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April 29, 2016

Honorable Kathleen Cardone  
Chair, Ad Hoc Committee  
Thurgood Marshal Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, DC 20544

VIA EMAIL

Re: Written Testimony of Federal Defender Monica Foster

Dear Judge Cardone,

Thank you for the invitation to speak with the Committee to Review the Criminal Justice Act Program, during your May hearings in Minneapolis.

I would like to speak with the Committee about a crisis in death penalty defense that comes as an unanticipated outgrowth of Work Measurement and the new formulas we use to budget in our offices. I will also suggest a possible solution that honors the importance of cases that could result in the death of a client and is also fiscally responsible. My comments are directed to the defense of capital cases within trial or “traditional” units, and not on capital habeas litigation.

Death penalty cases are some of the most costly in the criminal justice system, and necessarily so. It is obvious that attorneys must take more care when the life of a client is in their hands. But capital litigation is not only different in degree. It is also different in kind. This difference has required a specialization of sorts. Indeed, there is an entire jurisprudence that has developed within the criminal law relating to the prosecution of capital murder cases.

The rules for jury selection are different and in many ways counter intuitive to how we handle noncapital *voir dire*. The guilt phase presentation must blend seamlessly with the penalty phase presentation which is frequently a difficult and time consuming task. Because of the broad range of admissible mitigation evidence in a capital penalty phase,

the investigation, preparation, and presentation of that evidence is similarly vast. When clients have lived in many locales, as capital clients frequently have, that investigation is likely to be national in scope and sometimes span the globe. Experts from many different disciplines come into play in the case for life. Death penalty attorneys are required to learn, and be conversant in, disciplines that simply are not relevant in noncapital litigation.

The Department of Justice is filing fewer cases, but they are selecting those that are particularly aggravated which makes the defense attorney's job even more difficult. When the Department of Justice directs the filing of a death penalty case, they have been assigning expert prosecutors from Washington D.C. to assist the local United States Attorney's Offices. These lawyers do nothing but capital prosecution throughout the country. Their involvement at the local level requires a similar expertise on the defense side of the ledger. The national projects are an indispensable part of providing an adequate capital defense. But they cannot be primarily responsible for the litigation of all of these cases. The Defender Offices have and must continue to provide that expertise.

For the past many years, the Federal Defender Offices have been carrying the burdens of these cases both emotionally and fiscally. However, for the reasons I will discuss below, this cannot and will not continue unless we make some changes to the budget formulas to account for the extraordinary amount of work these cases require.

Under the current Work Measurement, a defender who agrees to represent a capital defendant receives a one-time, one-year only case weight of 37 the year the case is opened. This is so even though the duration of a capital case in the vast majority of instances will be two, three, or four times longer than that. And this is true even though the Defender Office will likely assign more than one attorney, at least one investigator, and at least one mitigation specialist to the representation.

Under the previous budgeting system, DSO had the flexibility to provide funding for payroll and to accommodate a capital case during the entire duration of the case. As long as the case was open and actively being worked, DSO could compensate informally even if weighted cases open was down as a consequence of the lawyer(s) not taking new cases while the death penalty case was being worked. This flexibility is no longer available. In the Work Measurement world, the Defender Office must make their Weighted Case Open benchmarks or lose staff. Because capital cases are anomalous work events, it will soon be impossible to continue to defend those cases within the

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funding limitations of the Work Measurement formula. It is an anomalous and episodic workload that the Work Measurement formula is not currently designed to accommodate.

The criminal justice system benefits when those with the most experience take on capital representation. Frequently, that experience resides in the Defender Offices. We also have the most experience in the courts where these cases are brought. In my own small office of 5.5 lawyers, two of my lawyers have over 60 years combined experience litigating capital cases at all stages. Another of my lawyers actually won an acquittal in a military capital case – an unheard of feat in the world of death penalty defense. It will be a wasted opportunity if capital cases are filed in my jurisdiction and these lawyers cannot be tapped to handle them. My office is not unique in this way.

I would note that we are not the only court unit to deal with anomalous or episodic workloads. For example, a large multi-district litigation case can have an anomalous workload demand for the district court's clerk office. Funding the workforce for these anomalous or episodic workload demands may be a challenge the Administrative Office needs to face for all court units under the Work Measurement formulas.

I believe that a relatively straightforward and inexpensive modification to the existing Defender Work Measurement formulas could provide the funding necessary for the anomalous workload presented by these capital cases. This modification could provide necessary funding for offices who defend these cases during the duration of the capital case. This would permit Federal Defender Offices to continue to provide quality representation of indigent capital clients.

I am asking the Committee to encourage this discussion by recommending the Administrative Office study the viability of new Work Measurement funding mechanisms for capital defense in Federal Defender Offices. Thank you.

Sincerely,

Monica Foster  
Executive Director  
Indiana Southern