

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

Defender Services

SUMMARY STATEMENT OF ACCOUNT REQUIREMENTS

Fiscal Year 2021 Enacted Appropriation	1,316,240,000
Fiscal Year 2022 Appropriation Request	1,409,591,000
Requested Increase from Fiscal Year 2021 Enacted Appropriation	93,351,000

APPROPRIATION LANGUAGE

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

DEFENDER SERVICES

For the operation of Federal Defender organizations; the compensation and reimbursement of expenses of attorneys appointed to represent persons under 18 U.S.C. 3006A and 3599, and for the compensation and reimbursement of expenses of persons furnishing investigative, expert, and other services for such representations as authorized by law; the compensation (in accordance with the maximums under 18 U.S.C. 3006A) and reimbursement of expenses of attorneys appointed to assist the court in criminal cases where the defendant has waived representation by counsel; the compensation and reimbursement of expenses of attorneys appointed to represent jurors in civil actions for the protection of their employment, as authorized by 28 U.S.C. 1875(d)(1); the compensation and reimbursement of expenses of attorneys appointed under 18 U.S.C. 983(b)(1) in connection with certain judicial civil forfeiture proceedings; the compensation and reimbursement of travel expenses of guardians ad litem appointed under 18 U.S.C. 4100(b); and for necessary training and general administrative expenses, [~~\$1,316,240,000~~]~~\$1,409,591,000~~, to remain available until expended.

(P.L. 116-260 - Financial Services and General Government Appropriations Act, 2021)

**SUMMARY OF REQUEST
DEFENDER SERVICES
FISCAL YEAR 2022
(Dollar amounts in thousands)**

Fiscal Year 2022 Resource Requirements:

<u>Page</u>		<u>FTE</u>	<u>Amount</u>
	Fiscal Year 2021 Obligations	3,194	1,337,613
	Less encumbered carryforward from FY 2020 into FY 2021	-	(370)
	Fiscal Year 2021 Obligations Excluding Encumbered Carryforward		1,337,243
	Less unencumbered available carryforward from FY 2020 into FY 2021	-	(21,003)
	Fiscal Year 2021 Enacted Appropriation	3,194	1,316,240
	<u>Adjustments to Base to Maintain Current Services:</u>		
	A. PERSONNEL RELATED		
	<i>Pay and Benefit Adjustments</i>		
	1. Proposed January 2022 pay adjustments		
5.24	a. Federal pay adjustment (1.0% for nine months)	-	3,986
5.25	b. Panel attorney capital rate adjustment (from \$197 per hour to \$199 per hour, effective January 1, 2022)	-	246
5.25	c. Panel attorney non-capital rate adjustment (from \$155 per hour to \$156 per hour, effective January 1, 2022)	-	291
5.25	2. Annualization of January 2021 pay adjustments		
5.25	a. Federal pay adjustment (1% for three months)	-	1,329
5.25	b. Panel attorney capital rate adjustment (from \$195 per hour to \$197 per hour)	-	215
5.26	c. Panel attorney non-capital rate adjustment (from \$152 per hour to \$155 per hour)	-	5,992
5.26	3. Promotions and within-grade increases	-	3,986
5.26	4. Benefits increases		
	a. Health benefits	-	1,543
	b. FICA adjustment	-	492
	c. FERS adjustment	-	5,408
	B. Other Adjustments		
	<i>General Inflationary Adjustments</i>		
5.27	5. Inflationary increases for contracts, services, supplies, and equipment	-	5,351
5.27	6. Inflationary increase in GSA space rental costs	-	2,450
	<i>Workload and Financing Adjustments</i>		
5.27	7. Change in projected panel attorney workload	-	9,910
5.27	8. Annualization of FY 2021 positions	102	25,788

<u>Page</u>		<u>FTE</u>	<u>Amount</u>
5.27	9. Increase in appropriation needed to maintain FY 2021 requirements due to a decrease in carryover funding	-	1,003
	Subtotal, Adjustments to Base to maintain current services	102	67,990
	Total Current Services Appropriation Required	3,296	1,384,230
 <u>C. Program Increases:</u>			
5.28	10. Additional positions for projected workload		
	a. FDO staffing formula positions	47	12,449
	b. National positions	5	1,055
	c. McGirt v. Oklahoma positions	16	3,376
5.29	11. Diversity Fellowship Program positions	7	1,477
5.29	12. Reimbursable positions	-	691
5.29	13. FDO staffing reserve	28	6,013
5.29	14. Establishment of new federal defender organization	-	300
	Subtotal, program increases	103	25,361
	Total Fiscal Year 2022 Appropriation Required	3,399	1,409,591
	Total Appropriation Increase, Fiscal Year 2021 to Fiscal Year 2022	205	93,351
 <u>D. Financing the Fiscal Year 2022 Request:</u>			
	Total Appropriation Required	3,399	1,409,591
5.30	15. Anticipated carryforward from FY 2021 and prior years into FY 2022	-	20,000
	Estimated Obligations, Fiscal Year 2022	3,399	1,429,591

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES
DEFENDER SERVICES**

Obligations by Activity (\$000)

Activity	FY 2020 Actual	FY 2021 Assumed	FY 2022 Request
CJA Representation & Related Expenses Obligations	1,252,555	1,321,922	1,412,269
Program Administration Obligations	9,553	15,691	17,322
Direct Obligations	1,262,108	1,337,613	1,429,591
Unencumbered Unobligated Balance, Start of Year	(30,100)	(21,003)	(20,000)
Encumbered Unobligated Balance, Start of Year	(2,800)	(370)	
Total Unobligated Balance, Start of Year:	(32,900)	(21,373)	(20,000)
Deposits and Other Adjustments:			
Prior Year Recoveries	(12,838)	(10,000)	
Anticipated Financial Plan Savings		(10,000)	
Transfers from CAFC and FJC	(2,147)		
Unobligated Balance, End of Year:	21,373	20,000	
Less Offsetting Collections	(22)		
Appropriation	1,235,574	1,316,240	1,409,591
Direct Appropriations	1,234,574		
CARES Act Supplemental Appropriation	1,000		

Obligations by Budget Object Class (\$000)

Description	FY 2020 Actual	FY 2021 Assumed	FY 2022 Request
11.1 Full-time permanent	363,453	385,205	418,726
11.3 Other than full-time permanent	8,969	9,506	10,333
11.5 Other personnel compensation	776	822	894
11.9 Personnel compensation subtotal	373,198	395,533	429,953
12.1 Personnel benefits	131,616	142,064	157,909
13.0 Benefits for former personnel	584	628	668
21.0 Travel	7,112	15,139	15,787
22.0 Transportation of things	341	377	416
23.1 Rental payments to GSA	42,581	45,661	48,471
23.2 Rental payments to others	945	1,086	1,149
23.3 Communications, utilities, and miscellaneous charges	9,315	10,983	12,054
24.0 Printing and reproduction	63	116	123
25.1 Advisory and assistance services	441,213	452,998	472,799
25.2 Other services from non-federal sources	49,293	50,610	52,822
25.3 Other goods and services from federal sources	5,490	5,637	5,883
25.4 Operations and maintenance of facilities	7,728	7,934	8,281
25.6 Medical care	296	304	317
25.7 Operations and maintenance of equipment	1,451	1,490	1,555
26.0 Supplies and materials	1,895	1,965	2,183
31.0 Equipment	18,286	20,721	23,121
41.0 Grant payments	170,698	184,368	196,100
42.0 Insurance claims and indemnities	1		
Direct Obligations	1,262,108	1,337,613	1,429,591

