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February 18, 2016

Honorable Kathleen Cardone, Chair
Members of the CJA Ad Hoc Committee
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Suite 4-200
Washington, DC 20544

Re: ***Testimony of Hilary Potashner,***
Federal Public Defender for the Central District of California

Dear Judge Cardone and Members of the CJA Ad Hoc Committee:

Thank you for the opportunity to testify before the Committee to Review the Criminal Justice Act Program and to submit written comments for your consideration. By way of introduction, please allow me to tell you about myself. I have spent my entire legal career defending indigent people charged with, or convicted of, committing criminal offenses. I started as a deputy public defender for the County of San Diego in December 1993. I joined the Federal Public Defender's Office in the Central District of California (FPDO) in 2001, and I have served in that office as a line deputy federal public defender, a supervising deputy federal public defender, and the Chief Deputy. In September 2014, I became the Acting Federal Public Defender. I was sworn in as the Federal Public Defender in June 2015.

The practices, expectations, and challenges facing each federal defender organization and each Criminal Justice Act panel (CJA panel) vary. To add to the understanding you have of other jurisdictions, please allow me to share the following overviews of the Central District of California and the work my office is doing. I also will comment on the need for appointed counsel to have independence from the bench, and I will conclude with my impressions of, and recommendations for, case budgeting within our current system.

The Central District of California

The Central District of California is an enormous district, with pockets of dense population, suburban sprawl, and rural communities. It encompasses approximately 40,000 square miles, and includes seven counties, with a total population of more than 18.7 million people. Nearly half the population of the state of California resides in this district. The district is larger than New Hampshire, Massachusetts, New Jersey, Hawaii, Connecticut, Delaware, and Rhode Island combined. Indeed, San Bernardino, one of the counties within the district, is itself larger than New Jersey, Connecticut, Delaware and Rhode Island put together. And another of the counties, Riverside, is about the size of New Jersey. The district has three main divisions: the Western Division, in Downtown Los Angeles; the Southern Division, in Santa Ana; and the Eastern Division, in Riverside. Court sessions are also routinely held by magistrate judges in outlying courtrooms located in Santa Barbara, Joshua Tree, Barstow, and Fort Irwin.

The Federal Public Defender's Office

Our office is one of the largest federal public defender offices in the country. Our caseload demands it. The current practice in our district, absent a conflict, is to appoint our office on every case in which the defendant financially qualifies for appointment of counsel. Our district includes Los Angeles, one of the urban epicenters of the United States and an international gateway. Thus, it is no surprise that our office is busy and has a varied caseload. Nearly a third of the cases in our district are drug cases and another 20% or so are fraud cases.

In addition to the challenges that come with a high-volume and varied practice, our office routinely faces the pressures of providing representation in multiple pre-trial, high-stakes cases at any given time. For example, last fiscal year, our office was simultaneously litigating an authorized capital case relating to shootings at Los Angeles International Airport, trying a terrorism case, and representing inmates in the death certification process for suspected involvement in four separate pre-indictment prison murder cases. The FPDO also has a robust appellate and habeas practice. Last year alone, we served as appointed counsel in over 150 appeals, we created a Non-Capital Habeas Unit, and our Capital Habeas Unit represented approximately 90 clients on death row, which is about 40% of the California death row inmates whose cases are in federal court.[1]

Individual representations are only a part of our mission and our service to the community. Our office also is responsible for significant portions of the administration of the CJA panel. Specifically, our office chairs the attorney advisory committees for the selection and renewal of the CJA panel on the trial, appellate, and habeas levels. We also manage the assignment of direct appeals to the appellate panel. We provide an on-call paralegal, two trial attorneys, and an appellate attorney each business day to field questions from the panel, private defense attorneys, and private citizens. We also co-sponsor yearly trainings for new trial panel members, and we assist in the planning and organizing of the annual trainings for both the trial

[1] For many years, we have handled a large number of non-capital habeas cases, and this year we decided it was time to create a unit specifically devoted to representing these clients.

and appellate panels. Finally, we oversee the CJA mentorship program for those interested in becoming CJA trial panel attorneys.

We also actively collaborate with the Court, the United States Attorney's Office (USAO), United States Pre-trial Services (Pre-trial Services), and United States Probation (Probation) on issues of systemic and mutual concern. One such example is our joint effort to craft a model complex case management order (model order). I have attached this model order to my letter for your reference. Our model order is intended to address the many and sometimes competing concerns present in our ever-growing docket of multi-defendant, massive-discovery cases. These concerns include the defense's need to fully digest and prepare these cases, as well as the Court's need to move the cases forward in a timely and cost-efficient manner. This model order rightly places on the government the responsibility of delivering pertinent case information and discovery in the most organized and useable manner possible in order to achieve these goals.

We have also collaborated with the Court and the USAO in our approach to the large-scale projects that challenge all jurisdictions. For example, we are methodically evaluating cases to locate those potentially impacted by the retroactive drug guideline reduction. Thus far, we have reviewed about 930 cases and entered into stipulations with the government in 360 of them. Additionally, in the wake of the United States Supreme Court's recent decision in *Johnson v. United States*, 135 S.Ct. 2251 (2015), our office also has begun screening scores of individuals in our own district whose sentences may no longer be valid. We would not be able to address these large-scale projects effectively without our Court's assistance or the good faith cooperation by Probation and the USAO.

Perhaps the most game-changing collaboration in our district has been achieved in our collaborative courts. Over the last six years, we have started a re-entry court and four diversionary courts. These courts are designed to address the underlying causes of criminality and provide the services and support necessary to put participants on better paths. These courts do not follow the traditional adversarial model. Rather, they are based on a team approach, including Pre-trial Services or Probation, the Court, FPDO, and the USAO. The impact of these programs has been astounding. Not only have they effected real change in the lives of those individuals fortunate enough to be admitted, but our experiences with them have made us wiser and more nuanced when addressing complicated problems in the rest of our docket.

