

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 4—Birmingham, Alabama

February 18-19, 2016

Transcript: Panel 1—Views from the Judiciary and a U.S. Attorney

Judge Prado: With that, I guess we'll get going. We have the first panel of the morning. Magistrate Judge Sonja Bivins, there; Judge Marcia Crone from the Eastern District of Texas; Judge Leon Holmes from the Eastern District of Arkansas, we went through our confirmation hearing together a few years back; Judge David Proctor; Judge Michael Putnam; and the Honorable Joyce Vance, U.S. Attorney. I think we'll start by allowing, by asking each of you to make a short, brief opening statement. We have your copies of your written material, so please don't read back to us that material, but any opening statements you wish to make. Then, we'll start and have questions from some of us with regard to some of the issues that we've been charged to look into. We'll start off . . . anyone want to go first? You want me to go right-left, left-right? By seniority? Do you want me to appoint you an attorney? We'll start with Judge Holmes, let's start this way.

Judge Holmes: Well, thank you for inviting us and letting our district participate in this inquiry, and I will be very brief. I think the judges in our district think the CJA plan and the Federal Public Defender's Office work really well. We're hoping that there's not any big changes that come out of this with. We like the way the process works and the kind of representation that our defendants get. There's obviously two concerns that compete with another. One of them is that the rates for CJA lawyers are too low and everybody knows that. The other one is, how do you fund the CJA plan and the Federal Public Defender's Office in the climate in which we're in, and have been in, for a number of years? And those obviously conflict, and I don't envy your task in figuring out how do you balance those things. I think that is the summary and the overview of what the judges in our district think about it. I did survey them all and asked for the comments and put their comments in our report.

Judge Prado: Thank you. Judge Crone?

Judge Crone: Good morning, Judge Prado and community members. Thank you for inviting me to participate in this important hearing. My comments are restricted to the three major topics that I was asked to address. First, the death penalty cases, Capital Habeas Units and death penalty resource council. By way of background, I've serviced the federal judge for twenty-four years, eleven years as a magistrate judge in the Southern district of Texas, Houston Division, and thirteen years as a United States District Judge in the Eastern District of Texas, Beaumont Division. Since my appointment as a district judge in 2003, I've presided over many complex

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criminal cases pertinent to this hearing, several capital murder prosecutions. It's not in my written submission, I've presided in twelve capital murder cases, involving twenty-three defendants, of these three cases went to trial, involving four defendants, all of whom received the death penalty, which was affirmed on appeal. One of those defendants is no longer on death row, as he and the government agreed to a sentence of life imprisonment after evidence of mental retardation was uncovered in habeas proceedings.

The remaining three defendants who received the death penalty at trial are currently challenging their sentences in the habeas process and I have a new case currently pending, a new capital murder case, with two defendants that's been authorized by the Attorney General, but it's not yet indicted. Presiding over a death penalty prosecution is the most formidable and daunting task that I've faced as a district judge. There's no greater responsibility than ensuring that a defendant whose life is at stake in my court receives a fair trial, is represented by effective counsel, and has the available resources necessary for an adequate defense. I take this responsibility very seriously. Capital cases are unique and the demands imposed upon counsel witnesses in the court. Capital prosecutions require immense amount of preparation management and time on the part of all participants. From my perspective, issues surrounding budgeting and the payment of attorneys, investigators and experts added to the difficulty of effectively managing these cases.

There's a relatively small group of attorneys who are qualified and willing to accept capital appointments in my district, voucher cuts, delayed payments and relatively low hourly rates may discourage these attorney from continuing to represent capital defendants and may deter new attorneys from engaging in this specialty. I'm also particularly concerned about new, younger attorneys pursuing this line of work. Most of the people who we appoint are my age or older, and they're retiring, they're not going to continue to accept these cases. The pipeline is somewhat more limited because in Texas now, with the availability of a sentence of life without parole, which wasn't available in Texas until 2005, there are fewer death penalty prosecutions, so that there are not as many attorneys learning to handle death penalty cases as there were before.

I think the number of available attorneys are decreasing and they're aging out. Similar problems exist for experts and other service providers, although not to the same extent. There appear to be positive developments in the Fifth Circuit with regard to some of these areas of concern according to the information received from the Senior Appellate Conference Attorney. The circuit approved 99% of the total vouchers forwarded by district judges in 2015. They also advised me that this circuit is in the process of filling a new position, a case budgeting attorney, to

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assist with budgeting throughout the circuit. On a related note, gathering information about capital budgets and payments is quite challenging as it's not readily accessible, even the court employees administering the system. Indeed obtaining financial information about the various cause of defense in my prior capital cases for submission to this Committee was extremely difficult and time-consuming.

It may be incomplete due to the frequently changing data systems over the past decade. Having ready access to CJA information circuit-wide and even nationwide would greatly assist district and circuit judges responsible for making decisions about budgets and payments, a sentiment echoed by the circuit conference attorney. I'm hopeful that the transition from older data bases to the eVoucher system will alleviate this problem to an extent. Capital habeas cases like capital prosecutions necessitate experienced attorneys since the stakes are high. Locating an appointed qualified counsel is not always easy, nor are reviewing vouchers for reasonableness, and capital habeas cases tend to be more difficult than in standard cases. Some are often unfamiliar with the practice of skills and reputations of habeas counsel who are generally from other geographic areas. I'm in favor of the establishment of a Capital Habeas Unit comprised of a small group of specialized attorneys who handle capital habeas cases originating in both federal and state court who would be more efficient and cost effective.

That sentiment is shared by the U.S. Attorney and the Federal Public Defender from my district. In the Eastern District of Texas, a Death Penalty Resource Counsel is not utilized as often as in other areas, this is likely because there are more experienced death penalty attorneys in and around the geographic area who are familiar with what's required for effective representation in capital cases. Nevertheless, resource counsel have proven to be a valuable source of information for both the court and defense attorneys. Thank you, again, for inviting me to provide testimony on these weighty topics. I look forward to answering your questions.

Judge Prado: Judge Crone, I might add that I talked to Joe St. Amant and he said it was fine for his letter to be made part of the record, so it's public and it's been made part of the record.

Judge Crone: Alright. Well, I also contacted him and he told me the same thing, that he did not have a problem with sharing it with the Committee.

Judge Prado: Okay, thank you.

Judge Crone: Thank you.

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Judge Prado: Miss Vance, what's going on in the U.S. Attorney's Office? Everything under control?

Joyce Vance: All sorts of things are all under control, I'm glad to report. Judge Prado, thank you, and the Committee, for including myself and my colleagues across the country in these field hearings. We appreciate your interest in hearing our views on a subject that obviously matters deeply to us as we go about our practice. Like all districts, the Northern District of Alabama has unique and specific characteristics and circumstances, and we benefit from flexibility that permits our court to administer the CJA program in a manner that's responsive to those unique characteristics. Our district is also very different from many in that our Public Defender's Office is a new one, I'm sure you all know that it was created in 2012 due to the persistent dedication of then Chief Judge Sharon Blackburn, to whom we're all very grateful for the creation of the Defender's Office.

We also, I think, are very fortunate to have Kevin Butler, our Federal Defender, who does an extraordinary job with his office and the relationship between the two offices, I'm told is a little bit less combative than it is in other districts and we try to be collaborative when possible. I'm a career prosecutor in our office. I joined in 1991. I've been in both the criminal and the appellate divisions. So I've actually had the chance to work personally with many of the lawyers who are now CJA panel members. I know all of them to be an outstanding group and they are deeply dedicated to providing the best presentation that they find it possible to give to their clients. Being mindful that the Committee is reviewing a court administered program, I'm not here to share the department's views on how the program should be run, but rather to recognize the challenges that we face jointly along with our colleagues on the defense bar side.

As the complexity and diversity of the cases in my office increases, it places additional demands on the defenders and the CJA panel lawyers as well. My office focuses its resources on the most serious cases that implicate substantial federal interests. By that, I mean that when we're looking at child pornography cases, we prosecute people who produce pornography, people who traffic pornography, not so much people who are in possession of child pornography. That approach, to prosecutive decision-making, permeates our decisions across the spectrum of cases that we prosecute. Our criminal prosecutions have become increasingly complex, and they cover an enormous diversity with the presence of Huntsville in the northern part of our district, we have a heavy cyber emphasis, but we also have public corruption cases, civil rights cases, violent crime cases, and so forth across the spectrum that all of you are aware of.

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The increased seriousness and complexity of our work really impacts the work and the demands on the defenders and the CJA panel. I know you've heard a lot about discovery in your hearings across the country. As government lawyers, we certainly can't quantify the costs that the CJA panelists and defenders experience, but we assume that their experience is much like ours and that those costs are straining their resources in a severe manner. In our district, we're a little bit different. We turnover discovery at the time of arraignment and that means we essentially burn discovery to a disk and actually turn it over. That includes turnover in complex cases that are discovery intensive. There are also still discovery materials that have to be reviewed in the office, whether they're classified materials or bulky file materials. That process, as much as it imposes demands on my lawyers, is also very time-consuming for the defenders.

They need to be fully staffed in order to meet those concerns. I'm particularly sensitive to e-discovery issues and as those evolve in complexity, it will be important that we have the resources to stay up with the evolving legal issues and the new technology. I have to tell you all that those issues are magnified enormously when we handle capital cases, such as the one we have currently pending in front of Judge Proctor. That's the fourth direct capital case to be prosecuted in this district. Many of those cases involve appointed counsel and the complexity and resources in those cases are just austere at this point. Our court, as you've had the opportunity to learn from Judge Proctor's written statements has made significant efforts to revamp the vetting and the training for CJA panelists. Much of that training is provided by the Defender's Offices and those changes in vetting and training are really reflected in the caliber of representation that's provided to criminal defendants in this district.

We hope that those programs will be permitted to continue. In closing, I would note that although it's critical that we're adversarial in the courtroom, the adversarial relationship needs to also be dropped off at some points in the system and the point for us in this district is when we work with defenders on prevention and on re-entry work. I hope that this panel, even if it's a little bit outside of the heart of your consideration, will consider the role that all of us can play in prevention and re-entry services and how that keeps people out of system and conserves resources for the court work we have to do. We're all better, the system and our community, when we enable to defenders to work along with prosecutors in these areas. Thank you and I look forward to any questions you may have.

Judge Prado: Thank you, Miss Vance. Judge Putnam?

Judge Putnam: Judge Prado, I want to thank you and the Committee for inviting me to be here this morning. I want to echo what Miss Vance said that we, in this

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district, from a capital standpoint, I've been a magistrate judge for twenty-nine years here and over the course of that time, I am aware of only four capital prosecutions that have occurred. We don't have a terribly heavy load of direct capital prosecutions in this district. We do, however, have I don't know if it's a heavy load or an average load or what, but it seems to us to be a heavy of habeas review of capital cases from the state system—defendants who have been convicted in the Alabama state system and have filed habeas reviews of their convictions in capital sentences. We deal a lot with that and that occupies a lot of our time. It's interesting though, that our experience here in the capital habeas review, or at least my experience, has been that most of the attorneys who appear in those cases are pro bono volunteer attorneys from usually typically large law firms around the country who have undertaken to represent capital habeas people.

