McCREA, P.C.

Attorneys at Law
1147 High Street
Eugene, OR 97401-3270

Robert J. McCrea, emeritus (1983-2014)

Shaun S. McCrea

shaun@mccreapc.com

TELEPHONE
(541) 485-1182
FAX
(541) 485-6847

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Hon. Kathleen Cardone, Chair
Ad Hoc Committee to Review the CJA Program

VIA EMAIL CJAstudy@ao.uscourts.gov

Re: Portland, OR, Public Hearing Testimony

Dear Judge Cardone and Honorable Committee Members:

BACKGROUND

A federal courthouse was built in Eugene in 1980 during my first year in law school. My father, Robert J. McCrea, a prominent criminal defense lawyer, was retained on numerous cases while I was in law school and I clerked for him during several trials. This experience allowed me to be admitted into federal court as soon as I passed the bar exam in 1983 and I handled my first federal trial on my own (a methamphetamine felony case) in 1985. Since then my practice has been limited to criminal cases and forfeiture in state and federal court throughout the state of Oregon.

I joined the CJA panel in approximately 1985. I do not handle state court appointments. My father and I practiced together for 30+ years; he retired recently. We have had associates over the years but I am currently practicing solo. I have a legal assistant and I utilize a contract paralegal on

complicated cases to assist with discovery and I hire an investigator in almost every case. I use experts often.

I was the Oregon CJA panel representative for approximately 12 years and I was the Ninth Circuit representative to the Defender Services Advisory Group (DSAG) from 1999-2008. I have been the vice chair of the Oregon Public Defense Services Commission (OPDS)-- which oversees all public defense in the state—since its inception in 2000; as of January, 2016 I am now the chair of the Commission. I am a past president of the Oregon Criminal Defense Lawyers Association (OCDLA) and a life member. I served five years on the National Association of Criminal Defense Lawyers (NACDL) board and I am a life member of that organization. I have been listed in Best Lawyers in America for over 15 years and I have been named an Oregon "super lawyer" for many years as well.

Thank you for the opportunity to share my thoughts regarding quality of representation and CJA Panel management. I have been fortunate to be able to review the submissions of my colleagues, Terri Wood and Tom Coan (who will also appear before you next week) before finalizing my own written testimony. They each covered a number of issues in their written testimony succinctly and well, and I adopt their statements instead of repeating them here (availability of resources, education and training, compensation, CJA panel management). Instead, I would like to address nuances of these issues through my prism of experience as the CJA panel representative, Ninth Circuit DSAG representative, as an OPDS commissioner and as a private practitioner.

QUALITY OF REPRESENTATION

Like Tom Coan, the current Oregon CJA panel representative, I attended the national CJA panel attorney conferences on a yearly basis. This was an extraordinary opportunity to meet and network with CJA lawyers across the country. I found these attorneys to be dedicated, smart, caring and tenacious. I also left each and every meeting feeling relieved and grateful that our CJA system in Oregon works so well and that we enjoy the support of both the federal defender and our judges. Each year I would hear

"horror stories" from other districts. Tales of woe included voucher cutting, refusal to authorize experts and investigators and sometimes a lack of support by the local federal defender office. Oregon has never experienced those issues and, knock on wood, I hope we never do.

We have a culture of collegiality between defense attorneys in the District of Oregon and, between the defense bar and the U.S. Attorney's office. There is also extraordinary coordination/cooperation among co-defense counsel. The tendency in this district is to pick up the phone and call someone (co-counsel, opposing counsel, another attorney) to talk about something *before* anyone starts filing motions. This culture results in the federal defense bar sharing resources and helping each other. This culture also results in prosecutors and defense lawyers talking and often agreeing to "streamline" issues and arguments at a hearing or trial, in other words: to fight about what needs to be fought (there is no sacrifice of zealous representation) and settling ahead of time what is not in contention. This culture fosters better outcomes for both the defendants and the courts (i.e., efficiency and cost savings in time).

