

COURTS OF APPEALS, DISTRICT COURTS, AND OTHER JUDICIAL SERVICES

Defender Services

SUMMARY STATEMENT OF ACCOUNT REQUIREMENTS

Fiscal Year 2022 Assumed Appropriation	1,343,338
Fiscal Year 2023 Appropriation Request	1,461,711
Requested Increase from Fiscal Year 2022 Assumed Appropriation	118,373

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, [\$1,343,338,000]\$1,461,711,000, to remain available until expended.

(H.R. 4502 - House-passed version of the Financial Services and General Government Appropriations Act, 2022)

**SUMMARY OF REQUEST
DEFENDER SERVICES
FISCAL YEAR 2023
(Dollar amounts in thousands)**

Fiscal Year 2023 Resource Requirements:

<u>Page</u>	<u>FTE</u>	<u>Amount</u>
Fiscal Year 2022 Obligations	3,383	1,437,656
Less encumbered carryforward from FY 2021 into FY 2022	-	-
Fiscal Year 2022 Obligations Excluding Encumbered Carryforward	3,383	1,437,656
Less:		
Unencumbered available carryforward from FY 2021 into FY 2022	-	126,718
Transfer to Salaries & Expenses	-	(32,400)
Total unencumbered carryforward	-	94,318
Fiscal Year 2022 Assumed Appropriation	3,383	1,343,338

Adjustments to Base to Maintain Current Services:

A. PERSONNEL RELATED

Pay and Benefit Adjustments

	1. Proposed January 2023 pay adjustments		
5.24	a. Federal pay adjustment (4.6% for nine months)	-	20,252
5.24	b. Panel attorney capital rate adjustment (from \$202 per hour to \$210 per hour, effective January 1, 2023)	-	863
5.25	c. Panel attorney non-capital rate adjustment (from \$158 per hour to \$164 per hour, effective January 1, 2023)	-	1,702
5.25	2. Annualization of January 2022 pay adjustments		
	a. Federal pay adjustment (2.7% for three months)	-	3,774
	b. Panel attorney capital rate adjustment (from \$197 per hour to \$202 per hour)	-	532
	c. Panel attorney non-capital rate adjustment (from \$155 per hour to \$158 per hour)	-	6,307
5.26	3. Promotions and within-grade increases	-	4,193
5.26	4. Benefits increases		
	a. Health benefits	-	1,367
	b. FICA adjustment	-	400
5.26	5. One less compensable day	-	(2,245)

B. OTHER ADJUSTMENTS

General Inflationary Adjustments

5.26	6. Inflationary increases for contracts, services, supplies, and equipment	-	6,782
5.26	7. Inflationary increase in GSA space rental costs	-	1,293

<u>Page</u>		<u>FTE</u>	<u>Amount</u>
	<i>Workload and Financing Adjustments</i>		
5.27	8. Change in projected panel attorney workload	-	(19,518)
5.27	9. Annualization of FY 2022 positions	59	15,091
5.27	10. Increase in appropriation needed to maintain FY 2022 requirements due to a decrease in carryover funding	-	64,318
	Subtotal, Adjustments to Base to maintain current services	59	105,111
	Total Current Services Appropriation Required	3,442	1,448,449
	<u>C. PROGRAM INCREASES:</u>		
	11. Positions for projected workload		
5.27	a. FDO staffing formula positions	(9)	(2,431)
5.28	b. National positions	5	995
5.28	c. McGirt v. Oklahoma positions	22	4,862
5.28	12. Reimbursable positions	-	669
5.28	13. Information technology, cybersecurity, and IT modernization requirements	-	9,167
	Subtotal, program increases	18	13,262
	Total Fiscal Year 2023 Appropriation Required	3,459	1,461,711
	Total Appropriation Increase, Fiscal Year 2022 to Fiscal Year 2023	77	118,373
	<u>D. FINANCING THE FISCAL YEAR 2023 REQUEST:</u>		
	Total Appropriation Required	3,459	1,461,711
5.30	14. Anticipated carryforward from FY 2022 and prior years into FY 2023	-	30,000
	Estimated Obligations, Fiscal Year 2023	3,459	1,491,711

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

Obligations by Activity (\$000)

Activity	FY 2021 Actual	FY 2022 Assumed	FY 2023 Request
CJA Representation & Related Expenses Obligations	1,210,228	1,420,237	1,472,271
Program Administration Obligations	8,947	17,419	19,440
Direct Obligations	1,219,175	1,437,656	1,491,711
Unencumbered Unobligated Balance, Start of Year	(21,003)	(126,718)	(30,000)
Encumbered Unobligated Balance, Start of Year	(370)		
Total Unobligated Balance, Start of Year:	(21,373)	(126,718)	(30,000)
Deposits and Other Adjustments:			
Prior Year Recoveries	(8,258)	(10,000)	
Anticipated Financial Plan Savings		(20,000)	
Transfer	0	32,400	
Unobligated Balance, End of Year:	126,718	30,000	
Less Offsetting Collections	(21)		
Appropriation	1,316,240	1,343,338	1,461,711
Direct Appropriations	1,316,240		

