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

RE: Testimony of Marjorie Meyers, Federal Public Defender, Southern District of Texas

Dear Judge Cardone:

Thank you for the invitation to address the Committee. I joined the Federal Public Defender's Office for the Southern District of Texas as an Assistant Federal Public Defender in 1983. In 1992, I went into private practice as a criminal defense lawyer, taking appointed cases in both federal and state court as well as representing retained clients. In1997, I returned to the public defender's office, and, in 2004 I became the Federal Public Defender. I have also served on a number of committees, which gives me some additional insight into the workings of the CJA and judicial systems. I am currently the Chair of the Federal Defender Sentencing Guidelines Committee and the representative for the Fifth and Tenth Circuits on the Defender Services Advisory Committee ("DSAG"). I welcome the opportunity to share my experiences and concerns with the committee.

A. History and Description of the Federal Public Defender's Office for the Southern District of Texas

The Southern District of Texas encompasses 46,610 square miles stretching from the border with Mexico to the Gulf Coast and north of Houston, the largest city in the state. The district court sits in seven divisions: Brownsville, Corpus Christi, Galveston, Houston, Laredo, McAllen and Victoria. The district consistently has the highest criminal caseload in the country.

When the office was established in 1974, the Houston headquarters had three attorneys, including the Federal Public Defender, and there was a single attorney in the two branch offices, in Brownsville and Laredo. When I joined the office in 1983, I was one of two Assistant Federal

Public Defenders in Houston. The Houston caseload was representative of the caseload for a major metropolitan area with a mix of cases including drugs, firearms, federal thefts and frauds, and the occasional bank robbery and kidnapping. Needless to say, this was before the implementation of the federal sentencing guidelines and the explosion of immigration prosecutions. At that time, the two of us handled both trials and appeals. Over the years, we have opened branch offices in McAllen and Corpus Christi, in addition to our original two branches, and we established a separate appellate division.

We currently have 124 employees (140 authorized), with 58 authorized attorney positions, not including the Federal Public Defender. Because of the nature of our practice, virtually all employees, including attorneys, are bilingual except in Houston.

The growth in our caseload has largely been driven by immigration, the war on drugs, and litigation under the sentencing guidelines, and that growth has been exponential. In FY 2001, we had 41 attorneys and opened 7020 cases, almost all of which were felonies. In 2002, as a result of recognition by the magistrate judges and the Supreme Court in Alabama v. Shelton, 553 U.S. 654 (2002), of the need for counsel in misdemeanor cases, the court began to appoint us in virtually all of the misdemeanor immigration cases. As a result, by FY 2004, we had opened 22,882 cases, including 7581 felonies. In FY 13, with 56 assistants, we opened 37,468 cases, of which 7557 were felonies, including 542 appeals. Most recently the misdemeanor representations have been hovering around 30,000 and the felony representations around 7000. Seven appellate attorneys were responsible for 595 appeals last year.

Virtually all of our misdemeanor docket and more than half of our felony docket is based on illegal entry or reentry prosecutions. The felony immigration cases often require litigation over the nature of predicate offenses and efforts to develop mitigation in foreign countries. In addition to drugs, alien smuggling and firearms cases, we have had numerous complex fraud cases, child pornography and sex-related cases, as well has gang related capital murder cases.

The history and nature of practice within the Southern District of Texas offers some context for my views on the impact of the current structure on representation of individuals under the CJA. First of all, in spite of our high caseload, we continue to provide high quality representation to our clients. Every year, we obtain a fair number of dismissals of charges against our clients, often because we announced ready for trial. We have been at the forefront of litigation concerning the sentencing guidelines and the development of the categorical approach to predicate offenses, and we are often successful in obtaining sentences below the guidelines. Our appellate lawyers are nationally recognized as consummate advocates and we have presented five arguments in the Supreme Court.

B. The Relationship of the Judiciary and the AO with the FPD

The story in the Southern District of Texas is one of dedicated advocates doing their best with extremely high caseloads. We have done so with the appreciation of and without interference from the judiciary. But, the quality of our practice and the morale in our office has been negatively impacted by misunderstandings on the part of the Administrative Office and our Circuit's view and desire to limit attorney positions.

We have been fortunate in that the Fifth Circuit has not interfered with the FPD's advocacy. In contrast to some circuits, the court has not sought replacements for an incumbent FPD who expressed a desire to remain in her position. The court's appreciation of the importance of administrative stability has benefited our office and our representation of our clients. The Circuit's view over the years of what is a sufficient number of AFPD's, however, has had an impact on our effectiveness and on our morale.