Full-time Equivalent (FTE) by Activity

Activity	FY 2020 Actual	FY 2021 Assumed	FY 2022 Request
CJA Representation & Related Expenses Obligations ^{1/}	3,056	3,183	3,388
Program Administration Obligations	10	11	11
Total FTE	3,066	3,194	3,399

^{1/} The FTE listed are attributable to Federal Public Defender Organization staff.

**COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES
DEFENDER SERVICES
Relation of Obligations to Outlays (\$000)**

	FY 2020 Actual	FY 2021 Assumed	FY 2022 Request
Direct obligations	1,262,108	1,337,613	1,429,591
Obligated balance, start of year	71,080	74,965	82,473
Recoveries of prior year unpaid obligations	(9,975)	(10,000)	(10,000)
Change in uncollected payments	14	0	0
Obligated balance, end of year	(74,965)	(82,473)	(51,738)
Total Outlays	1,248,262	1,320,105	1,450,326
Less Offsets	(2,899)	(5,000)	(5,000)
Net Outlays	1,245,363	1,315,105	1,445,326

GENERAL STATEMENT AND INFORMATION

The right to effective assistance of counsel for persons financially unable to obtain adequate representation is constitutionally mandated. It is a critical component of the criminal justice system and one of the foundations of liberty in America. The Defender Services appropriation supports the appointment of counsel and other related services required to be provided under the United States Constitution; the Criminal Justice Act (CJA), 18 U.S.C. § 3006A; and other statutes. It also provides for the continuing education and training of persons who furnish representational services under the CJA.

The constitutional right to the assistance of counsel is a cornerstone of the criminal justice system. In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the United States Supreme Court wrote: “The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” The mission of the Defender Services program is to ensure that the Sixth Amendment right to counsel is available to those who cannot afford to retain counsel and other necessary defense services.

The goals of the Defender Services program are to:

- provide timely counsel services to all eligible persons;
- provide appointed counsel services consistent with the best practices of the legal profession;
- provide cost-effective services; and
- protect the independence of the defense function performed by assigned counsel so that the rights of individual defendants are safeguarded and enforced.

By fulfilling its mission, the Defender Services program helps to:

- ensure the successful operation of the constitutionally-based adversarial system of justice by which both federal criminal laws and federally guaranteed rights are enforced; and
- maintain public confidence in the nation’s commitment to equal justice under law.

The Defender Services account funds the operations of federal defender organizations (FDOs), payments to private attorneys appointed under the CJA, and program administration costs. The fiscal year (FY) 2022 appropriation request of \$1,409.6 million will enable FDOs and private attorneys to accept CJA appointments; retain necessary expert services; and undertake case-related travel.

The FY 2022 request will support:

- additional FDO staffing to support 98 percent of the projected staffing formula requirements (caseload adjusted);
- additional national positions for information technology (IT) and the Capital Resource Counsel (CRC) Project;
- additional national positions for a new Diversity Fellowship Program to increase the diversity of attorneys qualified to provide counsel in federal capital trials and non-capital CJA representations;
- additional funding for the staffing reserve to address caseload surges, such as Opt-In requirements;
- additional funding for staffing to support an increase in caseload as a result of the decision in *McGirt v. Oklahoma*, 591 U.S. ___ (2020);
- start-up costs for a new FDO expected in a district based on recent inquiries from eligible districts (location to be determined and subject to congressional notification of reprogramming to create a new office) that meets the caseload criteria of having at least 200 appointments per year; and
- additional reimbursable staff in the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts (AO).

TYPES OF COUNSEL

The CJA authorizes the appointment of counsel, who are either (1) attorneys employed by an FDO or (2) private attorneys retained to represent clients (these private attorneys are known as “panel attorneys”). Each is described below.

Federal Defender Organizations

The CJA authorizes two types of FDOs:

- federal public defender organizations (FPDOs), which are part of the judiciary; and
- community defender organizations (CDOs), which are private, state-chartered, non-profit corporations funded by annual federal judiciary grants.

An FDO (whether an FPDO or a CDO) may be established in any district (or combination of districts) in which at least 200 CJA appointments are made annually. There are currently 81 FDOs authorized to serve 91 of the 94 judicial districts. (Georgia-Southern

and Kentucky-Eastern meet the requisite number of appointments but do not have an FDO. Northern Mariana Islands does not meet the requisite number of appointments.)

FDOs are the flagship of federal criminal defense, delivering high-quality representation at reasonable costs while safeguarding the rights of individuals under the Constitution. They recruit, train, and retain lawyers with skills comparable to those who prosecute criminal matters in U.S. Attorneys' offices. Because of their expertise and efficiencies, FDOs provide cost-effective defense services consistent with the best practices of the legal profession.

FDO attorneys are available for appointment on short notice, ensuring that the rights of the accused are protected and that court operations are not disrupted. FDOs also make optimal use of national resources by sharing their expertise and best practices with other FDOs and panel attorneys.

FDO staff improve the overall quality of CJA representation within the districts they serve by providing expert advice, training, and other assistance to panel attorneys in complex legal and technical areas such as sentencing, mitigation, litigation support, and cases involving death penalty issues.

Panel Attorneys

A panel attorney is a private lawyer who serves on a panel of qualified counsel maintained by the district or appellate court and is appointed by the court to represent eligible individuals in accordance with the CJA. The CJA specifies that in all judicial districts (including those served by an FDO), private attorneys shall be appointed "in a substantial proportion of the cases." 18 U.S.C. § 3006A(a)(3).

Panel attorneys are utilized primarily for three other reasons.

- (1) Ethical standards prohibit appointing FDOs in conflict-of-interest situations (*e.g.*, an FDO is precluded from representing more than one defendant in a multi-defendant case and is disqualified from accepting a new appointment that may present a conflict with the interests of previously represented clients).
- (2) The workload demands in some FDOs periodically limit the ability of that FDO to accept new representations and maintain professional ethical standards.
- (3) The district is not served by an FDO. As noted above, three districts do not have an FDO.

Nationally, almost 90 percent of CJA panel attorneys are in small law firms (with five or fewer lawyers), and approximately 60 percent are solo practitioners. The CJA provides that these attorneys shall be reimbursed for their expenses and compensated for their services at authorized hourly rates.

