FEDERAL PUBLIC DEFENDER
MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO
ERIC D. PLACKE
First Assistant Federal Public Defender

JOHN A. DUBERSTEIN
JOHN A. DUSENBURY
KATHLEEN GLEASON
TIFFANY JEFFERSON
IRA KNIGHT
Assistant Federal Public Defenders

FEDERAL PUBLIC DEFENDER
LOUIS C. ALLEN

WINSTON-SALEM
GREGORY DAVIS
Senior Litigator

MIREILLE CLOUGH
Assistant Federal Public Defender

ELIZABETH A. FLAGG
Research and Writing Attorney

December 23, 2015

The Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review the CJA
ATTN: Arin Melissa Brenner
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 4-210
Washington, DC 20544

Re: Testimony of Louis Allen, Federal Public Defender, Middle District of North Carolina

Dear Judge Cardone:

Thank you for the opportunity to testify before the Ad Hoc Committee to Review the Criminal Justice Act, and to submit these comments in advance. My comments are based largely on my experience as the Federal Public Defender for the Middle District of North Carolina for the last 18 years, but are also informed by the 6 years I spent as a member of the Defender Services Advisory Group, and the 14 years I spent as a private attorney on the Middle District of North Carolina CJA Panel.

HISTORY OF THE MIDDLE DISTRICT OF NORTH CAROLINA

The Middle District of North Carolina consists of 24 counties in the central Piedmont region of the State. The Middle District is headquartered in Greensboro, as is the United States Attorney and the Federal Public Defender. Three of our six federal district judges have chambers here, and three are resident in Winston-Salem, about 30 miles to the west, where both the United States Attorney and the Federal Public Defender maintain full-time branch offices in the federal courthouse. A single federal magistrate judge is stationed in Durham, about 55 miles to the east, but neither we nor the United States Attorney maintain an office there. Most of the criminal cases in the Middle District originate in three major metropolitan areas: Durham to the east, the Piedmont Triad of Greensboro, High Point and Winston-Salem, and Concord and Kannapolis, near Charlotte to the south.[1] The Sentencing Commission recently reported that a higher percentage of the total criminal cases in the Middle District are brought under 18 U.S.C. § 922(g) than any other district in the country, and firearms prosecutions make up a substantial portion of our caseload. Other traditional subjects of federal prosecution, including drug trafficking and bank robbery are also a regular part of our caseload, and in recent years, we have seen a dramatic increase in the federal prosecution of internet child pornography cases. Although North Carolina is not a border state, it is the 10th most populous state and has a large immigrant, particularly Hispanic, population. Accordingly, we represent a significant number of non-citizens in immigration-related cases such as document fraud and illegal reentry. Finally, while we also handle an assortment of other cases,

[1] The Eastern District is headquartered in the state capital of Raleigh, and the Western District is headquartered in Charlotte, the two largest cities in North Carolina.

there are no Native American reservations in the Middle District, and only a relative handful of small federal enclaves such as military bases, national forests and other federal facilities. Accordingly, we handle very few misdemeanors and even fewer prosecutions under the Assimilative Crimes Act.

Although the 1970 amendments to the CJA authorized the establishment of federal public defender or community defender organizations, the Middle District of North Carolina continued to rely exclusively on individual CJA Panel attorneys for another two decades. William E. Martin, previously the Federal Public Defender for the Eastern District of North Carolina, was appointed the first Federal Public Defender for the Middle District of North Carolina in late 1992. After several months spent securing office space, hiring staff and otherwise setting up a functioning office, we began taking clients in May of 1993. The impact on indigent criminal defense in the Middle District was quickly apparent. Our trial attorneys secured enough jury acquittals during our first year of operation to garner the attention of the local media, and our efforts established defense counsel presence at presentence interviews as the standard of practice in the Middle District, despite initial resistance from the Federal Probation Office, over a year before that right was codified by the December 1, 1994, amendments to Rule 32 of the Federal Rules of Criminal Procedure. Mr. Martin served one term as the Federal Public Defender, and I was appointed to replace him in 1997.

