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By email

Hon. Kathleen Cardone
Chair, Committee to Review
The Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: **Corrected** Testimony of Miriam Conrad, Federal Public Defender
Districts of Massachusetts, New Hampshire, and Rhode Island

Dear Judge Cardone:

Thank you for the extraordinary time and effort you and the Committee have devoted to this important project. I am grateful for the opportunity to share my thoughts about these issues.

Background

In 1992, I joined the Federal Public Defender's office in Boston as an Assistant Federal Public Defender ("AFPD"). During my first year, I was one of five lawyers.

Our office now covers three districts, has 20 lawyers (soon to grow to 23), an appellate division, and a total of 44 employees (with an anticipated increase to 50, thanks to the recent work measurement study).

The nature of our practice has changed in many ways. In 1994, I tried a case that seemed massive at the time: there were approximately 300 so-called consensual recordings and a few hundred pages of witness statements. Now, we routinely receive terabytes of discovery, extractions from smart phones and computers, pole camera surveillance, and thousands, if not millions, of pages of discovery. Experts and electronic case management systems are essential. The challenges of trial preparation and presentation are exponentially greater.

I am proud of our office, which is staffed with dedicated professionals who work in a collegial and mutually supportive manner. We do not have a role in administering the CJA panel, but I believe that CJA lawyers view us as a valuable resource. We provide them with

advice, manage a website and two listservs, and, working in tandem with the CJA Board chair, host regular training seminars.

Appointment of counsel

During the past decade or so, the District of Massachusetts has made significant advances in the way in which counsel is provided to indigent defendants. In 2004, the Court adopted a protocol to appoint counsel before the initial appearance and before any interview is conducted by a probation officer. Proposed by then-AFPD, now-U.S. District Court Judge Leo T. Sorokin, along with CJA Board chair (at the time) Charles Rankin, the protocol requires the assignment every day of a CJA duty attorney and a duty lawyer from the FDO. Despite apprehension on the part of some that the need to appoint counsel first would delay court proceedings, the opposite has turned out to be true, largely because a lawyer is immediately available. A courtroom clerk can readily locate counsel, who coordinates with the probation department about the pre-trial interview with the client, helps complete the financial affidavit before the initial appearance, and usually is prepared to conduct an arraignment at the initial appearance. I commend this system to other districts.

A further improvement was the implementation by the Clerk's office of an assignment program for the appointment of counsel. When a clerk makes an appointment, he or she enters it into the system. If the FDO is not appointed (for example, because of a conflict or because a CJA lawyer previously represented the client), the clerk must select the reason. If neither duty attorney can take the case, the system selects the next CJA lawyer eligible for appointment, based on an algorithm that takes into account the number of prior appointments, the number of cases declined by that attorney, and even the types of previous appointments. The system is designed to prevent favoritism and has been well-received by court staff and panel attorneys. The system also provides useful data regarding the number of appointments made, the breakdown between the FDO and the panel, and the number of appointments received by each lawyer over time.

Impact of the Sequester

During the sequester in fiscal year 2013, we lost approximately 13% of our staff, through attrition and buy-outs. For a time, I was instructed to plan for a reduction of 23%, which would require laying off at least one third of our staff. Valued employees assessed other employment options, in case the feared termination notice materialized.

In the end, I did not have to lay off anyone. But we lost a talented AFPD, whom I transferred from our New Hampshire office to Boston, where a number of departures left us short-staffed. The lengthy commute, coupled with visits to remote jails, imposed too much of a burden on him, leading him to resign.

All of our employees had to take 12 days off without pay, generally on alternating Fridays. We were compelled to notify the Court that we would no longer be able to provide a duty attorney on Fridays, asking them to appoint CJA counsel instead. We also asked them to avoid scheduling court appearances on Fridays. They were accommodating and understanding.

I do not believe that the sequester adversely affected our clients but it certainly had the potential to do so. Our employees are dedicated professionals, who chose to work on furlough days rather than neglect their clients. The furlough days took money out of the pockets of our hardworking employees. I had to decide how many to impose, assessing our need for funds for other costs, such as expert expenditures. The more that I spent on such outside services, the less money was left to pay our employees. I anticipated that at some point I would have to choose between additional furlough days and not hiring experts.

Some defenders, including myself, contemplated seeking court funds for payment of experts, or seeking appointment of CJA lawyers for certain types of cases that typically require a larger amount of expert assistance. But Judge Hogan, then the director of the AO, issued a memorandum (attached) prohibiting judges from authorizing expert funds for use by federal defender employees. The memo paid lip service to the challenges that Defenders faced and suggested that those who found themselves short of funds should request additional money from Defender Services. We knew – and surely Judge Hogan did as well – that no such funds existed.