CJA CASELOAD AND WORKLOAD TRENDS

Attorneys appointed under the CJA (FDO attorneys and private panel attorneys) provide constitutionally-required defense services in a wide variety of complex criminal cases, such as international and domestic terrorism; cybercrime; child exploitation and obscenity; complex fraud cases (health care, identity theft, public corruption, and bank and investment fraud); environmental crimes; drug cases; immigration matters; human trafficking; and all other serious federal crimes.

To determine FDO staffing requirements¹ in this FY 2022 budget request, a five-year statistical average is used that includes actual data from 2017 – 2020 and projected data for 2021. As shown in the following chart, FDO weighted representations² increased significantly between statistical years³ 2016 and 2019 and remained at a high level in 2020. During this time period, there were notable increases in capital prosecution, assault, racketeering, immigration, and sex offense cases. Actual 2020 weighted representations were approximately 17 percent above the 2016 level. Although the caseload is projected to decline in 2021 as a result of the COVID-19 pandemic, the caseload is projected to rebound in 2022. For a discussion of the COVID-19 pandemic's impact on workload, see COVID-19 - Impact on FDOs and CJA Panel Attorneys on page 5.14.

¹ FDO workload forecasts, as with all other judiciary workload projections, are prepared by the Administrative Office of the U.S. Courts' Judiciary Data and Analysis Office.

² Since FY 2016, the Defender Services program has used a comprehensive set of staffing formulas to determine FDO staffing requirements. These staffing formulas, developed using the same procedures as the rest of the judiciary, establish a fair, equitable, and rigorous basis for calculating and allocating FDO personnel. The judiciary uses a weighted caseload methodology for the federal defender portion of the Defender Services appropriation request to account for the complexity and resource intensity of FDO caseload. This methodology more precisely determines FDO staffing requirements. Instead of using raw, or unweighted case numbers, the formula uses a five-statistical-year average of FDO weighted representations to calculate the number of positions for each office. Using a five-statistical-year average provides a measure of protection against volatility in caseload.

³ An FDO statistical year is a period of one year beginning on April 1st of one year and ending on March 31st of the subsequent year.

FDO Weighted Representations							
Workload Factor	2016 Actual	2017 Actual	2018 Actual	2019 Actual	2020 Actual	2021 Projected	2022 Projected
FDO Weighted Representations – Non-capital	128,767	131,024	142,750	152,496	151,025	121,000	141,200
FDO Weighted Representations – Capital Prosecution*/**	1,104	2,752	2,101	1,174	1,019	1,700	1,700
Total FDO Weighted Representations	129,871	133,776	144,851	153,670	152,044	122,700	142,900
Year-to-Year Change		3.0%	8.3%	6.1%	-1.1%	-19.3%	16.5%

*The AO's Judiciary Data and Analysis Office (JDAO) will be including weighted capital prosecution representations to the FDO weighted representations going forward. To show accurate comparisons of prior statistical year (SY) data to the SY 2021 projections, weighted capital prosecution representations are added to the non-capital FDO weighted representations to show total FDO weighted representations.

**Actual non-weighted capital prosecutions from 2016 – 2020 range from 20 to 53 per year.

Though the overall change in weighted representations between 2019 and 2020 was small, some notable differences are shown in the chart below:

Major Types of FDO Weighted Representations*			
Case Group	2019	2020	Percent Change
Drug Representations	17,346	18,381	6.0%
Immigration – Illegal Re-Entry	19,510	21,946	12.5%
Weapons Representations	18,780	16,625	-11.5%
Criminal-Other	48,792	51,329	5.2%

*Statistical data is for a 12-month period through March 31 of each year.

Changes in technology, prosecution tactics and priorities, legislation, sentencing policy, and case law all add to the challenge of providing representation to eligible individuals in federal courts. The Defender Services program must respond to changes in case law, such as those resulting from Supreme Court decisions, changes in the U.S. Sentencing Guidelines, statutory changes, and changing priorities in federal law enforcement such as heightened immigration enforcement, the opioid crisis, and violent crimes

initiatives. While providing representation in these complex matters, CJA attorneys must also be able to respond rapidly to changes in law and practice since these changes are likely to result in new causes of action for FDOs and panel attorneys.

For example, the CARES Act (enacted in March 2020), which allowed courts to waive the limits on home confinement that restricted eligibility to the last 10 percent of an individual’s sentence, and the First Step Act (enacted in December 2018), which eliminated the mandatory “exhaustion” of the administrative appeals and process requirement with the Bureau of Prisons, increased the number of compassionate release cases filed, especially during the COVID-19 pandemic. The recent Supreme Court decision in *McGirt v. Oklahoma*, 591 U.S. ___ (2020), which changed the jurisdiction from state to federal court over numerous types of felony cases involving Indian persons or property in Oklahoma, is leading to an increase in representations not fully anticipated in current workload projections. In addition, changes in state law, such as California’s Proposition 66 that speeds up state court review of capital judgments, also impact the Defender Services program and increase resource needs.

Department of Justice (DOJ) policy also drives caseload for the CJA. For example, DOJ has increased the number of capital prosecutions in recent years, and federal executions resumed in 2020 after a 17-year hiatus. In March 2018, there were approximately 267 individuals with death-eligible indictments facing potential federal capital prosecution. Two years later, in September 2020, there were approximately 352 individuals facing capital-eligible charges, an increase of 32 percent.

As shown below, panel attorney representations were increasing prior to statistical year (SY) 2021 but declined due to the COVID-19 pandemic. However, panel attorney representations are projected to rebound in SY 2022. To determine panel attorney requirements in this FY 2022 budget request, SY 2022 projected workload was used (92,600 representations⁴).

Panel Attorney Representations*							
Workload Factor	2016 Actual	2017 Actual	2018 Actual	2019 Actual	2020 Actual	2021 Projected	2022 Projected
Panel Attorney Representations	80,043	79,352	77,130	89,079	93,189	75,100	92,600
Year-to-Year Change		-0.9%	-2.8%	15.5%	4.6%	-19.4%	23.3%

*Statistical data is for a 12-month period through March 31 of each year.

⁴ CJA Panel representations are based on vouchers paid during the 12-month period. If no voucher was paid, no representation is counted. The judiciary relies on a forecast of unweighted representations for estimating the panel attorney portion of the appropriation request. This projection is based on one representation for each case, regardless of the case type.

A significant increase in panel attorney payments occurred from FY 2018 to FY 2020 (14.3 percent, from \$396.2 million to \$452.9 million) as shown in the following chart. The increase was mainly due to more representations (20.8 percent, from 77,130 to 93,189) and hourly rate increases, which went from \$140 to \$152 for non-capital representations, and from \$188 to \$195 for capital representations. Of the \$56.7 million increase, \$35.5 million was for drug representations. Other non-capital categories showing significant FY 2020 payment increases from FY 2018 include immigration and weapons. In addition, capital prosecution panel attorney payments increased by \$18.6 million (65.0 percent) from FY 2018 to FY 2020.