I was trying to think back over the last couple of days of the last time I actually appointed an attorney to represent someone in a capital habeas case and certainly this is more anecdotal than anything. I didn't try to do any study of it, but the last one that I can recall was almost fifteen years ago, that I appointed an attorney in a capital habeas case. The other . . . and that's not to say we don't have a lot of capital habeas cases, we do. We have a lot of habeas cases. It's just that most of the attorneys who appear in those cases are already in the case having appeared pro bono volunteer at the state review level. In Alabama, the state courts have a post-conviction review procedure that's referred to as a Rule 32 hearing. Most of the attorneys in the capital cases have already gotten involved in the case at that stage in the state court at the Rule 32 hearing before it ever gets here on the § 2254 habeas petition. Most of those lawyers are already in the case. My typical experience is they don't ask for appointment or compensation under what used to be § 848(q) and now is § 3599.

They don't seek appointment or compensation under that statute in the vast majority cases. At least my experience is being that it's a fairly rare occurrence in a capital habeas case where CJA funds or resources or accounts, or anything of that sort is implicated. Now, having said that, I am a big proponent of CJA panel attorneys. As you've heard, here in our district, for many, many years, did not have a Federal Public Defender's Office. We started one and it became active in 2012. I guess I sort of developed the reputation on the court as being the person opposed to that, and that's not true, I'll have to say. I wasn't opposed to a Federal Public Defender's Office, I simply was saying, I was asking the question, "What's wrong with the CJA panel attorneys?" That's the question that I want to propose today, is, "What's wrong with private attorneys dedicated to representing federal criminal defendants?" From my view, if the CJA panel and the CJA system is administered and managed properly, that there's nothing wrong with that. What we have tried to do here in our

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district is, beginning more than ten years ago, is to take a very robust approach to management of the Criminal Justice Act panel.

We have a committee of lawyers that meets regularly to address problems with the panel. We have a plan that requires that the panel be reviewed and reconstituted periodically every three years. We are currently, at the moment, in the process of reconstituting our panel through accepting applications from lawyers. This is a very complex application that looks into their level of experience, their training, their history, and trying to assess who are the best lawyers to put on that panel. The criteria that we go by, that I try to go by in that activity is, it is our obligation as a court to provide to criminal defendants charged in our court. It's our obligation under the Sixth Amendment to give them the best possible representation we can possibly give them. That's what our goal is to do, is to try to locate the best possible lawyers to be on the panel. Then, after they're on the panel, we provide them with ongoing training. I want to thank Mr. Butler, the Public Defender, and I hope none of my remarks are taken as being any criticism of the Public Defender's Office.

It's not intended that way. I have immense respect for the Public Defender's Office and for Kevin Butler, and I'm glad they're here. Mr. Butler is immensely helpful in providing training to the panel members and providing guidance and consultation to them, and in providing resources on occasion in the form of experts and investigators and things of that sort. There is a good, productive working relationship between the Public Defender's Office here and the CJA panel. I think that the CJA panel attorneys are obviously indispensable, from my point of view. Any time Joyce wants to indict more than two defendants in a case, the Public Defender's Office can only take one of them. We necessarily have to reach out to panel attorneys to cover conflict situations and multi-defendant situations and that has resulted in our courts, statistically, although we attempt to appoint the Public Defender's Office in 75% of all cases by time you work through conflicts, multi-defendant cases, things of that sort, what that effectively means is the Public Defender's Office represents about 60% of the defendants and the remaining 40% are represented by appointed CJA counsel.

It seems to me that there remains a crucial role for private attorneys on a Criminal Justice Act panel. What I do advocate in connection with that though is that the court take a very active robust role in managing, in constituting that panel. Don't just appoint any lawyer that says he wants to take criminal defendants. Review their experience, review their training, create a select group of lawyers so that . . . I think I can say, in our district, the attorneys who make it on to the CJA panel in our district are regarded by most of the other criminal defense attorneys who are not on the panel as being sort of the cream of the crop. They are viewed as being sort of an

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elite group when it comes to criminal defense. That's what we are attempting to do, is to select the best lawyers, train them, keep them trained. We require in addition to any kind of Bar requirements of the State of Alabama, the State Bar has, for membership on our panel, we require attorneys to go through twelve hours of continuing legal education every year, focused specifically on federal criminal defense.

We require them to certify that to us every January that they, in the previous year, went through CLE training with that purpose. I want to thank Mr. Butler, the Public Defender, he provides much of that training. The Public Defender's Office puts on a one-hour CLE training session every month. We have provided an opportunity for panel members, if they simply wish to attend, if they do nothing more, and most of them do far more, but if they do nothing more, then, attending the monthly training sessions put on by the Public Defender's Office, they can get their twelve hours of CLE related to federal criminal defense. My view of the way a CJA panel should work is that there should be an active, robust management of it by the court, with active selection of lawyers, a limited number of lawyers. Our panel currently is about thirty-five lawyers, it's not big, about thirty-five lawyers, actively selecting those lawyers, training them, requiring them to continue to stay updated in criminal defense issues and working to have a profound cooperative relationship between the panel and the Federal Public Defender's Office.

I think that there is no necessary conflict between the Public Defender system and Criminal Justice Act panel attorneys, that there can be a cooperative relationship and that's the best for the criminal defendants that we're here to serve. I view it as being a constitutional obligation to provide those defendants with the best representation I can give them if we're going to send them off to prison for many, many years. The system requires that they be given a fair opportunity to try to defend themselves, and that means giving them the best lawyer we could possibly give them. I'm happy to answer any questions that anyone may have and I thank you for the opportunity to be here. Thank you.

Judge Prado: Thank you. Judge Proctor?

Judge Proctor: Thank you. Thank you to the Chair Emeritus, the Chair, the Committee and all the staff. We appreciate the opportunity. It's a privilege to appear before you and provide you some of our views and have a discussion with you about Review the CJA. I hope your time in Birmingham will be marked with our special brand of southern hospitality. By way of background, I've been a district judge entering my thirteenth year now. I am currently the chair, or the liaison as we call it, of the CJA panel committee. That committee is made up of CJA panel leadership, our Federal Public Defender's Office, Judge Putnam, who you just heard

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from. Prior to taking the bench, I had seen exactly one criminal trial and I was a juror in that trial. Unfortunately, struck as the randomly selected alternate at the end of the trial. My second trial I saw was soon after I took the bench with my first criminal trial as a judge. By way of background, because I didn't have any criminal justice experience or criminal experience to speak of, when I was nominated and actually passed through committee, I thought it would be safe to call on a friend of mine, George Barton, one of Joyce's colleagues, who I was coaching Little League baseball with, and Bill Clark, one of our senior criminal defense lawyers here in town, to sit down and take me through information, indictment, all the way through sentencing just so I'd have an understanding coming on the bench of exactly the process and what hopefully would be a quicker study than otherwise. I appreciate the task that each of you have, as you approach it, I hope you remember this though, our criminal justice system works well, quite well, actually. Is it perfect? No, but I would suggest that we should be looking at tweaks to the system so I echoed Judge Holmes' comments in that respect, that my hope would be that after you review, there will not be any recommendations, any major overhaul of our system. That's not to say that we, the system, can't use some work. I also want to echo a couple of remarks by Joyce Vance. Judge Blackburn, who was our Chief before Judge Bowdery, did yeoman's work in getting the Federal Defender Program landed here, much work.

We were one of the last districts, as you're aware, to adopt a federal program. Having said that, I think the . . . and I'll echo what Judge Putnam said also, the transition was actually quite smooth from my viewpoint. We do still have a robust panel of CJA counsel, private attorneys, and there's not only professionalism between the U.S. Attorney's Office and the Federal Defender's Office, that's quite palpable from my vantage point. We rarely have any issues with lawyers, and when they do, in my estimation, they're over legitimate good faith disputes about how the case ought to be prosecuted or tried. There's also a great deal of professionalism that I've witnessed being on the panel, on the panel committee, between our Federal Defender's Office and our CJA counsel. As a matter of fact, when the committee started, the first thing that the committee did was invite Mr. Butler, our new Federal Defender, to be a member of the committee.

He has served well and there's been excellent interaction, training, and just a solid approach by all sides in that respect. I will have a few suggestions as we begin our discussion about this. I want to address some things also that I think need to remain the way they are. Consistent with my written submission, I'll comment on some broader CJA issues, some death penalty issues, which I know was the emphasis of this particular

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hearing. I do look forward to our discussion, and again, thank you for your visit to Birmingham.

Judge Prado: Magistrate Judge Bivins, are all the district judges behaving following your recommendations?

Judge Bivins: They are doing a marvelous job. I want to say good morning and I am here from the Southern District Alabama. As was noted, I am a magistrate judge. I'm in my twelfth year on the bench. Our district, in relation to a lot of the other districts here, is a smaller district. We have both a CJA panel as well as Federal Defender's Office and surveying my colleagues, I think the general consensus is that our system works really well in our district. The Federal Defender's Office and the CJA panel, there's just a real cooperative spirit and I think, sort of like what Judge Putnam said, our CJA plan calls for our Federal Defender's Office to receive 75% of the cases. The actual breakdown in our district is also about 60-40, and in terms of problems, we . . . our system has been in place a long time. We've worked hard, probably in the last ten years, in creating a panel that is really robust and is one now that is really highly regarded and we also put a lot of time into a training panel. So when we do get openings on the CJA panel for one reason or another, we've got some pretty good attorneys in the wings to bring in.

In terms of capital cases, we've not had any in our district I know in the last ten years, there had been a couple of capital cases with respect to habeas review and I think, like here in Birmingham, primarily, those have been handled by pro bono organizations. That's primarily what I've got. If you guys have questions for me, I am happy to answer.

Judge Prado: Thank you. I know I thanked the judges from Birmingham for allowing us to use their courthouse but Judge Bowdre is here and it's her courtroom, so thank you very much for the use of your courtroom today. She plead the Fifth Amendment and is not testifying here today. No. With that, I'm going to open it up to the panel, to the Committee, for any questions. Anyone wish to go first?

Judge Goldberg: Okay, I'll volunteer. Judge Crone, good morning. I'm from Philadelphia. I've never had the privilege and honor to practice in your district, so I have some very basic questions to start out. Could you tell us, Joseph St. Amant, if I'm pronouncing that correctly, who submitted the memorandum, I believe to you, he's a Senior Appellate Conference Attorney, could you tell us what he does specifically, what his role is?

Judge Crone: I know he might have a better idea than I do. I have worked with him when I have capital cases on capital case budgeting. He's sort of the gateway to get vouchers approved and it's very complex when you have a

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capital case, it will be a budget that's approved by the district court and the Fifth Circuit that set parameters on an overarching budget. Then, every time that something is billed on that, there's a voucher that's submitted on that, too. You have to go through the process multiple times, any time for attorney's fees, for service providers, for whatever. There are many occasions where I communicate, or my staff communicates with Mr. St. Amant and that's how I've gotten to know him. I had contacted him originally with respect to this project. I was trying to capture data having to do with the cost of the capital cases I'd had and found it extremely difficult to find those numbers from my own financial people in the Eastern District of Texas.

