March 22, 2016

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

RE: Written Testimony of Terence S. Ward, Federal Defender, District of Connecticut

Dear Judge Cardone,

Thank you for the opportunity to testify before this Committee. I very much appreciate the time you and your colleagues have devoted to this important task.

I am the Federal Defender for the District of Connecticut. My office was established in 1971, making it one of the oldest Federal Defender offices in the nation. I joined the office as an Assistant Federal Defender in 1990, after being in private practice (and on the CIA Panel) for eight years. I became the Interim Defender in 2011, and I was fully appointed Federal Defender in February of 2012.

If I had been asked anytime from 1990 until 2012 what structural changes needed to be made for the provision of indigent defense services in the federal system, I would have replied “none.” In part that response would have been the product of myopia, due to the happy experience of practicing in a District and in a Circuit where the Bench has always supported – even demanded -- excellence in the representation of poor people. Luckily, that judicial attitude remains the case today where I practice.

What gives me pause, however, and what would alter my answer about structural change today has nothing to do with the District of Connecticut or the Second Circuit, which are very good places to be a public defender, but what has occurred on a national level within the Judicial Conference of the United States (JCUS) and in the Administrative Office of the United States Courts (AO). During the latter part of 2012 and during 2013, the Office of Defender Services was demoted within the AO from a “distinct, high-level status” with a Directorate to a lower level “court service group,” lumped together with Data Analysis and the Clerks Offices. This
demotion came with very real consequences since at approximately the same time, the Defender Services Committee of the JCUS was stripped of its budgeting authority.

In February of 2013, the typical shortfall in resources to pay the CJA Panel attorneys, which had always been resolved through deferment of Panel payments, was this time resolved by forcing a 5% cut on Defender Offices. This cut came nearly halfway through the fiscal year, so there was little time to adjust for the cut. It was followed in March by another 5% cut from Congress due to sequestration. So it is clear, 93.5% of my budget is salaries, benefits and rent. I have very little control over these costs. The remainder consists in large part of essential items (e.g., costs for transcripts, interpreters, mileage reimbursements to see clients at remote detention facilities, telephones, computers, copiers, and supplies). The only truly discretionary items in my budget are furniture and training. We did not buy furniture during sequestration and I cancelled all training. Still, I lost one attorney I could not replace during sequestration, and every member of my staff had to endure furloughs.

As you have no doubt heard, Federal Defender offices throughout the country had to lay off attorneys and staff, refrain from filling vacancies, and take furloughs. Panel attorneys had to take a cut to their hourly rate, which was already an insufficient amount of compensation, and they had to wait a long time to get paid. No prosecutors were laid off, furloughed, or had their pay reduced.

Indigent clients do not care that political squabbling in Washington affects their lawyers. Clients facing enormous federal sentences want and need help. During our fiscal crisis, my lawyers continued, as they routinely have, to work long hours that always surpass a forty hour work week. They simply got paid less to do the same amount of work.

Not to put too fine a point on it, but one example of that effort is that during sequestration, my small office (our numbers fell to five AFPDs and me) handled, in addition to our regular caseload, a terrorism case that had approximately five terabytes of discovery. A terabyte equates to 28,000 bankers boxes. We had 4 million items of discovery that equated to 140,000 bankers boxes. Our obligation was to our client, and we could not say that we were not going to look at the discovery today because we were furloughed. Indeed, the workload math in that case is astonishing. If an attorney could review 40 items of discovery an hour (a generous estimate given that some items were more than 100 pages), and worked on nothing else for 8 hours per day, and 7 days per week, it would take more than 34.3 years to get through the discovery one time (i.e., 40 items x 8 hours per day x 7 days per week x 52 weeks per year x 34.3 years = 3.99 million items). So my colleagues and I worked nights and weekends and holidays and every other opportunity.

Let me say again, the Judges in Connecticut supported the Federal Defender program as best they could during sequestration. I am grateful beyond words for their support. But the lesson of 2012-13 was that no matter how supportive one’s local Bench may be, the politics of Washington, both in the Congress and in the Judiciary, make Sixth Amendment guarantees vulnerable.
In the years that have followed, there has been a wave of voucher cutting occurring in many districts. Again, thankfully, this is not a problem in my district. But there is a real threat to the independence of the defense function when indigent defendants, facing the large resources of the Department of Justice, find their requests for investigators and experts unreasonably denied or cut. Moreover, cuts to legal fees are especially troubling when CJA lawyers are paid an amount that, after subtracting the overhead expenses of running a law office, leaves little on the table.

So, today, I would answer the question about the need for structural change in the indigent defense system differently than I would have in 1990-2012. I would say that there are at least four structural changes that need to occur.

1. **Restore Budgeting Authority To The Defender Services Committee of the JCUS.**

   The Defender Services Committee of the JCUS, in conjunction with the Defender Services Office, for many years did a very good job of seeing to it that Defender Offices were adequately funded. The members of that Committee and its staff were dedicated to learning about our needs and crafting budgets that would meet them. That did not mean that we had carte blanche to spend, but that Committee understood what we do and how to fund us. The development of budgets for the provision of indigent defense should be returned to that Committee. I also suggest that a Defender and a Panel Representative be at least *ex officio* members of that Committee.

2. **Restore The Defender Services Office To A Directorate in the AO.**

   Federal Defender and Community Defender Organizations are charged with a Constitutional duty to carry out the promise of the Sixth Amendment. We work for our clients, and we are not a “court service” akin to data analysis. To maintain independence within the existing structure of the AO, we need a voice, and one that does not require departmental approval before speaking.

3. **Expand the Use of Case Budgeting Attorneys.**

   In the Circuits that have them, Case Budgeting Attorneys have proven themselves an asset in containing costs and expediting voucher review. I suggest that there be Case Budgeting Attorneys at the District Court level as well. Care should be taken in the selection of these attorneys so that those who are chosen have actual experience and have earned the respect of their peers representing defendants in federal criminal cases. Case Budgeting Attorneys have served the Bench and Bar well in capital and “mega-cases.” Their role should be expanded to cover routine, or at least large case, voucher review, too. While judges would still retain the ultimate authority to approve vouchers, experience has shown that when a Case Budgeting Attorney is involved in the process, the parties and the Bench are generally satisfied with the result.
4. **Permit Legislative Access to the Defender Services Office and to Defenders.**

   There can be tension between the needs of the Judiciary and the needs of the Defender Program. To avoid some of the problems that arose in 2013 during sequestration, the Defender Services Office and Defenders ought to be able to make their budgetary case to the authority that actually provides the money for the budget. We should be able to express our needs to Congress.

**Conclusion**

   Thank you again for allowing me the chance to share my thoughts with your Committee. The goal of fulfilling the Sixth Amendment’s guarantees to indigent defendants is worthy of all the time and effort you have expended. I am hopeful that through this process some significant improvements can be made.

   Very Truly Yours,

   [Signature]

   Terence S. Ward
   Federal Defender
   District of Connecticut