

TESTIMONY OF KATHRYN N. NESTER, FPD - DISTRICT OF UTAH
Presented to Cardone Committee in Portland, OR
February 4, 2016

I would like to thank Judge Cardone and the other Committee members for the kind invitation to speak before you today. I fully support the Committee's mission and I am grateful that the Committee includes representatives from the Federal Public Defender community and that you are continuing to invite Defenders to appear before you to add our perspective to this very important conversation. I submitted a report to the Committee prior to the Santa Fe hearing covering topics specific to Utah. But today, I would like to focus on the topic of providing quality, holistic representation to our clients and how the current funding and staffing policies imposed upon the Defender community impact our efforts, our clients and our communities.

The Introduction of Evidence-Based Practices into the Federal System

For many years states have recognized the importance of addressing addiction and mental health issues suffered by individuals caught up in the criminal justice system and the impact that can have on reducing recidivism. State drug courts exist now across most of the country and the social science surrounding the links between identifying and addressing the risks and needs of individuals and their ultimate ability to successfully re-enter society is widely available.¹ It is only recently that the federal court system has begun to incorporate these evidence-based

¹ See Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism?*, 3 U. St. Thomas L.J. 521 (2006); Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, Topics in Cmty. Corr., 2004, at 3; EDWARD J. LATESSA & CHRISTOPHER LOWENKAMP, OHIO JUDICIAL CONFERENCE: FOR THE RECORD, WHAT ARE CRIMINOGENIC NEEDS AND WHY ARE THEY IMPORTANT? 15 (4th Quarter 2005).

principles into the federal criminal justice system. The Bureau of Prisons has embraced the science and has implemented cognitive behavioral therapy programs throughout their facilities in an attempt to give prisoners the tools they need to change their thinking and their resulting behavior and choices. They have also designated re-entry specialists throughout the country to focus on developing plans for each offender to re-enter their communities safely and productively. The U.S. Probation office has implemented risk assessment tools that are used at both the pretrial stage (the Pre-trial Risk Assessment Tool, or PTRR) and at the supervision stage (the Post-Conviction Risk Assessment Tool, or PCRA) to help identify the unique risks and needs of each offender so that their supervision can be particularly tailored to provide the best chance for each individual to succeed in their communities. More and more federal Districts are working with their US Attorney offices, US Probation Offices and Federal Public Defenders to implement re-entry programs that are focused on working with those returning from prison to insure that their risks and needs are monitored and addressed with the ultimate goal of significantly reducing recidivism and the related costs to the participants, their families, and our entire judicial system.

RISE Program - District of Utah

I am proud to report to the Committee that Utah has been one of the leaders in this effort to reduce recidivism and to incorporate the risk/needs/responsivity models throughout our criminal justice system. Our Chief Magistrate Judge Brooke Wells established our RISE initiative in 2008, which was one of the first few federal re-entry programs in the country focused on participants with a history of drug addiction and/or behavioral or mental health issues. “RISE” stands for Re-entry Independence through Sustainable Efforts and two separate tracks were created. The first track was the Drug Court program focusing on participants re-entering their communities after convictions that were fueled by drug addictions. The RISE Drug Court meets every week with the

participants and it also requires staffing preceding the court appearances with addiction counselors, the Court, the US Attorney, US Probation and the Federal Public Defenders. Most of the participants are involved for approximately eighteen months in the program. My office has two lawyers and two non-lawyer staff who rotate staffing and court duty and who spend many hours screening potential applicants and communicating with and assisting participants who are experiencing challenges in their daily life outside the regularly scheduled court appearances.

The second track of the RISE program created by Judge Wells is the Behavioral Health Court program focusing on individuals with diagnosed behavioral or mental health conditions. Again, this is one of the few such existing programs in the country and several Districts have visited and observed our program and implemented similar programs in their home Districts. This program also meets weekly with the participants and involves very hands-on involvement of mental health care providers under contract with the US Probation Office. These participants are closely monitored and require frequent intervention to assure compliance with their required medicines and treatment. These participants may be involved in the program for several years. Our office contributes one attorney and two non-attorney staff with social work degrees to this program.