Many times, the budget was affected by cuts or adjustments that were made at the Fifth Circuit level and I wasn't always aware of that. So I was trying to reach out to him to see if I could get more data on what he had as to what had been paid on those cases. It became not fruitful because he wasn't able to get the data either. I wanted to see if his data matched mine because I'm concerned that mine is under-reporting perhaps.

Judge Goldberg: Data relating to voucher cuts?

Judge Crone: Data relating to cost, just all the . . . what's been paid on representation for attorneys, for service providers, for investigator's expenses. Just, are our numbers is the same as with the Fifth Circuit's numbers and I could not get an answer on that. He got, I think, frustrated as well, not being able to get access to that data. I think over the past, this has been going on for a decade, there had been a lot of different changes in the systems that were used to calculate to capture the data.

Judge Goldberg: Are you folks on eVoucher yet?

Judge Crone: Now, we just got on that but we hadn't been on it. My contact with him, was trying to get these financial numbers to see if they matched ours. That was not fruitful, but in the midst of that, he decided to write this memo that was very thoughtful and insightful on these different issues. I didn't ask him to do that, but he did.

Judge Goldberg: He did?

Judge Crone: I didn't receive it until past the deadline for submission of things. I received it on my phone on Friday when I was travelling back from a trial I was presiding over in another division in our district and it was lengthy and so, yeah, I sent it in.

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- Judge Goldberg: Do his views . . . do you know, did he canvass the views of judges in the circuit or your district? In other words, are the opinions expressed here are his individual views?
- Judge Crone: I don't know. I think that they are his individual opinion, I would think.
- Judge Goldberg: Okay.
- Judge Crone: I didn't ask him, I was a bit surprised at receiving this letter, because it wasn't really within the scope of what I had asked him about.
- Judge Goldberg: Do you have . . .
- Judge Prado: Just to clarify, I did talk to him after the letter, and he said it was his comments, not those of the circuit and that it could be made public as I said a while ago. He made it clear in an email to me that it was his views and not those of the court.
- Judge Crone: I think they're his views. I don't know who he asked, if anyone, before he did this. I don't know.
- Judge Goldberg: Yeah. Well, he raises a lot of interesting topics. Yeah. Do you have a suggestion, in light of the fact that you had trouble gathering data and one of the focuses of this Committee is voucher cutting and the extent of voucher cutting, do you have a suggestion for us how there could be a uniform system to get our arms around, presently get our arms around the extent of voucher cutting, and whether it's a systemic big problem or not. In the future, do you have any recommendations how that data can be used?
- Judge Crone: Well, I'm concerned about this as well. I think eVoucher will make a difference. A lot of the problem in trying to get historical data is that we just kept changing systems, but I had trouble getting this even when I had cases going on. Trying to find out what's been paid, what's not been paid, because I'd hear rumblings, lawyers, claiming they weren't getting paid on time, but I could never find out what had actually been happening. I knew what was approved, but as far as what was paid, it was very difficult to access at that time. I'm in a division, it's not where the headquarters of the Eastern District is, that's in another town. The people who do all the financial stuff in the district are not where I am. That's part of the problem, having to deal remotely, but even then, they were having problems obtaining that data. I think eVoucher will help. I think there had been some voucher cutting but I . . . look, recently, there were 99% of the vouchers were paid from the Fifth Circuit. That's what Mr. St. Amant said recently.

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Judge Goldberg: Is that based on raw data, 99% are paid?

Judge Crone: That's what he told me.

Judge Goldberg: Okay.

Judge Crone: That's what his letter said. I think that's probably correct. That has to do, not death penalty, that will be all the things, and if the Fifth Circuit only gets certain things, if you're over a limit, you send it to the circuit. In a run-of-the-mill case, if it's plea, they'll never receive those. They're approved by the district court and they don't go up to the Fifth Circuit level. I dealt with him on my capitals cases and that's why there have been cases of that, at least the lawyers who report that to me. Do I have a lot of personal knowledge of it? No. That's what I could not get data about at the time. I think just the whole system is not set up to be very transparent to know what's happening and I think Mr. St. Amant is also worried about if the judges of this circuit are trying to make decisions, if we don't have data of what's going on nationwide, it's hard to evaluate what we're doing. I think he's concerned about that.

Judge Goldberg: Understanding that he . . . I'm sorry, go ahead.

Judge Crone: I'm sorry. Now, I have a new capital case that I might have . . . we have a new court reporter in our district and I've reached out and tried to say, "Look, I really need a person assigned to monitor this case, to be what's approved, what's being paid," to get a better handle on the finances, because I think being prepared for this hearing made me realize the importance of that and I was so troubled that we were not able to reconstruct a lot of the data that I thought we could. So I'm trying to get help from local people in the office who do the financial data to try to monitor it as we go along.

Judge Goldberg: Understanding that these are his views, he says, in discussing the rates for CJA lawyers, he says, "CJA Panels throughout the Fifth Circuit includes some extremely able attorneys. These people appear regularly as defense counsel, and their willingness to do so at the hourly rates currently paid suggests that these rates are not impossibly low." But I thought that you said that you're having trouble finding qualified counsel in habeas, in capital habeas cases, you said I think it's . . . you said it's very difficult. Do you want to comment on his views that the hourly rates are right where they should be and do you believe that your problem in finding capable capital habeas lawyers could be connected to and related to the rate, the current hourly rate?

Judge Crone: Okay, I don't know if his comments were about the general rates or the capital rates.

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- Judge Goldberg: I think they were, in fairness, they were in general, but it's a . . .
- Judge Crone: I think in general we have good quality people on the regular appointments list. I do think there are very good lawyers sometimes who are not on the appointments list because they can do better as a private attorney, or they don't want all the record-keeping, things like that. There are good people that are not on the list, but I think generally, we can find good, qualified people to handle the general criminal docket. Is it competitive with private? I don't know, perhaps not, but then in the criminal defense, boy, that's just going to be a different way. They're getting money upfront. It's paid differently, not so much an hourly rate. The problem with the habeas, those are hourly rate lawyers. It's a civil case. So you're looking at 183 versus what does the civil lawyer get from these big firms. A lot more.
- Judge Goldberg: Not 183?
- Judge Crone: No, but I think they're doing it for public service. They're just doing it for another reason, but on capital habeas as . . .
- Judge Goldberg: What's the other reason, in your opinion?
- Judge Crone: I don't know. I mean, private counselor, I'm seeing rates, \$400, \$350, \$400, \$475 for just civil cases. This is a different situation than that. And I think that we're not in the same ballpark on that, but I think some might have a raise other than 183 would be appropriate, but I do think many of the people from the big firms are doing it as pro bono. So what the . . . the only people we're really appointing are people that are being compensated that way, but we're using a lot of people who are public defender's in different places, and that works out because of they're salaried. We've had difficulty in finding other people that are not public defenders, not pro bono people. And some, I think abuses of the system, of expecting more payments than reasonable. I've had a situation when the people were married but didn't tell anybody this and then they were told that they would have to go together to replace the investigator. That not a good use of resources.
- Judge Goldberg: Do you think it's possible that the rate of \$188 for a capital habeas case as compared to twice that for a private attorney, coupled with the expectation that part of that work has to be pro bono could be a part of the problem that you're seeing in finding competent counsel for these cases?
- Judge Crone: I'm not having as much . . . we don't have as many capital habeas that we're having to appoint on regularly where there's that much difficulty. I have a problem with knowing who they are and knowing whether their vouchers are legitimate or not. The appointments are more difficult for the

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capital, the death penalty case in the first place, because there you have . . . we have qualified people in Texas, that's for sure, but I think the rate is low. I don't think it should be \$400 but I think some increase would be appropriate, \$200, \$250, something like that, but I'm not sure that that's going to solve the problem. We have a problem with . . . as I pointed out, they're all experienced lawyers, but I don't see a lot of young lawyers coming into the area doing it. In Beaumont, even on the regular appointments list, they can get more money in state court. They have a system where they hire these people who work in the state courts as almost a public defender in that court, and they will get a salary of a hundred thousand or something a year.

Then, they can still get appointments outside. Well, that's very attractive to these lawyers, especially the younger lawyers, they're going to do that. They're not going to really seek federal appointments that much. And as far as developing the expertise and doing death penalty cases, that part is a different set of skills and a lot of time and attention to that, so you've got to be involved in that type of jurisprudence. There are just not that many people doing it anymore. At one time, there were many more death penalty cases in the state courts when they didn't have life without parole as an option. Now, many cases are being resolved on that, I think that's a good idea, but it just changes dynamics of who's available to take the cases and to learn the skills to take the cases.

Judge Goldberg:

Ok, I don't want to consolidate the microphone, so I just want to ask one quick question of Judge Holmes, and then I'll let my colleagues ask some questions. Judge Holmes, good morning. In your remarks, your written remarks, you suggest the Committee's, our Committee study should implicate and does implicate competing interest although on one hand providing adequate representation for each defendant, and on the other hand, the need for fiscal responsibility. I would appreciate your thoughts on whether you see any dangers, problems, conflicts in having judges, who are supposed to be impartial, objective overseers of the case, also play this . . . a dual role of being a bean counter, so to speak, being a controller and deciding whether one advocate, that is the defense counsel, whether they should have funds or not. Do you see any conflicts or problems with that dynamic?

Judge Holmes:

Well, I hadn't thought about it in the terms in which you have posed the question before. I will say that it is a task that I find uncomfortable. It's a task that I find uncomfortable reviewing the vouchers and making decisions about them. I suspect that just based on hearsay, that I'm probably less likely to cut the vouchers than some of the other judges in my court because I'm . . . because of that and I don't know entirely why. But in my practice, and I've . . . like Judge Proctor, engaged in a civil practice, I did not handle criminal cases. I've worked on defense side of

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the civil bar, which means nearly all of my work was hourly rate work. We sent vouchers, or not vouchers, we sent bills to clients and clients reviewed them. If they had questions, comments, objections, they'd get in contact with me and we would work it out. This seems to put the judge in the position of being something like the client and determining as though the lawyer is working for us, and we're determining whether or not the lawyer's bills are appropriate under all the circumstances. It is a position that I'm not comfortable, whether it's a conflict or not, I have to think about that.

Judge Goldberg: Do you have a suggestion? If you're uncomfortable with it, do you have a suggestion as to how to reach your comfort level that you could suggest?

Judge Holmes: Well, certainly one possibility is to shift it away from the judges and have a panel of lawyers who review it or someone from the circuit. We do have . . . our circuit recently has hired a case budgeting analyst in conjunction with the Seventh Circuit. He's shared between us and the Seventh Circuit. It certainly could have them reviewed by someone other than the judges in order to . . . whether that's the best position or best way to go or not, I don't know. I don't know if other judges find it uncomfortable. I think that some do and some don't. I'm one who does find it uncomfortable and trying to second guess whether a lawyer should have done this or that or the other, or did this really happen? We audit, in my office, we audit every voucher but in terms of making judgments about some of the time, it's hard for me to say. It's hard for me to look at that voucher and say, "Should that lawyer have made that extra trip down to see the inmate who's seventy miles away? Was the amount of time spent on research for this particular issue, is that reasonable?"