The "graying" of the criminal defense bar

As Terri Wood indicated in her submission, CJA lawyers in Oregon are some of the very best in the state and the same is true about the federal public defender and her staff here. But, an issue we face (and it is coming faster than we think) is the "graying" of the criminal defense bar. Many of our panel members (and defense attorneys in the state system) are 1970s and 1980s "true believers"; attorneys who believe in the right to due process and justice, to the extent that we have been willing (or able) to accept less than parity with our peers on the prosecution side to handle public defense cases. The problem is two fold: first, the cost of defense (e.g. office overhead) keeps going up. Second, as our generation of attorneys retires, the question of who is going to replace us looms large. New attorneys are coming out of law school with crippling student loan debt. Many promising young defense attorneys are being forced to choose a different area of practice than criminal defense because they simply cannot afford to subsidize a system that cannot relieve their debt load nor pay them what prosecutors make.

We hit a crisis point in Oregon in 2003. That year state public defense ran out of money. Attorneys could not be appointed to represent defendants. Cases were delayed. It was a nightmare. The "silver lining" of this event was that it brought all parties to the table. Prosecution and law enforcement came to fully realize that the system is a three legged stool: courts, prosecutors AND defenders; the criminal courts cannot function without defense attorneys. Since that time there is some institutional memory in the legislature and funding is slightly increasing, albeit achingly, glacially slowly. What state criminal defense attorneys are paid and what investigators are paid is still shameful and far from parity with their prosecution counterparts. We continue to strive but I also see my state defense colleagues starting to retire in droves because –as one public defender put it—it isn't fun anymore. He is constantly trying to administer an office that is short on funding and his attorneys deal daily with "triage" on complex and serious cases. These attorneys do a good job because they are dedicated and they care, but it takes a toll. They sacrifice weekends and nights to put in the time needed to do a good job and they don't receive adequate compensation. At some point they say enough. For many, that time is now or it is close around the corner. For both the state and federal systems, the question is: who will take over public defense when this generation retires? Or more accurately, who will be able to afford to take over given student loan debt without increased compensation?

Criminal cases now more complicated

When the United States Sentencing Guidelines (USSG) were mandatory, criminal defense was arguably easier in many respects. The judge had no discretion, so in many "garden variety" cases, such as methamphetamine charges, there was less need for investigation or experts. A defendant was arrested in possession of a large amount of methamphetamine and absent argument about the quality or quantity, the case was often simple: apply the mandatory minimum or apply the guidelines. Rarely was there a circumstance that would justify a departure or a variance.

Now, given that the USSG are advisory and courts are required to apply 18 U.S.C. § 3553(a) and to impose a sentence that is "sufficient but not greater than necessary" more defense effort is required. This is why we need investigation. This is why we need experts.

The use of investigators

The truth is, the defense lawyer is often the person in the room who knows the least, particularly in a proffer situation. We don't know what the prosecution knows. We don't know what law enforcement knows. We know from our client only what he or she tells us. Quite often, the defendant is an unreliable source of information. Moreover, the "face" a client presents to his or her lawyer may be very different from the face he or she presents to the community. A good investigator (or mitigation specialist) can explore community attitudes toward a defendant in addition to testing fact specific questions. Investigation can help with presenting a defense at trial or convincing the prosecution to negotiate a lesser charge or sentence. Investigation can uncover information for mitigation at sentencing. At the very least, investigation—even if it's all "bad" for the defense--can convince a defendant that settlement is the better course of action than trial, thus saving court time and money.

On the other hand, sometimes what the client tells us is exactly right, even if it's contrary to what the prosecution says. We as defense lawyers, cannot rely on what law enforcement tells us in discovery. So long as our system of justice is an adversary construct, we are duty bound to test the prosecution's position and its case. Police officers have their own bias regarding events and this bias must be challenged via vigorous defense investigation. I was reminded of this lesson in a recent arson case.

My client insisted she was innocent and that she had nothing to do with her companion throwing a flower planter through the window of a pizza parlor and setting the place on fire. From the discovery, she appeared culpable. Very culpable. I instructed my investigator to interview every person named in the discovery because the police reports were sketchy. I also kept asking the prosecution for the interview of one named witness that was omitted from

the discovery. My investigator eventually was able to contact the omitted witness. He was an uninvolved passerby who confirmed completely the defendant's story that she was just standing there and her companion broke the window, started the fire and then told her "you'd better run." The charges against her were dismissed and she was released from jail. In the aftermath I laid in bed staring at the ceiling, feeling I had narrowly avoided allowing a horrible injustice to occur. She had been in custody for 30 days for no reason. But if the defense had been just a wee less diligent, this woman could have been convicted of a mandatory minimum arson crime and sentenced to a lengthy prison term for something she didn't do.