Obligations by Budget Object Class (\$000)

Description	FY 2021 Actual	FY 2022 Assumed	FY 2023 Request
11.1 Full-time permanent	376,847	421,624	451,979
11.3 Other than full-time permanent	8,153	9,122	9,630
11.5 Other personnel compensation	450	504	532
11.8 Special personal services	13	15	16
11.9 Personnel compensation subtotal	385,463	431,264	462,157
12.1 Personnel benefits	140,996	156,336	163,338
13.0 Benefits for former personnel	678	668	685
21.0 Travel	4,742	15,625	15,961
22.0 Transportation of things	254	403	421
23.1 Rental payments to GSA	45,528	48,938	51,056
23.2 Rental payments to others	1,084	1,150	1,177
23.3 Communications, utilities, and miscellaneous charges	10,708	12,081	15,639
24.0 Printing and reproduction	66	123	127
25.1 Advisory and assistance services	368,310	467,571	466,110
25.2 Other services from non-federal sources	47,561	60,379	60,088
25.3 Other goods and services from federal sources	6,130	7,782	7,745
25.4 Operations and maintenance of facilities	6,678	8,478	8,437
25.6 Medical care	347	440	438
25.7 Operations and maintenance of equipment	1,331	1,689	1,681
26.0 Supplies and materials	1,618	2,130	2,245
31.0 Equipment	24,183	25,315	30,261
41.0 Grant payments	173,497	197,282	204,144
42.0 Insurance claims and indemnities	0		
Direct Obligations	1,219,175	1,437,656	1,491,711

Full-time Equivalents (FTE) by Activity

Activity	FY 2021 Actual	FY 2022 Assumed	FY 2023 Request
CJA Representation & Related Expenses Obligations ^{1/}	3,091	3,372	3,448
Program Administration Obligations	10	11	11
Total FTE	3,101	3,383	3,459

^{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 2021 Actual	FY 2022 Assumed	FY 2023 Request
1 Direct obligations	1,219,175	1,437,656	1,491,711
2 Obligated balance, start of year	74,965	99,065	136,661
3 Recoveries of prior year unpaid obligations	(7,042)	(10,000)	(10,000)
4 Change in uncollected payments	1	0	0
5 Obligated balance, end of year	(99,065)	(136,661)	(72,935)
6 Total Outlays	1,188,033	1,390,060	1,545,437
7			
8 Less Offsets	(1,238)	(5,000)	(5,000)
9			
10 Net Outlays	1,186,796	1,385,060	1,540,437
11			

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:

1. provide timely counsel services to all eligible persons;
2. provide appointed counsel services consistent with the best practices of the legal profession;
3. provide cost-effective services; and
4. 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) 2023 appropriation request of \$1,461.7 million will enable FDOs and private attorneys to accept CJA appointments; retain necessary expert services; and undertake case-related travel.

The FY 2023 request will support additional:

- FDO staffing to support 98 percent of the projected staffing formula requirements (caseload adjusted);
- funding for staffing to support an increase in caseload as a result of the Supreme Court’s decision in *McGirt v. Oklahoma*, 591 U.S. __ (2020) (*McGirt*);
- reimbursable staff in the Defender Services Office (DSO) of the Administrative Office of the U.S. Courts (AO);
- national positions for the National Litigation Support Team (NLST) and National Information Technology Operations and Applications Development (NITOAD) branch; and
- information technology (IT) and cybersecurity and IT modernization requirements.

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 82 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 also primarily utilized 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 currently 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 federal crimes.

To determine FDO staffing requirements¹ in this FY 2023 budget request, a five-year statistical average is used that includes actual data from 2018 – 2021 and projected data for 2022. As shown in the following chart, FDO weighted representations² increased significantly between statistical years³ 2017 and 2019 and remained at a high level in 2020. Although the caseload declined in 2021 as a result of the COVID-19 pandemic, the caseload is projected to rebound in 2022 and 2023 as the effects of the pandemic dissipate and caseloads return to their historical levels. For a discussion of the COVID-19 pandemic's impact on workload, see COVID-19 - Impact on page 5.14.

FDO Weighted Representations							
Workload Factor	2017 Actual	2018 Actual	2019 Actual	2020 Actual	2021 Actual	2022 Projected	2023 Projected
FDO Weighted Representations – Non-capital	131,024	142,750	152,496	151,025	116,721	133,500	142,200
FDO Weighted Representations – Capital Prosecution*	2,752	2,101	1,174	1,019	663	800	900
Total FDO Weighted Representations	133,776	144,851	153,670	152,044	117,384	134,300	143,100
Year-to-Year Change		8.3%	6.1%	-1.1%	-22.8%	14.4%	6.6%

*Actual non-weighted capital prosecutions from 2017 – 2021 range from 12 to 47 per year.

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 1 of one year and ending on March 31 of the subsequent year.