Throughout recent decades, we have had to make strenuous arguments to justify an increase in the number of AFPD's positions, and our arguments have at times been at least partially unsuccessful. For example, when our caseload exploded in 2003, we requested 12 additional AFPD positions. The Circuit approved only nine and required that they be filled over a two-year period. The Circuit has been reluctant to approve additional positions and appears to disapprove of the use of Research and Writing Specialists to fill in the gaps. While the district court generally prefers to appoint us to the maximum number of cases, at least some members of the Circuit do not adhere to that view. Unable to control the number of prosecutions or, in many instances, the number of appointments by the district court, we have at times been caught between a rock and hard place.

Until the 2014 work measurement study, the Defender Services Office (DSO) determined budgets on the basis of historical caseloads. We have, at best, always been playing catch-up with the caseload. But every time we received approval for new attorneys, the caseload soared. In FY 2004, we tripled our total caseload but had added only 10 attorneys over the years. The total number of cases fell in FY 2005 but the caseload per attorney skyrocketed from 263.52 in FY 2004 to 434.31 in FY 2005. We consistently exceeded our budgeted caseloads over the years. In 2012, DSO began to determine budgets on the basis of weighted cases opened ("WCO") instead of total cases opened. Our budgeted WCO per attorney was 268.46, a number that dwarfed all other offices. The DSO did not respond to our request to reduce the budgeted WCO, although we were provided adequate funding to meet our budgetary needs. For FY 2013, we were advised that we would be budgeted for a WCO per attorney of 280.98, and because our caseload was below this, we were informed that we would need to cut attorney positions. Only after submitting an appeal, were we permitted to reduce the WCO per attorney to 229 and to retain the attorneys we had been authorized. Over the years, it was assumed that we could continue to do more with less because we had done so in the past.

The Work Measurement Study at least demonstrated the need for additional resources and staff in the Southern and Western Districts of Texas and DSO has been supportive of the need for these resources and staff. It remains to be seen, however, whether this data driven analysis will help us succeed in convincing the Fifth Circuit to authorize the necessary additional attorney positions.

While the district court does not control our budget or staffing, its policies and practices also impact our work. We have generally maintained an excellent relationship with the district court. The court has consistently expressed appreciation for our advocacy and it has not interfered in the representation of our clients. The court has worked with us in developing panel training and encouraged dialogue with other parties including the United States Attorney and the United States Probation Office to address matters of concern to all of us. The district court has also been supportive of our efforts to obtain additional staff and resources.

That being said, the court has not been willing to support our representation of defendants beyond the traditional trial, appellate and occasional habeas advocacy. While many courts in the country developed a cooperative model with the Federal Public Defender, the United States Attorney and the United States Probation Office to address retroactive application of Guideline amendments with respect to crack and ultimately most drug offenses, the Southern District of Texas declined to give us access to the Sentencing Commission list of potentially eligible defendants. The district court has expressed the view that even individuals previously represented by the Federal Public Defender are no longer our clients and therefore no longer entitled to our representation in the post-conviction context. The decision whether to appoint us was left to the individual judges, most of whom chose not to do so. As a result, the courts have reviewed the cases of thousands of defendants, including addendums prepared by the probation office and reports from the Bureau of Prisons, without benefit of counsel or even, in many cases, input from the defendant. Likewise, the court has declined to provide a list or appoint us to represent defendants who may be eligible for habeas relief on the basis of the Supreme Court's recent decision in Johnson v. United States, 135 S. Ct. 2551 (2015). And, this Committee is well aware of the impact of the AO's refusal to authorize federal defender participation in the clemency project. These limitations on our representation deprive defendants of much needed assistance in trying to obtain post-conviction relief.

The district court has always been supportive of our efforts to obtain more resources, but it has not been consistently willing to accommodate our shortages in staffing and resources. The court relies on us to represent the overwhelming majority of defendants in CJA cases. While we generally handle approximately 70% of the felonies in district court, when the misdemeanors are included, we are responsible for approximately 90% of all CJA representations at the district court level. This is in part a testament to our effectiveness. The court has repeatedly expressed its appreciation of our advocacy and its satisfaction that a defendant represented by the FPD will be ably represented. At times, however, our overwhelming caseload has had a negative impact on

both representation and morale. Some years ago, the attorneys were carrying 90 to 100 felony cases, in addition to handling a significant misdemeanor docket. The attorneys simply did not have enough time in the day to maintain adequate contact with the clients or to research important legal issues. My attempt to reduce the percentage of our cases was unsuccessful because, in the district court's view, even when we were overworked, we provided the best representation.

Again, I want to emphasize that our courts have generally let us do our job and have been supportive of the job that we do. The struggle has been to convince the Circuit to increase the number of authorized attorney positions so that we can alleviate the lack of staff and resources needed to represent the thousands of human beings we represent every day.