The CJA Panel

I appreciate the support that our office receives from the District Court and from the Ninth Circuit. I know that our Court views the FPDO as a resource to the CJA panel and recognizes the critical role that the FPDO plays in the district. Yet despite the good working relationship our office has with our Court, I firmly believe that we are able to engage in the high level of litigation that our clients deserve, and to push for systemic changes, precisely because our office is not run by our Court. We at the FPD work for our clients – not the Court – and our Court knows and respects that.

I see a disparity between the relationship the FPDO has with the Court and that the Court has with the CJA panel. I believe we must provide the CJA panel with as much independence in making litigation decisions for their clients as our office has with respect to our clients. When it

comes down to it, the only difference between the two groups of clients is the fact that, for ethical reasons, our office cannot represent everyone. There is no reason one indigent defendant should receive counsel who is more limited in his or her ability to make independent representational decisions because that defendant happens to be represented by a CJA panel attorney, rather than the FPDO. For that reason, just as the Court does not have control over the FPDO's hiring of deputy federal public defenders and individual case funding decisions, I do not believe that local CJA panel management and case funding decisions should continue to be made by the Court. Rather, those panel management responsibilities should be transferred to an ethically walled-off unit within the FPDO or to an independent and experienced defense attorney who is not an employee of our local Court.

The critical need for all appointed defense counsel, whether FPDO or CJA panel, to have independence from the bench is not a novel idea. In Professor Charles Ogletree's 1995 article, *An Essay on the New Public Defender for the 21st Century*, 58 *Law and Contemporary Problems* 81, 90, he explained:

> [T]he proposal for state and federal criminal justice centers offers an opportunity to develop a public defender service that is independent of the judiciary. Many of the arguments for such independent structures are obvious. For example, federal judges cannot possibly understand the defense function or client needs in individual cases and thus should not be in a position to determine who is hired to manage public defender offices, how resources should be allocated, or what constitutes a valid expenditure. Judicial involvement in Justice Department hiring and spending policies would quickly be denounced as unwise, yet analogous behavior is commonly tolerated between the judiciary and public defender offices. The creation of independent centers would ensure the integrity of the judiciary while protecting the interests of criminal defendants.

While this article is dated, its conclusions still ring true. Our adversarial system is founded on the basic principle that the bench is neutral and even-handed as to all parties appearing before it. Exercising control on day-to-day operations and budgeting decisions in individual cases on the defense side while not exercising the same control over the USAO's handling of those same cases threatens the Court's neutrality. At the very least, but perhaps equally as damaging to our system of government, it threatens the public's and the individual defendant's perception of the Court's neutrality. In criminal cases especially, where the stakes are so high, the Court should be equidistant from the government and the defense. This is true whether the client is rich or poor, and whether the client is represented by the FPDO or CJA panel.

For these reasons, when the Committee assesses the Court's role in selection and renewal of CJA panel attorneys, I urge the Committee to remember that the bench rightly has no role in the selection of individual deputy federal public defenders or assistant United States attorneys. Likewise, when the Committee assesses funding for retention of experts by CJA counsel, I urge the Committee to remember that the bench rightly has no role in the making of the same strategic decisions for the vast majority of FPDO clients or for our counterparts at the USAO.

I believe the Committee should recommend that CJA panel management and case-funding decisions be made by the local FPDO or an independent defense attorney. This change would ensure that CJA panel membership and funding decisions are made by those with an expertise in criminal defense. It would resolve the current tension between having the Court that presides over an indigent defendant's criminal proceedings make decisions governing that same defendant's representation. And it would lead to more even-handed and predictable decisions, as the current system has revealed that funding decisions vary significantly.[2]

I believe that we must obtain parity between our federal defender offices and our CJA panels across the country, and the defense function must be afforded the same level of independence to prepare its cases as our prosecutors currently enjoy.[3]

Case Budgeting

I understand that this particular hearing is to be focused at least in part on case budgeting under the current CJA-funding paradigm. Our office is regularly appointed in death-eligible cases, and we currently are appointed as co-counsel with outside learned counsel on multiple cases. I appreciate the Central District's regular appointment of counsel in death-eligible cases prior to indictment. As this Committee undoubtedly is aware, the Department of Justice (DOJ) recently modified its protocols to require its own review on the question of authorization prior to indictment in all death-eligible cases, absent extenuating circumstances. In other words, there is now more need than ever for competent and qualified counsel to be appointed prior to indictment. In light of the DOJ's amended protocols, I urge this Committee to recommend pre-indictment appointment of qualified counsel in all death-eligible cases.

I am familiar with case budgeting because case budgeting is being utilized in some death-eligible cases in my district. As with budgeting in non-capital cases, my concern is that the current system impedes on the needed separation between the defense and the Court. I do not believe that the Court should continue to make case-related funding decisions in capital cases.

If the Court is to continue in this role, however, it must recognize the vital role each member of a capital defense team plays. I am concerned based on my experience that some courts may view learned counsel's role as one limited to the responsibilities and tasks the FPDO

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[2] For example, in one case in our district, a CJA panel attorney litigated multiple motions and conducted a five-day jury trial, only to learn after his many hours of work and payment of $49,000 that the Court would not deem the case to be extended or complex. Instead, the attorney was asked to return all of the fees above the statutory maximum. It bears mentioning that at least one co-defendant's case, which resolved by guilty plea, was deemed extended or complex.

