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May 9, 2016

The Honorable Kathleen Cardone, Chair
Ad Hoc Committee to Review The CJA Program
Members of the Ad Hoc Committee
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington D.C. 20544

Written Testimony of Melody Brannon

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Public defense in the District of Kansas is robust. The FDO is considered a mid-sized office, covering three cities with 14 attorneys and 15 staff. Last year, we handled about 550 cases, as well as misdemeanor dockets for two military bases. We also provided almost 40 hours of CLE education. Comprehensive changes have been made in the CJA program in the last two years, as the administration was moved to the FDO and e-voucher was implemented. The relationship between the FDO and CJA panel is active and collaborative. Our judiciary, who moved the CJA administration to the FDO, has been enthusiastically supportive of the FDO and the restructuring of the CJA panel.

The good fortune of our district, however, reveals the deep flaws in judicially-administered public defense. In comparison, other districts are plagued with interference by local judges, limitations imposed by the circuits, and random or unjustified voucher cutting. A system that depends on the individual values and personal philosophy of a particular judge cannot achieve systemic fairness. Public defense must be administered consistently, predictably, without fear of retaliation or frustration from limited resources. And there must be a public perception that indigent defense is not beholden to the judiciary.

Today our system falls short. Federal justice depends on geography more than any other factor. After watching the hearings and reading the testimony, I have great hope that this Committee and this Study will change that. A model should be adopted that eliminates the Courts' actual involvement in public defense and avoids even the appearance of a possible conflict. Whatever changes are made, at the very least, the power to hire defenders, and control staffing and budgets should be removed from the judiciary.

I have always been a public defender. Over 26 years, I have served in both state and the federal system. For the past two and a half years, I have served as the Defender for the District of Kansas; I have been with the FDO for just over 18 years. Before that, I was a state public defender in Oklahoma, Texas, and Kansas, practicing primarily in capital defense work, both at trial and habeas levels. With those various positions, I have worked in systems that were administered by the local judges, by a board selected by state government, and as a publicly funded capital defense office, the Texas Resource Center. My experience with these various models, leads me to conclude that an independent model is viable and effective.

This is the last hearing and I have tried not to be repetitive. Our panel representative, Melanie Morgan, testified in Santa Fe and provided detail of our programs and the FDO support of the panel. Below, I address other questions before this Committee.

Independence from the Judiciary

Public defense should not be judicially administrated. Defenders should not be hired and retained by the Circuit who hears their cases. Defenders should not have to seek permission to hire attorneys from the Circuit. Defenders facing employment discrimination complaints should not be forced to litigate those claims before the Circuit.

I retain a caseload—that is, I represent clients myself—both at the District Court and Circuit level. I brief and argue before the Circuit. Sometimes the cases are controversial. That I must advocate for my clients before my employers is a conflict of interest. It has not influenced what issues I raise or how I argue. But the specter of the Circuit's influence over my career should never be present. When I receive an unfavorable ruling from the Court, the thought of whether this will influence their decision to retain me is unavoidable. Certainly, were my clients aware, they would have a right to be concerned about the obvious conflict. And public perception of a conflict from the judiciary employing the defense is more than fair. It is accurate.

That I must seek the approval of the Circuit to hire additional attorneys, even though I have the funding available, is also a conflict. As this Committee has heard, this power is wielded inconsistently among the Circuits. In the Tenth Circuit, this is less of a problem. But it still influences how I staff my office, and I have been reticent to seek approval for these positions. Instead, I have chosen to staff my office in other ways and to divide the work differently than I would if I had more attorneys available.

Additionally, the Circuit hears and adjudicates EDR complaints, but I will not address that conflict here.

The Committee has probably heard more about the problems than offered solutions. But whatever change occurs, it must include independence from the judiciary in matters of staffing, budget, and day-to-day operations, such as IT. No model is without drawbacks. But at the very least, Defender Services should be charged with the responsibilities now vested in the judiciary.

CJA Panel Administration

The FDO administers the CJA panel in the District of Kansas. Our CJA Supervising Attorney and her staff manage the day-to-day operations. She serves as a liaison between the CJA panel and the courts; this not only creates a buffer but has served to resolve issues (such as budgeting and service providers) early on and to make the system more effective and efficient.

When the CJA administration was moved to the FDO, the judges also agreed that there needed to be a ground-up overhaul of the panel. Too many attorneys meant that too few cases were assigned per year, far too few for panel members to remain proficient in federal criminal practice. A new system was developed, after surveying other districts and how they operated. Everyone had to reapply, and the panel was divided into tiers. The core panel was limited to ensure (or at least attempt) at least six felony cases each year; terms are staggered and six CLE credits in federal criminal defense are required. This also meant that the panel was significantly reduced in size.

Still, because the local judiciary is so involved in selection of CJA attorneys, payment, and provision of service providers, clients who are assigned CJA panel attorneys rather than federal defenders are at risk of compromised representation.

In reviewing the scope of this Committee's review, because of the restructuring and the increased training opportunities described below, the quality of the CJA panel is much better. The core panel is made up of experienced and dedicated defense attorneys. The improved relationship between the FDO and CJA, increased collaboration, and regular communication continue to improve the quality of indigent defense. Much time and many resources have been committed to FDO support of the panel. And, unlike a few years ago, I am confident that there are sufficient qualified panel members to staff large defendant cases. Those are common in our district.

