

FEDERAL DEFENDERS OF SAN DIEGO, INC.

THE COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA

June 22, 2018

VIA E-MAIL

Hon. Barry Ted Moskowitz
Chief Judge
Southern District of California
333 W. Broadway
San Diego, CA 92101

Re: Minimal constitutional requirements for expedited pleas and
sentencings

Dear Chief Judge:

We submit this letter to provide input in considering the Executive Branch's request that the Judiciary create a separate court to adjudicate misdemeanor 1325 immigration prosecutions. While below we describe features necessary to allow defense attorneys in such a court to comply with ethical obligations—and for the court itself to meet basic constitutional guarantees—we wish to make clear that we do not endorse this project. Believing that no “separate” court can possibly be “equal,” we object to its creation and continue to urge this Court to reject the Executive's special pleading. Beyond this, we wish to emphasize that as criminal defense attorneys, our duty of loyalty runs and will continue to run solely to our clients. So though we offer these suggestions, that duty of loyalty will compel us to challenge these and any other set of procedures that impair either our clients' dignity and humanity or the exercise of their constitutional rights.

In considering what steps might be taken to ameliorate the harm that would flow from the Executive's proposal, we consider carefully our ethical obligations. The following sections of the American Bar Association's CRIMINAL JUSTICE STANDARDS (Am. Bar Ass'n 2015) are highly relevant:

- **Defense Function, Standard 4-1.8 Appropriate Workload**
 - (a) Defense counsel should not carry a workload that, by reason of its excessive size . . . , interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of

professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters.

- **Defense Function, Standard 4-2.2 Confidential Defense Communication with Detained Persons**

- (a) Every jurisdiction should guarantee by statute or rule the right of a criminally-detained or confined person to prompt, confidential, affordable and effective communication with a defense lawyer throughout a criminal investigation, prosecution, appeal, or other quasi-criminal proceedings such as habeas corpus.

- **Defense Function, Standard 4-3.1 Establishing and Maintaining an Effective Client Relationship**

- (a) Immediately upon appointment . . . defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense.
- (c) Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. Even if a client appears to have such a condition, this does not diminish defense counsel's obligations to the client, including maintaining a normal attorney-client relationship in so far as possible.
- (e) Defense counsel should ensure that space is available and adequate for confidential client consultations.
- (f) Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.

- **Defense Function, Standard 4-3.7 Prompt and Thorough Actions to Protect the Client**

- (b) Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution
- (c) Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.
- (f) For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters. Defense counsel should not be deterred from sensible action merely because counsel has not previously seen a tactic used, or because such action might incur criticism or disfavor. Before acting, defense counsel should discuss novel or unfamiliar matters or issues with colleagues or other experienced counsel.
- (g) Whenever defense counsel is confronted with specialized factual or legal issues with which counsel is unfamiliar, counsel should, in addition to researching and learning about the issue personally, consider engaging or consulting with an expert in the specialized area.

- **Defense Function, Standard 4-4.1 Duty to Investigate and Engage Investigators**

- (a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.
- (b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

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The separate, unequal court system envisioned by the Executive (the USAO and Marshals) all but ensures that any defense counsel accepting appointments will violate these standards. As described in the ABA standards set out above, in any constitutional system, we must meet new clients, establish a relationship of sufficient trust to allow confidential communication, review charges and discovery with our new clients, consider appropriate investigation, explore bail, possible defenses, the consequences of a criminal conviction, and where desired, prepare people unfamiliar with our legal system to enter a knowing, intelligent, and voluntary guilty plea. These ethical commands require both time and space to realize, and these are the very things the Executive's proposal would deny defendants and their counsel in the name of "efficiency."

In our view, the following steps providing for that space and time are the minimum necessary to allow us to comply with our ethical obligations and for the Court to provide Due Process. We propose that this new court system aim to resolve cases in five business days—we do not believe a one-day plea and sentencing system is feasible or constitutional. The proposed same-day resolution is not a required feature of "Operation Streamline." There are districts that have longer Streamline type programs. For example, in Las Cruces, New Mexico, a three-day program is in effect, and in Del Rio, Texas, a two-day program is in effect¹. In El Paso, Texas, not all section 1325 cases go through a Streamline Court; some do, but others are assigned in the normal course.

A timeframe of anything less than five business days will not allow these minimal standards of competent, constitutional representation to be satisfied.

¹ It is our understanding that these are effectively four and three-day programs. For example, a client who had an initial appearance on Monday would enter a plea on Thursday of that same week.