The pandemic resulted in a sudden drop in weighted representations, one that is expected to be temporary in nature. The impact of the COVID-19 pandemic and its associated disruption to the economy, and society more broadly, is reflected in notable year-to-year differences in several major case groups, including Immigration – Illegal Re-Entry, Fraud, and Drug Representations, as shown in the chart below:

Major Types of FDO Weighted Representations*			
Case Group	2020	2021	Percent Change
Drug Representations	18,381	14,602	-20.6
Immigration – Illegal Re-Entry	21,946	7,441	-66.1%
Fraud	7,535	4,850	-35.6%
Weapons Representations	16,625	14,649	-11.9%
Criminal-Other	51,329	41,772	-18.6%
Habeas Corpus (Non-capital)	879	1,024	16.5%
Other	15,870	17,382	9.5%

*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 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. When these changes happen quickly or without sufficient advance notice, it can take multiple budget cycles for their impacts to be fully reflected in the Defender Service’s appropriations request.

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 by FDOs, especially during the COVID-19 pandemic. This activity continued into 2021. The

Supreme Court decision in *McGirt v. Oklahoma*, 591 U.S. ___ (2020) changed the jurisdiction from state to federal court over numerous types of felony cases involving Indian persons or property in Oklahoma. This is leading to an increase in representations not fully captured in current workload projections that were calculated based on historical workload which did not include the more recent influx of *McGirt*-related cases. In addition, changes in state law, such as California’s Proposition 66 that speeds up state court review of capital judgments, may also impact the Defender Services program.

Department of Justice (DOJ) policy also drives caseload for the CJA. For example, in FY 2022, DOJ requested a total of \$99.4 million (200 positions) in order to provide additional funding and staff for the following programs: COVID-related fraud, domestic terrorism, and *McGirt* prosecutions.⁴ If these requests are funded and implemented, related caseload is expected to increase.

As shown below, panel attorney representations were increasing prior to statistical year (SY) 2021 but declined due to the COVID-19 pandemic. However, as the effects of the pandemic decline, panel attorney representations are projected to rebound by SY 2023. To determine panel attorney requirements in this FY 2023 budget request, SY 2023 projected workload was used (72,600 representations⁵).

Panel Attorney Representations*							
Workload Factor	2017 Actual	2018 Actual	2019 Actual	2020 Actual	2021 Actual	2022 Projected	2023 Projected
Panel Attorney Representations	79,352	77,130	89,079	93,189	64,326	65,300	72,600
Year-to Year Change		-2.8%	15.5%	4.6%	-31.0%	1.5%	11.2%

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

The following chart reflects panel attorney representations and payments by fiscal year. In FY 2021, panel attorney payments decreased from \$452.9 million in FY 2020 to \$373.0 million in the wake of the COVID-19 pandemic, a decline of \$79.9 million

⁴ <https://www.justice.gov/jmd/page/file/1398566/download>

⁵ 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.

(17.6 percent). In addition, total panel attorney representations decreased by 16,224 (20.9 percent) from 77,770 in FY 2020 to 61,546 in FY 2021.

Panel Attorney Representations and Payments				
Offense Type	FY 2020 Reps	FY 2020 Payments (\$ in millions)	FY 2021 Reps	FY 2021 Payments (\$ in millions)
Capital Prosecution	711	\$47.2	643	\$33.3
Drugs	19,192	\$157.5	17,886	\$127.8
Immigration	20,080	\$29.7	7,593	\$18.2
Fraud	3,115	\$33.5	2,472	\$27.6
Weapons	4,535	\$35.9	4,413	\$31.9
Capital Habeas	350	\$16.3	288	\$13.1
Appeals	5,131	\$35.0	4,287	\$32.4
Criminal - Other	24,656	\$97.8	23,964	\$88.6
Total	77,770	\$452.9	61,546	\$373.0

* Fiscal year data is for a 12-month period through September 30 of each year.

In accordance with anticipated ECI increases, the panel attorney hourly rates are projected to increase from FY 2022 to FY 2023 for non-capital and capital representations from \$158 to \$164 and \$202 to \$210, respectively.

FISCAL YEAR 2022 APPROPRIATIONS

In the absence of an enacted FY 2022 appropriation, the judiciary built the FY 2023 discretionary budget request for the Defender Services account on an assumed FY 2022 appropriation of \$1,343.3 million which is the FY 2022 fall re-estimate level. This amount fully funds the FY 2022 budget request, including hiring an additional 134 FDO positions to address additional workload requirements, a staffing reserve, and start-up costs for a new FDO. In addition, this appropriation level assumes \$4.5 million in funding for cybersecurity improvements and development related to bandwidth increases and application modernization, network management, and data security.

For bill language for this account, the judiciary used the relevant language from H.R. 4502, which includes the House-passed version of the Financial Services and General Government Appropriations Act, 2022, as the closest approximation of eventual enacted FY 2022 appropriations language, updated with the assumed funding level as described above.

After full-year fiscal year 2022 appropriations are enacted, the judiciary will re-estimate its FY 2023 budget request and transmit to the Appropriations Committees any changes to FY 2023 appropriations requirements and bill language.

SIGNIFICANT ISSUES FOR FISCAL YEAR 2023

COVID-19 Impact

As with all aspects of society, the pandemic continues to impact both the FDOs and the CJA panel attorneys. After the initial COVID-19-driven caseload decline, the program has been subject to volatility, similar to the country as a whole, as the pandemic evolves.