[3] I recognize that when discussing independence, I do not address the question of the defense function's complete independence from the Judiciary on all levels. If the federal defender/CJA panel program is to stay within the umbrella of the Judiciary and be administered on a national level by DSO, changes must be made at the AO. First, DSO must have greater independence from the other offices and agencies within the AO. Second, it must have the authority to set policies for defender organizations which are expressive of, and consistent with, the core mission of the defense function. For example, DSO should have the express authority to wholly support projects such as defenders' filing of clemency petitions in non-capital cases on behalf of our clients.

is unable to perform. This, however, is not how learned counsel's role should be defined, particularly by the entity overseeing counsel's funding requests.

An effective defense of a capital case requires a well-functioning team. While my office's role in pre-trial death-eligible cases that we co-counsel is always active and robust, that does not mean that the role of outside learned counsel should be limited by the Court. Rather, I believe capital cases demand a fully integrated team approach, and I am not alone in this perspective. Many stakeholders, including the U.S. Judicial Conference Committee on Defender Services and the American Bar Association, recognize that effective defense of capital defendants requires a team of people. *See, e.g.*, Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, 65, 103 (2010) ("Updated Spencer Report"), *available at* http://www.uscourts.gov/file/fdpc2010pdf.

In order for capital teams to function effectively, both appointed attorneys must play active roles throughout the duration of the case and must work closely together. *See* Hon. Mark W. Bennett, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 42 Hofstra L. Rev. 391, 406 (2013). It is only through active participation of both attorneys that a defense team can present the unified theory so vital to an effective capital defense. *See* ABA Guideline 10.10.1 (Trial Preparation Overall).

If the Court is to continue to be responsible for budgeting capital cases, it should not use its role as the funder to micromanage the defense team by divvying up the work among the various members or dictating how much time one member, like learned counsel, can spend on the case. *See United States v. Pesante-Lopez*, 582 F. Supp. 2d 186, 191 (D.P.R. 2008); ABA Guideline 7.1 at 973 (Monitoring; Removal) (The court "should not attempt to micro-manage counsel's work."); Updated Spencer Report at 69 ("[C]ase budgeting does not mean micromanaging the lawyers.").

By assigning responsibility for dividing up work in a capital case to counsel, the ABA Guidelines make clear that this is not a job for the Court. The Court should not define how big or small a role any member of the defense team, including learned counsel, is to play in a capital case. Aside from not being in the best position to make that decision, the Court should not insert itself into the decision-making process because, as the Guidelines recognize, judicial micromanagement can even interfere with the attorney-client relationship. ABA Guideline 7.1 (Monitoring; Removal).

A lesson from a real case about the dangers of judicial micromanagement is instructive. In his law review article, Judge Bennett shares his "mistake" of micromanaging appointed counsel in two capital cases over which he presided. After appointing a third attorney to the case, he writes that he "was very concerned about duplication of efforts and having counsel divide up the labor to avoid what [he] perceived, at the time, to be unnecessary, overlapping, and duplicative work." Bennett, *supra*, at 402. "In hindsight," however, he realized that this "may have undermined a 'team approach' to [the defendant's] representation," driving a "huge and unnecessary wedge" between the trial team and the client. Bennett, *supra*, at 403. Judge Bennett

concluded that his attempt to impose rigid divisions of labor from the outside was a "critical mistake" that led to "disastrous results" when he granted the defendant's habeas petition on the basis that her defense team had provided ineffective assistance of counsel. Bennett, *supra*, at 402, 404.

On the subject of case budgeting in potential capital cases, I believe it critical for the Court to see the defense as a team that is itself in the best position to assign the work needed to be done to save their client's life. Our Courts, in their current capacity as funders, should not intentionally or unintentionally control the method of preparation of these cases.

In conclusion, I truly appreciate your Committee's dedication and commitment to this study, and I thank you very much for allowing me to participate.

Respectfully,

Hilary Potashner
Federal Public Defender
Central District of California

Attachment

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [LEAD DEFENDANT], et al., Defendants.	Case No. COMPLEX CASE MANAGEMENT ORDER

A. INITIAL MEET AND CONFER: By not later than [date 7 calendar days after Post-Indictment Arraignment], prior to the USAO's filing of the First Status Report (see Section C below), the United States Attorney's Office ("USAO") shall meet and confer with counsel for all defendants and individuals with sufficient technical knowledge and experience regarding electronically stored information ("ESI"), to reach agreement on the format and mode of transmission of ESI discovery, including:

1. Production of ESI, under each of the general categories discussed in Section C.6.i below, in a searchable, reasonably usable, cross platform or open platform format (i.e. searchable PDF format, TIFF and OCR format, Native files as received, Native files with metadata, etc.);

2. Case mapping, indexing, and organizational software generally used by, and available to, the USAO and defense counsel;

3. The practicability of sharing indexed or organized ESI without revealing work product;

4. Production of ESI received from third parties in a reasonably usable, cross platform or open platform format that conforms to industry standards;

5. Confidential, private, or sensitive information in any ESI discovery that will be produced, and:

a. how recipients will prevent unauthorized access to, or disclosure of, such ESI discovery to unauthorized parties;

b. the need for the producing party to seek a protective order from the court addressing the management of the particular ESI at issue;

c. whether redaction or encryption is warranted;

d. what steps will be taken at the conclusion of the case to return confidential or sensitive discovery to the producing party.

