United States Senate Committee on the Judiciary

Hearing on the Nomination of Brett M. Kavanaugh to Serve as Associate Justice of the Supreme Court of the United States

September 7, 2018

Prepared Statement of
A.J. Kramer
Federal Public Defender for the District of Columbia

Members of the Committee:

Thank you for the opportunity to comment on Judge Brett Kavanaugh's nomination to be an Associate Justice of the Supreme Court of the United States. It is a privilege to take part in this process.

My name is A.J. Kramer, and I am the Federal Public Defender for the District of Columbia. In that position, I represent indigent criminal defendants before the United States District Court in D.C. as well as the U.S. Court of Appeals for the D.C. Circuit. I am here today in my personal capacity (and am not speaking on behalf of any Federal Defender office or the program).

I have known and interacted with Judge Kavanaugh for the past 12 years. I first got to know Judge Kavanaugh shortly after he became a judge (although I had met him a couple of times briefly before that at events). Since then, I served on two committees with him and talked with him on numerous occasions at various events in the courthouse. As D.C.'s Federal Public Defender, I have argued many cases before Judge Kavanaugh. The two committees on which I served with him are the U.S. Court of Appeals Advisory Committee on Procedures and the U.S. Court of Appeals Criminal Justice Act Panel

Committee. Based on that cumulative experience, it's clear to me that Judge Kavanaugh should be the next Associate Justice of the Supreme Court.

Listening to some of the rhetoric surrounding Judge Kavanaugh's nomination, you could be forgiven for thinking he is, among other things, committed to sending every criminal defendant to prison. Nothing could be further from the truth. Judge Kavanaugh treats all litigants fairly, no matter how unsympathetic they might be, and his overriding commitment is first and foremost to the rule of law. To understand that, one need look no further than two cases I argued before him, along with a third line of cases that I have followed closely. (I should add that I do not recall reading any of Judge Kavanaugh's opinions in civil cases.)

First is the case of *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016). A woman named Queen Nwoye was convicted of conspiring with her boyfriend to extort money from a prominent doctor. At trial, Ms. Nwoye's defense was that she acted under duress because her boyfriend repeatedly beat her and forced her to participate in the extortion scheme. But Ms. Nwoye's counsel did not introduce any expert testimony on battered woman syndrome, which is the set of "psychological and behavioral traits common to women who are exposed to severe, repeated domestic abuse." *Id.* at 1132. As a result, at the close of trial the District Court denied her request to instruct the jury to consider as a defense that she acted under duress. She was convicted.

On appeal, I argued that the failure of Ms. Nwoye's counsel to introduce the battered-woman-syndrome testimony had been prejudicial. Writing for the majority, and over the dissent of a colleague, Judge Kavanaugh agreed. Judge Kavanaugh explained that the testimony would have helped Ms. Nwoye prove the defense of duress by

explaining to a jury why a woman in her situation may have felt unable to leave her abuser. It would have been easy for Judge Kavanaugh to dismiss Ms. Nwoye's argument as a mere "syndrome" of her imagination. Instead, Judge Kavanaugh demonstrated that he recognized the subtle ways in which being a battered woman might have influenced Ms. Nwoye's understanding of her situation. Indeed, Judge Kavanaugh wrote a thorough and thoughtful legal and factual discussion of battered women syndrome in his opinion.

Judge Kavanaugh exhibited this same open-mindedness in the second case I want to discuss, *United States v. Williams*, 836 F.3d 1 (D.C. Cir. 2016). Rico Williams was the leader of a gang that killed a new member during a violent hazing ritual. After the court instructed the jury on both manslaughter and second-degree murder, the jury convicted Mr. Williams of second-degree murder—the more serious offense. The difference between the two crimes—and the validity of the conviction—turned on Mr. Williams's *mens rea*, or intent. In other words, the question was whether Mr. Williams knew that his conduct created an extreme risk of death or serious bodily injury. During the initiation, the victim had repeatedly stated that he was okay and that the hazing should continue. The Government argued to the jury that those statements were irrelevant because consent is not a defense to murder.