FDOs recorded 152,044 weighted cases opened (WCO) in SY 2020, averaging 12,670 WCO monthly. Due to the COVID-19 pandemic, WCO declined to 117,384 in SY 2021, averaging 9,782 WCO monthly. Since April 2021, WCO has rebounded to reach a monthly average of approximately 11,400 WCO. Caseload is currently projected to continue to increase in FY 2023 as the pandemic's impact on the justice system is expected to ease.

Continued Impact of the McGirt Decision

While the July 9, 2020, Supreme Court decision in *McGirt* held that federal jurisdiction existed for an offense committed on the Creek Nation, arising under the Major Crimes Act (“MCA”), its precedent has had far greater implications.⁶ The Court’s decision found that the Creek Reservation was never disestablished and thus, the federal government, rather than the state, must prosecute major crimes involving Indian defendants in that jurisdiction for offenses such as murder, rape, sexual assault, and robbery. *McGirt v. Oklahoma*, 591 U.S. __ (2020).

Over the intervening year and a half, the Oklahoma Court of Criminal Appeals (OCCA) expanded *McGirt*’s reasoning to the lands of the “Five Civilized Tribes” of Oklahoma, including the Cherokee, Chickasaw, Choctaw, and Seminole Nations. These decisions

⁶ 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).

recognize that nearly half of Oklahoma remains “Indian country,” and should have always been under federal jurisdiction. 18 U.S.C. § 1151. Recently, the OCCA applied the *McGirt* rationale to the Quapaw Nation Reservation, located in the northeastern corner of Oklahoma. *State v. Lawhorn*, 2021 OK CR 37 (Oct. 21, 2021). However, the OCCA limited *McGirt*’s reach when it denied retroactive application for state convictions that had completed appellate review and were deemed final. *State ex rel. Matloff v. Wallace*, 2021 OK CR 21 (Aug. 12, 2021). The impacted defendant in *Matloff* filed a petition for certiorari with the Supreme Court arguing for retroactive application of *McGirt*, and this petition is currently pending.⁷

The renewed “Indian country” status forced Oklahoma state courts to cede further jurisdiction to federal courts in the affected areas for cases involving the General Crimes Act (GCA). 18 U.S.C. § 1152. Federal law also applies when the offense involves (1) non-Native defendants but Native American victims on tribal lands, or (2) the Assimilated Crimes Act, 18 U.S.C. § 13, applying state statutes where no federal equivalent exists. The Oklahoma Attorney General has responded by filing more than 30 petitions of certiorari with the Supreme Court to maintain its previous state jurisdiction. The petitions argue generally for *McGirt* to be overturned due to its impact on the state criminal justice system and specifically for concurrent state jurisdiction in GCA offenses. In the meantime, the DOJ is treating the issue as settled federal law, citing the GCA at least in part for jurisdiction in more than 280 cases filed in the Northern and Eastern districts of Oklahoma. Litigation to define the parameters of *McGirt* will likely extend into the foreseeable future.

Data from the AO’s Judiciary Data and Analysis Office (JDAO) indicates that in the twelve-month period following the *McGirt* decision (August 2020 – July 2021), felony filings in the Eastern district of Oklahoma increased by 274 percent and in the Northern district of Oklahoma by 195 percent when compared to the same period one year earlier (August 2019 – July 2020). These increases reflect filings for the initial five impacted tribes, but do not demonstrate the full caseload as a backlog of cases persists due to capacity limitations and the lingering effects of the COVID-19 pandemic.

Because the number of new cases filed in federal court are dependent on the prosecutorial discretion of the U.S. Attorney’s Office, it is difficult to predict the magnitude of future criminal filing increases. The courts and defender offices must rely on information and estimates from the Offices of the U.S. Attorneys (U.S. Attorneys). In FY 2022, the DOJ requested \$33 million in additional *McGirt* funding for the U.S. Attorneys in Oklahoma, as well as another \$36.9 million for related local federal law enforcement agencies.⁸ There are ongoing cross-functional meetings between the impacted court units and the DOJ to plan for future staffing and resource

⁷ *Parish v. Oklahoma*, petition for cert. pending, No. 21-467 (filed Sept. 27, 2021).

⁸ <https://www.justice.gov/jmd/page/file/1398851/download>.

needs. As for case numbers, the DOJ’s request for the United States Attorneys appropriation included the following in their FY 2022 Congressional Justification⁹:

“Criminal felony caseloads in the U.S. Attorneys for the Eastern and Northern Districts of Oklahoma have increased exponentially and will continue to increase sharply as the *McGirt* decision is expanded. It is estimated that they will handle up to 4,400 additional felony defendants per year – or 366 per month – once the decision is being fully applied to all five Civilized Tribes. This number represents more than a **25,000** percent increase over the average number of Indian country defendants charged over the prior three fiscal years.”

DOJ continues to refine its projections as more information and experience are gained.

