FEDERAL PUBLIC DEFENDER

WESTERN DISTRICT OF TEXAS

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November 02, 2015

SENT VIA EMAIL

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

Re: Written Testimony

Dear Judge Cardone:

Thank you for the opportunity to address the Committee to Review the Criminal Justice Act Program. Detailed herein below are my observations with regard to the current processes and procedures of the Criminal Justice Act. Of the fourteen areas of concern noted by the Committee, I will address four of the areas in specific detail as how they impact my District and my role as the head of the NITOAD (National IT Operations and Applications Division) Branch. The four areas I will address herein are: The impact of judicial involvement in the selection and compensation of federal public defenders and the independence of federal defender organizations (Issue 1); judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers (Issue 3); the availability of qualified counsel, including for large, multidefendant cases (Issue 9); and, an examination of the national structure and administration of the defender services program under the CJA (Issue 13). I will give an overview of our office and our District before addressing the four noted areas.

Overview

The federal public defender organization for the Western District of Texas is one of the largest defender organizations in the nation, comprising seven divisions and covering two time zones, 68 counties, and more than 92,000 square miles. It also remains one of the busiest districts, in both total caseload and average caseload per attorney.

In Fiscal Year 2014, we opened 6,785 cases and closed 7,163 cases. In FY 2015, we opened 8,275 cases and we closed 7,388 cases. We are available to accept appointments in all but two of the divisions within the Western District of Texas[1]. Since 2013 when I asked that our office be removed from "Operation Streamline"[2] cases, the vast majority of cases our office handles are felony cases. As a large part of our District shares a border with Mexico, we continue to have a large felony immigration caseload and felony drug trafficking load but our caseload and the complexity of our caseload has changed based upon the charging decisions made by local prosecutors and policies in the Department of Justice. White-collar crimes involve increasingly high amounts of potential loss, drug offenses involve increasingly serious drugs and increasingly high number of defendants, child pornography offenses increasingly involve conduct in addition to pornography.

Issue 1 – Judicial involvement in the selection and compensation of federal public defenders and the independence of federal defender organizations

I was honored to be selected by the Director of the AO to participate as a steering member on the work measurement study initiated by the Judicial Resource Council. As a result of this extremely collaborative and comprehensive study, it was shown that the Western District of Texas[3] lacked the necessary personnel to handle its caseload. In fact, the formula generated by the office of personnel management recommended that our office receive in excess of an additional 25 FTEs (full time equivalent) employees. Of the 25 new positions our office was awarded, at this time I cannot add any assistant federal defenders as I am capped by the Circuit at 50 attorneys (including myself). Historically, it has been extremely difficult for the Circuit to approve raising our attorney caps. In fact, the last time we asked for additional positions was in August 2008 and the Circuit did not respond to that request until May 2009. Only 4 positions were requested at that time. Prior to the request in 2008, the last request to increase the attorney cap was in 2000. In order to properly represent the thousands of cases we are appointed to yearly, our attorney cap should be raised to reflect that reality. The JRC, the Budget Committee, the Executive Committee and the Judicial Conference all endorsed the work measurement formula which contemplated giving my office additional attorney positions. The Circuit has indicated it will not consider any request to raise our respective attorney caps until sometime next year when they meet en banc – probably in May 2016. It seems incongruous that there should be a delay in allowing defenders within the Fifth Circuit to hire attorneys necessary to do the work supported by the work measurement formula. In order to reduce individual attorney caseloads to equalize them somewhat with other defender offices throughout the country, I would need to add 10 additional attorney

[1] There is no Federal Public Defender office in the Waco or Midland Divisions. All CJA appointments are handled by their respective panels.
[2] "Operation Streamline" refers to immigration offenses which are petty or misdemeanor offenses.
[3] The Southern District will gain substantial positions as well

positions. I am hopeful that Defender Services and the office of personnel management within the AO will assist us in educating the Circuit as to why raising the cap is of utmost importance.

Issue 3 – Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts and other service providers

As mentioned previously, as a border district, we carry a heavy immigration load. When appropriate, our attorneys and investigators pursue U.S. citizenship claims in defense to illegal reentry charges. Successful citizenship claims happen often enough in our district that no reentry case can be called "routine" anymore – each must involve at least a preliminary inquiry into whether, under a complex statutory scheme and often complex family histories, the defendant might be a citizen. Is this type of investigation and review possible for a court-appointed attorney who is not within a Defender office? Do they have the expertise to be able to make a determination as to whether or not a derivative claim should/can be pursued? Will the Judge in charge of the case appointed an investigator, *knowledgeable in this area*, upon request of the court-appointed attorney? Will the court pay for the time spent researching a possible derivative claim? The questions presented above are just a few of the areas of concern the Commission should examine and study. It is important to note that we assist all of our non-United States citizens who could claim derivative citizenship – regardless of what brought them into federal custody as we believe it is ancillary to our appointment. Do other court-appointed attorneys have the ability to do the same?

We have a high percentage of Spanish-speaking defendants, and because many of our cases involve immigration and drug violations, a high pretrial detention rate. To see clients and/or interview witnesses, attorneys and investigators frequently must travel distances of up to 270 miles round-trip. Court appointed counsel has the same issue when appointed to a case within our District. The remote detention issue within our District complicates and exacerbates the issues of finding and retaining qualified court appointed counsel to handle these cases and to get compensated for meeting the requirements of the Sixth Amendment.