I. Summary of Proposed Streamline System.

- 8 a.m. USAO provides to the Clerk the list of all 1325s who will be appearing in court that day.
- 9 a.m. FDSDI and CJA duty attorneys receive notice of appointments from the Clerk's office.
- 9:30 a.m. USAO provides copy of complaint and discovery to assigned FDSDI and CJA duty attorneys.
- 9:30 a.m. - 1:30 p.m. FDSDI and CJA duty attorneys meet with clients in the designated courthouse meeting spot to prepare for initial appearances.
- Clients who are juveniles, with competency issues, or who speak other-than-Spanish languages are brought to the USAO's attention.
- 2 p.m. Criminal duty court for 1325 calendar begins: initial appearances, confirmation of appointment of counsel, advisement of charges, advisement of rights, and bail determinations. *See* Fed. R. Crim. P. 5 (a)(1)(A); 58(b)(2) and 18 U.S.C. § 3142(a).
- 1 week later Appear in court for plea and sentencing or to set motions date one week out and trial date two weeks out.

II. This Proposal Balances Sixth Amendment Concerns & ABA Minimum Standards for Representation With the Need to Handle Larger Volumes of a Certain Category of Cases.

We envision having the Clerk's Office prepare a fixed CJA appointment schedule where four CJA attorneys will be on duty for a fixed number of days per month—on their duty day, attorneys will meet their new clients, conduct interviews, and arraign them, which includes making a bail presentation. The CJA attorneys will be responsible for handling all future court dates of these assigned clients. Similarly, Federal Defenders plans to dedicate four attorneys per day to handle these cases. Below, we set forth minimum requirements necessary to ensure compliance with our constitutional obligations as the ABA delineates them.

A. Appointments per attorney cannot exceed four clients.

Because of the additional strains this new system will place on FDSDI and CJA attorneys who represent other clients as well, no attorney (FDSDI staff attorney or CJA panel attorney) should be assigned more than four clients per day.² There are only so many hours in a day. Reducing the time between the appointment of counsel and the entry of a guilty plea also reduces the number of clients an attorney can adequately represent.³

B. Private, in-depth consultation with clients housed locally.

In order for this expedited system to work, defense counsel need the opportunity for private, timely, in-depth consultation with our clients⁴. We must develop a “relationship of trust and confidence with each client.” It is only through such a relationship that we can ascertain whether our client is truly fluent in Spanish or whether he/she in fact speaks an indigenous language necessitating the services of a qualified other-than-Spanish interpreter, whether the client understands that he/she is in criminal court and not immigration court, whether the client has any defenses to the charged offense, whether the client is a juvenile, and also whether the client has any “mental impairment or other disability that could adversely affect the representation.”⁵

² See CRIMINAL JUSTICE STANDARDS: PROSECUTION AND DEFENSE FUNCTION 1.8(a) Appropriate Workload (Am. Bar Ass’n 2015)

³ The USAO’s desire for expedited processing must be tempered by their own ethical duties. See CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION 3-5.6(d) CONDUCT OF NEGOTIATED DISPOSITION DISCUSSIONS (Am. Bar Ass’n 2015) (“The prosecutor should not set unreasonably short deadlines, or demand conditions for a disposition, that are so coercive that the voluntariness of a plea or the effectiveness of defense counsel is put into question.”).

⁴ See CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION 4-3.1(e) ESTABLISHING AND MAINTAINING AN EFFECTIVE CLIENT RELATIONSHIP (Am. Bar Ass’n 2015) (“Defense counsel should ensure that space is available and adequate for confidential client consultations.”).

⁵ See CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION 4-3.1(c) ESTABLISHING AND MAINTAINING AN EFFECTIVE CLIENT RELATIONSHIP (Am. Bar Ass’n 2015) (“Counsel should consider whether the client appears to have a mental impairment or other disability that could adversely affect the representation. . .”).

This client contact will first happen in the provided space before the initial appearance,⁶ but in order to ensure continued access to counsel, all pretrial 1325 detainees need to also be housed at one of the local facilities (MCC or GEO).

C. Concerns with clients speaking languages other than Spanish, who present competency issues or who are juveniles must be addressed more effectively.

Over the past two weeks, we have seen a tremendous increase in misdemeanor prosecutions of individuals who speak indigenous languages. We have also seen several juveniles (at least three to date) who were also caught up and prosecuted as adults. One boy was incarcerated with adults all weekend because he was arrested on a Friday. The government's screening process is not functioning—our attorneys identified these individuals merely by looking at them, and it was that obvious that they were juveniles. The government needs to put greater protections in place to identify juveniles.

In cases of non-English/non-Spanish-speaking clients or clients where competency is questionable, the Arizona Streamline attorneys have advised us that their prosecutors immediately dismiss such cases. Here, we are scrambling trying to find other-than-Spanish interpreters or just to communicate with a client who is unstable – the current press of these cases cannot be sustained. The Court will need to make the interpreters it uses for these proceedings available to defense counsel or we will never be able to represent this increasing number of individuals. We were also advised during the Border Courts Conference that the AO expects that the court interpreters could be made available for defense counsel to use during that initial appearance court date because such consultation is “incidental” to the hearing happening that same day. To date, our in-court interpreters have not been available to any defense counsel.