Those are the kinds of things that we're asked to judge. In my opinion, a lot of the time, if we do a good job of vetting the lawyers and we get good lawyers, and we trust them, then, we need to trust them to make those judgments as well, and expect that they are fulfilling their professional obligations when they submit their vouchers to us. I'm reluctant to second guess some of those things.

Judge Prado: Let me ask Judge Crone a follow-up question since I'm sort of familiar with the responsibility of Joe St. Amant. He handles all the circuit vouchers. He worked for the court and reviews them for any mathematical errors and then submits it to the judges. In your frustration of finding out where things stand, if you call him, will he tell you where it is? In other words, would he say, "It's been sitting on Judge Prado's desk for three months and he's been too busy being in Birmingham and hasn't gotten to it?" Will he tell you, "It's off my desk. We've done our work and it's now . . . it's on some judge's desk?"

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- Judge Crone: Yes.
- Judge Prado: Okay.
- Judge Crone: That's what he repeatedly said.
- Judge Prado: So you sort of know where it's at? It's not like once it gets there . . .
- Judge Crone: Generally, that's right, but as far as affecting any action, that was difficult.
- Judge Prado: Yeah, so is the problem sometimes that it's not in his office but maybe in another office?
- Judge Crone: I believe that is the problem. There's been a change in leadership for the Fifth Circuit and people reviewing it, so I think things may be different than my experiences in the past.
- Judge Prado: Okay, all right.
- Judge Crone: I recently had more of a preliminary budget. I think that went through pretty quickly and anecdotally, I've heard that for another district in the Fifth Circuit that a budget was approved rather rapidly with Judge Stewart but I don't have personal . . . it's hearsay, but it was favorable.
- Judge Prado: Okay, Reggie.
- Judge Walton: Following up on the dialogue that was occurring between Judge Goldberg and and Judge Holmes, I'd like to hear from the other judges because we have heard in other hearings and just meetings with defense counsel, that many lawyers feel that there is a conflict between judges deciding who gets cases and judges deciding how much lawyers should receive for their services. Some lawyers say that they feel intimidated by judges, and they think that we as judges should not be in the business of overlooking or looking over their shoulders as to what services they should be compensated for, and they draw an analogy between the United States Attorney's Office as compared to the work that they do, and nobody is second guessing them from the bench as to what expenditures they should make in prosecuting the case. So query, why should we as judges be involved in second guessing what defense counsel, what they do?
- Judge Putnam: Well, I have several views about that. Let me explain. Here in our district, we have used the eVoucher System since before the Administrative Office had it. We went back to the old Nevada System in using it and we're very pleased with the eVoucher system. Under that system, the magistrate judges are tasked with conducting an initial review of the vouchers when they're submitted by the attorneys, and to the extent that there are any cuts

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or changes in them it's usually done at the magistrate judge level, which is then passed on with the recommendation to the district judge for approval. Do I find it uncomfortable in some ethical sense of reviewing the attorney's vouchers? No. Is it a job that I enjoy doing? No, but it is . . . I don't think that it creates a problem. First off, on the appointment end of it. Before we, ten years ago, embarked on what I refer to as the robust CJA system that we have, attorneys were appointed just sort of randomly, at the whim of judges or courtroom deputies or whoever else was tasked with appointing attorneys.

We now, under our CJA system, mandate that the attorneys are appointed by a computer. We go to a computer. We say, "We need an attorney for a § 922(g) case." The computer randomly selects an attorney off of the CJA panel, if that's where we're going to go, rather than Public Defender's Office, we go to the CJA panel. It's randomly selected, so there's no . . . we have tried to, intentionally, we have tried to remove from the appointment system any kind of bias, prejudice, favoritism, good buddyism, anything of that sort in the process in order to try to fairly distribute the case load across the lawyers on the CJA panel. So I don't see any kind of opportunities there for conflicts in the sense that the judge managing the case has handpicked some particular lawyer to handle that case. That just doesn't and it shouldn't happen, I agree with that. The problem with reviewing vouchers when they come in is, that there is no way that I can know whether a claim for a time item by a lawyer is real or reasonable, or anything of that sort, other than looking at the reputation of the lawyer that I know.

If it's a lawyer that I have known for years, and I know is trustworthy, I have no reason to assume that there's going to be a padded or fraudulent voucher submitted to me. Having said that, I still go through and I review those vouchers and let me give you some numbers to show that I think the whole question or . . . these are indicative of our district. I don't know what's going on nationwide, but the whole problem of reviewing I think is a tempest in a teapot. Judge Proctor supplied you with statistics for our court over the last ten years, from 2005 to 2015. The average voucher amount, the average amount that we paid on a voucher over that period of time was \$3,258.60. That is far, far less than what a private attorney would have charged, if possible, for that same case. Private attorneys would have charged, 10, 15, 20, 25 thousand dollars. CJA appointments are a bargain right off the bat. When I go through and I'll review a voucher, if there are any entries on the voucher that I have any questions about, I will mark them and make a change in the amount of the voucher for recommendation to the district judge that it's going to.

The problem is, after I do that, and I spend time reviewing the voucher and going through, and making changes, the typical change that ends up in the

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voucher is less than \$200. It is not a huge amount that it makes a difference in the review of the voucher. I spent far more time reviewing it than any change that I might make in it. Even with all of that, what we have provided under our CJA system and I recommend this to courts where the lawyers are grumbling about cuts being made in their vouchers, and I can appreciate the impact of cuts being made on the vouchers of attorneys, because it's discouraging to them to work hard on a case and then for reasons that are unknown to them, have their voucher cut. Under our CJA system, we provide an opportunity for the attorney whose voucher has been reduced, to notify the clerk's office within seven days after receiving notice of the cut, to ask the CJA Administrative committee, the committee that operates the CJA panel, to review those cuts for fairness.

We provide an opportunity for the attorneys to raise, on their end, a question about any kind of cuts that may be made in a voucher and then the CJA committee will review it. If the committee believes that the cuts were proper, then they'll notify the attorney of that. If the committee thinks that some of the cuts should be eliminated or reviewed or reduced, then the committee will make that as a recommendation to the district judge. We recognize that at the end of the day, under the Criminal Justice Act, ultimately, it is the district judge's call, but we do provide an opportunity for the committee to have input on cuts that may be made in a voucher. I think that gives lawyers on the panel a level of comfort that they're not going to be arbitrarily having their vouchers cut.

Judge Proctor:

Let me just echo a couple of things there. First, the eVoucher System makes so much sense. We were a pilot program for the automated CJA payment program that was developed in the District of Nevada. They are to be commended for an excellent and outstanding program they developed and we went live about seventeen months ago. This is not original, but I think I said in my written submission, eVoucher is to CJA eVoucher as computers are to typewriters. It's just an exponentially better system. It provides, as Judge Putnam said, for random attorney's assignment. It allows for consistently accurate voucher calculation, so arithmetic problems don't have to be generally caught at the circuit level. It allows assignment and case management reports, it allows for interaction with the AO's payment system, all on a perpetual electronic record. It's much easier to keep the records, so I think some of the problems that Judge Crone ran into in terms of finding historical data are going to be largely solved with an electronic record that's stored.

Our judiciary's approach to a case budgeting and review of vouchers, in my view, is quite fair. I think that's the key. Do we provide a fair process and do we have sufficient information to make decisions? I'm with Judge Putnam. We have thirty-five members of our panel. They regularly appear

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before us. We know them. We know all of them well. We know some of them better perhaps. There's just generally not going to be a concern when I review a voucher that someone has padded time. Do I have personal knowledge? Can I go back in time and transport myself to what actually happened to that moment? No. I think it would be a mistake for the judiciary to be divested of this review process. I've consulted with members of our court. I've consulted with Chief Judge Carnes of our circuit on this issue, and I am . . . I've seen, I've not talked directly to him yet, but I've seen Judge Jordan on the circuit's letter to the Committee about his responsibility at the circuit level for reviewing the vouchers.

I know a lot of that is delegated administratively, the people and the staff of the Eleventh Circuit. I do think we are on the front line. We know the case. We're better able to make determinations about what's reasonable in terms of time devoted the case, tasks devoted the case. I don't understand why we would want to create a level of bureaucracy. I don't know that anybody is going to volunteer to sit around and review vouchers. I think we're going to have to pay them for that task. I do think it would be a grave error to add another layer of bureaucracy, another layer of work involved, another layer of potential confusion and misunderstanding about what's needed in a particular case that's presided over by two particular judges. I like our system. I particularly like the fact that magistrate judges take the first crack at things. We have excellent magistrate judges in our district, so I actually have a lot of confidence when Judge Putnam passes something along to me and says, "Either this is good to go or I have a question about this particular item."

We have regular meetings. Just this month, we took up the issue of voucher cuts. Judge Putnam and I often make that inquiry of our CJA panel leadership, just to make sure we know what's going on with respect to the pulse of that issue and others. What we consistently hear is, that if a voucher cut occurs, it's such an anomaly in some ways that it just . . . either the lawyer may seek feedback or might just let it go because that's just part of the process sometimes. They might disagree with the voucher cut, but I think the judiciary in this district has the confidence of the lawyers, that we're going to be fair in how we approach vouchers. Is there a sentiment out there that perhaps judges think, "If I don't cut a voucher from time to time, people won't think I'm really looking at these." Perhaps. Maybe we need to train judges not to think that way and understand that they're trusted to do their job. If there's no change to the voucher, that doesn't mean it wasn't reviewed and carefully considered.

I want to reemphasize that I understand that it's not particularly fun to review vouchers. It's one of my least favorite tasks, but it's a necessary task. I understand the sentiment of maybe people on other districts, that the judiciary shouldn't be trusted to be a neutral with respect to handling

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of the litigation and also serve in a role as almost, as Judge Holmes said, a client in reviewing a bill. We have to remember though, that the defense of these defendants who are indigent is being provided with someone else's money. There has to be checks and balances to make sure that appropriate expenditures occur. And it's certainly, in my view, the best system that we have now, so I go back to my opening remarks, I don't think we require an overhaul here. I do think there are some tweaks that we can make in terms of how we tell district by district judges perhaps better ways to approach the system. Thank you.

Judge Walton: Two other points and then I'll cede the microphone. Should the circuit, and there may be some reluctance to respond to this question, but should that second or maybe third in some jurisdiction's tier review, the circuit be involved because there have been some, in other hearings, concerns expressed about voucher-cutting taking place at that level by judges who really haven't been actually involved in the case, so why should they be involved? The second is, should we be involved as judges in making an assessment as to whether a CJA lawyer should be able to hire an expert to provide expert services? Because there have been some concerns expressed to us in that regard, that we should not be second guessing their assessments as to whether they need expert services.