**Panel Attorney Payments
(\$ millions)**

Offense Type	FY 2018	FY 2019	FY 2020	Dollar Change from FY 2018 to FY 2019	% Change from FY 2018 to FY 2019	Dollar Change from FY 2019 to FY 2020	% Change from FY 2019 to FY 2020	Dollar Change from FY 2018 to FY 2020	% Change from FY 2018 to FY 2020
Capital Prosecution	\$28.6	\$40.6	\$47.2	\$12.0	42.0%	\$6.6	16.3%	\$18.6	65.0%
Drugs	\$122.0	\$136.5	\$157.5	\$14.5	11.9%	\$21.0	15.4%	\$35.5	29.1%
Immigration	\$19.8	\$24.3	\$29.7	\$4.5	22.7%	\$5.4	22.2%	\$9.9	50.0%
Fraud	\$34.0	\$33.1	\$33.5	-\$0.9	-2.6%	\$0.4	1.2%	-\$0.5	-1.5%
Weapons	\$28.5	\$32.1	\$35.9	\$3.6	12.6%	\$3.8	11.8%	\$7.4	26.0%
Capital Habeas	\$16.2	\$13.7	\$16.3	-\$2.5	-15.4%	\$2.6	19.0%	\$0.1	0.6%
Appeals	\$33.8	\$30.4	\$35.0	-\$3.4	-10.1%	\$4.6	15.1%	\$1.2	3.6%
Criminal - Other	\$113.3	\$100.3	\$97.8	-\$13.0	-11.5%	-\$2.5	-2.5%	-\$15.5	-13.7%
Total	\$396.2	\$411.0	\$452.9	\$14.8	3.7%	\$41.9	10.2%	\$56.7	14.3%

Requirements for panel attorneys are directly attributable to expected FY 2022 caseload and inflationary rate increases, resulting in an increase of \$9.9 million for projected panel payments in FY 2022 (See page 5.27 for more details). Other issues that impact the FY 2022 budget request are detailed in the Significant Issues for Fiscal Year 2022 section (See pages 5.14 – 5.19).

FISCAL YEAR 2021 APPROPRIATIONS

The judiciary built the FY 2022 budget request for the Defender Services appropriation on the FY 2021 enacted appropriation, which is \$1,316.2 million. This amount funds current services in FY 2021 and allows for hiring an additional 250 FDO positions, including 206 FDO staffing formula positions, 13 CJA panel management positions, 26 positions related to the additional workload associated with the Supreme Court's *McGirt* decision, and five national positions. In addition, the FY 2021 appropriation funds the \$1 above-COLA increase to the panel attorney non-capital rate to reach the statutory maximum, eight Defender Services Office reimbursable positions, and critical information technology requirements.

For bill language, the judiciary used the language from P.L. 116-260, Financial Services and General Government Appropriations Act, 2021.

SIGNIFICANT ISSUES FOR FISCAL YEAR 2022

COVID-19 – Impact on FDOs and CJA Panel Attorneys

In the spring of 2020, the COVID-19 pandemic resulted in a 63 percent reduction of appointments for FDOs, from a monthly average of 7,259 appointments over the first six months of FY 2020, to 2,647 appointments in April 2020. Appointments gradually increased each succeeding month from that low. By the summer of 2020, representations rebounded in many districts, erasing most of the decline experienced earlier in the year. There were 5,636 appointments in September 2020, which is 77% of the monthly average over the first six months of the fiscal year. The judiciary expects that caseload will continue to increase as the pandemic situation improves. Most FDOs were already operating at historically high caseload levels in the two years before the pandemic. Therefore, based on the FDO work measurement formula, which utilizes five years of workload, many FDOs' staffing requirements will increase in FY 2022 despite the pandemic-induced reduction in caseload.

Similarly, panel attorney appointments dropped by approximately 60 percent during the first few months of the pandemic but have steadily increased more recently. Despite this decline in appointments, panel attorney payments in March and April 2020 spiked to approximately \$50 million per month (compared to the FY 2020 financial plan average monthly amount of \$36.0 million). This increase at the beginning of the pandemic was likely a function of accelerated voucher submissions as attorneys had more time to work through their billing backlog. Panel attorneys are paid upon approval of a payment voucher (generally after the completion of a case). Typically, there is a delay of several months from appointment to payment. Therefore, the slowdown in appointments

beginning in March 2020 resulted in lower than projected payments beginning in June 2020. Given the projected change in panel representations from 75,100 in SY 2021 to 92,600 in SY 2022, spending is expected to increase consistent with the increase in caseload.

Projected Impact of the “McGirt v. Oklahoma” Decision

The Major Crimes Act (MCA) gives federal courts exclusive jurisdiction over certain enumerated serious crimes committed by “any Indian . . . against the person or property of another Indian or any other person” within “Indian country.” See 18 U.S.C. § 1153(a). On July 9, 2020, the Supreme Court held in *McGirt v. Oklahoma* that land in northeastern Oklahoma reserved for the Creek Nation in the 1830s remains “Indian country” for purposes of the MCA because Congress never expressly disestablished the reservation. As a result of the decision, the federal government, rather than the state, must prosecute major crimes involving Indians, which include violent crimes such as murder, rape, sexual assault, and robbery. *McGirt v. Oklahoma*, 591 U.S. __ (2020). The precedent set in *McGirt* is expected to be applied to cases involving four other Oklahoma-based tribes and, as such, will affect all three federal judicial districts in the state.

The impact of the *McGirt* decision on FDOs and CJA panel attorneys in Oklahoma is substantial, and the anticipated increased federal court workload is currently expected to last indefinitely. The Department of Justice estimates that there are thousands of state prisoners whose cases will need to be reviewed and who may be prosecuted anew in federal court because the state’s jurisdiction to prosecute the original offense may be invalidated under *McGirt*. During the immediate aftermath of the decision, the U.S. Attorneys in Oklahoma estimated caseload increases of 300-500 percent for Creek Nation prosecutions only. Should *McGirt* apply to all Five Civilized Tribes, the U.S. Attorneys estimated a 1,300-1,500 percent increase in caseload.

The FDOs and CJA panel attorneys in Oklahoma are already starting to experience the effects of the *McGirt* decision. Since the *McGirt* decision, monthly caseload in Northern District of Oklahoma is up 286 percent over the past twelve-month average. Monthly caseload in the Eastern District of Oklahoma is up 294 percent in the same timeframe. For the Eastern District of Oklahoma, the weighted representations in September and October of 2020 are 89 percent higher compared to the same period in 2019. The weighted representations for the Northern District of Oklahoma are 16 percent higher than last year. There have been more than 225 new cases, of which four are death-eligible murder cases, just from Creek Nation cases, and four other tribes’ cases will almost certainly follow. The federal defender for the Northern and Eastern Districts of Oklahoma has stated that due to the number of CJA appointments already resulting from *McGirt*, both the FDO and the CJA panel in those districts will soon be unable to take additional appointments. The Tenth Circuit has already approved the Eastern and Northern Districts of Oklahoma FDO to double their number

of assistant federal public defenders (from 10 to 20). In the meantime, several FDOs from outside the state and panel attorneys from other states are accepting appointments to absorb some of the overflow caseload. Based on current projections, the caseload numbers will continue to rise during SY 2021 and SY 2022, and the Eastern and Northern Districts of Oklahoma FDO will have to transition from a small office to one of the program's larger FDOs.