6. Proprietary or legacy data (e.g., video surveillance recordings in an uncommon format, proprietary databases, or software that is no longer supported by the vendor) and suitable generic output form, or specific requirements necessary to access data in its original format;

7. Attorney-client or protected information issues, including methods or procedures for segregating such information and resolving disputes;

8. Naming conventions (e.g., in a Title III wiretap case naming conventions should be established for audio files, monitoring logs, and call transcripts, to facilitate cross-referencing the audio calls with the corresponding monitoring logs and transcripts);

9. Software or hardware limitations of the USAO or defense counsel;

10. Issues specific to ESI produced from a seized or searched third-party digital device, such as identifying the device's probable owner or custodian and the

need for a protective order to regulate the receiving party's access to or inspection of the device;

11. Inspection of hard drives and/or forensic (mirror) images, where specialized software is required to access the stored information;

12. Access to already extracted metadata from third party ESI in an industry standard load file format;

13. Appointment of a Coordinating Discovery Attorney ("CDA") (see Section F below).

B. FIRST STATUS CONFERENCE: All parties and their counsel shall appear for an initial status conference in this matter on [date 21 calendar days after Post-Indictment Arraignment].

C. FIRST STATUS REPORT OF GOVERNMENT: By not later than [date 14 calendar days after Post-Indictment Arraignment], following the Initial Meet and Confer with defense counsel, (see Section A, supra), the USAO shall file a document entitled "First Status Report." For good cause shown, the USAO may file portions of the First Status Report in camera and/or under seal. The First Status Report shall:

1. For each defendant who has not yet made an appearance in this case, specify:

a. Why the defendant has not yet made an appearance;

b. When the defendant is expected to make an appearance, if this is known or can be reasonably estimated;

c. Any factors that make it difficult to reasonably estimate when the defendant will make an appearance; and,

d. For any defendant already in state or federal custody on other charges:

(1) Whether the charges underlying the custody are related to the charges in this case and, if so, how; and,

(2) Whether the charges underlying the custody have been or will be resolved before the defendant makes an appearance in this case.

2. For each defendant who has made an appearance in this case:

a. Specify whether the defendant has been detained or granted bond and, if detained, provide the registration number;

b. Specify whether the defendant is believed to require an interpreter, and if so, the language;

c. Specify whether the defendant is currently known to have a medical or mental condition that warrants special attention, treatment, or accommodation; and,

d. If the defendant has been detained or remained in custody due to a failure to satisfy bond conditions confirm that the defendant's counsel has been advised of the institution in which the defendant is currently being held. (The USAO shall also file separately with the court, under seal and in camera, a list of in-custody defendants that identifies the institution in which each in-custody defendant is being held.)

3. Include as attachments each of the charts specified under Section D below.

4. State whether the USAO currently plans to seek additional charges related to this case, and if so, when (this portion of the First Status Report may be filed in camera and under seal if the USAO has concerns that revealing planned additional charges might cause potential targets to flee or jeopardize an ongoing investigation).

5. Estimate the following with respect to trial, assuming that all defendants named in the pending indictment were to make appearances and proceed to trial (such estimate not to be binding on the USAO):

a. Number of government witnesses; and

b. Number of trial days for the government's case-in-chief (assuming reasonable cross-examination).

6. Estimate the following with respect to discovery, assuming that all defendants named in the pending indictment were to make appearances and proceed to trial (such estimate not to be binding on the USAO):

a. With respect to search warrants:

(1) Number of warrants;

(2) Number of locations searched;

(3) Pages of documents seized;

(4) Number of digital devices seized;

(5) Number and general description of items of physical evidence seized.

b. With respect to wiretaps:

(1) Number of applications;

(2) Number of target telephones;

(3) Hours of audio recordings, specifying hours in English and, if applicable, hours in foreign languages and which languages;

(4) Pages of transcripts.

c. With respect to other audio- or video-recordings:

(1) Hours of recordings, specifying hours in English and, if applicable, hours in foreign languages and which languages;

(2) Pages of transcripts.

d. With respect to physical evidence, including photographs:

(1) Number of items;

(2) General description of items;

(3) Number and, if known, identity of locations at which items will be made available for inspection.

e. With respect to digital devices:

(1) Number and kind of devices seized or otherwise obtained;

(2) Whether originals and/or forensic images have been retained, returned, or destroyed;

(3) Whether government will make originals and/or forensic images available;

(4) Number of pages of documents printed or otherwise stored by the government from data obtained from each device.

f. With respect to confidential informants anticipated to provide testimony at trial:

(1) Number of such informants;

(2) Hours of audio- or video-recordings;

(3) Pages of transcripts;

(4) Pages of other documents (e.g., criminal histories, payment histories, interview reports).

g. With respect to foreign evidence:

(1) Countries of origin;

(2) Nature and type, including whether in foreign languages and which languages;

(3) Hours of audio- or video-recordings;

(4) Pages of transcripts;

(5) Pages of other documents;

(6) Whether any foreign evidence requests remain pending, and if so, a general description of the evidence sought.

h. With respect to written discovery (excluding items covered by more-specific sub-categories above), number of pages for the following:

(1) Law enforcement agent reports;

(2) Expert reports (e.g., chemist reports or other reports of scientific analyses);

(3) Transcripts (e.g., grand jury or other court-proceedings);

(4) Business records (e.g., bank records, toll records, pen register records, correspondence, emails).

i. With respect to ESI (including electronically stored written discovery), the nature (i.e. file format), volume, and mechanics of producing the following categories of ESI, as agreed upon during the Initial Meet and Confer (see Section A below):

(1) Investigative materials (investigative reports, surveillance records, criminal histories, etc.);

(2) Witness statements (interview reports, transcripts of prior testimony, *Jencks* statements, etc.);

(3) Documentation of tangible objects (e.g., records of seized items or forensic samples, search warrant returns, etc.);

(4) Acquired digital devices (computers, phones, hard drives, thumb drives, CDs, DVDs, cloud computing, etc., including forensic images);

(5) Photographs and video/audio recordings (crime scene photos; photos of contraband, guns, money; surveillance recordings; surreptitious monitoring recordings; etc.);

(6) Third party records and materials (including those seized, subpoenaed, and voluntarily disclosed);

(7) Title III wiretap information (audio recordings, transcripts, line sheets, call reports, court documents, etc.);

(8) Court records (affidavits, applications, and related documentation for search and arrest warrants, etc.);

(9) Tests and examinations;

(10) Experts (reports and related information);

(11) Immunity agreements, plea agreements, and similar materials;

(12) Discovery materials with special production considerations (such as child pornography, trade secrets, tax return information, etc.);

(13) Related matters (state or local investigative materials, parallel proceedings materials, etc.);

(14) Discovery materials available for inspection but not produced digitally;

(15) Other information.

