred (200). The court’s Criminal Business Committee Chair works closely with me on panel issues. Several years ago, in an effort to improve the quality of the panel, the Committee established explicit procedures as to renewal and membership. We solidified that panel membership renewal was neither a right nor an expectation. Thus, we now evaluate both applicants whose three year term has expired and new applicants by the same standard. We also established a review and removal process which affords the panel member due process in a fair and deliberate manner. As the number of applications has increased, we have obtained success in approving qualified applicants and expanding the diversity of our panel.

The Eastern District of Pennsylvania does not have a panel administrator. Instead, judges assign cases to CJA panel attorneys and review vouchers, which are filed through an electronic filing system. While I am often made aware of complaints of voucher cutting, I am generally not privy to the details involved. However, where the court suspects overbilling or is concerned
about the conduct of a panel attorney, it has not been uncommon for the court to refer the matter
to our panel committee for review and recommendation. Our committee has effectively served
as a buffer between the attorney and the court.

I do believe that panel attorneys should not be required to justify their need for experts to
judges while defending their case. I believe the practice intimidates attorneys and makes them
disinclined to make appropriate requests for funds. Judges should not be involved in deciding
what is necessary to defend a case properly any more than they are involved with determining
the necessary cost of prosecuting a case.

I work closely with our CJA Panel Representative, Jeffrey Lindy. The panel
representative spends countless uncompensated hours communicating with the panel at large on
issues such as administrative office policy updates, guidance, and practice issues. I recommend
that panel representatives be permitted to bill for their administrative time or, alternatively,
receive a fixed stipend for their services.

CDO Sponsored Support and Training

Our office has a longstanding commitment to the CJA panel. Historically, we have
provided a spring continuing legal education training and initial orientation for new members.
Upon becoming the Chief Federal Defender in 2009, I added an additional annual training in the
fall. Thus, we annually provide two large CJA panel training programs, an orientation for new
panel members and, upon demand, periodic brown bag lunch trainings. Attendance for the two
large trainings typically exceeds 150 panel members who receive continuing legal education
credits at cost. A judge from the court’s Criminal Business Committee typically provides
opening remarks and updates on CJA-related matters at these large trainings. The appearance of
a judge at our trainings evidences the support and appreciation the court has for the CJA work.

Our TU staff members also field daily inquiries from panel members in administrative,
practice, and substantive areas. Our staff members hold brainstorming sessions and moot courts,
provide assistance with motion and appellate practice, publish a periodic newsletter to keep the
panel abreast of developments in practice.

Our CHU also regularly holds training sessions on various topics pertinent to its capital
practice, many of these trainings are open to the capital federal defender community. These
sessions usually last from an hour to several hours. Some are designed to provide new lawyers
with an intensive introduction to common issues; others educate existing staff on changes and
developments in the law and provide an intensive look at particular areas relevant to our practice.
Many of the sessions offer participants continuing legal education credits.
Diversity Efforts

I applaud this Committee’s efforts to review equal employment and diversity efforts. Within the Defender community, over the last several years, we have increased efforts to address and improve diversity among our staffs. We recognize and appreciate the value and benefit of a diverse staff, and we understand that we must employ aggressive affirmative recruitment and hiring initiatives. Although I have experienced challenges in my diversity hiring efforts, I have realized modest gains. The NAFD Diversity Committee is in its formative stages of maintaining a job bank of referred applicants for all positions. Defenders are encouraged to check the data base for diverse applicants during the hiring process.

Attractive diversity candidates are in demand. As a result, we must engage in outreach to local law schools and capitalize on internships and public interest job fairs, making them part of the recruitment hiring structure. Participation in such activities is an investment into a future applicant.

Relationship with the Court Community

We are fully integrated into the court community with related offices such as the U.S. Attorney’s Office, Probation and Pretrial Services. The court’s Criminal Business Committee is actively involved in CJA matters. The communication and relationships between the court and related agencies is positive. Proposals, issues, and suggestions are discussed in the spirit of cooperation, efficiency and justice.

Judges in our district respect and often compliment our work. An open dialog exists providing for communication on practices and systemic issues. I welcome and highly value all judicial feedback.

I look forward to answering any questions the Committee may have.

Thank you.

Respectfully,

LEIGH M. SKIPPER
Chief Federal Defender