Thus, there is an immediate need to increase the availability of attorneys in the Oklahoma districts to address the increased caseload. The Defender Services FY 2021 financial plan included 26 positions to address *McGirt*-related caseload. The FY 2022 request includes an additional 32 positions. These resources dedicated in FY 2021 and requested in FY 2022 are to address the immediate *McGirt* decision currently affecting the Creek Nation.

Opt-In

Opt-In refers to expedited procedures for federal habeas corpus review of state-imposed death sentences enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act and DOJ implementing regulations. Designed to speed-up the legal processes from sentencing to execution, Opt-In significantly curtails federal court review of the constitutionality of state death row prisoners' convictions and death sentences. Opt-In fast-tracks federal habeas review by, among other things, shortening the statute of limitations for prisoners to file a federal habeas corpus petition under 28 U.S.C. § 2254 from 12 months to six months, and strictly limiting amendments to the petition. Opt-In's accelerated federal judicial review significantly increases workload and associated staffing and funding requirements for FDO capital habeas units (CHUs) and CJA panel attorneys in states affected by Opt-In.

In order for a state to benefit from Opt-In's accelerated procedures, the U.S. Attorney General must certify that the state meets certain statutory and administrative requirements, including having a mechanism for providing for state post-conviction counsel, compensation, and litigation expenses. Two states have applied for Opt-In certification: Arizona and Texas. On April 14, 2020, the Attorney General certified that the state of Arizona meets the requirements for Opt-In status and is, accordingly, entitled to utilize the fast-track federal habeas review procedures. While there is litigation pending in the D.C. Circuit regarding the certification decision, the Opt-In provisions remain in effect in Arizona. DOJ has not yet acted on Texas's application for certification.

The Arizona CHU projects that, over the next eight fiscal years, a minimum of 44 new cases will be impacted by Opt-In and subject to its fast-track procedures, and that the increased workload generated by Opt-In will require approximately 43 additional temporary positions to staff those cases. In comparison, the current staffing formula authorizes 57.3 FTE for the Arizona CHU to handle its current caseload, excluding Opt-In. The judiciary's FY 2022 budget request includes an FDO staffing reserve of \$6.0 million (28.5

FTE) which, if funded, may be used to help address some of the Arizona CHU's increased Opt-In requirements. If DOJ also certifies Texas, there are approximately 199 cases throughout Texas that would potentially be impacted by Opt-In. (See page 5.29 for more details.)

Diversity Fellowship Program

In September 2020, the Judicial Conference approved the establishment of a Defender Services Diversity Fellowship Program. The Fellowship Program will seek to enhance the quality of representation provided under the CJA by increasing the diversity of attorneys who are qualified to join federal defender organizations, CJA panels, or federal capital trial teams. The Fellowship Program will establish a national legal training program that targets a diverse pool of law school graduates interested in federal criminal defense practice. The intent of the program is to increase participation by attorneys from groups traditionally underrepresented in the legal profession, enhancing the Defender Services program's ability to provide high-quality, effective representation. Expected to begin in FY 2022, the Fellowship Program will place 14 fellows in federal defender organizations for two-year terms. Two of the fellows will focus on federal capital trial practice, and 12 will focus on non-capital cases. The program complies with all applicable equal employment opportunity laws, and eligibility to participate and selection are without regard to race, color, religion, age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status, or other difference. The judiciary's FY 2022 budget request includes \$1.5 million for the Fellowship Program.

Non-Capital Panel Attorney Rate

The judiciary is grateful for the significant increases to the non-capital hourly rate that Congress has provided in recent years. The judiciary is especially thankful for the FY 2021 non-capital rate increase that allowed this rate to reach the maximum statutory level of \$155 per hour. Obtaining the statutorily authorized non-capital hourly rate demonstrates support for the essential contributions of private panel attorneys to the CJA program, thereby helping to improve the availability and quality of experienced private attorneys willing to accept appointment in CJA cases. A meaningful public defense system, and compliance with the constitutionally and statutorily mandated right to the effective assistance of counsel, cannot function without qualified and experienced panel attorneys willing to provide representation.

Other Critical Positions

National Positions: This FY 2022 request includes seven national positions (from 20 to 27) to support information technology needs and three national positions for the Capital Resource Counsel Project (CRC).

FY 2022 is the first year of implementation of a new national Defender Services information technology staffing formula that was approved by the Judicial Conference. The information technology positions will ensure Defender Services information technology systems are mission capable and functioning at judiciary standards. Further, they will aid the Defender Services program's initiative to further centralize cybersecurity protections and expand its managed security operations center (MSOC) capability.

The CRC request of three additional positions (from seven to ten) would provide two resource counsel attorneys and one paralegal. These positions are necessary due to the substantial increase in defendants with death-eligible indictments; DOJ authorizations to seek the death penalty; and the greater complexity of capital litigation cases. In March 2017, there were 158 individuals with death-eligible indictments facing potential federal capital prosecution. By September 2020, there were approximately 352 individuals facing death-eligible charges and pending an authorization decision by the U.S. Attorney General. These additional positions would expand the CRC's ability to provide cost-effective direct representation by expert capital litigators and enhance CRC's ability to provide expert advice and assistance to CJA appointed counsel. (See page 5.28 for more details on national positions.)

Reimbursable Positions for the Defender Services Office: The FY 2022 request includes a total of eight additional reimbursable positions. These positions, which will be part of the AO's Defender Services Office, would be funded by the Defender Services appropriation, and the funding would be reimbursed to the AO account. These positions would support data management, financial analysis, legal and policy support, program operations, training, and implementation of CJA-related policies approved by the Judicial Conference. (See page 5.29 for more details.)

Update on CJA Review Study

In April 2015, Chief Justice John G. Roberts, Jr., established the Ad Hoc Committee to Review the Criminal Justice Act (CJA Committee) to conduct a comprehensive and impartial review, consistent with Judicial Conference policy, of the administration and operation of the CJA program. In November 2017, the CJA Committee submitted its findings and recommendations to the Judicial Conference. The CJA Committee recommended establishing an independent Federal Defender Commission within the judicial branch, but outside the oversight of the Judicial Conference, with sole authority to set policy and practices related to the provision of federal defense. Recognizing that the creation of an independent commission would require an act of Congress and could not be implemented immediately, the Committee also made 35 interim recommendations designed to give the Defender Services program more authority and autonomy within the current structure. The full text of the Committee's findings and recommendations may be found online. See https://www.uscourts.gov/sites/default/files/2017_report_of_the_ad_hoc_committee_to_review_the_criminal_justice_act-revised_2811.9.17.29_0.pdf

At its September 2018 and March 2019 sessions, the Judicial Conference approved 29 of the 35 interim recommendations, with some modifications. The interim recommendations approved by the Judicial Conference include, but are not limited to, providing additional training opportunities, encouraging the establishment of capital habeas units, increasing staff and funding for litigation support activities, and adequately funding and staffing the National Information Technology Operations and Application Development Branch (NITOAD) within the Defender Services program. In response to these recommendations, the judiciary immediately began implementing the Judicial Conference's interim recommendations.