To respond to the rapid caseload increase, the FY 2021 Defender Services financial plan funded 22 positions for *McGirt*, and the FY 2022 and FY 2023 requests include 32 and 44 more positions, respectively. In addition, in Fall 2021, the Appropriations Committees approved the judiciary’s request to establish a stand-alone FDO in the Eastern District of Oklahoma (giving the state an FDO in all three districts). Lastly, as a temporary measure while the Oklahoma FDOs acquire the necessary resources to respond to the sudden surge in caseload from *McGirt*, 41 FDOs from outside of Oklahoma, and panel attorneys from across the country, accepted case appointments stemming from *McGirt*.

Infrastructure Requirements

This request assumes that there is \$4.5 million in the FY 2023 base for IT infrastructure requirements and requests an additional \$8 million, for a total of \$12.5 million. This FY 2023 request for the additional \$8 million includes funding for critical IT infrastructure requirements in the following areas:

Data Center Migration (\$1,000,000)

The judiciary has two national data centers that host judiciary networks, applications and servers and facilitate the connectivity between the judiciary’s IT infrastructure and the internet. The building that currently houses the west coast data center in San Diego

⁹ U.S. Attorneys, U.S. DEPARTMENT OF JUSTICE FY 2022 CONGRESSIONAL JUSTIFICATION, <https://www.justice.gov/jmd/page/file/1398566/download>, p. 44 (FY 2022).

and the judiciary, including Defender Services, must fund the relocation of its equipment and data center operations by July 2024. The requested funding supports the projected cost of new hardware to stand up the data center and labor costs to support the move.

Cybersecurity Support (\$750,000)

Cybersecurity is constantly evolving and has become one of Defender Services' top IT priorities. This request will allow Defender Services to simulate cyberattacks and provide candid insight regarding the cybersecurity posture of FDOs. It will also enable coordination with local FDO IT staff to evaluate and address security weaknesses on the local network and provide advanced training for local IT staff to ensure a common security baseline. This request for an additional \$750,000, increases the total funding available for infrastructure cybersecurity support from \$2.8 million to \$3.55 million.

DSO Networks, Governance, and Services Modernization (\$2,907,000)

Defender Services seeks to establish the governance for hybrid cloud services and finalize Concept of Operations (CONOPS) for commercial cloud offerings. DSO will pilot cloud use cases in order of their priorities, to establish standards, guidelines, and best practices for each use case. This will allow DSO to establish a cloud environment for the needs of the FDOs and reduce the footprint of equipment in the data centers. This request for an additional \$2.9 million increases the total funding available for DSO networks, governance, and services from \$1.1 million to \$4.0 million.

Data Security Management and Improvement (\$2,585,000)

It is essential to the judiciary's viability to increase the use of digital tools to replace manual or paper-based workflows. This improvement includes providing document collaboration capabilities to securely send and retrieve documents digitally with non-judiciary users; designing and implementing a national electronic faxing solution to better utilize the existing IT infrastructure and eliminate the need for older local communications technologies; and centralizing data reporting which was previously isolated to each circuit. This request for an additional \$2.6 million increases the total funding available for data security management from \$0.6 million to \$3.2 million.

Application Upgrades (\$800,000)

Application upgrades are essential to the Defender Services' efforts to modernize and replace aging legacy applications with current and secure solutions that support the mission and administrative needs of the judiciary. FDO staff often need to obtain signatures from remote parties such as expert witnesses, clients, and vendors. Moving to an electronic process will save time in having to fax, email,

print, and scan documents back and forth. It will also provide better control over access to these documents. This request is for \$800,000.

Opt-In

Designed to speed-up the legal processes from sentencing to execution, “Opt-In” refers to regulations promulgated by DOJ for the certification of states seeking special expedited procedures that fast-track and significantly curtail federal habeas review of state-imposed death sentences.

On April 14, 2020, former U.S. Attorney General Barr certified that the state of Arizona meets the requirements for Opt-In status, and since then the judiciary has worked with the Arizona FDO to meet critical resource needs to handle the expedited litigation and increased workload in Opt-In cases. The Arizona CHU projects that, in future fiscal years, 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 an increase in additional temporary positions from 16 in FY 2022 to 18 in FY 2023. These temporary positions will be provided using existing funding and staffing flexibilities, as well as by utilizing the FDO staffing reserve assumed to be funded in FY 2022.

Diversity Fellowship Program

In September 2020, the Judicial Conference approved two positions for the Defender Services Capital Diversity Fellowship and 12 positions for the establishment of a pilot Defender Services Non-Capital Diversity Fellowship Program to begin in FY 2022. Combined, the Defender Services Fellowship Program (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 FDOs, 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 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.

Scheduled to begin in FY 2022, the Fellowship Program will place 14 fellows in FDOs for two-year terms. Twelve fellows will focus on non-capital cases and two fellows will focus on federal capital trial practice. The Fellowship 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 protected status.

Other Critical Positions

National Positions:

This FY 2023 request includes eight national positions for the NLST and one national position in NITOAD to support information technology needs.

