BRUCE D. EDDY
FEDERAL DEFENDER
WESTERN DISTRICT OF ARKANSAS

February 8, 2016

Honorable Kathleen Cardone
Chair, Ad Hoc Committee to Review
The Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Re: Testimony of Bruce D. Eddy, Federal Public Defender,
Western District of Arkansas

Dear Judge Cardone,

My name is Bruce Eddy, and thank you for the opportunity to submit these comments and to testify before the Ad Hoc Committee to Review the Criminal Justice Act Program. I have been the Federal Defender for the last three years and worked in the Arkansas Federal Public Defender Office for fourteen years prior to becoming the Defender.

History of the Western District of Arkansas

There was one federal public defender office in Arkansas from its opening for business in 1995 until October 1, 2012 when the office was split into the Eastern and Western District of Arkansas Federal Public Defender Offices. I became the first Federal Defender for the Western District of Arkansas on February 1, 2013.

The Western District of Arkansas covers approximately the western half of Arkansas from the Missouri border in the north to the Louisiana border in the south. The Western District has five[1] judicial divisions: Fayetteville, Fort Smith, Hot Springs, Texarkana and El Dorado. The headquarters office for the Western District Federal

[1]There were six judicial divisions until the Harrison Division courtroom was closed November 30, 2015.

FORT SMITH
(479) 782-1097 • FAX (479) 782-0525
30 S. 6TH STREET, ROOM 205
FORT SMITH, AR 72901

FAYETTEVILLE
MAIN OFFICE
(479) 442-2306 • FAX (479) 443-1904
3739 N. STEELE BLVD., SUITE 280
FAYETTEVILLE, AR 72703

EL DORADO
(479) 782-1097 • FAX (479) 782-0525
P.O. BOX 11780
EL DORADO, AR 71730

Public Defender Office is in Fayetteville with a branch office located in Fort Smith, 65 miles away. The United States Attorney Office has its headquarters office in Fort Smith with a branch office in both Fayetteville and Texarkana.

The office used to have a significant number of immigration cases which have now been replaced with an ever increasing number of sex offenses (including child pornography and pimping) and drug offenses. The remainder of the office's caseload consists of wire & mail fraud, firearm offenses, income tax cases, supervised release revocations and appeals.

The rate of pretrial detention continues to remain very high, 68.1% for the 12 months ending June 30, 2015, with our clients being detained in various county jails scattered across the Western District of Arkansas. Significant resources, both in time and money, are spent on attorney, investigator and interpreter travel to meet with our clients in preparation for trial, change of plea and sentencing. Some clients are detained up to 300 miles from the headquarters office in Fayetteville.

Independence of the CJA Program

1. CJA Panel Independence Is Needed

The Western District has a CJA Panel for each division with 20 attorneys in the Fayetteville Division, 13 attorneys in the Fort Smith division, 10 attorneys in the Hot Springs division, 7 attorneys in the Texarkana division and 12 attorneys in the El Dorado division for a total of 62 CJA Attorneys. CJA Attorneys are assigned to both felony and misdemeanor cases.

The federal defender office does not manage the CJA Panel even though that offer was made to the judiciary and soundly rejected. Appointments are made by the magistrate judges who do not keep a list of appointments which may help explain why some CJA Attorneys do not receive any appointments and others receive 25% or more of the appointments for a particular division. The defender office is not involved with voucher review either. The district court judge, before whom the CJA Attorney appeared, reviews the voucher. A number of CJA Attorneys have voiced their concern to me that some district court judges are arbitrarily cutting vouchers. The hourly rate for the work performed by the CJA Panel is set by the judiciary as well.

There is a CJA Panel Selection Committee composed of the magistrate judges, the chief judge, the CJA Panel representative, the clerk of court and the Federal Public Defender. Applications for CJA Panel admission are given to the committee for its review and are then voted on. If the vote is not unanimous the judges make the final decision. There is also a mentor program where applicants with little or no federal criminal defense experience, if otherwise a good candidate, are offered the opportunity to be mentored by an experienced attorney until the individual has gained enough experience to be added to the CJA Panel. The majority of such mentoring is provided by the defenders office.

CJA Attorneys remain on the panel until they ask to be removed, or a district court judge decides a panel attorney should be removed, which has happened several times in the recent past due to their deficient performance. There is no review of a district court judge's decision to remove an attorney by the Panel Selection Committee, nor is there an appeal process for the removed attorney.

The prior CJA Panel representative recommended to the chief magistrate judge that each Panel member should receive 6 to 8 appointments a year. However, there were only 396 CJA appointments in FY 2015, so even if all appointments went to the CJA Panel that would only average 6.39 appointments per Panel attorney. In an effort to match the number of CJA Attorneys to the number of available appointments, I recommended limiting the size of the Panel, reducing the current Panel as needed, requiring yearly CLE in federal criminal defense (which the defender office would sponsor) and establishing minimum experience requirements before being eligible for Panel admission. All of those suggestions were rejected.