Timely Appointment of Counsel

Appointment of counsel is timely as counsel appears at the Rule 5 hearing with their client, and often have opportunity to visit before the hearing. In two of the three courthouses, Rule 5 hearings are scheduled quickly, often within hours of arrest. In comparison, in other districts, defendants must appear alone at the initial hearing, then counsel is appointed.

Client Transportation and Funding

Funding for our clients' transportation to court hearings, *one way*, has not been an issue. But full financing for transportation both ways is rare. We often provide transportation if within an hour or so of our office. Other times the attorneys personally pay for bus tickets. Food and lodging during hearings or long trials is routinely denied, usually after opposition from the US Marshal. At times, we have been told that our clients could stay at the local homeless shelter. But our US Probation office is outstanding—they maintain a food pantry and a cash drawer to help with transportation (which the CJA and FDO contribute to regularly) and they will try to help with lodging. But it is not unheard of for CJA or our attorneys and staff to help with finding and funding housing and food for our clients.

Resources and Education

Because of the mandatory CLE for panel members, the FDO greatly expanded its educational programs. The CJA Supervising attorney develops, plans, and coordinates the training. Twice a year, a full-day CLE is held on a variety of topics. The one last fall was all on *Johnson* issues. Every other month a one-hour lunch CLE is held; on alternate months, the panel host what we call FED Talks, an informal gathering that discusses local issues and concerns. We have also offered specialized training, Introduction to Federal Capital Cases, to encourage attorneys to become qualified for capital cases. To encourage use of service providers, we developed and offered a three-session training for paralegals in all cities, and plan to do the same for investigators. Last year, over 1600 CLE credit hours were claimed from attendance at FDO programs.

Borrowing from the District of Minnesota, we also established a Second Chair mentoring program for attorneys who would like to be on the panel but lack the requisite experience. This has become the flagship of our training program. It is limited to seven full participants per year, who are compensated by the Bench-Bar fund. Second Chair has several components. First, each is assigned to an experienced mentor, either FDO or CJA, to follow certain cases. Next, a six-part orientation program, tracking all phases of the criminal prosecution, is offered every other month. On alternative months, we hold guideline workshops. A number of attorneys audit program. The training totals to approximately 36 to 40 hours. If they successfully complete the year-long program, they can apply for the CJA Training panel. We are now in our third year. The judges have offered tremendous support, both in financing the program and often visiting to speak with the participants during training.

We do all of this, essentially, pro bono. The current system that determines our budget and the number of attorneys we are allowed does not compensate us for either education or CJA administration. Each case we handle is assigned a value and will determine our funding, but the work we do beyond direct representation is not really credited.¹ The same is true of districts that participate in special courts, such as reentry programs. This understandably discourages FDOs from devoting resources to programs such as these, programs that provide needed education to CJA panel and serve to strengthen the defense bar through education and collaboration. Especially in offices that are already strained, uncredited resources cannot be spent on CJA panel support.

Further, these expenditures would probably not factor into any request to the Circuit for another attorney position. In our Circuit, again, we have not been as constrained in requesting new attorney positions. But I remain extremely reticent to do so, and only if the actual case numbers strongly support the request. I would not include the resources devoted to education in a request for another attorney position, even though I strongly believe that this is a worthy and necessary function of the FDO.

One other note: much of the success in building a strong relationship between the FDO and CJA, one that results in a stronger defense bar, is our CJA panel representative, Melanie Morgan. Ms. Morgan testified before you in Santa Fe. She devotes much time to this position, working with us through problems that arise among the CJA and helping organize training. She does this at her own personal cost. If the changes that come about as a result of this study include a district panel representative, please consider compensating them for their time. To allow the hours to be billed at the current CJA rate (which will hopefully increase) makes sense and would encourage active and vocal attorneys to serve in this position.

Retroactive Litigation

At our request our Chief Judge, Tom Marten, issued standing orders allowing us to represent all District of Kansas cases for purposes of litigation related to Amendment 782 and *United States v. Johnson*. We are very grateful that Judge Marten invested this responsibility with us. Because we had this authority, much of the work was streamlined, and in collaboration with the U.S. Probation and the U.S. Attorneys, most cases were resolved by agreement. We have had other retroactive litigation particular to Kansas that was similarly handled. While *Johnson* may prove to be more involved and protracted, the access to documents and the grant of authority to represent all, rather than on a case-by-case basis, has proven more efficient for everyone involved, and beneficial to our clients.

¹ Some CJA administration was factored into the original work management formula, but, as I understand it, that does not reflect ongoing work, resources, and time.

Not all districts were so fortunate, again highlighting the disparities. In some districts, the judiciary chose not to follow the same course of litigation, which cost the FDO more in time and resources to litigate the retroactive application of both Amendment 782 and *Johnson*. And although this is a question distinct from judicial administration of public defense, it is worth noting that some FDOs did not have the attorney resources to devote to this.

Remote Detention

Some of our clients are housed at a private detention facility, CCA, in Leavenworth, Kansas. The remainder are held in county jails. To reach any of these facilities from our office requires 45 minutes to one hour travel.² While this is comparatively less than some other districts, it still requires significant time to reach our clients. It is particularly expensive for the CJA; we often see more than one client per visit, but if they only have one or two clients at that facility, each visit costs about two hours. In contrast, each of the three cities have local county jails within walking distance of our offices.

Conclusion

Public defense should not be judicially administered. The Defenders should soon offer the Committee a comprehensive alternative to the current system. Thank you for hearing from the Defender community, and for allowing me to testify.

Respectfully,

/s/ Melody Brannon

Melody Brannon

² On rare occasion, our clients will be housed there, but usually for a short time while in transit or because of separate issues.