D. An appeal or hearing process for writs, bail appeals, discovery disputes, other pressing issues, medical or family emergencies, must exist.

As contemplated by the Bail Reform Act, a procedure for review of adverse bail determinations must exist. Similarly, counsel must have an expedited hearing process in place to ensure that discovery, Rule 5, or Rule 58 violations can be

⁶ The USMS does need to provide for telephone access for counsel to contact family members for bail or investigative purposes.

addressed. The Court can either randomly assign any matters or assign a duty judge to handle these issues as they come up.

III. Discovery

In order to expedite these cases, intervention and guidance from the Court on what discovery must be provided to the defense is necessary. The Court envisioned a two-track General Order requiring the USAO to produce the following the day of the defendants' initial appearance:

- (1) Initial Discovery Packet for 1325/1326 prosecutions:
 - a. I-213,
 - b. any deportation document (including Notices and Orders),
 - c. records of sworn statements from immigration proceedings,
 - d. a full rap sheet for the client,
 - e. any arrest reports,
 - f. interrogation, port of entry or any other videos, and
 - g. FINS/USVISITS records.

These materials are necessary to the competent advisal of the risks or benefits of any offer from the USAO.

- (2) Subsequent Discovery For Trials Proceedings After Initial Week
 - a. Dispatch Tapes
 - b. Copy of entire A-file
 - c. Arrest reports of other individuals arrested in same group as defendant (where applicable)
 - d. Henthorn material
 - e. All other Rule 16 information including *Brady* material which relevant to guilt/innocence or sentencing.

IV. Family Separation Issues

In light of recent developments, we are hopeful that this issue will not recur going forward. But there are still Defender parent-clients who have been separated from children because of the administration's Zero-Tolerance policy. For the sake of those clients -- and if there are any future instances of family separations -- the Court should issue a General Order directing the USAO to inquire of arresting agents of every instance where an arrest results in separating a parent from his or her children. We have been told that the administration's family separation policy was deliberately devised to prevent the line prosecutors from learning of this information

so that they could not communicate it to the Court or to the distressed parents. The Court should not tolerate this intentional cruelty to our parent-clients or their children. Regardless of the motivation and its continued practice, the Court should issue a General Order to deal with cases where children are separated from an arrested parent requiring:

- the government to provide defense counsel with the location of the children,
- a contact phone number and name for the facility where they are being held, and
- each child's A-file number at the initial appearance, or immediately upon being notified of a parent-child separation.

If necessary going forward, we strongly suggest that the Court's General Order include a presumption that in the mine-run 1325 misdemeanor/time-served offer case, the parent pretrial detainees should be given Notices to Appear by the government. That would prevent the child from becoming "unaccompanied" as immigration law defines this term.⁷ Then parents and children would go into ICE custody together. The parent-clients who have been "released" on bail have been brought to court by ICE officials so this would allow for families to remain together and would also solve the USMS bed space problems.⁸

V. The USAO must ensure that clients are released with their property – at minimum, identification & money.

In other Streamline districts, processes are in place where clients' property is returned to them and their identification documents are provided to the country of origin's consulate. No such system is in place here and the lack of identification documents is especially problematic for our parent-clients who are removed without any means of demonstrating who they are in an effort to reclaim their children still held in the United States. Nor should our government be keeping people's

⁷ Under immigration law, as soon as ICE officials separate a child from their parents, the child is deemed "unaccompanied."

⁸ Prior to the recent policy mandating separation of parents and children if a parent is apprehended attempting to enter unlawfully, parents and children were housed together at ICE family facilities.

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identification documents or their money. These people are charged with misdemeanors and given time-served offers—absent some forfeiture proceedings, our government has no authority to retain these items which have paramount importance to our clients. The client’s property should be returned to them at the conclusion of the criminal case and their identification documents should be given to the consulate of the client’s country of origin.

VI. Mass, indiscriminate shackling of misdemeanor defendants is unnecessary.

We expect that in these cases where clients largely have no criminal history, are charged with misdemeanors and given a time-served plea offer, that there is no need—and will not be any need—for shackling of any sort. At the recent Border Courts Conference in El Paso, the Arizona bench reported that Streamline clients appearing without shackles were calmer, more at ease during their colloquies, and that the clients appeared “more engaged.” This Court’s own lengthy experience with clients free from shackles, these anecdotes from our Arizona colleagues, and the potential that presenting indigent misdemeanants in court solely in chains may infect the voluntariness of their proceedings all militate in favor of shackle-free proceedings.

Thank you for the opportunity to have input on the proposed change. We greatly appreciate that our Court values our perspective and invited us to provide it.

Sincerely,

/s Reuben Camper Cahn

/s Jami L. Ferrara

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Executive Director

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RCC/ma

cc: District Court Judges
Magistrate Judges