7. Propose a schedule for completion of discovery (assuming production under the terms set forth under Section E below), and identify for the court any types of discovery as to which the need to limit disclosure (e.g., child pornography, trade secrets, malware, personal identifying information) may require limits on one or more defendant's access to discovery that cannot be accomplished by redaction.

8. Provide any other information that may assist the court, the USAO, or the defense in handling this matter efficiently and cost-effectively.

D. CHARTS

1. As specified in Section C.3 above, the government's First Status Report shall have as attachments each of the following summary charts (which shall also be provided to chambers email in Word or Word Perfect format):

a. A table of contents to the indictment;

b. A chart listing the defendants charged in each count of the indictment, arranged by count number;

c. A chart listing the defendants and the respective counts with which they have been charged, arranged alphabetically by last name of the defendant, and listing the predicate acts/overt acts alleged as to a particular defendant for any RICO/conspiracy counts;

d. The chart described in the previous subparagraph, arranged by defendant's position in the caption of the indictment;

e. A chart grouping and identifying those defendants who are blood relatives or relatives by marriage (common law or otherwise), if known, and specifying the relationship; and,

f. A chart addressing relative culpability by placing each defendant in one of the following four categories: (1) most culpable; (2) next-most culpable; (3) next-to-least most culpable; (4) least culpable. These designations shall be based only on conduct alleged in the indictment, shall not be affected by prior criminal convictions or cooperation with the USAO, and shall not be binding on the USAO, meaning that USAO may change its position regarding relative culpability at any time, including during plea negotiations, at trial, or at sentencing.

2. On each of the above summary charts, next to the name of each defendant the USAO shall add, in parentheses, the name of that defendant's attorney.

3. Within 7 calendar days after the filing of any superseding or otherwise new or redacted indictment in this case, the USAO shall file modified summary charts to reflect allegations in any superseding or otherwise new or redacted indictment.

E. DISCOVERY: The USAO shall produce discovery, whether to a CDA (see Section F below) or an individual attorney or pro se defendant, as follows:

1. Master Discovery Index: With each production of discovery, the USAO shall provide to the CDA and any individual attorney or pro se defendant not receiving discovery through the CDA, a master index of all discovery produced in this case, updated to reflect the current production. This master index shall identify discovery as follows:

a. Written discovery shall be identified by Bates number range, with document(s) within each range identified by general type (e.g.,

interview reports, wiretap transcripts, business records, search warrant or wiretap applications).

b. ESI discovery shall be identified by general category (e.g., digital device forensic image, investigation reports, surveillance footage, etc.), location (e.g., CD, DVD, Thumb Drive, Hard Drive), source (e.g., wiretap, third-party subpoena, seizure), and, where applicable, format (e.g., TIFF, PDF). For ESI that is generated by the government, the government will make its best efforts to use a consistent file naming convention that will make it easy to cross-reference related ESI. For example, in a Title III wiretap case the government will make its best efforts to use a consistent file naming convention for the audio files, monitoring logs, call transcripts, and other similar items, so that the files can easily be cross-referenced.

c. Audio or video recordings shall be identified by date of recording, source (e.g., target telephone intercepted, location of recording), and, to the extent possible, participants. The USAO's identification of participants in the master discovery index shall not be binding on the USAO.

d. Physical evidence shall be identified by type (e.g., narcotics, weapons), quantity or number (e.g., kilos of cocaine, number of pills, number of weapons), date and manner by which obtained (e.g., seized pursuant to search warrant issued on particular date and executed on particular date), and current location and custodian (e.g., FBI evidence locker with identification of responsible agent).

2. Draft Transcripts: At the same time as it files its First Status Report, the government shall file an agreement to be executed by defendants and their counsel stipulating that draft transcripts of recorded calls or recorded surveillance may not be used for cross-examination or other purposes and may not be distributed to any

defendant or counsel who have not executed the agreement, unless otherwise ordered by the court. If draft transcripts are prepared, the USAO:

a. will make them available to all counsel and pro se defendants who have executed the agreement, pursuant to all terms of the agreement, including the terms regarding non-distribution; and

b. if a CDA is appointed, will make them available to the CDA, who will distribute them to those counsel appointed to represent a defendant under the Criminal Justice Act ("CJA Defense Counsel"), the Federal Public Defender's Office ("FPDO"), provided that the FPDO has opted to utilize the services of the CDA, and pro se defendants who have executed the agreement, pursuant to all terms of the agreement, including the terms regarding non-distribution.

3. Discovery From Investigating Agencies: The USAO shall provide to a responsible representative of each law enforcement agency -- local, state, or federal, including penal institutions -- in possession of potentially discoverable material, including possible *Brady* and *Henthorn* material, specific instructions regarding the nature of such discoverable material under federal law and the type of search that must be accomplished to locate and identify such discoverable material. As part of its Second Status Report (discussed in Section J below), the USAO shall confirm that such instructions have been given and list the representatives receiving the instructions.