Veterans Court - District of Utah

Magistrate Judge Paul Warner created the very first federal Veterans Court in the country in our District in 2010. Our Veterans Court addressed the unique risks and needs of veterans of the armed forces, including but not limited to Post-Traumatic Stress Disorder. Health care providers from our Veterans Administration hospital attend our monthly Court appearances. Participants are typically facing misdemeanor charges but some are also facing felony charges. Their cases are monitored for a year or longer and some are able to avoid the collateral

consequences of felony or serious misdemeanor convictions. Judge Warner has been asked to appear by Districts across the country who are interested in setting up similar programs modeled after our Veterans Court and several Districts, including some from the Ninth Circuit, have visited and observed our Court in action. My office contributes one attorney who appears with the applicants monthly and monitors their cases and mentors them typically for a year, and sometimes much longer.

Tribal Re-Entry Courts - District of Utah

Magistrate Judge Dustin Pead has recently spearheaded a much-needed effort to establish two Tribal Re-Entry Courts in the District of Utah. Beginning last year, these programs were established near the Ute reservation in the Northern part of our state and on the Navajo reservation in the Southern part of our State. This population is particularly impoverished and suffers from very high recidivism rates. Our participants are in dire need of health care resources and the most basic forms of support. The tribes are working with our Court to assist in getting tribal members access to quality drug, alcohol and mental health treatment. We have two attorneys assigned to the Northern Court, which is approximately a seven hour round-trip drive from our office, depending on the weather. The Court meets monthly (every other month they meet via teleconference) and corresponds regularly via email among all the partner agencies. Our Southern Court is a twelve hour round-trip drive and requires overnight stay. They also meet every other month in person and via teleconference the remaining months. Both courts require staffing, court appearances and regular email contact with all the participating agencies. A total of four attorneys (two assigned to each Court) from my office rotate duty to cover this program.

UACT - Pre-trial Diversion Court - District of Utah

The US Attorney's Office has taken the lead in establishing a Pre-Trial Diversion Court in the District of Utah, which is expected to be up and running within the next few months and will be administered by United States District Judge Robert Shelby. The idea is to focus on non-violent cases with defendants who have little to no criminal history and try to intervene with specialized supervision in the hope that they will be able to avoid the costly consequences of a felony conviction while remaining productive members of their community. The program is modeled after the highly successful CASA program out of California. Both programs acknowledge that felony convictions can cause difficult and costly challenges including inability to find employment or housing, along with an endless list of daily challenges that can lead to the destruction of families and recidivism. The UACT court will meet regularly and will require two attorneys from my office to rotate duty.

Pre-Trial Pathways - District of Utah

Out of a desire to ease transition to prison life and reduce prison violence and recidivism, our District runs a Pre-Trial Pathways program that educates individuals facing federal prison and their families about what awaits them. Former prisoners, counselors and BOP employees meet with participants and provide support, materials and advice. Our office contributes one attorney to this program and she is involved in educating our local attorneys about these services and working with partner agencies to implement the program.

UDOWD - Workforce Development - District of Utah

UDOWD is a collaboration between the State and Federal criminal justice systems in Utah

focused on assisting individuals returning to their communities and/or under pretrial supervision in finding gainful employment. One of the highest risk factors correlated with recidivism is unemployment. UDOWD has partnered with local employers who are willing to hire convicted felons and created a program that starts with training and moves through creating resumes and learning interview techniques, and then providing the support needed to enter the workforce. We have one attorney who works closely with the UDOWD committees and communicates with our office and CJA attorneys about available employment opportunities for our clients.