Judge Kavanaugh saw through that argument on appeal. He agreed with me that, although consent is not a defense to murder, it might bear on whether Mr. Williams understood the risks associated with his actions. In his concurrence, Judge Kavanaugh acknowledged that "Williams committed a heinous crime," but he argued that nevertheless "the jury did not have a correct understanding of the law and, armed with that misunderstanding, . . . proceeded to convict Williams of second-degree murder rather

than manslaughter." *Id.* at 20. However "heinous" Mr. Williams's actions, Judge Kavanaugh made clear that he was "unwilling to sweep" the Government's fundamental mistake "under the rug." *Id.*

Once again, Judge Kavanaugh saw past the wrongs committed by the defendant and focused instead on the fact that the defendant had not received a fundamentally fair trial. In retrospect, I should not have been surprised: *Williams* was only the latest in a long line of cases that has established Judge Kavanaugh as a leading voice in favor of robust *mens rea* requirements. *See, e.g.*, *United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting); *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

Third and finally, Judge Kavanaugh has repeatedly expressed serious concerns about district courts' use of conduct for which a defendant was acquitted to calculate higher sentencing ranges. *See, e.g.*, *United States v. Bell*, 808 F.3d 926, 927–928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc); *United States v. Settles*, 530 F.3d 920, 923–924 (D.C. Cir. 2008); *United States v. Henry*, 472 F.3d 910, 918–922 (D.C. Cir. 2007) (Kavanaugh, J., concurring). As he has explained, such behavior "seems a dubious infringement of the rights to due process and to a jury trial." *Bell*, 808 F.3d at 928. After all, if a jury finds someone not guilty of a particular offense, how is it fair for the trial court to still rely on that offense to impose a higher sentence? Supreme Court precedent ties Judge Kavanaugh's hands on the issue. But in a telling display of thoughtfulness, he has nevertheless urged district court judges as a matter of discretion to refrain from using acquitted conduct to calculate higher sentencing ranges.

These three examples are not outliers. Time and again, Judge Kavanaugh has been willing to rule for criminal defendants and to check prosecutorial overreach. To name only a few cases: Judge Kavanaugh ordered resentencing in *United States v. Burnett*, 827 F.3d 1108 (D.C. Cir. 2016), because the District Court had improperly based the defendant's sentence on pre-conspiracy conduct. In *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011), Judge Kavanaugh vacated a defendant's conviction of felony possession of a firearm on Confrontation Clause grounds. In *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008), he upheld a probationary sentence for a defendant over the Government's objection, writing an opinion describing sentencing review in light of the Supreme Court's rulings. In *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011), Judge Kavanaugh concluded that the Mandatory Victims Restitution Act did not require criminal defendants to reimburse organizations for the costs of private internal investigations. When Judge Kavanaugh issued his opinion in *Papagno*, he opened a circuit split with half a dozen other circuits. Last Term, the Supreme Court vindicated his view unanimously. *See Lagos v. United States*, 138 S. Ct. 1684 (2018).

This is not to say that Judge Kavanaugh has not ruled in favor of the Government in criminal cases. Of course he has. But even when Judge Kavanaugh rules against a criminal defendant, he does so because he believes that the best view of the law requires that result. He is always evenhanded and extremely well prepared at oral argument, engaging in thorough questioning of both sides at argument, a practice which shows that he reads every brief with an open mind, cover to cover. He also goes out of his way to be fair to the losing party in his opinions, taking great pride in making every litigant feel like they've been heard. And in his capacity as a member of the Criminal Justice Act Panel

Committee, he has always pushed to ensure that criminal defendants receive the absolute highest-quality representation available, recognizing the importance of effective advocacy to any fair system of justice.

America needs an Associate Justice who can apply the law fairly and neutrally to all cases that come before him. Judge Kavanaugh has repeatedly demonstrated that he is that judge. He understands the value of a fundamentally fair trial grounded in the law for *all* parties, including unsympathetic ones. The Senate should vote to confirm him.