4. Discovery Format: To the extent possible, the USAO will produce discovery in a searchable, reasonably usable, cross platform or open platform format using the following standard format conventions, and, if it is able to do so, shall not be required to produce discovery in any other format, regardless of any requests by individual defense counsel:

a. Written discovery may be produced in that form, made available for inspection, or produced as electronic files that can be viewed and searched, using one of the following methods:

(1) Single-page TIFFs. Production in TIFF and OCR format consists of the following three elements:

(a) Paper documents are scanned to a picture or image that produces one file per page. Documents should be unitized. Each electronic image should be stamped with a unique, sequential Bates number.

(b) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as image file.

(c) Load files that tie together the images and text.

(2) Multi-page TIFFS. Production in TIFF and OCR format consists of the following two elements:

(a) Paper documents are scanned to a picture or image that produces one file per document. Each file may have multiple pages. Each page of the electronic image should be stamped with a unique, sequential Bates number.

(b) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as the image file.

(3) PDF. Production in multi-page, searchable PDF format consists of the following element:

(a) Paper documents scanned to a PDF file with text generated by OCR included in the same file. This produces one file per document. Documents should be

unitized. Each page of the PDF should be stamped with a unique, sequential Bates number.

b. ESI discovery shall be produced using one of the following methods:

(1) Native files as received. Production in a native file format without any processing consists of a copy of ESI files in the same condition as they were received.

(2) ESI converted to electronic image. Production of ESI in a TIFF or PDF and extracted text format consists of the following four elements:

(a) Electronic documents converted from their native format into a picture/image. The electronic image files should be computer generated, as opposed to printed and then imaged. Each electronic image should be stamped with a unique, sequential Bates number.

(b) Text from that original document is extracted or pulled out and stored without formatting in a generic format.

(c) Metadata that has been extracted and stored in an industry standard format. The metadata must include information about structural relationships between documents (e.g., parent-child relationships).

(d) Load files that tie together the images, text, and metadata.

(3) Native files with metadata. Production of ESI in a processed native file format consists of the following four elements:

(a) The native files.

(b) Text from that original document is extracted or pulled out and stored without formatting in a generic format.

(c) Metadata that has been extracted and stored in an industry standard format. The metadata must include information about structural relationships between documents (e.g., parent-child relationships).

(d) Load files that tie together the native file, text, and metadata.

c. ESI discovery from a seized or searched third-party digital device (e.g., computer, cell phone, hard drive, thumb drive, CD, DVD, cloud computing, or file share), shall identify the digital device that held the ESI, indicate the device's probable owner or custodian, and indicate the location where the device was seized or searched. Where the USAO has limited authority to search the digital device (e.g., limits set by a search warrant's terms), the USAO shall confer with defense counsel to discuss the need for a protective order or other mechanism to delineate defense counsel's access to, or inspection of, the device. The USAO will maintain the originals of all electronic files it has authority to retain, whether obtained from acquired digital devices or by other means. If retention has been authorized, the USAO will maintain the originals and/or original forensic images of all acquired digital devices. The USAO will produce a copy of any such forensic image along with instructions that will enable the extraction and reading of files contained on any such forensic image.

d. ESI discovery received from third parties should be produced in the format in which it was received or in a reasonably usable, cross platform or open platform format. The USAO shall retain a copy of the ESI as it was originally produced, in the event that the copy is

subsequently needed to perform quality control or verification of the discovery produced.

e. Photographs and video and audio recordings that either were originally created using digital devices or have previously been digitized should be produced as digital copies of the images or recordings, if they are in the USAO's possession, custody or control. Photographs and video and audio recordings that are not already in a digital format should be digitized into an industry standard format, if and when they are duplicated. The USAO is not required to convert materials obtained in analog format to digital format for discovery.

f. ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production (e.g., a CD, DVD, or thumb drive). If the size of the production warrants a large capacity hard drive, the USAO will, upon request, make discovery available on external, stand alone hard drives, which hard drives must be provided to the USAO by defense counsel and must meet requirements to be specified by the USAO.

g. Discovery shall be clearly labeled with the case name and number, a unique identifier for the electronic media (e.g., a CD, DVD, or thumb drive), and the production date. A cover letter should accompany each transmission of ESI discovery providing basic information including the number of electronic media, the unique identifiers of the media, a brief description of the contents, including a table of contents if created, any applicable Bates ranges, and any necessary passwords to access the content. The USAO shall retain a write-protected copy of all transmitted ESI as a preserved record to resolve any subsequent disputes.

5. Access to Discovery for In-Custody Defendants: Subject to any limitations imposed by any protective or other order, the USAO, CDA (if one is appointed), and counsel for any defendant in custody will attempt to arrive at reasonable procedures that will enable defendants and their counsel to review discovery produced in the electronic formats specified in Section E.4 above. If the USAO, CDA, and counsel are unable to arrive at such procedures, the issue shall promptly be brought to the court's attention. Counsel for defendants housed at San Bernardino Central Detention or West Valley Detention Center or at Santa Ana City Jail shall be authorized by this order to take their personal laptop computers into those facilities in order to assist counsel in reviewing discovery with defendants housed at those facilities. No further order authorizing such a use of personal laptops shall be required.

F. APPOINTMENT OF COORDINATING DISCOVERY ATTORNEY

1. At the initial status conference, the court will consider whether to appoint a CDA from the available national CDA and litigation support group, or, upon a proper showing that the national CDA is unavailable and case efficiency requires appointment of a local CDA, a local CDA. Any CJA Defense Counsel, DFPD, or any indigent pro se defendant may make a request for a CDA, and such request should indicate how the appointment of a CDA will benefit the majority of the defendants who have qualified for appointment of counsel or other ancillary services under the Criminal Justice Act ("CJA defendants"). Where multiple defendants are represented by the FPDO and CJA Defense Counsel, the FPDO may opt to receive discovery directly from the USAO, despite the appointment of a CDA.