Our office has grown from an initial cadre of six attorneys, two investigators, one paralegal and three support staff (12 total FTE) to nine trial attorneys, a research and writing attorney, three investigators and six support staff (19 total FTE). Nevertheless, last year's exhaustive nationwide work measurement study indicates we are significantly understaffed, and that our caseload in recent years supports a total staff of 27. Although we believe we do need to increase our staffing, we are proceeding with caution for several reasons.

FACTORS INFLUENCING STAFFING DECISIONS

GENERAL SERVICES ADMINISTRATION (GSA)

First, as a practical matter, GSA's inability to move at anything more than glacial speed on our modest request to expand our Greensboro office by approximately 1300 square feet means we have no place to put additional staff in our main office. Our Chief Judge has voiced similar concerns with respect to the Judiciary. I realize that this issue may be outside the scope of this committee. However, Defenders from around the country have shared stories about horrific experiences with GSA that have directly affected their ability to manage their offices. I know many Court agencies can relate. I would urge this Committee to recommend to the AO that an initiative to address GSA complaints be commenced. Better yet for FDOs, the Committee could recommend that FDOs have the same ability as CDOs to negotiate and manage their own leases without the requirement of GSA involvement.

PREDICTING FUTURE CASELOADS

Second, although our caseload in recent years calls for a total staff of 27, we recognize that our numbers have been driven in part by unusual developments including retroactive amendments to the Sentencing Guidelines, and post-conviction work, which our office traditionally did not do, in the wake of the Fourth Circuit's 2011 decision in *Simmons*, which reversed over a decade of settled circuit precedent on the federal interpretation of North Carolina convictions. We continue handling *Simmons* cases, and it appears we may take on over two hundred similar post-conviction cases involving the Supreme Court's decision last term in *Johnson*. Nevertheless, we recognize overall federal prosecutions are down somewhat, and that decisions like *Simmons* and *Johnson,* and retroactive guideline amendments, while seemingly the new normal, may well prove to be anomalies over the long term.

FALLOUT FROM THE SEQUESTER – JUDICIAL ACTIONS

Third, and most concerning as we consider hiring additional staff, we cannot afford a repeat of our sequester experience two years ago. Even though our expansion over the life of our office has been measured, the combined effect of the 2013 budget deadlock driven sequester, and the AO's separate cut of defense funds earlier that year, was devastating for our office. I had to furlough our entire staff for 13 days, and we lost two of our most experienced attorneys to forced early retirement, a 22 percent reduction in our trial attorney staff from which we have only recently recovered in terms of attorney numbers, and from which we will not recover in terms of professional experience for many years. Our local court was understanding and supportive, and other agencies did what they could to help us endure larger cuts than they had to absorb. At the same time, my attorneys continued doing their job, each one choosing to work without pay one day per pay period, to continue providing high quality professional services to our clients. Nevertheless, it is an experience we do not wish to repeat, and which necessarily counsels caution as we consider hiring additional attorneys or other staff.

SEPARATION OF THE DEFENSE FUNCTION WITHIN THE AO

Not only was our local court understanding and supportive during the recent sequester, we have enjoyed a very good relationship with our court and other agencies throughout the history of our office. Our district court judges regularly voice their appreciation, respect and support for our office, and our work. We have not experienced judicial interference in the management of our office, while at the same time, our court regularly calls upon us for input and assistance on a variety of issues. Our court agreed with our suggestion to craft a new CJA Plan based on the Model Plan, and adopted without change a plan prepared by a committee that consisted of my first assistant, our CJA Panel Representative, and one of our magistrate judges. While the court still retains ultimate control, our new CJA Plan provides for greater federal public defender and panel attorney involvement in the selection and management of CJA Panel Attorneys. Our court was receptive to our ideas for enhanced training and CLE requirements for panel attorneys. Also noteworthy, and particularly valuable to us, have been efforts by our court to intercede with other agencies on other matters. For example, our current Chief District Judge, the Honorable William L. Osteen, Jr., helped persuade the United States Marshals Service to make greater use of local detention facilities, thereby reducing the amount of attorney and investigator time, travel expense and other resources devoted to visiting clients outside our district, and even outside North Carolina.