Judge Putnam: My experience with that is, I have heard very, very little from lawyers in our district about cuts being made at the circuit level. I'm not sure that that's occurring a lot in the Eleventh Circuit, or at least not in my experience with it. The only comment that I would have about the circuit review is that it's triggered at too low a level. The limit right now is \$9700, and while I pointed out to you that the average voucher over the last 10 years has been \$3250, most of the vouchers never get reviewed at the circuit level. There are cases that can be complex multi-defendant drug cases or public corruption cases, things of that sort, that fairly quickly get up to the \$9700 level and triggers the circuit review. The suggestion I would have would be, look at some higher level, and I don't know what that would be, \$20,000, \$25,000, I'm not talking about an excessive amount, but something higher than \$9700 before the circuit review is triggered. As far as judges making assessments of whether we should approve a request for an expert service, I think I can say for at least all of our judges here in our district, we readily approve expert services for CJA counsel when it's requested.

CJA counsel, in my experience, has been . . . has not abused that. They don't come in in the average case, every day, asking for appointments of psychiatrists, and they frequently ask for an investigator. We provide that usually, but we don't get any extraordinary requests for expert services. So again, because of the size of our panel being relatively small, and the active management that we have with our panel, I think there is a level of

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trust that the lawyers on the panel are not going to abuse requests for services of experts under the CJA and we're not going to arbitrarily deny those services in cases where there is a reasonable possibility that the expert is necessary in the case. Now, if somebody with a § 922(g), simple possession of a gun case comes in and says, "I need an expert on bombs." Well, you know, that sort of request, and that's never happened, that's hypothetical, but that request kind of is what Judge Carnes used to refer as something that jumps off the page and slaps you in the face.

I'm going to question that, but I don't find, first off, that has, as far as I know, has never happened and I think it's due to the level of trust that the lawyers have with us and that we have with them on the panel.

Judge Prado:

I guess a follow up questions is, where do you draw the line and where do you think you're interfering in the defense part of the case? The U.S. Attorney has a case, they have a confession, they have five eyewitnesses, it looks like a slam dunk case and the defense lawyer asks for finger print expert. You go, "You don't need a fingerprint expert. You've got a confession. You got five eyewitnesses." Are you going to question that? Where do we draw the line as judges as to second guessing the defense theory or where the defense wants to go? Say in another situation, they want an expert in Atlanta, because that's a good one, and you say, "Well, we got good people here in Birmingham? Why are you going to go to Atlanta? It's a lot cheaper to get someone down here in town. There are good qualified psychiatrists here. Why do you need the guy in Atlanta? It's going to cost us a lot more money." Whereas, we, as judges, draw the line as far as getting involved in what the defense lawyer wants to do with their case?

Judge Putnam:

I don't know that there is a bright line. I will say this, here in our district, the district judges have entrusted the magistrate judges to make those initial determinations about whether a request for an expert should be approved or not. And so I'm routinely involved in doing that sort of thing. Any time I have a question as to whether an expert is necessary or even if the expert . . . I guess, I can phrase it this way, that you're asking for an expert who is a little bit excessive, more than what you really need, the Atlanta expert as opposed to somebody here in Birmingham. I hold an ex parte conference with the defense lawyer. You come in and explain to me why you need this. I think that that operates to a certain extent as a deterrent for lawyers making those sorts of requests. They have to come in and see me face to face, not in the presence of the U.S. Attorney, and Joyce understands this, and they're fine with it, but explain to me why you need this particular expert in this particular case. If I can't get a reasonable explanation for that from the lawyer, then I may not approve it.

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I don't get many of those situations, I think, because the very prospect of having to come explain something to me operates as a deterrent against making any kind of extraordinary or excessive request rates.

Judge Proctor:

Let me follow up on that. I think part of it is, what is the perception of the process? If we perceive the process for a request, such as you referred to Judge Prado, as a unilateral request that goes up to the star chamber, and is either stamped 'Agreed' or 'Denied', 'Granted' or 'Denied' and sent back. Lawyers may have a reason to distrust that process. As Judge Putnam has just very ably explained, that's not our process. Our process is very much interactive. If there's a question, the magistrate judge has the opportunity on the front-end, and the magistrate is not the judge who's going to try the case, to bring in the defense lawyer, have an explanation. All right, "Now, I have a question, why do we need to go hundred and fifty miles from here to get an expert when there's plenty here in town? Why do we need this expenditure when that seems a little high to me?" There's some dialogue that takes place. Not only does that create that foundation of trust that I've referred to, I believe it also serves as an adequate deterrent, as Judge Putnam said, to unreasonable requests on the front-end.

A lawyer knows that if something is an outlier as terms of a request, there will have to be a good explanation for that. Lawyers often can give good explanations for it. I think the tide goes to the lawyer, if we're unsure about something, we can't say that it's unreasonable. We have a question about its reasonableness. My view is, the tide goes to the lawyer. As far as the circuit review, I agree to Judge Putnam, we need a circuit review. I need to have a check and balance. I don't need to be the final . . . the buck stops here or Harry Truman model of CJA vouchers, but I do think that current levels should be raised because we're routinely having to send out even a garden variety of defense that's multiple, in a multiple defendant case, where there's a number of tapes that have to be listened to, a number of witnesses that might have to be interviewed. Those can get close to the level of the cut-off, so my view is, and I don't have a number just as Judge Putnam didn't have a number, \$9700 isn't the right number.

Judge Prado:

Do the other judges want to comment?

Judge Crone:

I agree with what they said about . . . I think it's up to \$10,000 now, but still it seems rather low. We have many multi-defendant cases that are complex. These aren't death penalty, just regular cases, they're going over that amount regularly on cases that don't . . . they don't go to trial but they have to look at a lot of discovery. So I do think raising that rate would be helpful because it's triggering a lot of circuit reviews on things that I think are pretty normal things that are happening in the cases, nothing extraordinary. I don't see a lot of cases where in a normal criminal case, that they were asking for experts, translators, yes. Occasionally,

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investigators, some mental health people, but the rate on that is really low, that's \$2500. If you get one below that, then we could just approve that at that level, which is going to usually be not a major concern, but they're not asking, for my experience, the attorneys were really not asking for experts maybe as often as they should, because I think sometimes some mental health people would be useful.

As far as, well, I had one, it was a child porn case and the person wanted an expert on sex. Well, they had to go to the Ninth Circuit to find this type of expert. It was rather expensive, but I don't know, he did come and talk about sexual fantasy and different things. It was interesting. It helped this fellow's case. The person was still . . .

Judge Prado: We have a copy of that transcript, that you want to be part of the record.

Judge Crone: No, but it was . . . no, but it was an unusual type of expert, and he did testify and I think the jury didn't go along with what he was saying, but that's really an unusual situation. He was kind of expensive, but I guess there are not many experts who are Ph.D. sex experts, so it was expensive. That had to go up, but usually, lawyers aren't asking for experts, maybe they should, but I think the \$2500 is pretty low on experts and then the \$10,000 now on just regular attorney's fees on the other cases, I think that's pretty low. I don't have a problem necessarily in looking at the request. As I said, I don't have very many of those kinds of requests except in the death penalty cases.

Judge Prado: Do you feel some obligation to be the gatekeeper at what is reasonable and what is not?

Judge Crone: Right. Obviously, if they're in there trying to get some expert that would seem an inappropriate type of expert for that kind of case, that's not happening though. I do know these lawyers. They're not going to come in and ask for something outlandish, generally. The most unusual ones, the expert on sex, but it was certainly relevant to this case on child pornography. I have no personal expertise in that area that I could necessarily think this was inappropriate.

Judge Prado: Judge Holmes, anything you want to add to . . . ?

Judge Holmes: Well, I agree with what Judge Crone said about the limit on experts being too low. It has come up a couple of times with me, and one instance involving a tax fraud case which was fairly complicated and another instance involving a commercial fraud that was being punished. It would have been hard to get an accountant to review all the records that needed to be reviewed for \$2500, I think. I haven't had a lot of . . . requests for experts. As far as the circuit review, I don't have a problem with it. I will

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tell you what happens and most of the time, I don't get a lot, we don't get a lot that go over the limit, when we do, more often than not, I will write the lawyer a letter and say, "I'm going to have to send this up for circuit review unless you just want to take the statutory maximum." Most of the time the lawyer will write back and say, "I'll take the statutory maximum," and it never goes up for review.

If it does go up for a review, then I will write a letter and either recommend that it'd be approved and explained why and accompanied . . . the lawyer also has to write a letter that goes with it or I may just forward it without a recommendation. I do that, and I suspect that the Chief Judge knows that that would not be unhappy if it was cut some. I think that needs to be approved. I'll write the strongest letter I can to the Chief Judge of the circuit explaining why, and so far, he's not disagreed with my recommendation when I have said, "I think this needs to be approved." It has not been a big issue as far as my practice has been concerned.

Judge Prado: Anyone else? Dr. Rucker?

Dr. Rucker: Thank you, Judge Prado. I was struck by a number of comments that you all made and I want to thank you for being here and sharing your thoughts with us. What I'd like to do is pick up on a comment that Judge Proctor made in saying that you liked the system pretty much as it is, but you'd like to see a few tweaks to it. I'd like all of you, including Ms. Vance, to talk about what tweaks you would make to the system, or, if you don't agree with that, should there be more radical change made to the system? Let me just say that one of the things that we've heard in some of our public hearings, that people would like to take this totally out from under the judiciary and maybe have it in a defender office or something like that. But if you have suggestions, and let me begin with Judge Proctor and then go to Judge Bivins and then just go down the line because I would like very much to hear about what suggestions you have in addition to the ones you've made so far, so Judge Proctor?

Judge Proctor: Anticipating this question, really, and mindful of the fact that you wanted to focus on the death penalty, I'm going to address three areas of tweaks that I think bear upon death penalty litigation in federal courts. Judge Fischer, I consulted with Judge Carter, Judge Carter, who's a friend of mine. He is an expert. No question about it, so I thought to myself, "Why would I go testify before this Committee without at least talking to Judge Carter about it?" and took that opportunity on a couple of occasions in the last couple of weeks. Some of this, I must give high credit to him on. One, I think we can learn much from our state court colleagues about how to handle capital litigation. They do it much more frequently than we do, and particularly, I'm referring now to subset of death or direct death cases, trials in the federal court. I have one of those, I have one of the four in our

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district. We have a colleague on our court, Scott Coogler, Judge Coogler, who is a state court judge, tried a number of death penalty cases on the state court.

He's someone that I will always call when I've got questions about this area, but I almost wonder if we can take more advantage of our current colleagues on the state bench. They deal with volume and violence in this area much more than we do. I would wonder if the Committee might examine ways to take advantage of and learn from our state court colleagues in that respect. Second, Judge Carter, this is an intriguing view, I'm still processing it, Judge Carter suggested that perhaps because of the number, the infrequent number of death cases, death capital cases we have to deal with, that perhaps we should look at whether a cadre of specialized or experienced, not specialized, but experienced judges might offer some assistance to us, who've had the experience. I sit on the judicial panel on multi-district litigation and I drew this analogy. We are called upon to assign complex civil cases filed in multiple districts to a particular judge for pretrial litigation activities and we centralized those cases for a particular judge.