C. CJA Panel Representation

When I became the Federal Public Defender in 2004, there was no formal CJA panel in the Southern District of Texas. In Houston and some of the other divisions, the magistrate judges had developed their own individual lists of attorneys who would accept appointments. In at least two of the divisions, the district court required all attorneys practicing in their divisions to accept CJA appointments.

After the CJA panel representative and I received complaints from local attorneys about the appointment process, we approached United States District Judge Kenneth Hoyt, who is the liaison judge for the FPD. He assisted in establishing a CJA selection committee composed of judges, private attorneys and myself, which revised the Southern District CJA Plan to more closely conform to the model plan and we set up a formal CJA panel for the Houston-Galveston Divisions. At that time, we were unable to convince the other divisions to follow suit but all but one of the divisions now have a panel. I am most familiar with the Houston-Galveston panel, which specifies to some extent the experience level of the attorneys, whether they are bilingual, and whether they accept trial, appellate and habeas appointments. The magistrate judges attempt to distribute appointments evenly to the panel taking into account the attorneys' availability and expertise.

Except in capital cases, the FPD in our district does not recommend appointments in individual cases and plays no role in the voucher process. As others have already noted to the committee, the involvement of the trial judge in the approval of expenditures is of serious concern. It forces the attorney to divulge privileged information and trial strategy to the same judge who will preside over the trial and sentencing. It results in inconsistent practices that depend on the individual judge's view of what it takes to represent a defendant in a criminal case, views that may be uninformed by experience with actual representation. Voucher review and approval of expenditures should be performed by a neutral party, who is an experienced criminal defense attorney.

Until recently, the panel in this district has been poorly compensated and often not compensated at all. Many attorneys reported that delays were so long and payments reduced so much that they did not bother submitting vouchers at all. While the timeliness of payments has improved, and well-documented vouchers are generally paid, panel counsel's use of investigator and expert services is disturbingly low.

Unfortunately, there is still a culture among some members of the judiciary that views the representation of criminal defendants as a *pro bono* obligation of the bar. This view is untenable and undermines the effectiveness of advocacy in this district and the circuit. The complexity of modern criminal litigation and the severity of punishment require advocates who are experienced and adequately paid. There can be no equality in representation between the defense and the prosecution when everyone but the defense attorney is being paid a full and fair salary.

D. Capital Representation

Our office has been appointed in capital cases but we have not tried a case where death was the potential punishment. Nor have we represented an individual in a capital habeas proceeding, so I will limit my comments to my observations in my role as the Federal Public Defender.

Ever since I joined this office, there has a dearth of qualified attorneys to represent capital defendants in federal courts in Texas. In the mid-1980's, we held a meeting of death penalty litigators and attorneys from private firms to try to address the need for competent counsel to handle federal habeas challenges to state death penalty convictions, pursuant to 28 U.S.C. § 2254. With only three attorneys in the Houston office and the largest death row in the country located in our district, the FPD was ill equipped and therefore unwilling to take on this capital representation. We sought volunteers from firms and for a while, the men and women on death row were ably represented by attorneys from the Texas Resource Center. When the Resource Center was defunded, the crisis began anew.

Throughout my tenure as the Federal Defender, federal capital resource counsel has provided invaluable assistance in trying to find attorneys to represent individuals in capital habeas proceedings. At one point, judges from the Fifth Circuit and the district court organized a gathering of local defense attorneys and attorneys from law firms in an effort to expand the pool and train attorneys to do this work. Even at this event, however, attorneys were urged to provide their services *pro bono*.

As capital litigation has become increasingly complex, and the time limits and funding more constrained, it has become more difficult to find enough attorneys to represent these individuals. Moreover, there is no centralized system of appointment, which has resulted in appointment of unqualified attorneys and assignment of too many cases to one attorney.

All of the Federal Public Defenders in Texas have come to the conclusion that only a federal Capital Habeas Unit can assure timely and competent representation for the countless individuals on the Texas death row. Our efforts at starting such a unit, however, have been discouraged by the Circuit.

As the Federal Defender, I am supposed to assist the court in finding competent counsel for federal death penalty cases. There is also a desperate need for such counsel and for funding in the area of direct capital defense. Many of the federal capital cases within the Southern District of Texas arise out of prosecutions of multiple defendants for gang related activity or defendants alleged to be involved in large alien or drug smuggling operations. This necessitates finding numerous attorneys and we are often conflicted out of the case because we represent a codefendant or a cooperating individual. While there are a number of attorneys with significant capital experience in Texas, few of them have experience in federal court. The problem is exacerbated by the same practice that concerns panel counsel in non-capital representations; the courts are often reluctant to provide full and timely funding, especially for investigators, mitigation specialists and other experts.