The judiciary controls all aspects of the Panel. The judges on the selection committee determine who will be placed on the panel, the magistrate judges then decide both the type and number of CJA appointments each CJA Panel Attorney will receive and the district court judges review and approve the vouchers submitted by the CJA Panel. The CJA Panel Attorneys selection, appointment, hourly compensation and voucher review and payment should all be independent of the judiciary.

2. Federal Defender Program Independence Is Needed

The Federal Defender Program is at a crossroads, and the time has come for the Federal Defender Program to have its independence from the judiciary. Our criminal

justice system is based on an adversarial process where the United States Attorney files criminal charges, the Defender Program provides Sixth Amendment representation to indigent individuals charged with federal crimes and the judiciary serves as legal referees and interprets and applies the law. Three separate but equal functions, each of which must operate independently for the criminal justice system to work as designed. The adversarial system breaks down when the judiciary controls the Federal Defender Program's budget, caseload, number of attorneys per office and the hiring of each individual defender. The judiciary is now exerting undue influence over the Sixth Amendment defense of indigent defendants.

Beginning in 2013, the Administrative Office ("AO") has taken several significant steps to control the Defender Program. The AO demoted Defender Services and made it a program on the same footing as probation and pre-trial services, which exist to serve the courts. The Defender Program exists to serve indigent individuals charged with federal crimes in accordance with the Sixth Amendment, not the courts. The Executive Committee of the Judicial Conference ("Executive Committee") stripped the Defender Services Committee of its budgetary authority over the Defender Program and gave that authority to the Judicial Resources Committee. I became the Federal Defender for the Western District during the time of sequestration in 2013 and watched as the budget for the Defender Program shrank and many Defender offices had to terminate and/or place their employees on furlough. The AO could have lessened the financial hardship to the Defender program, but instead, steps were taken which placed the heaviest burden on the Federal Defender Program. That was not a Congressional mandate but rather a decision of the AO. A decision that interfered with the Federal Defender Program providing Sixth Amendment representation to indigent individuals.

On the heels of sequestration came the mandate from the Judicial Resources Committee to accelerate a work measurement study of the Federal Defender Program. All defender offices participated in the work measurement study and provided a significant amount of data to be analyzed. There was even a steering group formed from various federal defender offices to provide input and help with the data analysis. The work measurement study showed that the Federal Defender Program as a whole is understaffed. (Nevertheless, there are defender offices which are overstaffed and will lose employees.) Fortunately the staffing for my office did not change. Now I hear that a new work measurement study will begin in the near future. It makes we question why another study so soon. There is, at a bare minimum, the appearance of impropriety when the AO mandates a work measurement study, the results of which now control the budget

of every defender office.

In addition, the judiciary controls the caseload for my office. The United States District Court for the Western District of Arkansas amended its CJA Plan on March 4, 2011. The amended CJA plan was approved by the Eighth Circuit Judicial Council. The amended CJA Plan for the Western District of Arkansas includes that "the Federal Public Defender Organization should be appointed to approximately 75% of the [CJA] cases. . . ." Amended CJA Plan (March 2011), section IV, subsection B. The remaining 25% of CJA appointments should go to the CJA Panel.

An analysis of the CJA appointments for the Western District from May 1, 2014 to May 1, 2015 was done at my request, which revealed that the defender office received 59% of the appointments, and the CJA Panel received 41%. This information was provided to the court which then conducted its own analysis for FY2015. The percentage of total appointments remained the same, 59% federal defender and 41% CJA Panel.

Receiving less than 75% of the CJA appointments was discussed with the court. The court advised it was pleased with the work that the office does, but that receiving 75% of the CJA appointments was merely an arbitrary number that can be disregarded. The court did not, and has not, suggested a percentage of cases the defender office should receive. Rather, the court advised that the CJA Panel should receive additional appointments to ensure there is a highly trained panel. However, from May 1, 2014 to May 1, 2015, in at least half of the judicial divisions, more than 50% of the CJA Panel appointments, for that division, were given to only 2 CJA Panel attorneys. "Appointments from the list should be made on a rotational basis, ..." Amended CJA Plan (March 2011), section VI, subsection E. "Appointing officers are to avoid favoritism and monopoly, or the appearance thereof, in making appointments. *Id.* at subsection F.

Each defender office is mandated to meet a weighted case opened number as determined by the work measurement study which was mandated by the judiciary. If that weighted case opened number is not met for two consecutive fiscal years, then the office's funding and staff are reduced. My office's weighted case openings are controlled by the number of appointments received, which is controlled by the number of appointments given by the magistrate judges. My fear is that the magistrate judges appointing the office to less than 75% of the CJA appointments will result in the office not being able to sustain the weighted case opened number assigned by the work

measurement study.

It is, at a minimum, the appearance of impropriety for the judiciary to dictate a work measurement study which set a weighted case opened number for each defender office and then be able to control whether an office achieves that number by arbitrarily manipulating the number of appointments an office receives. The judiciary can now decide whether my office grows, remains at its current level, or goes out of existence simply by manipulating the number of appointments. There is no oversight of the court's appointment of cases.