We have transferee judges, as we call them, who volunteer for that task. We bring them together annually for a conference to train them. We have other resources available to them. I think Judge Carter's view is that perhaps we have something similar in terms of capital litigation in the federal courts, just an idea that I'll throw out to you. The one I'm most strong about today and I want to . . . this is coming directly from a staffing of our capital habeas cases, I think under the current system, we don't trust our local district units to decide how those ought to be staffed. Our court's chief concern regarding the CJA involves not just the formula but the policies that go into determining death penalty law clerk allocation. In my view and the view of others, the policies currently don't allow local court units the flexibility to properly manage that.

Now, I'm with Judge Putnam, I don't know exactly how our numbers flesh out with respect to the numbers of other courts dealing with capital habeas petitions. I have provided them to you. We just, this week, got a new capital habeas petition that I believe was assigned to Judge Bowdre. She's got the newest one. I don't know how you'd determine a track record. There have been some ebbs and flows with respect to the capital habeas litigation based upon some Supreme Court decisions, some issues of stay. I'm not going to address those in my remarks today, but what I will say is that perhaps we could look, and I tried to look at the numbers I provided on Page twelve of my written submission, in terms of the three circuits that at least I thought were the heaviest in capital habeas petition work, based upon the number of people on death row, and

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Judge Goldberg: Can I interrupt you for a second, because I'm not following something that you're saying. Are you now talking about allocation of law clerks to judges?

Judge Proctor: Allocation of law clerks to court units. Right now, we have one . . .

Judge Goldberg: To what? I'm sorry.

Judge Proctor: Right now, we have one death penalty clerk allocated to our court, but from a budgetary standpoint . . .

Judge Goldberg: What I'm missing is, how does that connect to the Criminal Justice Act? It sounds to me that that's a judge law clerk resource issue.

Judge Proctor: No, no, it's not staff. It's not chamber staff. These are court clerks. Does your court have pro se clerks?

Judge Goldberg: Yeah.

Judge Proctor: Do you have a death penalty clerk on your staff?

Judge Goldberg: Yeah, but they ultimately provide advice and counsel to the judges, so what I'm missing is how does that relate to representation for indigent defendants?

Judge Proctor: Well, it relates to resources that judges have to efficiently, and I think, correctly rule on indigent defendant's petitions. Returning to the point I was trying to make, if you look at the number of death row inmates per state in the various circuits, Alabama has thirteen death row inmates, currently on death row. We just executed one in Alabama. We were at 196 until just recently, but we have 195 death row inmates for a total of 14 active judge positions. Now, the statistics are interesting. You can approach them in different ways, but it seems to me that there's a good chance each death row inmate is at some point going go through habeas process in a court in Alabama, in federal court in Alabama. That is thirteen death row inmates for every judge assigned in our state. That's the highest state, higher than California, higher than Texas, higher than others. I've laid out in my written submission the difficulty that our pro se death penalty clerks have, I'm sorry, death penalty law clerks have compared to pro se clerks, for example.

You know, our clerk does a wonderful job in this district. There's a number of positions that are funded, but she makes the determination, we don't need to fill those positions based on current needs. I think it's been, and Judge Bowdre can correct me if I'm wrong, but I think it's every year that I've been on the court, we've returned personnel dollars to the AO at

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the end of the year. We've never spent our budget, so to speak. It just seems to me that a district unit such as ours could be trusted to make some determinations if the formula doesn't fit to have a second death penalty clerk. I think that is actually a fairly critical need for indigent defendants, but I understand when we review the Criminal Justice Act, we're not just looking at it from the lens of the indigent defendant. We're looking at it from efficiencies of the court, ability of the court to process cases. I've laid out for you, and I realized some of you may or may not have dealt with capital habeas litigation in your particular district, particularly state prosecution habeas review.

I laid out for you what one of our former death penalty law clerks provided me, and I've revised it somewhat, in terms of what it looks like from the clerk's perspective to walk through a case, beginning to draft opinion, and I would say that I think the formula needs to be revisited but more importantly, we ought to provide for some flexibility for district units to . . . staff, as they see fit with respect to the needs they have that are unique to them.

Dr. Rucker: Thank you. Judge Bivins, do you have any thoughts about restructuring this?

Judge Bivins: No major thoughts. As I indicated earlier, in our district, I think the system, as implemented, works pretty well. With respect to the billing, we really have not had major issues in terms of having to cut the attorney's time. When there is an issue, generally, before any cuts are made, the magistrate judge and the district judge discuss the issue and will generally then call the attorney to find out about different things. I think we may have had one case where, and this was before the eVoucher, somebody had submitted, didn't realize it, but their office had submitted their billing twice. That was the reason why it was so high, but most of the times, because we are familiar with the cases, it may have been a situation where there was a difficult defendant or whatever, but I would say nine times out of ten, the vouchers are not cut, even if they are over the limit. The district judge will send a letter up to the circuit indicating the reason for it. I can only recall maybe one or two occasions where it was necessary to make the cut.

While uncomfortable, I think, for the judges to do it, it was just one of those necessary things. I think in talking to the attorney, there was no push back from it. They were in agreement about the cut. With respect to experts, we've really not had instances from our CJA panels where we thought they were asking for experts that were out of line, because they are qualified. We generally try to give them the benefit of the doubt with respect to experts. The tweak, if there was one, I think is to make sure that the Federal Defender's Office is funded fully and has the resources that

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that office needs, because for our system, the Federal Defender's Office not only plays a critical role in terms of providing a defense for indigent defendants, but they also serve as a great resource for our CJA attorneys, so there's no real conflict between them. The CJA attorneys know that they can go to the Federal Defender's Office and get feedback, find out about experts and things such as that.

When funding is addressed with respect to the Federal Defender's Office, I would say that I think they should have the full resources that they need to be effective, not only in terms of their direct representation of criminal defendants, but also with respect to assisting the CJA attorneys.

Dr. Rucker: Let me follow up on that if I may. Some of the defenders have said they think they would do better if they were not under the judiciary as far as getting the funds that they need. Do you have any thoughts on that?

Judge Bivins: No, because I don't know the . . . inner workings of how their funding comes from the judiciary. Somebody else probably would be able to address that.

Dr. Rucker: Judge Putnam?

Judge Putnam: Yeah, the only thought that I would add to what I've already probably excessively said, is it would be useful, and this is sort of following up with what Judge Crone was saying, it is in the case budgeting area, when we ask attorneys and ask courts, for that matter to . . . at the front end of the case come up with a budget for what we think we're going to spend on that case, that's inherently a predictive process. At the beginning of the case, we don't know what sort of potholes and snags we're going to run into, or issues that may arise during the course of the processing of that case. This is particularly so in the capital litigation area. Those cases are very complex, they are very extended, you don't know exactly what all you're going to run into, and so to help try to develop a realistic budget, a budget that has some connection to reality, I would like to see . . . I don't know if it's the administrative office or somebody, conducts some kind of a study to develop numbers from the past of cases that have gone through the system.

What was spent on lawyers in a capital case? What was spent on psychiatrists in a capital case? What was spent on various types of experts? What's the averages about that? Give us some sort of a database or some updated statistical figures that they're periodically updated. It don't have to be every year, but every five years or something like that, so that when we're trying to put together a case budget, there is something we can go look at and say, "Well, you know, this case has psychiatric issues in it and the past history of similar types of cases has involved this

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amount of attorney's time, this amount of expense for mental health experts, things of that sort. Not as limits, not as the \$10,000 limit before circuit review is triggered, but just information about what has been spent in similar types of cases in the past. Now, I don't know where that information would come from other than, and this is kind of me thinking, is that for years, and years, and years, we used to have these paper vouchers, these CJA 20s that we would review and get recommendations and would sign off on.

They would get go to the circuit or go somewhere. I'm assuming that there's a room somewhere where there are piles, and piles, and piles of those vouchers lying around that if somebody wishes to put some resources into it, get an accountant or somebody to go in and just do a study of even just the areas that are identified on a voucher. In court and out of court time, investigation, conferences, things of that sort, to just give us some running averages of what those vouchers look like in relation to particular types of cases, § 922(g) cases, child pornography cases, whatever they might be, just so that we can get some idea of what is reasonable for a particular type of case or particular types of issues that may exist in a capital case, something that ties us back to reality when we're trying to develop a budget for a case.

Dr. Rucker: Thank you.

Judge Prado: We got a lot of member . . . Committee members haven't asked questions, Ms. Roe? Mr. Cahn, do you have questions?

Katherian Roe: Thank you, Judge Prado. Judge Putnam, I just want to follow up on a few of the things that you were talking about. It sounds like in your district that the court, as you put it, has a very robust role in managing the panels. Is that fair to say?

Judge Putnam: Yes.

Katherian Roe: That you select or have a major role in selecting the panel, have a major role, or actually, the role, in appointing attorneys in the cases, is that correct?

Judge Putnam: Right.

Katherian Roe: So for any reason you decide or you believe that that attorney should not be on a particular case, then you wouldn't assign them to that case, is that fair to say?

Judge Putnam: Yeah, but it's not going to be something . . . obviously, setting aside things like conflicts that may arise, things of that sort where we would, you know

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. . . typically, the way we found out about that is we would select the lawyer randomly off the computer. The computer gives us a lawyer. We contact that lawyer and the lawyer will say, “I can’t do it because I’ve previously represented this guy’s codefendant, or something.”

Katherian Roe: I understand, so let me ask you about that. One of the things that you talked about earlier was you talked about expert services. I think we all can agree that in the area of criminal defense, or in the area of almost in any litigation, sometimes expert services are helpful, correct?

Judge Putnam: Yes.

Katherian Roe: In criminal defense, it may be, you need an interpreter, you need an investigator, certainly in, I would think most cases. You need maybe a psychologist, DNA expert, fingerprints, could be anything, correct? Is that fair to say?

Judge Putnam: We don’t see a lot of requests for exotic type of experts, sort of like Judge Crone was saying, what we typically see are request for translators, investigators, and some mental health people. It’s what we typically see.

Katherian Roe: Certainly, things that would be considered necessary in many cases. I heard you saying that you felt that the . . . in your district, at least, the district judges really trust the magistrate judges to make sure that there aren’t any services that are approved that just are not necessary in your judgment, is that fair to say?

Judge Putnam: It is. The system we have here is whenever a defense counsel, whether that’s CJA appointed or privately retained, if they’re seeking CJA assistance . . . and we have that occasionally where you’ll have retained counsel who will come in and say, “Well, my client needs the assistance for something but he has no more money to pay for an investigator.” We’re a little bit . . . we’re more careful with those, because it is a retained attorney.

Katherian Roe: Right, well, let me ask you about the CJA ones, not necessarily the retained ones. I’m not trying to cut you off but we’re on a very limited time schedule. Let me try to get to the point, and that is that I heard you say that if you thought that an attorney was asking for more than they needed, more than you thought they needed, that you would bring them in and have a face to face conversation. It was your intention, I think, what you were saying, is that that would act as a deterrent. A deterrent to be asking for something that you thought was maybe more than they needed as a resource. I’m just asking you, is that what I heard you say?