With respect to the CJA Committee's final recommendation to create an independent Federal Defender Commission, the Executive Committee of the Judicial Conference requested that the Defender Services Committee, with the assistance of the Federal Judicial Center, assess the judiciary's implementation of the adopted interim recommendations and the degree to which those actions have addressed concerns identified by the CJA Committee's report. Such an assessment will provide useful information for any study of final recommendations and will help identify areas in which the judiciary can promote further implementation of the interim recommendations. The FJC team has a publicly available website that includes more information about the study. It is available online at: <https://www.fjc.gov/content/348307/cardone-recommendation-study-overview>. The study is expected to be completed in 2023.

COST CONTAINMENT INITIATIVES

The judiciary has implemented various cost-containment initiatives across the Defender Services program without compromising its constitutional mandate. Funding decisions are made with a keen awareness of the budget challenges facing the nation and the need to continue cost-containment measures in every aspect of the Defender Services program.

Key cost-containment initiatives include, but are not limited to:

- (1) supporting distance learning initiatives to optimize the accessibility of CJA panel attorney training opportunities;
- (2) promoting the use of case budgeting to control expenditures in capital and other high-cost CJA panel attorney representations;
- (3) improving DOJ procedures for making decisions *not* to seek the death penalty in death-eligible cases; and
- (4) identifying more cost-effective means of handling increasingly large and complex discovery in CJA representations.

Distance Learning

The Defender Services program continues to develop and produce distance learning as part of its robust training program. Since October 2010, substantive criminal defense video training sessions have been made available to CJA practitioners, including CJA panel attorneys and defender staff, expanding the reach of the programs without the necessity of additional live training events. At this time, more than 62 training sessions presented at national and local programs over the last several years may be viewed by FDO staff and panel attorneys through the Training Division's website, www.fd.org. Since 2013, the Training Division has also presented 55 webinars, most of which included two live presentations. Until the onset of COVID-19, between 1,000 and 2,000 practitioners accessed the videos each year. In response to the pandemic, the Defender Services program increased the frequency of webinar presentations. By the end of FY 2020, the DSO Training Division had completed 26 live webinars, which reached approximately 8,800 participants. Currently, each live webinar can accommodate 1,000 participants during the live event. The FY 2020 webinars provided quality training on a variety of criminal defense topics including the Ethics of Sentencing, Pretrial Release, and Supreme Court Update.

The training made available through distance learning provides an additional resource to improve the quality of representation provided by CJA counsel and enables live training programs to have a greater impact nationally. For example, FDOs are using the webinars as part of their local panel attorney training, which increases the availability of training without incurring additional costs.

Case Budgeting of CJA Panel Attorney Representations

Defender Services funding supports eleven case-budgeting attorney positions. These attorneys are assigned to federal judicial circuits across the country and work to identify cost drivers, monitor case expenditures, assist the courts and CJA panel attorneys with individual case budgeting and voucher review, and, consistent with the Defender Services program’s goals, promote representation consistent with the best practices of the legal profession. The case-budgeting attorneys focus their attention on “high-cost” representations, defined as all capital cases and those non-capital representations where it can be anticipated that there will be more than 300 attorney hours or total expenditures are expected to exceed 300 times the prevailing non-capital hourly rate, rounded up to the nearest thousand, for an individual defendant. To address these high-cost cases, the judiciary continues to promote the nationwide use of case budgeting techniques to help ensure that, in all capital and other high-cost panel attorney cases, the expenses of representation are anticipated, substantiated, monitored, and, where appropriate, limited before they are incurred. Case-budgeting attorneys funded by Defender Services currently serve the following ten circuits: First, Second, Third, Fourth, Fifth, Sixth, Seventh/Eighth (shared position), Ninth (two positions), and Tenth.

Improvement in DOJ Procedures for Making Decisions Not to Seek the Death Penalty in Death-Eligible Cases

The judiciary continues to urge DOJ to streamline its procedures for evaluating and making decisions *not* to seek the death penalty in cases where the government can quickly conclude that the death penalty is inappropriate. In the vast majority of death-eligible cases, the local U.S. Attorney does not recommend, and the U.S. Attorney General does not authorize,⁵ seeking the death penalty. In FY 2020, the U.S. Attorney General reviewed approximately 151 cases of defendants indicted with death-eligible offenses and decided whether or not each case would proceed as a capital case. Of these 151 cases, only five cases (3 percent of the total) were approved to proceed as a death penalty case.

Until DOJ notifies counsel and the court that it does *not* intend to seek the death penalty for an eligible defendant, which can take years to determine, defense counsel must assume that the death penalty will be pursued. Pending DOJ’s decision, the judiciary is obligated to bear the substantial cost of the statutorily-required two capital-qualified defense counsel – currently compensated at the higher capital panel attorney hourly rate of \$197 – who must undertake the intensive, time-consuming work required to attempt to persuade the government *not* to seek the death penalty, and prepare for a capital trial and sentencing proceeding. An early decision by

⁵ For any federal death-eligible case to proceed as a death penalty case, the U.S. Attorney General must decide whether to seek the death penalty. After a case is approved by the Attorney General to proceed as a capital case, it is considered “authorized.”

the Attorney General *not* to seek the death penalty could achieve significant cost savings for the Defender Services program, DOJ, and the courts.

Discovery Costs

Each year, the data associated with individual CJA representations expands in size and complexity. There are a number of critical issues defense counsel must address to adequately manage and review e-discovery, including the large volume of information, the variety of sources from a multitude of digital devices and locations, proprietary formats, hidden information such as metadata and embedded data, and software and hardware limitations.

Federal defenders and panel attorneys require litigation resources, including national staff, to meet the challenge presented by DOJ's e-discovery and litigation support capabilities. Even in "simple," single defendant prosecutions, discovery can include electronic stored information (ESI, or e-discovery) extracted from client computers and mobile devices. Law enforcement officers review social media sites, like Facebook, Instagram, and Twitter, to capture possible incriminating materials. Video discovery is common and may include months of pole-camera recordings, business security videos, and hours of concealed camera footage. Additional discovery may include data from cell phone wiretaps, body wires, and GPS tracking devices.