The NLST request of eight additional positions (from 7 to 15) would provide seven paralegals and one computer systems administrator. The NLST educates and trains CJA practitioners on e-discovery review strategies, practices, and litigation support technology, and provides consultations and limited direct assistance with cases. The NLST staff manage national litigation support software and services contracts; and are directly involved with ongoing outreach with the DOJ regarding their national e-discovery production practices.

With these eight additional positions, NLST would have enough staff to have someone assigned to each of the 12 circuits, consistent with Judicial Conference policy that there be national litigation support positions “at the circuit level”. Without these positions, the current staff is limited in the amount of training, direct assistance, and case support they can provide. Additional litigation support personnel will increase training opportunities and resources for CJA panel attorneys and FDOs to use litigation support technology more effectively.

Based on the national Defender Services information technology staffing formula, the FY 2023 request includes one additional national position (from 27 to 28) for the NITOAD staff. The information technology position will ensure Defender Services information technology systems are mission capable and functioning at judiciary standards. Further, the position will aid in centralizing Defender Services cybersecurity protections and expanding its managed security operations center (MSOC) capability. (See page 5.28 for more details.)

Reimbursable Positions for the Defender Services Office:

The FY 2023 request includes a total of eight additional reimbursable positions. These positions, which will be part of the AO’s DSO, would be funded from the Defender Services appropriation, which will reimburse the AO account for all associated expenses. These

positions would support data management, financial analysis, legal and policy support, program operations, training, and implementation of Judicial Conference-approved CJA-related policies. (See page 5.28 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 (NLST), and adequately funding and staffing NITOAD within the Defender Services program. In response to these recommendations, the judiciary began and continues to work on 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 to reduce costs, where appropriate, 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) promoting the use of case budgeting to control expenditures in capital and other high-cost CJA panel attorney representations;
- (2) identifying more cost-effective means of handling increasingly large and complex discovery in CJA representations;
- (3) coordinating with respect to remote detention of pretrial detainees; and
- (4) promoting cost-effective use of paralegals.

Case Budgeting of CJA Panel Attorney Representations

Defender Services funding continues to support eleven circuit 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.

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 electronically 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 a recent multi-defendant racketeering conspiracy case, DOJ provided “rolling” discovery (7 productions) totaling over 1.5 terabytes of discovery, which included investigative reports, search warrant pleadings, 122,000 audio and text message wiretap interceptions, Instagram social media data for 23 accounts that included thousands of private direct message communications, photographs, audio recordings, and video files.

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 and will meet in 2022 and 2023. 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 organizations on cost-effective ways to manage large volumes of documents in the most complex cases to increase the quality of representation. As of November 2021, these five attorneys have been appointed by federal courts to assist CJA counsel in over 120 active cases in over 48 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.

Remote Detention of Pretrial Detainees

There has been recent re-engagement with DOJ on the issue of remote detention of pretrial detainees. In addition to raising fundamental concerns about the quality of representation provided under the CJA, remote detention results in increased costs for the Defender Services program, which must pay for CJA counsel to travel long distances to meet with clients.

This issue had been the subject of inter-branch coordination starting in 2008, and resurfaced in 2021 following Executive Order 14006, issued on January 26, 2021, ordering DOJ not to renew contracts with privately-owned criminal detention facilities. In those districts where there are no suitable local public facilities to house pretrial detainees, CJA clients are being relocated to remote facilities, often in different states and, sometimes, different time zones. Judicial-Executive branch meetings to resolve this problem are ongoing.

Cost-Effective Use of Paralegals

The Committee has long-supported CJA panel attorneys' use of paralegals, billed at lower rates than appointed counsel, to promote cost-effective and high-quality representation. In 2021, in response to CJA panel attorneys' reported difficulties in finding qualified service providers willing to do CJA work, a new website was launched to help CJA panel attorneys around the country locate paralegals who could provide services in CJA cases. The NLST will be providing targeted training to these paralegals to improve their ability to assist CJA panel attorneys on cases with large volumes of electronic discovery.

JUSTIFICATION OF CHANGES

The FY 2023 request for the Defender Services account is \$1,461.7 million, an increase of \$118.4 million, or 8.8 percent, over the assumed FY 2022 appropriations level of \$1,343.3 million.

The request will fund adjustments to base and staffing for the FDO program to support 98 percent of the staffing formula requirements (caseload adjusted), national positions, *McGirt* positions, and AO reimbursable staff. This additional staffing allows the judiciary to support workload demands and implement CJA-related policies approved by the Judicial Conference.

This request also funds information technology requirements, including cybersecurity and IT infrastructure modernization for the Defender Services program.