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Judge Putnam: A deterrent in the sense that attorneys are not going to ask for experts where they don't have a good reason to do so, what they can't articulate.

Katherian Roe: The whole idea is that you bring them in and you question them a little bit, and say, "I don't really think you need this." Or, "I'm wondering if you really do, and let's talk about this." I want to ask you about that. Now, you told me that, or you told us, I should say, that you have a very significant role in choosing the attorneys on the panel, a very significant role in appointing them or assigning them to the cases. Is it possible that this practice of having a judge, if you will, question or second guess whether or not an expert is necessary, actually deters the attorneys or prevents them from asking for expert services when they actually are necessary in their cases?

Judge Putnam: I don't think so. I can't tell you for certain a no, but I don't think so.

Katherian Roe: All right, well let me . . . I want to tell you a fact that I think is, at least I found somewhat interesting when . . . especially after hearing what you were saying earlier, and that is that, in the CJA cases in your district, only three percent of them have expert services. Those expert services in those 3% averaged \$94 in total. Can we at least agree that that's an extremely low number of cases that have expert services and that you can buy very little in an expert marketplace for \$94?

Judge Putnam: Well, that's assuming that \$94 is what is spent in any particular case, and that's a false assumption.

Katherian Roe: Well it's the average for the 3%, sir.

Judge Putnam: An average, that's the key word, average. If we look at the vast majority of cases, I took a grand jury report two weeks ago and there were twenty-one cases on it, half of them were § 922(g) felon in possession of a gun case. Typically, that case does not require an expert of any sort in it. Now, occasionally, you'll get some that may involve an interpreter, or something of that sort, but when you say an average of \$94, that's not a fair way of looking at what's being spent on expert. I also had a case where I approved \$3500 each for two experts to do a forensic analysis on cell phones for those defendants. Taking the \$94 as the "average" misleads us about what is spent on experts when they are really requested in cases where they're really needed.

Katherian Roe: Let's take the three percent if you don't want to focus on the \$94, let's take the three percent. Can we agree . . . ?

Judge Putnam: Go through them and see which ones really needed experts.

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- Katherian Roe: Let me ask you this, sir. Do you think, this is just your opinion, do you think that a district that has only three percent of expert services in CJA cases, do you think that's low?
- Judge Proctor: Compared to what?
- Judge Putnam: Yeah, that's what . . . [CROSSTALK]
- Katherian Roe: Compared to other districts. What do you mean compared to what? Compared to other districts.
- Judge Proctor: That's exactly what I mean, compared to what?
- Judge Putnam: I'm not willing to say . . .
- Judge Proctor: What assumptions are you drawing?
- Katherian Roe: I'm drawing an assumption that of every hundred cases, if only three of those cases have requests for expert services, that you might want to consider whether bringing the lawyer in and having them have to justify in front of a judge, face to face, as you put it, in your chambers, alone, whether or not those services are really needed, may be deterring that group of attorneys who are assigned by the judge, who are determined as to whether or not they are on the panel by the judge, it may be deterring them from asking for services that are necessary.
- Judge Putnam: I just don't think that it's true for several reasons. First off, all of the lawyers on the CJA panel know me and have known me for years. Secondly, I cannot think of a single instance when I've called a lawyer in to ask for an explanation where I have refused that expert. So the deterrent value lies in the lawyer's mind that there has to be a good reason for this expert, and that we're not going to ask for experts that truly are not necessary. Now, if you believe that in every simple case, that there needs to be an investigator, there needs to be a mental health expert, there needs to be a finger print expert, there needs to be a ballistics expert, if that's what you think is necessary for an adequate proper defense in every case, then we just disagree about that.
- Katherian Roe: All right. I understand, but I'll ask you to think about this, it may be that when the lawyer comes in that you approve the request for the expert, the deterrents maybe that folks don't ask for the experts so they don't have to come in.
- Judge Proctor: Well, in fairness, I think you're selectively picking out some things that form the basis of your question. I think you've missed on the fact, and I think we'll be glad . . . you're going to hear from some of our CJA panel

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counsel in this hearing over the next two days, feel free to double check this. We have an excellent relationship with our CJA counsel. There's not going to be any intimidation about approaching Judge Putnam, Judge Ott, Judge Cornelius, Judge Davis, or Judge England about the things you're inquiring about. That's just simply, I think, a misassumption that you're making. Second of all, again, you're making some assumptions. Three percent compared to what? I don't have the numbers in front of me. I can't say that three percent is right, but even if it is, which cases, if you reviewed our dockets, do you think an expert should have been asked for and/or approved in? I'm not familiar with any expert request being declined. That doesn't mean there isn't one.

You have plenty of other people to ask about with respect to the conduct of our district's criminal justice practice, and I think you're making some assumptions that were off-base.

Reuben Cahn: Judge, can I follow-up with a quick question on that, because here's a problem that we're running into as a Committee. We've heard from judges and we've heard from panel lawyers, and we've heard from federal defenders, mostly these groups of people. We hear from, with only a couple of rare exceptions, the judges, "Things are good. We don't cut vouchers. The panel lawyers are happy with the system, and everybody's getting the resources we need." We hear from panel lawyers, "Our vouchers are being cut. We're afraid to ask for experts. We don't think we can get paid for work that's necessary." We have to somehow square this circle and one of the few pieces of data we have is we've got actual counts of how many cases experts are used in. I'd have to tell you, to me, as a federal defender who manages the budget for my office and oversees how money is spent and where investigators and interpreters, other experts are used. Three percent sounds crazy to me.

I don't know of a case where we don't use an investigator to at least get criminal records and to look at some other matters in the case. How can we match up these perceptions to make sense of them?

Judge Proctor: Let me ask you, have you gone back and looked at how often your federal defender, in the last three years, has used experts?

Reuben Cahn: Well, I approve every expert expense in my office.

Judge Proctor: Have you checked with Mr. Butler about how often, what his experience rate is for use of experts in the cases?

Reuben Cahn: He will be testifying later so we'll get a chance to ask him about that.

Judge Proctor: I'll give him a heads up. That would be an interesting . . .

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Reuben Cahn: [CROSSTALK].

Judge Proctor: To me, that would be an interesting comparison rather than comparing to thin air of what your assumptions would be about how often experts should be used, how often should they be used with respect to the actual cases that come before the court.

Judge Walton: Let me just ask, Ms. Vance, do you have any statistics about . . . in what percentage of your cases that you prosecute you use expert testimony?

Joyce Vance: I don't have a statistic off the top of my head. I'm sure it exceeds three percent. One distinguishing factor that comes to mind maybe that in the . . . for instance, the complex health care fraud cases, or the public corruption cases we do, typically we're not seeing a CJA panel lawyer in the mix. Typically, that will be retained counsel, but one general comment that I'll just put in front of the Committee is one of the impacts we've seen in this district, with the Public Defender coming on board, is the level of independence and the willingness to make different types of arguments and push the envelope in terms of defending clients, of course, increases. Judge Proctor talked about procedural justice and I think that we all understand the importance of that, so the strengthening of the defenders and the CJA panels in their independence surely has impacted in this district now, because all I can speak about is, what I'm familiar with the procedural justice that we're able to deliver.

Reuben Cahn: Ms. Vance, can I follow up and ask you a quick question? Do you approve the litigation expenses in your office or do you have a deputy to do that?

Joyce Vance: My criminal chief looks at routine expenses, and if for instance in our capital case, where we're looking at expenditures, typically, that's the sort of issue where I'll be in the loop. There are no blank checks in the criminal justice system. We have budgetary constraints that dictate the way we do cases. We can't always do everything we'd like to do. We can't always get high-end experts. We have to make decisions about priorities and cases on that bases.

Reuben Cahn: I certainly understand that. We have that issue in my office as well, but I guess the question I'd ask you is, and then maybe you can remember back in the days when you're approving more routine expenses, what was your process and what was your criteria? What did you ask your lawyers when they came to you and said, "I want to get in an expert to testify about this gun or about this car, or about whatever it was."

Joyce Vance: Interestingly, it's much like the criteria that Judge Putnam outlines. I know my lawyers. They're federal prosecutors because we trust their discretion and their judgment. There might be the rare case where the criminal chief

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or the first assistant or I might want to toss around with them. Do we need this expert? Is there something different we can do? Typically, if an AUSA believes that they need an expert, they need an expert.

Reuben Cahn: Was your criteria typically, whether you could . . . whether that expert was reasonable in cost and would advance the interest of the litigation?

Joyce Vance: Well, I think that that's one way of looking at it. You have to make a decision about whether your quantum of proof is sufficient. If an expert's testimony is simply cumulative and very expensive, then probably, that's not the sort of thing that you need. Then, again, that's not the sort of an expert my prosecutors are typically are going to request.

Judge Walton: Do you think that you have a financial advantage as a government counsel, and if you do, do you think that that in some ways skews the quality of justice that poor people get in criminal cases.

Joyce Vance: That's a very interesting question. When Kevin testifies in the next panel, he will tell you that I'm flush with cash and he is not. I think the reality is on neither side of the system do we have the resources that we would want to see in a perfect world to do our jobs. We've lived through tough times in sequestration and we lost 20% of our staffing. Federal prosecutors were working overtime to maintain their case loads. The number of cases that we did were dropping at the same time that the complexity of the cases was increasing. I don't think that I could adopt a view that the resources are skewed, such that at least in my district, which is really the only district I can speak to, that the resource posture somehow prejudiced defendants. By the same token though, I know that Mr. Butler will tell you, and I think accurately so, that he could do more with more resources. Would that impact the results in individual cases? I don't think any of us can speculate. If we're concerned about procedural justice, then I think that he has an argument that he can make.

Judge Prado: Professor, did you have a question?

Prof. Gould: Thank you, Judge Prado. I'm going to back fill on just something, Judges Proctor and Putnam asked about this three percent figure. The Committee has before it data on expert use across the country that has been compiled from the 6x system and also from eVoucher. If you . . . we have eight districts represented by the members of the Committee. If you average all of those eight districts, and come up with a figure of expert use, that rate is seven times higher than the rate that is going on . . . not just in Alabama Northern, also in Alabama Southern, Texas Eastern, and Arkansas Eastern. Now, I heard you all say earlier that the system here is quite good and that you approve expert requests. How then should the Committee

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understand that your rate of experts is seven times lower the average of all the districts that are represented here?

Judge Proctor: May I ask this? What's the time period you're looking at and how did you assemble the data?

Prof. Gould: The data was not assembled by the Committee, it was given to the Committee by the statisticians within the AO. The Committee has it by fiscal year. I'm quoting you fiscal year 2014, but it is consistent with previous fiscal years.

Judge Proctor: Did you have the data for the Federal Defender's Office use of experts?

Prof. Gould: Right now, no, this is . . . I'm quoting you panel appointments, and these are . . . I should also add, these are in non-capital cases.

Judge Proctor: Sure, and a couple of things there, one, that means you're looking at data from 40% of the appointments, not a 100% of the appointments, let's start there.

Prof. Gould: Right.