To illustrate the volume and complexity of information, in just one recent multi-defendant bank fraud case, the government provided "rolling" discovery (more than 17 productions) totaling more than 131.8 gigabytes of documents including Word documents, spreadsheets, PowerPoint presentations, and PDF files; native email files of 4.5 gigabytes; 700 gigabytes of multimedia files (including wiretap recordings, jail calls, and ATM proprietary video recordings); 5.3 terabytes of forensic images from 125 digital devices seized by the government; and 48 terabytes of proprietary pole camera video recordings.

Three major initiatives are in place to address this issue:

- (1) The DOJ/AO Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) addresses various issues related to e-discovery and discovery production between the prosecution and the attorneys for defendants charged in federal criminal cases. The working group produced national guidance designed to facilitate a more predictable, cost-effective, and efficient management of electronic discovery, and a reduction in the number of disputes relating to ESI, by encouraging early discussion of electronic discovery issues through "meet and confers" between the prosecution and defense; the exchange of data in standard or reasonably useable formats; and resolution of disputes without the necessity of court involvement, where possible.

- (2) Contracts with five national coordinating discovery attorneys are in place to advise panel attorneys and defender offices on cost-effective ways to manage large volumes of documents in the most complex cases to increase the quality of representation. As of November 2020, these five attorneys have been appointed by federal courts to assist CJA counsel in over 120 active cases in more than 45 districts, and because nearly all the cases have multiple defendants, these five attorneys have been able to provide services to over 1,200 panel attorneys and assistant federal defenders nationally.
- (3) The Defender Services program has procured national licenses for software applications and tools to allow for the more efficient capture, organization, analysis, review, and management of case-related electronic data by CJA panel attorneys and FDO staff, thereby generally avoiding the higher cost alternative of purchasing software for multiple individual cases year after year.

JUSTIFICATION OF CHANGES

The FY 2022 request for the Defender Services account is \$1,409.6 million, an increase of \$93.4 million, or 7.1 percent, over the enacted FY 2021 appropriations level of \$1,316.2 million.

The request will fund adjustments to base and staffing increases to the FDO program to support 98 percent of the staffing formula requirements (caseload adjusted), national positions, *McGirt* positions, AO reimbursable staff, and a staffing reserve.

This staffing allows the judiciary to support workload demands and implement CJA-related policies approved by the Judicial Conference and provides the resources necessary to respond to sudden surges in workload.

This request also funds start-up costs for a new federal defender organization.

ADJUSTMENTS TO BASE TO MAINTAIN CURRENT SERVICES

A. PERSONNEL RELATED

Pay and Benefit Adjustments

1. Proposed January 2022 pay adjustments

a. Federal pay adjustment

Requested Increase: \$3,986,000

The judiciary is assuming federal pay rates will increase by 1.0 percent in January 2022. The requested increase provides for the cost of nine months of the anticipated pay adjustment in FY 2022, from January 2022 to September 2022. (If the pay adjustment included in the President's FY 2022 budget request is different from this 1.0 percent guidance, the judiciary will revise this line item in its FY 2022 budget re-estimate.)

b. Panel attorney capital rate adjustment

Requested Increase: \$246,000

The requested funding would increase the capital panel attorney hourly rate by an assumed cost-of-living increase of 1.0 percent. This would increase the hourly rate from \$197 per hour to an estimated \$199 per hour, effective January 1, 2022. There is a time delay between when the rate increase is implemented and when vouchers are submitted with the higher rate. Therefore, the requested increase provides for the cost of six months of the rate increase in FY 2022. (If the pay adjustment included in the President's FY 2022 budget request is different from this 1.0 percent guidance, the judiciary will revise this line item in its FY 2022 budget re-estimate.)

c. Panel attorney non-capital rate adjustment

Requested Increase: \$291,000

The requested funding would increase the non-capital panel attorney hourly rate by an assumed cost-of-living increase of 1.0 percent. This would increase the hourly rate from \$155 per hour to an estimated \$156 per hour, effective January 1, 2022. There is a time delay between when the rate increase is implemented and when vouchers are submitted with the higher rate. Therefore, the requested increase provides for the cost of three months of the adjustment in FY 2022. (If the pay adjustment included in the President's FY 2022 budget request is different from this 1.0 percent guidance, the judiciary will revise this line item in its FY 2022 budget re-estimate.)

2. Annualization of January 2021 pay adjustments

a. Federal pay adjustment

Requested Increase: \$1,329,000

The requested increase provides for the annualized costs of the 2021 pay adjustment associated with the Employment Cost Index (ECI). Based on the FY 2021 enacted appropriations bill, federal pay rates increased by 1.0 percent, effective as of January 2021. The requested increase provides for the cost of three months (from October 2021 to December 2021) of the enacted 2021 pay increase in FY 2022.

b. Panel attorney capital rate adjustment

Requested Increase: \$215,000

The requested funding annualizes the enacted FY 2021 panel attorney capital rate cost-of-living increase from \$195 to \$197 per hour. The increase to the capital hourly rate is expected to impact six months of costs in FY 2021. The requested increase annualizes this rate increase for the first six months of FY 2022.

c. Panel attorney non-capital rate adjustment

Requested Increase: \$5,992,000

The requested increase annualizes the enacted FY 2021 panel attorney non-capital cost-of-living rate increase from \$152 to \$154, as well as the enacted FY 2021 above inflation rate increase of \$1 to \$155 per hour. An increase to the non-capital hourly rate impacts three months of costs in FY 2021. The requested increase annualizes this for the first nine months of FY 2022.

3. Promotions and within-grade increases

Requested Increase: \$3,986,000

The requested increase provides for promotions and within-grade increases for personnel. The FDO salary plans provide for periodic within-grade increases for staff who receive at least a satisfactory performance rating.

4. Benefits increases

a. Health benefits

Requested Increase: \$1,543,000

Based on information from the Office of Personnel Management, agency health benefit premium contributions are projected to increase by an average of 3.0 percent both in January 2021 and January 2022. The requested increase annualizes the 2021 premium increase and includes a nine-

month provision for an estimated 3.0 percent increase anticipated in FY 2022.

b. FICA adjustment

Requested Increase: \$492,000

Based on information from the Social Security Administration, employer contributions to the Old Age, Survivor, and Disability Insurance (OASDI) portion of the FICA tax will increase in 2021. The salary cap for OASDI increased from \$137,700 to \$142,800 in January 2021. The requested amount is needed to pay the agency's contribution in FY 2022.

c. FERS adjustment

Requested Increase: \$5,408,000

Consistent with guidance from the Office of Management and Budget, funds are requested for an increase in the agency contribution rate to Federal Employees Retirement System (FERS) plans for FY 2022. For most employees, the agency contribution rate will increase from 17.3 percent to 18.4 percent. Any FERS increase is in accordance with revised estimates of the cost of providing benefits by the Board of Actuaries of the Civil Service Retirement and Disability System.