Not only can, and does, the judiciary control the number of cases an office receives, it also sets the number of attorneys an office is allowed to have. The circuits approve the number of attorneys each defender office is allowed to have. The philosophy of each circuit as to the number of attorneys an office should have varies greatly. Finally, the judiciary appoints the defender for each office. The Federal Defender Program has lost its independence to the judiciary both in fact, and in appearance.

Request For Independence

I respectfully request that the Committee recommend independence for the Federal Defender and CJA Panel programs. There must be oversight and accountability of the collective Defender and CJA Program to ensure its quality, adequacy of representation, and its expenditure of taxpayer funds. However, that oversight and accountability should not be administered by the judiciary.

The necessary oversight and accountability could, and should, be performed by a system of local and national boards or committees composed of individuals such as federal criminal defense attorneys, past and present federal defenders, CJA Attorneys and law professors. There should not be any prosecutors or law enforcement on any of the boards or committees.

Judges should not be members of any of the committees or boards and should not have the authority to elect any members of the committees and/or boards. Judicial recommendations for the committee/board members should be requested and carefully considered, but there should not be any requirement that their recommendations be followed. These same local boards and/or committees should be responsible for the recommendation and selection of the local federal defender and the CJA Panel

representative.

There are various models that should be studied and considered, such as the United States Sentencing Commission, Federal Judicial Center, or a 501(c)(3) non-profit corporation as used by some state defender programs. It may be that a completely different model or a hybrid of the above would work best. Once there is a decision to have independence from the judiciary, a study of the best structure for that independence would be needed.

In the interim, Defender Services should be immediately given considerable independence within the AO. Restoring Defender Services to its previous high-level position is not enough. Rather, Defender Services should be given the authority to develop and present its budget to the AO, determine the necessary staffing for each office and otherwise run and administer the Defender Program.

The structure of Defender Services should be immediately changed to require both input and control by advisory groups composed of federal defenders and CJA Panel representatives. Those advisory groups should have the authority to hire and fire the head of Defender Services, evaluate all Defender Services employees, set compensation for all Defender Services employees and manage and run Defender Services in all respects. If Defender Services is to represent and support the Defender Program, then Defender Services must answer directly to the federal defenders and CJA representatives. Defender Services cannot be subordinate to the AO if it is to support and run the Defender Program. The requested structural changes to Defender Services should be implemented immediately while working on the best method and/or structure for the Defender Program to achieve complete independence from the judiciary.

Focus Areas

1. Death Penalty Cases and use of resource counsel

My office recently completed its representation of its first and only death penalty trial case when the defendant was sentenced to life in prison on December 3, 2015. The case took a significant amount of the office's financial resources and investigator time to develop the compelling mitigation. I have previous state capital trial experience and was able to assume responsibility for the case within the office.

State capital representation and federal capital representation are significantly different and the assistance of resource counsel proved to be invaluable. Resource counsel worked tirelessly with the office and the local CJA Attorney appointed to the case. Resource counsel provided help to the team in understanding the federal death penalty process, how to focus our mitigation investigation and how to make our presentation to the local United States Attorney. Through the efforts of our team and the timely and insightful directions and suggestions of resource counsel, the compelling mitigation which was discovered was used to settle the case with a life sentence.

Resource counsel played a critical role in obtaining the favorable outcome through the use of their expertise in the case development stage and also helped identify, find, and use, a variety of experts. Death penalty litigation has become an extremely complex area of the law where expertise is required, as it should be when the government is seeking to take the life of another human being. Resource counsel's expertise is essential to a small office that infrequently is appointed to a capital trial case. Resource counsel helps level the playing field with the United States Attorney Office and its seemingly endless and unlimited resources including its "death squad" that often swoops into town and takes charge of the local capital prosecution. (Fortunately that did not happen in our case.)

2. Capital Habeas Unit and use of resource counsel

For several years I worked in the capital habeas unit in the Arkansas Federal Defender Office before the split. During my time there, I worked on state habeas capital cases where it quickly became apparent that the state appointed attorneys' (both trial and post-conviction) performance was woefully inadequate. The capital habeas unit was able to set a new standard of care for capital habeas representation and while doing so helped educate the state trial and post-conviction attorneys on the work required for a capital case. Without the capital habeas unit, it would have been business as usual with the State placing individuals on death row at an alarming rate with no meaningful federal habeas review. With the creation of the capital habeas unit, there has been a reduction in the number of executions. The last execution was in late 2005.

Habeas resource counsel was extremely helpful to the capital habeas unit when I was there. Numerous times I reached out to resource counsel for help developing legal issues and understanding the standard of care that is required in capital cases at the trial, post-conviction and habeas stages. Resource counsel also provided top-notch training programs which I attended and which provided much needed insight into the complex and

ever changing world of capital habeas litigation.

Conclusion

Thank you again for the invitation to participate and allowing me to contribute to the discussion of this important project. Also, thank you for your hard work on these important matters.

Highest regards,

Bruce D. Eddy
Federal Public Defender