Judge Proctor: Second of all, and again, I'm speaking in a little bit of darkness because I don't have the data, I've not seen the data that you've provided. It would have been very helpful if this would have been an issue that you want to inquire about at the hearing, that maybe we would have had that on the front end, but put that aside for a moment. Our panel counsel often end up with a § 922(g) appointment. If, I don't know, if you think about this, if Judge Putnam's anecdotal could be taken forward, we have twenty-one cases on the last grand jury return, half or a little more than half are § 922(g) cases as it happens this time around. That means, let's assume that the panels gets some of those, perhaps a few of those, we don't typically get experts use in § 922(g) cases. The reason I asked about the Federal Defender is, one, the Federal Defender has resources and doesn't have to come to the court for approval with respect to use of experts. Second, the Federal Defender, in fiscal year 2014, would have gotten the lion's share of the appointment, 60% is what we estimated, then, it might have been up or down from that, in that particular year, depending on conflicts and other things.

Third, it would be an interesting comparison to look at the experience of the Federal Defender's use of experts to the CJA panel counsel's, because one, complex cases tend to go to the Federal Defender. Second, even on a multi-defendant case, we try to get the most culpable defendant assigned to the Federal Defender. I just don't know what to make at the statistics. I just don't know that we can necessarily draw a lot of assumptions from

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that. Certainly, what I've learned in this hearing is we're going to go back and take a look at this issue for our court, but it would be interesting to me to see what those comparisons are.

Prof. Gould: Fair point, but I'm wondering if we could just take this a little bit further. I think the Committee, or at least, I'll put it this way, having observed a number of the hearing so far, it seems to me that there are generally one of three possible explanations. I'm wondering if there are more that I'm missing here in terms of why expert rate is different. Number one, it may be that there's something very different about the kinds of cases that come before one district court versus another. It seems like that's one of the things that you're saying. Another possibility is that the bench is simply giving experts at a different rate in certain districts rather than others. And another possibility is that lawyers simply aren't asking for them in certain districts over others for a variety of reasons. In your experience, particularly as you travel around, and you talk to your colleagues in other districts, might there be any other explanation for the difference in expert use particularly here?

Judge Proctor: Well, other than the one I just provided you

Prof. Gould: Yes, other than that.

Judge Proctor: A CJA panel counsel may not get the cases that an expert's required in to the same level of the Federal Defender, but I take it, that would be accounted for in your comparison of statistics because the same thing might be able to be seen about other districts.

Prof. Gould: Right. Is there anything else I'm missing as a possible explanation?

Judge Proctor: I'd have to study it. I certainly will now.

Prof. Gould: Okay, and one last thing for Judge Putnam, you had mentioned the interest in a study that looked at cost and capital cases. Actually the Defender Services Committee commissioned this twice. The most recent one in 2010, and the reason I know is I was the author of it. Those data are actually available, and I'd be happy to make them available to you if you're interested.

Judge Putnam: See, and apparently they've been buried very, very well because I'm completely unaware of either one of them.

Prof. Gould: Okay, thank you.

Judge Prado: Judge Fischer, do you have something?

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Judge Fischer: Yes, I just have one quick question please for Judge Holmes. It was interesting that in your submission you suggested that an alternate public defender be considered. Do you have any more detailed thoughts on that subject?

Judge Holmes: Well, I don't. I do know, for those of you, well, I know everybody on the panel read it. Some people in the audience didn't but in our county, we have a Public Defender's Office and what I think of as an overflow of Public Defender that gets the cases when there's a conflict and they go there before they go to any kind of panel. I don't know how that . . . I didn't practice criminal law. I am aware of that, that that's the system, but I haven't had any or very little direct contact with it, and so I don't have any suggestions other than it seems to me that something ought to be considered and studied.

Judge Fischer: Thank you.

Judge Walton: If I could just ask Judge Putnam one . . .

Judge Prado: Professor Kerr, do you have any questions? Okay, yes, sir.

Judge Walton: There are still several districts in the country that don't have Federal Defenders. What would you say to the judges of those districts based upon the recent experience that you've had at this district with a new Federal Defender?

Judge Putnam: Despite the reputation that some of the court staff and some of the judges think that I'm opposed to the Public Defender, that's not true. I'm glad they're here. I think the addition of the Public Defender in our district has been a positive thing. Do I believe that that should substitute entirely for a panel of private attorneys? I do not believe that. I think that a panel of private attorneys not only brings a valuable resource for handling conflicts, multi-defendant cases, things of that sort, but they also bring a different mindset than the Public Defender's Office. There's a place for all of them. There's a place for the Public Defender's view of things. There's a place for the private attorney's view of things. I think that they should complement each other and I would say to other districts that to the extent that you maintain a robust, active management and support for your Criminal Justice Act panel, the addition of a Public Defender's Office would be a benefit, would be a good thing.

Reuben Cahn: Judge Crone, can I ask you a couple of questions? These should be simple. You may not know the answer, so for years, we've been hearing about limits on expenses in capital cases in this circuit. Mr. St. Amant makes a reference to a couple of them in regard to panel lawyers, so that helps clarify that. But I've also heard that the circuit actually maintain some

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oversight of Federal Defender expenditures in capital cases, do you know anything about that?

Judge Crone: I don't know anything about that because that would be between the Public Defender and the circuit.

Reuben Cahn: Okay, that's something that's never come to you, because I know the Federal Defender has appeared in front of you on capital cases.

Judge Crone: Right, well, they are. They're representing people in these cases, and that it's very cost effective when you have the Public Defender doing it, because their rights are not then within their rights where . . . the attorney's fees are just good. They can fund some of their own experts and investigators, but that's out of their own budget. So I don't see that the circuit would have any control over that or any say on that.

Reuben Cahn: Let me ask you another question about these limits that Mr. St. Amant makes reference to and ask you . . . let me give you a piece of background in the report that our reporter referred to on the cost and quality of representation in capital cases. There were a couple pieces of information that were discovered, one that, in what were marked as lower cost cases, and that's all relative, of course, a capital case is always expensive, but those were essentially . . . those, I think, below something just around the \$300,000 figure total cost, that there was a correlation. And obviously, we can't determine causation that easily, but there's at least a correlation between results in those low cost cases, that there were a significantly higher risk of death sentences in those low cost cases. There was a concentration of those low cost cases in a couple of circuits and in fact, the Fifth Circuit was one of them. Do you think that these limits that were referred to in Mr. St. Amant's letter is affecting the level of resources that are made available to lawyers in your capital cases and do you think it's affecting their ability to do their job?

Judge Crone: Are you talking about the presumptive limits?

Reuben Cahn: The presumptive limits, yes, and I know that they're presumptive, not absolute.

Judge Crone: They seemed to be like there's . . . the problem was they were, I think, put in place years ago. They're not really very accurate. I think those should be raised because I know they're always exceeded, so they don't seem to really provide much of a guidance, guideline for anybody because they're out of sync with today's reality, but I think that the Fifth Circuit likes to have them. That's the threshold that they're going to become involved, that's their own decision to do that. As a district judge, yes, it would be much better from my perspective to have them higher. I don't know if this

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have a chilling effect in the lawyers who are asking for more. I don't think it does, because they certainly asked for more than that, because it's just not realistic, not to. I don't know, in the cases I've had, they ranged in price. Sometimes the lawyers just seem to be . . . they do it more efficiently. They're not asking for other experts, some other ones, they are. All those requests were taken into consideration.

But everyone I've done, the person always got the death penalty no matter what was spent. Some were lower cost, some were higher cost. I will say, it seemed like they had effective experts on all the cases. I don't know of any case where I thought, "Oh, well, if they just had this kind of expert, what a difference that would have made." It seemed like they had good, effective experts that did an excellent job, the jury just didn't buy in to their view of the case, I would suppose.

Reuben Cahn: Do you have any thoughts about why we're seeing this concentration of low cost capitals cases, and I use that term in the way I explained, because obviously, anything . . . a few hundred thousand dollars is not low cost, but relatively low cost capital cases in of the Fifth Circuit and in Texas, in particular. Can you think of any reasons they're concentrated there?

Judge Crone: Well, I haven't seen all the data I have on my end. I know what's happening on those cases and for another colleague within my district. I think the lawyers are more efficient. The cases are shorter. They don't last on and on for months. That's true, a lot of cases in Texas, all kinds of criminal cases, you hear about these things going on for months in other states and we don't have that in the state court or the federal court. So if it's shorter, it's not going to cost as much, or not as many attorney's hours spent on it. There are not as many experts, but those are mainly dictated by what the lawyers are doing. I mean, I don't feel like they're cutting back on that, just the custom and practice in Texas court, so they're shorter. That's one major factor I would think. One of the defense attorneys I talked to, one of the CJA panel attorneys, we were discussing and he brought that up. We just don't do things like they do in some other states, that just run this out forever. I feel like they can effectively represent their client within a shorter time period.

Reuben Cahn: The federal death penalty is not . . . it's a national penalty. It's a national issue and the Department of Justice certainly sees it that way. I know in cases I've tried, there have been people parachuting in from the capital case unit and DOJ to drop motions on me and do *voire dire* in my cases and that sort of thing. I know that they've done that in other districts as well. So I'm wondering, do you think that that's something that's appropriate, that we should have this different ways of handling it in different amounts of lawyer time, effort, expert money going into the cases in different jurisdictions?

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Judge Crone: I don't know what they're doing it in other places, and in my district, we have the local U.S. Attorney people who are on staff in that office. They're not people from outside. That's who's, who is prosecuting the cases. They're making a decision on how long their presentation is going to be, so that's not usually all that long either. The whole thing is just more tailored in the time, I think. I don't see different people coming in from Washington, D.C. That generally . . . I've seen them in some other kinds of cases, not in the capital ones. They're not usually received that well by the jury. Probably it's best that they didn't come from the perspective of the U.S. Attorney.

Judge Holmes: Can I comment once very briefly? This is on his question and also on the question that was asked from the reporter. As I look here, I see the districts and I can't read that far down, and I apologize, but I can see the District Columbia, Eastern Pennsylvania, Southern District of California, District of Minnesota. I would be willing to bet that if you compare civil cases and what they cost and how much time is spent, and what the lawyers billed for and all of that, in those districts and the districts like we represent here, which are comparatively rural, that you'd see a vast difference. I think that difference is also going to show up in criminal cases. It is going to show up on how often people ask about . . . asked for experts. You're going to find a different legal culture that operates in Birmingham, Alabama or Little Rock, Arkansas as opposed to Los Angeles, California, or the District of Columbia.

I think that is one of the . . . I think if you compare the large urban districts with large urban districts and relatively rural sparsely populated districts, with relatively rural sparsely populated districts, I think you're going to find out something that's more common than much of the statistics that you put out here today.

Judge Prado: I wish to thank all the panel list for your time here today. I know you all have a busy schedule, a busy docket and we appreciate you taking the time to be here before us. We got a chore in front of us and it's going to be a challenge to figure out what, if anything, needs to be done.

Judge Holmes: Just remember, if ain't broke, don't fix it.

Judge Prado: Yeah, nothing's perfect, but thank you very much for your time, and we'll go ahead and take a short recess.