B. OTHER ADJUSTMENTS

General Inflationary Adjustments

5. Inflationary increases for contracts, services, supplies, and equipment

Requested Increase: \$5,351,000

Consistent with guidance from the Office of Management and Budget, this requested increase is required to fund inflationary adjustments of 2.0 percent for operating expenses such as travel, communications, printing, contractual services, supplies and materials, and furniture and equipment.

6. Inflationary increase in GSA space rental costs

Requested Increase: \$2,450,000

The request represents a 4.0 percent increase in the cost of GSA space rental charges in FY 2022.

Workload and Financing Adjustments

7. Change in projected panel attorney workload

Requested Increase: \$9,910,000

The requested increase is due to a projected change in panel attorney caseload. Panel attorney representations are projected to increase from 75,100 in SY 2021 to 92,600 in SY 2022. Caseload is subject to variation due to prosecutorial priorities and case complexities. The judiciary will advise the

appropriations subcommittee staff of any changes to this estimate in the FY 2022 budget re-estimate process.

8. Annualization of FY 2021 Positions

Requested Increase: \$25,788,000

FTE: 102

The requested adjustment funds the annualization for the 250 FDO positions expected to be hired in FY 2021, including 206 staffing formula positions [162 FPDO positions (81 FTE) and 44 CDO positions], 13 CJA panel management positions (ten positions/5 FTE for FPDOs and three positions for CDOs), 26 *McGirt* positions (13 FTE) and five national positions (3 FTE); as well as eight reimbursable positions expected to be hired in FY 2021.

9. Increase in appropriation needed to maintain FY 2021 requirements due to a decrease in carryover funding

Requested Increase: \$1,003,000

The judiciary has been able to reduce its Defender Services appropriation request using unobligated no-year funds carried forward in this account from prior fiscal years. In FY 2021, \$21.0 million in balances from FY 2020 will be used to finance the FY 2021 requirements. In developing the FY 2022 request, the judiciary expects \$20 million to carry forward from FY 2021 into FY 2022 and be available to finance FY 2022 requirements. Because the judiciary anticipates having less in carryforward funding available in FY 2022, it requests

\$1,003,000 in funding to substitute direct appropriations for base expenses previously funded from carryforward balances. The judiciary will advise appropriations subcommittee staff of any changes to this estimate throughout FY 2021.

C. PROGRAM INCREASES

10. Additional positions for projected workload

a. FDO staffing formula positions

Requested Increase: \$12,449,000 **FTE: 47**

The requested increase supports the continued implementation of the FDO staffing formulas. This increase would provide FDOs with funds to support 98 percent of the staff projected to be required under the Judicial Conference-approved staffing formulas in FY 2022. This request is for 118 additional FDO staff funded for six months (94 positions/47 FTE for FPDOs and 24 CDO positions). This increase in staffing is critical because of the workload described on pages 5.10-5.13.

b. National positions

Requested Increase: \$1,055,000 **FTE: 5**

The requested increase supports 10 new national positions (5 FTE), of which seven positions (3.5 FTE) are related to information technology (IT), and three positions (1.5 FTE) are related to the Capital Resource Counsel Project.

Of the requested increase, \$738,000 is for seven information technology positions. FY 2022 is the first year of implementation of the new Defender Services IT staffing formula. Its major workload driver is the total number of FDO FTE. The IT positions will address cybersecurity needs by establishing a security incident response team, and non-cybersecurity requirements by ensuring defender IT systems are mission-capable at or above judiciary standards while also avoiding unnecessary duplication of efforts.

Of the requested increase, \$317,000 is for three Capital Resource Counsel positions, including two resource counsel attorneys and one paralegal. The judiciary requests this increase in light of the substantial increase in defendants with death-eligible indictments (158 individuals in March 2017 compared to 352 individuals in September 2020) and DOJ authorizations to seek the death penalty, as well as the greater complexity in capital litigation. These additional CRC staff are necessary to meet the challenges brought about by this increase in cases, expand CRC's ability to provide cost-effective direct representation by expert capital litigators, and increase the expert advice and assistance provided to CJA appointed counsel.

c. *McGirt v. Oklahoma* positions

Requested Increase: \$3,376,000 **FTE: 16**

The requested increase supports 32 positions (16 FTE) to address the increase in caseload from the decision in *McGirt v.*

Oklahoma, 591 U.S. ___ (2020). See pages 5.15-16 for more details.

11. Diversity Fellowship Program positions

Requested Increase: \$1,477,000 **FTE: 7**

The requested increase supports 14 positions to establish a Diversity Fellowship Program within FDOs. The 14 positions include two capital fellows and 12 non-capital fellows. See page 5.17 for more details.

12. Reimbursable positions

Requested Increase: \$691,000

The requested increase supports eight additional positions at the AO funded by the Defender Services appropriation. These positions will support higher workload demands associated with data management, financial analysis, legal and policy support, program operations, training, and implementation of CJA-related policies approved by the Judicial Conference.

13. FDO staffing reserve

Requested Increase: \$6,013,000 **FTE: 28.5**

The requested reserve will provide the Defender Services program with more flexibility to quickly allocate additional resources to FDOs in response to significant caseload pressures, such as substantial surges in workload due to changes in law and practice. Any additive FTEs allocated to

address caseload surges would be temporary and only approved for one fiscal year. Any portion of the reserve that remains unspent at the end of a fiscal year will be carried forward into the next fiscal year and used to offset requirements in that year's budget request. Reserve funding requested in FY 2022 may be needed for Opt-In staffing requirements in Arizona (see discussion of Opt-In on pages 5.16-17).

14. Establishment of new federal defender organization

Requested Increase: \$300,000

The requested increase will support non-recurring start-up costs for one new organization. The requested start-up costs are for tenant alterations, furniture, equipment, and law books. The FY 2022 staffing costs are expected to be minimal and will be paid for by using existing resources. Once established, the FDO staffing formula will be used to determine staffing requirements.

At this time, the judiciary has not identified a specific district in which the organization will be established. Currently, there are two districts without a federal defender organization that meet the qualifications pursuant to 18 U.S.C. § 3006A(g)(1) of having 200 or more appointments each year – Georgia-Southern and Kentucky-Eastern. These two districts have both recently studied the possibility of, and are actively considering, establishing a new FDO. In addition, the Tenth Circuit has specifically inquired about splitting the FDO for the Northern District and Eastern District of Oklahoma into two separate FDOs. In accordance with section 608 of the Financial Services

and General Government appropriations bill, the Judiciary will transmit a reprogramming notification to the Appropriations Committees before establishing the new FDO.

D. FINANCING THE FISCAL YEAR 2022 REQUEST

15. Anticipated carryforward from FY 2021 and prior years into FY 2022

Estimated funds available: \$20,000,000

The judiciary projects \$20 million will be available through anticipated carryforward from FY 2021 and prior years into FY 2022 to offset the FY 2022 appropriation request for the Defender Services program. The judiciary will advise the appropriations subcommittee staff of any changes to this estimate throughout FY 2021.