

**Ad Hoc Committee to Review the Criminal Justice Act**

Public Hearing # 4—Birmingham, Alabama

February 18-19, 2016

**Transcript: Panel 2—Views from Federal Defenders**

Judge Prado: Second panel of the morning, and, like the first one, we'll let each one of you make a brief statement, and then we'll come back with questions. We can start with you, Mr. Butler.

Kevin Butler: Oh, thank you very much. Thank you for the opportunity to address the Committee, and welcome to Birmingham. I hope you've all had the opportunity to enjoy some of the fine southern food that's available here. My ever-expanding waistline, I used to be a thirty-two and now I'm about a forty, is testament to just how many good southern restaurants there are in town.

In my remarks today, I'll address the impact of increased judicial oversight on the Federal Defender program and how it has impacted national morale. I will also address why the results of the work measurement study reduced the need for judicial approval of attorneys in Federal Defender offices. I was taught and I believe that the constitutional guarantees of equal protection, due process, and the right to counsel for all individuals are tenants that can make our criminal justice system outstanding. Pursuant to the Criminal Justice Act of 1964, attorneys and Federal Defender offices, CJA attorneys work nights, weekends, all hours of the day in remote jails, depressed communities, and remote locations providing individuals with the least resources, these constitutional guarantees, the constitutional guarantees of equal protection, due process, and fair representation.

Though the work is difficult, through my twenty years in the system, morale has always been high. We all recognize amongst us how hard the work is, but we enthusiastically embrace the challenges that are presented. In this district, I'm fortunate to have the outstanding support of the district and circuit courts. Since our inception five years ago, the court has recognized and allowed me to independently manage my office and to have the ability to confidentially counsel my clients.

The court has never attempted to access any of the information we gather in connection with our cases, it supports our efforts to get the resources we need to provide quality representation, and, importantly, the court regularly provides me, the panel, and the other lawyers in my office the understanding that our work is respected and that our clients will receive fair consideration before the court. As a consequence, I believe morale amongst the criminal defense bar in this district is high. I understand some questions that were raised in the previous panel, I'll address those later,

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but, as a rule, the morale in this district is high. I feel, my lawyers feel, that we get a fair shake before the court.

Now, at the national level however, it is my opinion that the morale of the Federal Defender program is at its lowest that I have seen in the twenty-three years that I have been part of the Federal Defender community. During national training conferences, though there continues to be outstanding conversations and discussions related to effectively managing and addressing new legal issues and developments and effectively addressing case strategies that could help all organizations throughout the country, some conversations have been supplanted and changed to address effective strategies of addressing the impact of increased judicial oversight and management of our offices, how to limit and manage judicial access to our confidential data, and how to effectively utilize staffing formulas.

Though the enthusiasm for our office mission has not waived, it is now tempered and influenced by how our advocacy will be viewed through the lens of increased judicial oversight. The conflict of interest between zealous advocacy being monitored and regulated by the judiciary has had a chilling effect on our national morale. The Federal Defender program is large, and we are acutely aware that, for us to succeed, our budget and our resources must be managed effectively and efficiently.

However, what has not been trumpeted recently, kind of to my surprise, is that, as a result of the work measurement study that we all went through, what the study showed was the Federal Defender program has for years been understaffed and under-resourced. We were actually doing a commendable job providing outstanding client representation, though the program and most offices were operating under a budget and personnel deficits. To me, what that finding shows is that the Federal Defender program and individual Federal Defender offices are rational actors, that the program has not historically sought excessive resources, and it has effectively utilized its limited resources to provide the best representation possible in the face of an adversary, that is, the Department of Justice, with substantially more resources.

Because of work measurement, the program now has an empirical and analytical tool to address its staffing, resources and requirement, and the need for judicial oversight over the defender program is substantially reduced. As a consequence, at a minimum, at a minimum, DSO should be re-elevated to the directorate within the AO and judicial oversight of our staffing and budget limited. This will allow DSO the ability to more effectively advocate not just for necessary resources but also advocate for policy and programs initiatives that will be beneficial to the accused.

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It is my opinion that, when the Sixth Amendment right to counsel is viewed as a “program service” for the court, our ability to champion the guarantees of equal protection of the law and due process becomes muted. Working in conjunction with DSO and its budget analysts, the defense community will continue to be responsible stewards for the resources we are provided. There is no evidence that we were wasteful or have ever been wasteful. We are responsible stewards. I believe, with these changes, at a minimum re-elevation of DSO to a directorate, possibly additional changes, morale within the Federal Defender program will quickly improve.

I have other comments, but they address comments that are contained in my written submission regarding what I believe to be the no longer need for circuit oversight of staffing as a result of the work measurement, and I can address those individually if there are questions. Thank you.

Judge Prado: Thank you. Ms. Cardarella?

