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March 25, 2016

Hon. Kathleen Cardone, Chair
Ad Hoc Committee to Review the Criminal Justice Act
Thurgood Marshall Federal Judiciary Building
One Columbus Circle
Washington DC 20544

Re: CJA Panel Hearing April 11-13, 2016
Philadelphia PA

Dear Judge Cardone and Honorable Committee Members,

It has been an honor to serve on the CJA panel in Boston for the last fifteen or more years. My tenure has spanned from the mandatory guidelines with departures to the current advisory atmosphere. In this capacity and time period, I have been a party to some horribly draconian sentences. Thankfully, this has occasionally been balanced by a just result. However, my point in addressing you is that, despite the difficulties of practicing within the harsh realities of federal sentencing, I always felt zealous advocacy was encouraged, and indeed required. This atmosphere of support for quality advocacy transcended the facile labels of conservative or liberal. When sentences as long and severe as those handed out in federal court come down, it is critical that the defendant have had high-quality representation. All the judges, no matter who appointed them, conveyed and understood that nothing less than the integrity of the system was at stake.

Unfortunately, in action, principles can be expensive. As CJA lawyers in Massachusetts, we were trained to write insightful sentencing memos. We were to incorporate strategies learned in death penalty mitigation cases to fight for lower sentences. Similarly, if there were openings for developing appellate issues, we were to create and preserve them. Clients with significant records needed prior convictions to be tested and, if possible, vacated. All of these efforts come only after sorting through what could be tens of thousands of phone calls or thousands of

pages of documents, and finding no or insufficient defenses to take a case to trial. Many if not the majority of federal cases are complex multi-defendant matters that require great amounts of work, yet the most important advocacy is often at sentencing. Appropriate advocacy in federal court almost by definition is going to be costly.

The care and professionalism with which cases are handled in the federal courts is the embodiment of the enlightenment principles upon which American exceptionalism is founded. My client, no matter his station in life, his ethnicity or his religion, is treated with respect and dignity by the judges and court personnel during court proceedings. Unfortunately, this is in sharp contrast to what often occurs in many of the state-level courts of Massachusetts. This distinction is not lost on lawyers, but most importantly it is apparent to defendants and their families. While the sentence meted out may be far greater than one hopes for, there is usually no denying that there has been a fair hearing at which the defendant received high-quality advocacy.

In terms of where we could lower the cost of high quality advocacy, a few areas that come to mind. The first is in the discovery phase. In Massachusetts, discovery is controlled by local rules, which anticipate a single discovery letter between the parties. This is almost impossible given the rolling discovery that occurs in so many cases. Therefore, the same disputes recur, even within the same case. Additionally, almost every prosecutor has a different approach to providing discovery.

In multi-defendant cases, the prosecutors could be clearer in noting what is relevant in the often huge amount of discovery material that is provided. As an example, in two of my cases that were not tried but where drug weight was at issue, I had two vastly contrasting experiences. One, where the prosecutor identified the four or five calls she would be relying upon, and another where the prosecutor was calling a police witness and did not identify where, in the thousands of pages of discovery provided, the relevant information was located. In both situations I was "provided with the relevant discovery." However, the difference in preparation time was wildly divergent. Federal judges seem loathe to get involved in discovery issues, but when defense lawyers are given hundreds of hours of tapes and thousands of pages of reports, with no clear guidance on what is relevant, it is a recipe for a mega bill.

A second area where costs could be contained concern fights over incremental differences in sentences, which are hugely expensive and should be addressed. Three recent cases of mine highlight this problem. In the first case, the prosecutor and I reached agreement on a twelve-month sentence in a marijuana case. Her superiors would not sign off and wanted two years. This led to the scheduling of a hearing on drug weight and the required preparation. Literally minutes before the hearing, after hours of additional preparation on my part, the

U.S. Attorney's Office agreed to the twelve months. In another drug case, there again appeared to be agreement on an eighteen-month sentence. The prosecutor's supervisor would not sign off and they are asking for the high end of the guideline, in that case twenty-one months. I will be seeking the low end, or fifteen months. This has led me to seek letters from prior employers, meet with family members, meet with my client regarding allocution statements, file a more robust series of objections to the PSR, and I will be writing a sentencing memo. I have a third case with a larger gap, 24 to 48 months, but where the prosecutor is figuring the judge will split the baby. We have offered to resolve the case for 36 months. This offer was declined.

Currently, I am embroiled in a case where the court for the first time is telegraphing to me that I should not put forth my best efforts. This situation comes in the wake of the Boston District Court's concern regarding its place in the national billing queue. The court has seen fit, without complying with CJA rules, to decline payment of an interim bill, and has given me no road map to getting paid. The court opined that I had spent too much time on suppression issues, thus chilling my effort to challenge his ruling or mount further suppression efforts. My predecessor counsel, who filed no motions, was paid in full. I will be going to trial on a kidnapping conspiracy case in which there are six to seven alleged kidnappings and where my client is facing life in prison, and I will not have been paid. I anticipate a three to four week trial and I am working on the case on evenings and weekends in anticipation of being penalized for being a zealous advocate.

I will not go hungry, but this is a burden for a two-person law firm. However, we will survive. What is more important is that principles survive. My client is a Spanish-speaking immigrant who cannot understand why the judge is trying to "chase the lawyer who is working on the case away." It is difficult to understand that I have been paid to fight over sentencing differences of months, but will be penalized for working zealously for a man who is facing a life sentence.

I have taken great pride in working in the federal courts because all that was asked and expected was excellence. Please do not let an effort to cut expenses, left in the hands of the arbiters of the defendant's fate, strip our system of something we get right. In a time where the country can seem to be being pulled apart, it was comforting to know that judges from across the spectrum shared the belief that quality defense counsel was critical to the justice system.

Sincerely,

/s/ Mark W. Shea
Mark W. Shea