ADJUSTMENTS TO BASE TO MAINTAIN CURRENT SERVICES

A. PERSONNEL RELATED

Pay and Benefit Adjustments

1. Proposed 2023 pay adjustment

a. Federal pay adjustment

Requested Increase: \$20,252,000

The judiciary is assuming federal pay rates will increase by 4.6 percent, of which 4.1 percent is for an across-the-board increase and 0.5 percent is for a locality increase, in January 2023. The requested increase provides for the cost of nine months of the anticipated pay raise in FY 2023, from January 2023 to September 2023. (If the pay adjustment included in the President's FY 2023 budget request is different from this 4.6 percent guidance, the judiciary will revise this line item in its FY 2023 budget re-estimate.)

b. Panel attorney capital rate adjustment

Requested Increase: \$863,000

The requested funding would increase the capital panel attorney hourly rate by an assumed employment cost index (ECI) increase of 4.1 percent. (Panel attorneys do not receive locality pay.) This would increase the hourly rate from \$202 per hour to an estimated \$210 per hour, effective January 1,

2023. 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 2023. (If the ECI pay adjustment included in the President's FY 2023 budget request is different from this 4.1 percent guidance, the judiciary will revise this line item in its FY 2023 budget re-estimate.)

c. Panel attorney non-capital rate adjustment

Requested Increase: \$1,702,000

The requested funding would increase the non-capital panel attorney hourly rate by an assumed ECI increase of 4.1 percent. (Panel attorneys do not receive locality pay adjustments.) This would increase the hourly rate from \$158 per hour to an estimated \$164 per hour, effective January 1, 2023. 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 2023. (If the ECI pay adjustment included in the President's FY 2023 budget request is different from this 4.1 percent guidance, the judiciary will revise this line item in its FY 2023 budget re-estimate.)

2. Annualization of January 2022 pay adjustments

a. Federal pay adjustment

Requested Increase: \$3,774,000

The requested increase provides for the annualized costs of the 2022 pay adjustment associated with ECI and locality pay. As a result of the ECI, federal pay rates increased by an average of 2.7 percent, effective as of January 2022. The requested increase provides for the cost of three months (from October 2022 to December 2022) of the 2022 pay increase in FY 2023.

b. Panel attorney capital rate adjustment

Requested Increase: \$532,000

The requested funding annualizes the FY 2022 panel attorney capital ECI rate increase from \$197 to \$202 per hour. An increase to the capital hourly rate impacts six months of costs in FY 2022. The requested increase annualizes this rate increase for the first six months of FY 2023.

c. Panel attorney non-capital rate adjustment

Requested Increase: \$6,307,000

The requested increase annualizes the FY 2022 panel attorney non-capital ECI rate increase from \$155 to \$158 per hour. An increase to the non-capital hourly rate impacts three months of costs in FY 2022. The requested increase annualizes this rate increase for the first nine months of FY 2023.

3. Promotions and within-grade increases

Requested Increase: \$4,193,000

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: \$1,367,000

Based on information from the Office of Personnel Management, health benefit premium contributions are projected to increase by an average of 2.4 percent both in January 2022 and January 2023. The requested increase annualizes the 2022 premium increase and includes a nine-month provision for the increase anticipated for FY 2023.

b. FICA adjustment

Requested Increase: \$400,000

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 2022. The salary cap for OASDI increased from \$142,800 to \$147,000 in January 2022. The requested amount is needed to pay the agency's contribution in FY 2023.

5. One less compensable day

Requested Decrease: -\$2,245,000

There is one less compensable day in FY 2023 than in FY 2022. The requested decrease adjusts for personnel compensation and benefits associated with one fewer compensable day.

B. OTHER ADJUSTMENTS

General Inflationary Adjustments

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

Requested Increase: \$6,782,000

Consistent with guidance from the Office of Management and Budget, this request of \$6,782,000 is required to fund inflationary increases of 2.0 percent for operating expenses such as travel, communications, printing, contractual services, supplies and materials, and furniture and equipment.

7. Inflationary increase in GSA space rental costs

Requested Increase: \$1,293,000

The request represents a 2.0 percent inflationary increase and adjustments in the cost of GSA space rental charges for space for FY 2023.

Workload and Financing Adjustments

8. Change in projected panel attorney workload

Requested Decrease: -\$19,518,000

Prior to the COVID-19 pandemic, panel attorney caseload and payments showed significant increases. However, the onset of the COVID-19 pandemic resulted in a large reduction in panel attorney vouchers and representations, and the recovery to pre-pandemic levels in panel attorney caseload and payments has been slower than expected. Therefore, to adjust for these decreases, a base adjustment of \$19.5 million is requested. Even with this \$19.5 million base reduction, there are adequate funds in the FY 2023 Defender Services request to meet projected panel attorney payment and representation requirements. As the projected caseload and payment trends change, the judiciary will advise the appropriations subcommittee staff of any updates to this estimate in the FY 2023 budget re-estimate process.

9. Annualization of FY 2022 Positions

Requested Increase: \$15,091,000 **FTE: 59**

The requested adjustment funds the annualization for the FDO positions expected to be hired in FY 2022, including staffing formula positions [62 FPDO positions (31 FTE) and 16 CDO positions], 32 *McGirt* positions (16 FTE), and 24 national positions (12 FTE), as well as eight reimbursable positions.

10. Increase in appropriation needed to maintain FY 2022 requirements due to a decrease in carryover funding

Requested Increase: \$64,318,000

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 2022, \$94.3 million in balances from FY 2021 will be used to finance the FY 2022 requirements. In developing the FY 2023 request, the judiciary assumes \$30 million will carry forward from FY 2022 into FY 2023 and be available to finance FY 2023 requirements. Because the judiciary anticipates having less in carryforward funding available in FY 2023, it requests \$64.3 million 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 2022.