The use of experts

There is a significant need for experts in many criminal cases as well. Experts are needed for various different kinds of issues: first, to assist a lawyer in understanding the facts (e.g. a forensic accountant in a white collar fraud case, a computer expert in a child pornography case, an accident reconstructionist in an auto accident case, a firearms expert in a gun case). Second, an expert can help determine *why* a defendant acted as he or she did. In over 32 years, my clients have generally been good people who have done bad things. There have been a few "bad apples" but mostly these have been good people. There is a reason people act outside the norm. An expert can help figure out what that reason is. The reason may be situational (e.g. alcoholic black out) or it may be psychological or physiological (e.g. drug addiction, mental illness). Once we know the reason the defense attorney can determine whether the issue is a defense (e.g. lack of *mens rea*) or a mitigation factor (need for treatment and amenability to treatment). Third, an expert may be instrumental in providing the defense attorney information about the defendant that supports a reduction in the charges or a lesser sentence because of the history and characteristics of the defendant (e.g. significant medical issues, family history of abuse or violence).

I do not indiscriminately request authorization for either an investigator or an expert. I do not request authorization for an investigator or an expert in every case. But I, like others in this district, am well aware of my obligation to

test the prosecution's case and the need for assistance outside myself in many cases. The bottom line is: using an investigator and expert more often than not, makes a difference in the outcome of the case. The prosecution is more likely to negotiate a reduction in the charges or to agree to a lesser sentence or not oppose the defense request for a lesser sentence. Moreover, the use of good investigators (and other service providers) not only saves the court money if a case settles, but generally saves money because more expensive attorney time is not expended, saving the government and court money overall.

CJA PANEL MANAGEMENT

Several years ago I flew to Washington DC to meet with Judge Gleeson who was then head of the Defender Services Committee to discuss the Oregon commission structure with him and others. We talked about the possibility of taking Defender Services and the public defense budgets for defenders and CJA lawyers out of the judiciary. At this point, I do not think that is a good idea.

Separation of public defense from the judiciary has worked for Oregon because our legislature understands the criminal justice system and, perhaps, our legislators don't face the same political scrutiny or vengeance in supporting public defense that a representative or senator might suffer on the national stage. Additionally, the chief justice of the Oregon Supreme Court is an *ex officio* member of the commission and has been vocally supportive of public defense.

Defender Services should be reinstated as a directorate position within the Administrative Office of the Courts and should remain under the protection of the judiciary. Judges have an interest in ensuring defendants receive effective representation under the Sixth Amendment to the United States Constitution. But, administration of the CJA and defender programs should be returned to Defender Services with a certain amount of autonomy over budget expenditures and policy decision-making. Judges should not be reviewing and cutting vouchers nor should judges be appointing the defense lawyers. The system in place here in Oregon, administered by and through the federal defender, is working well. The appointments are done fairly,

requests for experts and investigators are reviewed and, if a request is outside the "norm", federal defenders will call us to discuss it before sending it on to the judge. Our vouchers are reviewed, checked and errors can be corrected on the front end, thus speeding up the process.

CONCLUSION

Defendants in this district receive effective representation from their appointed counsel. My experience has been that a defendant who trusts his or her lawyer is less likely to file for appeal or for post-conviction relief. Building a trust relationship takes time, effort and patience. Defendants have more confidence in the process and the result when they have a team working for them (attorney, investigator, expert or other service provider) who knows them and knows their case. Clients do not always like the results in their cases but when they believe (and their loved ones believe) that their lawyer (and her team) has done everything possible, they respect the system and they respect law, they have more "buy in" with the court and, often they can move on with their lives.

I look forward to seeing you next week.

Sincerely,

McCREA, P.C.

Shaun S. McCrea

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cc: FPD Lisa Hay