While I am pleased with the lack of judicial interference, and level of judicial support, we enjoy in the Middle District of North Carolina, I cannot say the same about the federal defender program's experience on a national level. Judiciary actions contributing to our funding shortfall in 2013, and the roughly contemporaneous demotion of Defender Services within the Administrative Office of United States Courts, have had a profound impact on our program nationwide, both in terms of resources and morale. Comments about "Cadillac representation" by members of the federal judiciary imply a disdain for, not only the work our dedicated professionals do in support of the Sixth Amendment right to counsel, but the importance of that right to our democracy, and every person in it. At a minimum, a return of Defender Services to its former status within the AO, and reforms that better insulate our budget from the direct action of the Judiciary, while considering the DOJ prosecution initiatives and budgets to which we are necessarily reactive, would be good steps.

It is sometimes troubling that major decisions impacting the defense function are being made by individuals or groups who have little or no experience defending indigent people. That is not to disparage the lack of experience. Very few of the finest attorneys in the land have federal criminal defense experience. It is only to suggest that experience of this particular sort would make a positive difference in decision making.

Having Defender oversight rest primarily within an Associate Directorate within the AO, staffed by those fully immersed in the defense function would be the only way to give independence similar to that enjoyed by the Department of Justice.

PERFORMANCE AND STAFFING METRICS

A matter of particular concern to me is what I believe to be excessive reliance on metrics that do not, and cannot, fully capture the nuances of our work. We do not produce widgets, we deliver professional services to individual human beings in cases that range from simple to incredibly complex. While the recent work measurement study was probably the best effort to date to accurately assess what we do, and what we need to do it, there are still problems. Over-reliance on such metrics encourages gamesmanship in the competition for scarce resources. Moreover, while not a problem we have experienced, some federal defenders across the country have reported circuit resistance to increased attorney staffing even though supported by the work management study results. I say all these things about excessive reliance on metrics not as one who seeks to overcome statistics that threaten my office, but rather as a federal defender whose office is due a significant staffing increase after the work management study. As grateful as I am for that support, I am still compelled to voice these concerns about excessive reliance on statistics that have long troubled me.

It is not news to anyone that failures in an underfunded mental health system have increasingly turned the criminal justice system into the method for dealing with the mentally ill. However, unless one has personally represented mentally ill clients, it would be impossible to understand the difficulties in effectively providing representation. Assuming that the time it takes to represent a fully functioning defendant charged with bank robbery should be remotely the same as representing a schizophrenic bank robbery defendant is like comparing apples to horses.

As a reactive agency, I have long advocated that Defender budgets should have a direct relationship to Department of Justice budgets within each district.

FOCUS AREAS

I have very little to add, I'm afraid, to the issues designated for the focus of this particular hearing. Multi-defendant cases are obviously more complex and time-consuming. However, our office has not had nearly the number of complicated multi-defendant cases as in other districts, so my input would add little to the discussion

Electronic discovery has not impacted us greatly. The move, several years ago, to provide discovery on discs has been a tremendous time-saver for defense attorneys. The only issue that has arisen is the encrypting, which varies greatly depending on the source of the discovery. As discovery moves to the cloud,, it would greatly contribute to judicial economy to require the government to standardize its encryption. Having said that, I realize that I have attempted to talk about something I barely understand and I think I should get back in my lane.

Perhaps the Middle District of North Carolina is unusually parochial, but this office has little experience with extraterritorial discovery, so I will not again venture out of my lane.

The use of experts is much more of an issue to panel attorneys. We have found that Defender Services has been very good about giving us funds to pay for our experts. It is very appropriate to keep those decisions with the purview of the defense function. It would be useful to provide panel attorneys with independent oversight regarding experts (and vouchers).

CONCLUSION

We have come a long way since the first enactment of the Criminal Justice Act in 1964, both nationally and here in the Middle District of North Carolina. I applaud the Committee's work, and I hope that its recommendations promote both the preservation of the progress we have made in support of the Sixth Amendment right to counsel, and the reforms needed to insure the continued vitality of independent, vigorous and professional representation of every person prosecuted in our federal courts, regardless of their station in life. Thank you again for the opportunity to testify before the Committee, and to submit these comments in advance.

Very truly yours,

LOUIS C. ALLEN
Federal Public Defender

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