E. Transportation, Subsistence and Detention of Unconvicted Defendants

As this Committee is already aware, the provision of services or funds to financially eligible persons for noncustodial transportation and subsistence is inadequate. Courts have held that 18 U.S.C. § 4285 does not provide authority to order the United States Marshals Service to provide lodging and subsistence during a court proceeding, or for travel costs back to the client's place of residence. Pretrial Services has only limited funds to providing housing and subsistence.

The remote detention of unconvicted defendants also hinders effective representation. The United States Marshal Service houses pretrial detainees where it is most convenient and cost effective for the Marshal. This results in unnecessary time and expense for attorneys, who must travel significant distances to visit their clients. For example, there is a Federal Detention Center in downtown Houston, but the Marshal houses the pretrial detainees 45 miles away because it is cheaper for them and they find dealing with the Bureau of Prisons cumbersome at best. In other divisions, some of our clients are housed some two and a half hours away from the courthouse, and these distances pale in comparison to my colleagues in other districts. The court could intervene to urge the Marshal to house pretrial defendants in a location where their attorneys can have ready access.

F. The Impact of the National Structure and Administration of the Defender Services Program under the CJA

All of us can agree that the defense function must be free from undue influence. In my experience, the judiciary has generally not interfered in the actual representation of clients. As the

NACDL report reflects, however, judicial oversight has undermined the necessary independence of CJA counsel.

As others have already eloquently explained, the placement of the CJA program within the judiciary is an awkward fit. We are not like other court employees but, in recent years, the judiciary has tried to treat us as such. The demotion of the status of the DSO in 2013 to one of many "program services" has severely undermined the authority and independence of our program. AO initiatives to combine services, such as computer services, threatened to breach the inviolability of our privileged client records. The decision to transfer the authority of the Defender Services Committee (DSC) to the Judicial Resources and Budget Committees resulted in micromanaging of our staffing and budget by persons unfamiliar with the nature of our work.

At a minimum, the DSO's position as a distinct high-level office should be restored and the responsibility within the judiciary for defender staffing and budget, and CJA expenditures overall, should be restored to the DSC. Moreover, a member of the Federal Defender community should be a member of the DSC to insure that defenders have a voice in the implementation of their program and that DSC is able to obtain firsthand knowledge of the needs of CJA attorneys. In short, Defenders should also be given more autonomy and control over their program.

The relationship between the DSO and the Defender advisory groups requires substantial change. The composition of DSAG should be expanded to reflect the diversity of defender offices. Currently, there are just seven slots for defender representatives designated to representative highly disparate areas of the country. The Fifth and Tenth Circuits share a single representative, as do the Fourth, Eleventh and DC Circuits. These circuits represent a high percentage of the federal caseload and have very different issues and concerns. Combining these circuits makes no sense. Further, the composition of DSAG does not reflect the racial and ethnic diversity of our program. Expansion of the slots could increase this type of diversity as well.

Second, the defenders and DSAG must be permitted to set policy and develop priorities. Currently, DSAG is not much more than a sounding board for DSO, which controls the number and location of the meetings and sets the agenda. It is the defenders, with their expertise and knowledge of actual practice, who should have the primary responsibility for the direction of the program. The defenders have demonstrated that they are quite competent to do this. During the Work Measurement Study, it was the defenders who worked together to obtain accurate data and to insure a fair implementation from the results. Defenders must be able to use their expertise to administer their program.

Defenders must also have more autonomy in setting policy. While the AO is responsible for oversight of the program, it is the defenders who must be recognized as the authority on substantive policy. For example, the Federal Defender Sentencing Guideline Committee was established pursuant to Congressional directive to consult with the United States Sentencing

Commission and to develop sentencing policy. On numerous occasions, however, DSO has suggested that it speaks for the defenders on sentencing and has attended meetings on matters of policy with other stakeholders, to the exclusion of Defender representatives, who have the most in-depth knowledge of the issues. Similarly, the Congressional detailee program has been highly effective, but the requirement of AO review and approval has delayed and sometimes obstructed our staffing of this program. The legislative budget process is another prime example of why the defenders must be permitted to advocate directly for their program. Too often, the judiciary has viewed a dollar for the CJA program as a dollar less for the judiciary, and their statements to Congress reflect as much. When defenders have been able to communicate directly, they have been much more effective at obtaining the necessary funds for the program.

The issue of setting policy demonstrates why our placement in the judiciary is an awkward fit. Defenders, including those charged with administrative oversight, should be able to take policy positions without regard to whether or not those positions are consistent with the policy of the judiciary as a whole. We present criminal defendants, not the judiciary, and we should be able to advocate for policies that benefit our clients regardless of the view of the judiciary.

In closing, I want to thank the Committee for your work on these matters and I look forward to speaking with you in Birmingham.

Very truly yours,

Marjorie Meyers
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