Post-Sequester Fall-Out

In early 2014, we learned that a work measurement study would be used to determine future staffing formulas. Our office had long been identified as one with low caseloads per attorney and we feared that cuts were imminent. Much of the criticism we faced was based on a comparison between the case weights per attorney, calculated using the so-called Rand formula, despite the fact that the Rand study specifically warned that the tool was not designed for this purpose. See N.Pace, G. Ridgeway, J. M. Anderson, C. Fan, M. Horta, *Case Weights for Federal Defender Organizations* (2011), at xxxiv, available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR1007.pdf.

We feared that the work measurement study would lead to cuts. But the opposite occurred: it validated our position, finding that we were understaffed, given the nature of our districts and the types of cases we handle. We have slowly been rebuilding, filling positions lost during the sequester, and adding some new ones. Weighted cases opened in our office have climbed during the past two years, boding well (we hope) for future stability. Our attorneys still work long hours but schedules and caseloads are gradually returning to manageable levels.

Funding

The issue of structure cannot be separated from the issue of funding. As I have struggled with the question of whether we are better off within the judiciary or outside of it, the main concern I have is whether an independent agency would find its funding vulnerable to political whims. Our experience during the sequester somewhat allayed these fears: the willingness of the Subcommittee on Bankruptcy and Courts of the Senate Judiciary Committee to hold a hearing on the issue of funding for Defender Services and of a number of Congressmen to support the Defenders is a hopeful sign. But I am not naïve enough to believe that an independent agency would not become a more vulnerable target for budget cuts.

It is essential that politicians, government officials, judges, and the public understand that the cost of public defense is an integral part of the cost of prosecution. That means that funding for defender services – no matter what the structure – should be calculated using an algorithm that takes into account the funding provided to U.S. Attorney’s Offices nationally.

Our salaries are based on parity with the U.S. Attorney’s Offices. *See* 18 U.S.C. § 3006A(g)(2).¹ Our work is responsive to what they do. An increase in funding for federal prosecutors inevitably leads to an increase in our workload, as filings and case complexity rise. Moreover, parity in resources is essential to ensure fairness, due process, and justice. If a prosecution rests on deep dives into digital data, the defense must have equivalent resources to replicate those efforts.

Parity is lacking in the current system. In Massachusetts, CJA guidelines adopted in November, 2013 (in the wake of the sequester) set “presumptive” expert rates for CJA attorneys at the level of those used by the state public defender’s office. That office, while providing stellar indigent defense, is vastly underfunded. When adjusted for cost of living, salaries for state public defenders in Massachusetts are among the lowest in the nation. The rates used by the state agency were the result of deep budget cuts. They fall far short of market rates in a high-cost area like Boston and undoubtedly are below those paid by the U.S. Attorney’s Office. Adopting them for federal cases, which generally present more complex issues, hampers the ability of the defense to compete with federal prosecutors for highly qualified experts.

Structure

Many of my colleagues have weighed in on the question of independence. I wholeheartedly agree that, if we are to remain within the judiciary (whether inside the AO or not), certain steps must be taken, including:

- Eliminating the judges’ role in approving vouchers and expert expenses
- Restoring DSO to *at least* a directorate level
- Removing oversight of our data from the AO
- Eliminating the requirement of circuit approval for the number of AFPDs in a given office
- Allowing defenders and CJA panel reps a voice on the Defender Services Committee and other committees whose decisions affect our operations
- Allowing Defender Services to make its own budget proposals directly to Congress

In my view, remaining in the AO poses serious institutional issues beyond funding. Under the current system, the judges decide the scope of our work, without meaningful input from us. For example, in 2014 the Office of General Counsel issued a memorandum, adopted by the AO, that prohibited us from filing commutation petitions, in response to an initiative by Attorney General Eric Holder to reduce excessive sentences. *See* attached memorandum from Hon. John G. Bates, dated July 31, 2014. If the statutory interpretation is correct, then perhaps

¹ While the statute only provides that compensation for Federal Public Defenders and their employees shall not exceed that paid to U.S. Attorneys, in practice salaries have been matched.

the Criminal Justice Act needs to be amended. But, at a minimum, Defender Services and the defenders themselves should have been given an opportunity to address this important issue.

The fact that judges in districts and circuits like mine are supportive and appreciative of the work that we do is not, in my view, an argument in favor of the status quo. The current structure depends upon the largesse and self-restraint of the judiciary, which we have been fortunate, for the most part, to receive. But in order to fulfill our constitutionally mandated role, we must be able to function independently and, at the same time, be assured that adequate funding will not be vulnerable to politics.

Thank you again for allowing me the opportunity to address these issues.

Respectfully,

/s/ Miriam Conrad

Miriam Conrad
Federal Public Defender
Districts of Massachusetts, New Hampshire, and
Rhode Island