ARC - District-wide Committees - District of Utah

With mentoring and guidance from the Federal Judicial Center, Utah became one of the first few Districts to recognize the importance of a cohesive approach to Evidence-Based Practices, which we call ARC (Assisting Re-Entry to our Communities). Our District has created a Standing Committee consisting of District and Magistrate Judges, the US Attorney, the Chief US Probation Officer, the Court Clerk, the CJA Panel Representative and myself to oversee and develop our District-wide approach to initiatives aimed at reducing recidivism and assisting with safe and productive re-entry into our communities after prison. There are multiple sub-committees focused on the areas of training, research and assessment, risk/needs assessment tools, re-entry courts, pre-trial pathways and community outreach. We have multiple attorneys and staff-members serving on and contributing to these committees, which typically meet quarterly.

Funding and Staffing Issues Facing Evidence-Based Initiatives

As you can see from even a cursory glance at the above summaries of the alternative approaches to criminal justice currently existing in the District of Utah, the investment of time and resources required by the FPD is significant. Yet, when you compare our resource investment to

the ever-increasing costs of incarceration after recidivism, this investment makes all the sense in the world. However, the Federal Defenders have continued to experience a complete lack of recognition of the critical work we are doing in these areas and the resources that we require to do so. This is despite the fact that OPPS has recognized and invested in the resources requested by the US Probation Offices, the DOJ has recently authorized millions of dollars to fund Re-entry Specialist positions in every US Attorney's Office, the BOP is funding programming and added positions focused on re-entry, and the AO has recently earmarked fifteen million dollars to be allocated to the Courts to assist in Evidence-Based Practices and Re-Entry Courts.

Meanwhile, my office has suffered immensely as a result of a failure to credit the work we are doing in the exact same areas. The traditional system of RAND weighted cases and the new staffing formulas are wholly inadequate to take ongoing investment of FPD resources into account. For example, the RAND case weight for our RISE Drug Court cases is .51, the weight for a Behavioral Court case is .87, the weight for a Veterans Court case is .50, and the weight for a Tribal Re-Entry Court case is .47. To put those numbers in perspective, a typical Illegal Reentry case is weighted at 1.08. These Re-entry cases are rarely complex, are often fast-tracked and may only take a month or so from beginning to end in many cases. Whereas, our Evidence-Based initiatives require weekly and/or monthly involvement and travel for a period of years. The FPD staffing formulas are still dependant on case weights, meaning that the formulas incorporate these inaccurate case values and completely fail to capture the time spent on administrative and committee work (e.g. UDOWD, ARC, Pre-trial Pathways), therefore the result is that our work is not adequately accounted for and we are losing critical staff positions. In addition to all the extra programming discussed above, we have had to contribute significant resources to short-term projects addressing retroactive sentencing laws (e.g. Drugs -2 and *US v. Johnson*) - all while still

maintaining our full caseload and being told we need to lose as many as nine employees based on staffing formulas.

CJA attorneys have been left completely out of this trend in the federal system. Most CJA plans do not take into account the need to compensate CJA attorneys for these types of programs, nor would they provide the necessary training in the area of Evidence-Based Practices. Our District has been trying to make local training available to our CJA Panel free of charge, yet we still have not made much progress bringing the attorneys into the programming apart from Pre-Trial Pathways.

Suggestions of Ways the Committee Could Help

It is imperative that the Federal Defender System be on equal footing with all of the other federal agencies engaged in Evidence-Based practices and Re-Entry Courts. Failure to do so will make it impossible for FPD's to continue to participate and the programs simply will not function without total collaboration of all federal agencies. I hope the following suggestions will assist the Committee in determining what to suggest to Chief Justice Roberts at the conclusion of your study.

- 1) The AO and the Judicial Conference should recognize the value of Evidence-Based Practices in the federal court system and commit to supporting those efforts within the Judicial Branch.
- 2) The AO and DSO should be given the flexibility to evaluate the time and resources being committed in individual Districts to these alternative programs and to make exceptions to the staffing formulas that will allow for sufficient personnel to staff the various alternative courts and programming.
- 3) The AO and DSO should consider creating formal job descriptions and dedicated positions within the FPD offices to work solely in the areas of re-entry and

Evidence-Based Practices. similar to what the DOJ and BOP have done,
WITHOUT reducing current staffing to do so.

Thank you all for your kind consideration of these matters. I look forward to reviewing
your final report and wish you all the best along the way.