2. On the appointment of a CDA, the CDA, FPDO, and/or CJA Defense Counsel will confer regarding general and common discovery issues. The scope of the CDA's duties is defined by this Order, which may be supplemented or revised as necessary.

3. The CDA shall be responsible for accepting discovery from the USAO and duplicating and distributing the discovery to the FPDO, if applicable, the CJA Defense

Counsel, and indigent pro se defendants. The CDA will coordinate with the USAO on behalf of the FPDO, the CJA, and indigent pro se defendants regarding any additional discovery issues and needs, including any need to obtain copies of digital data in original format.

4. The CDA shall assist the FPDO, if applicable, the CJA Defense Counsel, and indigent pro se defendants in making discovery materials accessible to in-custody CJA and indigent pro se defendants. The CDA will coordinate with each institution housing in-custody FPDO, CJA, and indigent pro se defendants to determine what limitations to discovery access exist for defendants housed in the institution, and will attempt to provide access to discovery within those limitations if possible.

5. The CDA shall provide any additional discovery support service as agreed on by the majority of FPDO, CJA Defense Counsel, and indigent pro se defendants. The CDA also shall identify and oversee any discovery issues that are common to a majority of defendants.

6. It is the obligation of each FPDO, CJA Defense Counsel, and indigent pro se defendant to confer with the CDA directly on issues of discovery. It is the responsibility of the CDA to address discovery issues with the objective of avoiding or reducing potential repetitive costs that would be incurred if FPDO, CJA Defense Counsel, and indigent pro se defendants individually employed ancillary services to handle the discovery in the case.

7. The USAO shall provide one complete set of all discovery materials directly to the CDA and shall not thereafter be responsible for providing any of the discovery materials provided to the CDA to any of the FPDO, CJA Defense Counsel, or indigent pro se defendants, except where the FPDO has opted not to utilize the services of the CDA. The USAO shall be responsible for maintaining the originals of all discovery and evidence in the case and shall make originals available for inspection and copying by the defense on reasonable notice.

8. Nothing in this Case Management Order regarding the appointment or duties of a CDA shall be interpreted to be a restriction on or interference with defense counsel's obligations to their individual clients. The CDA shall in no way replace or interfere with defense counsel's efforts on behalf of their clients. The representation of each defendant remains the responsibility of the counsel of record for that defendant or the pro se defendant. Discovery issues specific to any particular defendant, including *Brady*, *Giglio*, and related issues, should be addressed by individual defense counsel or the pro se defendant directly with the USAO and not through the CDA.

9. To the extent that any defendant is represented by the FPDO and the FPDO has opted not to utilize the services of the CDA, the USAO shall produce discovery directly to the FPDO according to the provisions in Section E above. The CDA will coordinate with the FPDO (if assigned to a given case) for the benefit of all CJA Defense Counsel and indigent pro se defendants to provide appropriate services and to employ available support and equipment from the FPDO.

G. FUNDING FOR ADDITIONAL ANCILLARY SERVICES

1. For CJA Defense Counsel and indigent pro se defendants, all requests for funding for ancillary services (duplication, experts, investigators, paralegals) shall be made to the CJA Supervising Attorney's office. All requests for funding for domestic travel shall also be made to the CJA Supervising Attorney's office. All other funding requests shall be made by ex parte application under seal and in camera to the court.

2. If a CDA has been appointed, before requesting funding for additional discovery-related services, any CJA Defense Counsel or indigent pro se defendant shall confer with the CDA to determine whether the scope of the additional discovery-related services has been or could be addressed by the CDA. Any application for additional discovery-related services shall include a description of the efforts to coordinate with the CDA and why such services cannot be provided by the CDA.

H. DEFENDANT-COUNSEL COMMUNICATIONS: Every CJA Defense Counsel must meet with his or her client regularly. Telephone calls and visits with

defendants by a paralegal or investigator are not sufficient compliance with this provision.

I. DEFENSE RESPONSE

1. Defense counsel may respond to this Order or to any response filed by the USAO;

2. Defense counsel may add information on matters not necessarily covered by this Order.

J. SECOND STATUS CONFERENCE: All parties and their counsel shall appear for a second status conference in this matter on [date 35 calendar days after First Status Conference].

K. SECOND STATUS REPORT OF GOVERNMENT

1. By not later than [date 7 calendar days after First Status Conference], the USAO shall provide, in writing, to defense counsel and pro se defendants, a proposed schedule for all of the items set forth in Sections K.1.b through K.1.g below. By no later than [date 14 calendar days after First Status Conference], defense counsel and pro se defendants shall provide, in writing, to the USAO, any objections and/or proposed modifications to the proposed schedule. After considering any objections and/or proposed modifications, by no later than [date 21 calendar days after First Status Conference], the USAO shall file a document entitled "Second Status Report," which shall:

a. Update or correct all information provided in the First Status Report pursuant to Section C.1-8 above.

b. Provide an updated proposed schedule for production of discovery, including production of discovery by the defense. In the event that production of discovery will not be completed within 14 calendar days of the second status conference, provide a proposed schedule for monthly telephonic status conferences between the USAO and counsel for all defendants to resolve ongoing discovery issues. The

USAO shall file a document entitled "[#] Status Report" within 4 business days of each status conference.

c. Propose a trial date. Concurrently with the Second Status Report, the USAO shall file proposed findings and an order regarding excludable time under the Speedy Trial Act with respect to the proposed trial date. At the Second Status Conference, the court shall seek defendants' concurrence to the proposed findings and order with respect to the trial date selected by the court. Such concurrence shall be without prejudice to additional requests by the USAO or any defendant for continuances of the trial date based on a showing of good cause.

d. Propose schedules for at least the following:

(1) Completion of discovery production;

(2) Motions to compel or other discovery motions;[1]

(3) Motions regarding joinder and severance;

(4) Motions challenging Title III intercepts;

(5) Motions to suppress any other evidence;

(6) Other pretrial motions dispositive as to all or any portion of the indictment;

(7) Motions in limine;

(8) Completion of plea negotiations, if appropriate;

(9) Provision by the USAO (if 10 or more defendants remain pending trial) of a proposal for dividing the charges in this case into a series of manageable trials, with the objective (if possible) of having every remaining defendant subjected to

[1] FPDO and CJA Defense Counsel shall meet and confer with the USAO, either in person or telephonically, to attempt informal resolution of discovery disputes prior to the filing of any motions. Discovery motions concerning ESI production shall include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party, the parties have been unable to resolve the dispute without court action.

only one trial, which proposal should contain an explanation of the basis for the proposed division, and should propose the sequence in which the trials should be conducted;

(10) Disclosure by the USAO of Federal Rule of Evidence 404(b) evidence for trial;

(11) Disclosure by the USAO of Federal Rule of Criminal Procedure 12(b)(4)(B) evidence subject to suppression under Rule 12(b)(3)(C), not earlier designated as such pursuant to Rule 16 disclosures;

(12) Disclosure by the USAO and defense of any testifying experts;

(13) Disclosure by the USAO and defense of discoverable witness statements, including grand jury transcripts, not earlier produced;

(14) Disclosure by the USAO of testifying informant information, including *Giglio* material, not earlier produced as part of the discovery;

(15) Provision by the USAO of prospective witness lists for trial;

(16) Provision by the USAO of prospective exhibit lists for trial.

e. Confirm that the instructions required by Section E.3 above have been provided, and list the individuals to whom these instructions have been provided.

f. Confirm that procedures for providing discovery to defendants in custody have been arrived at or identify the issues preventing the implementing of such procedures for consideration by the court.

g. Provide any other information that may assist the court, the USAO, or the defense in handling this matter efficiently and cost-effectively.

L. DEFENSE RESPONSE

1. Defense counsel shall file any response to the Second Status Report not later than [date 28 calendar days after First Status Conference];

2. Defense counsel may add information on matters not necessarily covered by this Order.

M. MANDATORY CHAMBERS COPIES: Paper chambers copies of all documents are mandatory. [Set forth instructions for delivery of chambers copies. For example: The USAO must deliver Chambers copies to the box outside of Chambers by noon on the day after filing. Defense counsel may provide Chambers copies by regular mail. If counsel provide copies by Federal Express, they should not require a signature. The court will not rule on stipulations or ex parte applications until Chambers copies have been received.]

N. E-FILING DOCKETING: The captioned title of every pleading shall contain the name of the first-listed defendant as well as the name(s) and number(s) (in the order listed in the indictment) of the particular defendant(s) to whom the pleading applies, unless the document applies to all defendants. The individual defendant's registration number (if known) should be provided on any document pertaining to defendant's custody status (e.g., requests for transfer, medical requests). All parties shall docket items only as to the particular defendant the item pertains to, not as to all defendants, unless the item pertains to all. With the exception of documents filed under seal or in camera, every pleading shall be electronically filed in such a way that it is clear from the docketing entry to which defendants it applies. The outer envelope containing any pleading filed under seal should identify only the case title with first-listed defendant and case number, and should state that the document is filed under seal.

O. SPECIAL REQUESTS: Requests for any of the following shall comply with the following requirements:

1. Bail Reviews: Any request for a bail review based on changed circumstances or information not previously presented to the magistrate judge shall be

addressed in the first instance to the magistrate judge and shall be served on both opposing counsel and Pretrial Services.

2. Pre-Plea Reports: Any request for a pre-plea report by the Probation Office shall be supported by a showing of good cause, shall propose a schedule for consideration and entry of a guilty plea that comports with any schedule set by the court for completion of plea negotiations and entry of guilty pleas and provides at least six weeks for the Probation Office to prepare the pre-plea report, and shall be served on both opposing counsel and the Probation Office.

3. Custody Transfer Requests: Any request by an in-custody defendant for a transfer to a different custodial location (regardless of where the defendant is housed) shall be made only after consultation with the United States Marshals Service Custody/Transportation Supervisor (who can be reached through the Communications Center at 213-894-2485), shall include a statement of the position of the United States Marshals Service regarding the proposed transfer, and shall be served on both the USAO and the United States Marshals Service.

4. Bail Modification: Any request by a defendant for a modification of release conditions (e.g., to permit travel) shall be supported by a showing of good cause, shall be made only after consultation with both Pretrial Services and the USAO, shall include a statement of the positions of both Pretrial Services and the USAO, shall include the written consent to the modification from each surety, and shall be served on both Pretrial Services and the USAO.

5. Medical Treatment: Any request by an in-custody defendant for an order requiring medical treatment shall be made only after the inmate has made a written request to the custodial facility (inmates needing immediate medical attention should approach any staff member and make an oral request) and after the submission to the custodial facility of a written request from the defendant for his/her medical records relevant to the request for treatment, shall include a statement of position of the

custodial facility, or a statement regarding defense counsel's attempt to obtain the facility's position, and shall be served on both the custodial facility and the USAO.

6. Communications with MDC: Counsel should communicate with MDC, including requests for medical treatment, by emailing LOS/EXECASSISTANT@BOP.GOV or calling Eliezer (Eli) Ben-Shmuel at ext. 5428, Corry Nastro at ext. 5187, Sarah Quist at ext. 5474, or Timothy Rodrigues at ext. 5471.

IT IS SO ORDERED.

DATE:_____ _____
UNITED STATES DISTRICT JUDGE