C. PROGRAM INCREASES/DECREASES

11. Positions for projected workload

a. FDO staffing formula positions

Requested Decrease: -\$2,431,000 **FTE: -9**

The requested decrease is due to a change in projected FDO caseload and the subsequent calculation of the FDO staffing formulas. The formulas use multi-year caseload averages and several other inputs, so the change in formula results from FY

2022 to FY 2023 does not correlate directly with the projected change in caseload across just those two years. This request 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 2023. This request is for 22 fewer FDO formula positions (18 for FPDOs and 4 for CDOs) for six months. More details on FDO workload are provided on pages 5.10-5.12.

b. National positions

Requested Increase: \$995,000 **FTE: 5**

The requested increase supports nine new national positions (5 FTE), of which one position (1 FTE) is related to information technology (IT) and eight positions (4 FTE) are related to the National Litigation Support Team (NLST).

Of the requested increase, \$110,000 is for one IT position. FY 2022 was 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 position will help to address cybersecurity and other IT 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, \$876,000 is for eight NLST positions, including seven paralegals and one computer systems administrator. With these eight additional positions, NLST would have enough staff to have regionally assigned staff covering each of the 12 circuits. Without these positions,

the current personnel are limited in the amount of training, direct assistance, and case support they can provide.

c. *McGirt v. Oklahoma* positions

Requested Increase: \$4,862,000 **FTE: 22**

The requested increase supports 44 positions (22 FTE) to address the increase in caseload from the decision in *McGirt v. Oklahoma*, 591 U.S. __ (2020). See pages 5.14-5.16 for more details.

12. Reimbursable positions

Requested Increase: \$669,000

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

13. Information technology, cybersecurity and IT modernization requirements

Requested Increase: \$9,167,000

The requested increase will support three IT initiatives to expand capacity and upgrade licenses for existing systems (\$1.1 million) as well as cybersecurity enhancements and IT modernization initiatives (\$8.0 million).

The three IT initiatives are:

- (1) Online Document Review Platform (\$500,000);
- (2) Cloud Content Repositories and File Sharing Services (\$450,000); and
- (3) National Log and Event Management Software (\$175,000).

The National Litigation Support Team (NLST) oversees a national contract for an online document review platform used by FDOs and panel attorneys to organize, review, and analyze e-discovery. The platform, which is designed for large, document-intensive litigation, assists criminal defense teams in managing large volumes of electronically stored information (ESI) in various formats. Because of the continued growth in e-discovery, both in the number of cases and the size of discovery, the need for this type of tool has increased. The requested \$500,000 would increase the total funding available for this platform from \$2.0 million to \$2.5 million.

Defense teams are increasingly using cloud content repositories and file sharing services. These tools, also managed by the NLST, are particularly critical for hybrid FDO/panel attorney teams, as they allow the teams to collaborate even when some team members lack access to the judiciary network. All files are encrypted in transit and in storage, thus ensuring the security of discovery and case materials. This request of \$450,000 would increase the funding available for these services to approximately \$1.0 million.

With the recent widespread government and private sector data breaches, cybersecurity has continued to be a critical priority. Defender Services has initiated the use of national log and event management software to ensure the safety of traffic on its virtual private network (VPN). As more traffic moves through the VPN, there is a corresponding increase in the funding necessary to continue to ensure the soundness of the IT security posture of the FDOs. This request of \$175,000 would increase the funding available for this tool from approximately \$1.5 million to \$1.7 million.

The cybersecurity and IT modernization initiatives are:

1. Data Center Migration (\$1,000,000)
2. Cybersecurity Support (\$750,000)
3. DSO Networks, Governance, and Services Modernization (\$2,907,000)
4. Data Security Management and Improvement (\$2,585,000)
5. Application Upgrades (\$800,000)

The cybersecurity and IT modernization requested increase of \$8.0 million will support critical IT infrastructure requirements in the following areas: the relocation of the Defender Services portion of one of the judiciary's data centers; cybersecurity support to assist with designing and implementing state of the art security mechanisms to combat cyberattacks; DSO networks, governance, and services modernization; data security management and improvements; application upgrades; and recurring costs of proposed FY 2022 infrastructure purchases. These requirements were included in the judiciary's

July 2021 infrastructure request to Congress for consideration as part of the broader government-wide infrastructure proposals being drafted at that time. Because no action was taken on the judiciary’s infrastructure proposal, key elements of that request are now being transitioned into the annual appropriations request to ensure that critical needs can be addressed. More details on Infrastructure Requirements are provided on pages 5.16-5.18.

D. FINANCING THE FISCAL YEAR 2023 REQUEST

14. Anticipated carryforward from FY 2022 and prior years into FY 2023

Estimated funds available: \$30,000,000

The judiciary projects \$30 million will be available through anticipated carryforward from FY 2022 and prior years into FY 2023 to offset the FY 2023 appropriation request for the Defender Services program. The judiciary will advise the appropriations subcommittee staff of any changes to this estimate throughout FY 2022.