The remoteness and vastness of the Western District of Texas along with judicial involvement in the appointment, compensation and management of panel attorneys similarly complicates the ability to recruit and retain qualified court appointed counsel to serve on a divisional panel of eligible attorneys available for court appointments. For example, although many efforts have been made to establish a panel of attorneys in the Austin Division available for court-appointed cases, no such formal panel exists within that division.[4] The Alpine/Pecos Division and the Del Rio Division are handicapped in efforts to recruit and retain qualified court-appointed

[4] Our Austin branch office handles the majority of appointments in that division. In FY14, we were appointed to 81.6% of the cases and in FY15 we were appointed to 93.3% of the cases.

counsel based upon the rural nature of these locales and the shear lack of interested, qualified attorneys to take on court appointed work. The additional issue of judicial involvement in assessing the need for the number and duration of remote client jail visits further exacerbates any effort to recruit and retain qualified court appointed attorneys in these underserved areas.

In capital habeas cases, the judicial involvement in the case budgeting and approval of experts is especially disconcerting. Few, if any, of the court staff have firsthand experience in the investigation and preparation involved in a capital habeas petition. Thus, the estimates for the attorney time needed to prepare the petition and the expert fees may seem excessive. However, no such review is taken on the government's side of the case. A judge is not setting the budget for the Assistant State Attorney General litigating to uphold the death sentence. Additionally, the presumptive caps for funding both the CJA counsel and the ancillary services are too low – especially in Texas because of the historically poor representation in state habeas proceedings and the Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), allowing federal habeas counsel to raise new ineffective assistance of trial counsel claims in federal court.

Issue 9 – The availability of qualified counsel, including for large multidefendant cases

Recently, I had the near impossible task of assisting judges within the Western District in finding qualified appointed counsel to handle federal capital habeas cases which had been filed after the Texas habeas relief had been exhausted. Much to my dismay and disbelief, the various judges within the Western District of Texas did not have a list of qualified court-appointed attorneys to handle this type of highly technical and specialized litigation. Additionally, it became readily apparent that the number of attorneys who are truly qualified and capable of handling this type of litigation were few and far between and were already burden with a pending caseload of capital habeas cases and could not take on additional work. In every case where I assisted one of our judges in finding qualified counsel, we had to go outside the Western District to make an appointment. A capital habeas unit should be created in Texas in order to address this lack of qualified and available court appointed counsel.

In large multidefendant cases, the lack of qualified counsel capable of handling complex cases is also an issue of concern within the Western District of Texas. Many times our office will be conflicted out of having even one of the defendants and thus all of the appointments would necessitate court appointed counsel being assigned to the case. If a division either does not have a plan (Austin) or the division does not have a robust or deep panel with regard to experience and aptitude (Alpine/Pecos and Del Rio), attempting to find qualified counsel becomes extremely difficult for the district court.

Issue 13 – An examination of the national structure and administration of the defender services program under the CJA

An examination of the national structure and administration of the defender services program highlights several areas of concern. One, of course, was the demotion of DSO within the AO which occurred around the time of sequestration. However, in my role as the head of NITOAD, and in light of the reorganization of the AO during this same timeframe, the area I will address herein is in the area of defender IT. It is extremely important and imperative to keep the technology systems of a federal public defender office, including specifically federal defender e-mails, case management programs, and statistical systems separate from the management of the Administrative Office of the United States Courts (AO).

NITOAD was establish to manage the defender email systems, case management systems and statistical systems and all NITOAD employees are employees of the Western District of Texas. Thus, they are defender employees and their access to client data is protected by the attorney/client privilege. Before the IT consolidation by the AO in 2013, DSO and NITOAD worked together to ensure the security and confidentiality of the defender IT systems and they did that for 81 offices. After the merger of the IT function, this independence became much more precarious.

As a cost-cutting measure in 2013, the AO assumed responsibility for the technological needs of defender offices, providing the AO with access to client and case information by someone outside of a defender office. Following this announcement, the NACDL's Ethics Advisory Committee concluded in Formal Opinion 13-01 (December 2013) that it would be "unethical for the Federal Defenders to participate in a data merger program that does not adequately protect confidential information for past and present clients." Although DSO and the federal defenders strongly opposed the AO taking over defender systems, the AO scheduled the merger anyway. Only after the release of the ethics opinion and the continued opposition by DSO and the defenders did the AO back down and it subsequently entered into two memoranda of understanding which restricted the AO's access to our data. Defenders and DSO should have been consulted prior to this merger to ensure the obligations of defenders were met and the rights and privileges of their clients protected.

Although there are memoranda of understanding between the parties, defenders continue to be concerned with the AO's access to client information. And they should be concerned. Although management at the AO and within the technological department continue to make assurances that our confidential information will not be accessed, such reassurances are not comforting when the individuals in charge do not understand the reason for the confidentiality. For example, one AO IT manager explained that he had "top secret" clearance and thus we (defenders) should not be concerned if he had access to our data. He did not understand that having access to our data when he is not a defender employee violates the duty of confidentiality owed to our clients.

Another AO IT manager wanted access to our protected case management system (defenderData) in order to test applications within that protected realm – not realizing that allowing her through the firewall would jeopardize thousands of clients' confidential data and information.

Defender IT should be removed from the AO IT in order to ensure the independence and confidentiality of the defender IT function.

Thank you once again for giving me an opportunity to address the Committee with my concerns and comments.

Very truly yours,

MAUREEN SCOTT FRANCO
Federal Public Defender