Laine Cardarella: Yes. Thank you.

Judge Prado: Is it Missouri or “Missoura?”

Laine Cardarella: Missouri.

Judge Prado: Okay.

Laine Cardarella: Well, for me.

Judge Prado: For you?

Laine Cardarella: There are some people who say “Missoura,” but I’m not one of them. Thank you. I don’t have prepared remarks for you, so somebody throw a shoe if I go longer than five minutes. I don’t think I will.

I do want to reiterate what I said in my written testimony, which I won’t because you’ve read it, but I made some notes during the earlier panel that I did want to address so that you could get some feedback on the information that you got in your first panel. I do believe that there is a break in our system that needs to be fixed. I feel like where we are broken is more with the panel than with the Federal Public Defender offices. Obviously, I think the Eighth Circuit did a great job when they picked me, I mean that’s just silly, but . . .

Judge Prado: You haven’t heard?

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Laine Cardarella: I'm only two years in! I don't have a complaint about the way the system works for the federal public defenders' side of our hybrid system. I agree with Kevin, I would like less judicial oversight on our staffing, but I've only ever had to ask for a new attorney one time. I got it. I suppose, if I ever go to the Eighth Circuit and ask for a new attorney and they say, "No," I might feel differently, but I'm very cautious about how I staff my office. I don't think I'm going to have that problem.

Where I think we have problems is the judicial oversight when it comes to the panel attorneys, and that's what concerns me. In my district, I would like to see greater structure in our panel. We don't have criteria for membership on the panel. We don't have an educational component. You have to get so many hours. Obviously, you have to get fifteen hours to stay a licensed member of the bar, but our panel members could go get fifteen hours of bankruptcy CLE and still be active members of our panel, and that concerns me.

We don't have any hierarchy within our panel. We have a huge panel. We don't have any hierarchy. That I am aware of, there's no, "These are the people that should get the complicated cases. These are the people that maybe should be second chairing a more experienced attorney," and those are the things that I know the original committee, the Prado committee, made recommendations that just haven't been taken to heart in our district.

Having said that, I have approached our chief district court judge, and I do think that we'll be able to have some really good conversations about how to change the panel, especially since the model plan is being revamped. Voucher review needs to be taken away from the judges. When I think about what my attorneys say to me when they want to hire an expert, I cannot imagine having to go say those things to any judge, the judge that's the magistrate on my case or the judge that's the district court judge on my case. My attorneys share really intimate and important details of my client's mental health and other parts of their lives in order for us to decide together whether this is money well spent, and I just don't believe that's a conversation that should be had with a judge.

I'm also concerned about, at least in the Eighth Circuit, there is an opinion that the work of the CJA panel is pro bono, and so there is some voucher cutting that happens at the circuit court level. My very informal poll of some of our panel attorneys revealed to me that we don't have a lot of voucher cutting at the district court level, but there is a lot of voucher cutting at the circuit court level, and I do think that's because there's this general theme that you should be doing this for free as part of your contribution back to the world as an attorney. I respectfully disagree with that. I think that federal criminal defense is an expertise, and I think that, when we don't fairly pay these attorneys, we're going to lose the ones that

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are well qualified, and what we will have left is attorneys who are just trying to get that experience. They should not be getting that experience at the expense of the clients.

Finally, just briefly, to address whether or not there is the fear or intimidation with having the judicial oversight. I know that was part of the last discussion with the panel previously. We have a unique situation. This is the only example that popped into my head. We have a unique situation in our district. Our newest district court judge is married to the First Assistant in the U.S. Attorney's Office, which raised a lot of eyebrows. I have told her that we will, on a case by case basis, decide whether we need to ask for her recusal in cases. We think that that's a conversation we need to have with each client, and, if the clients with or without our advice wants us to move forward with the "Motion to Recuse," then we will. I shared that with her because that's such an unusual motion to be filed. I didn't want it to come out of the blue.

We have not filed any such motions as it turns out in the few months that she's been on the bench, but I had more than one panel attorney tell me they hope we file those motions because they're afraid to. I do recognize all of us temper what we say, we don't want to offend our judges. That's the judge that's going to sentence my client someday. I want that judge to like me. I understand that that's how it works, but to be afraid to file a motion because you're afraid you won't get your next appointment, to me, that's a huge problem, and I do think that it's the structure of the panel and the structure of the system that can eliminate at least that factor. And that's all I have.

Judge Prado: Mr. Joiner.

Dennis Joiner: Judge Prado, I thank you for inviting me, and I did want to share with the Committee that our Chief Judge Guirola, asked me and Terryl Rushing also, who's in the courtroom, to appear on behalf of the district, so it's a little bit more, not much more, but a little bit more than just the Federal Public Defender Office that I speak for.

I do want to say that, since we opened the office in 2002 to represent indigent defendants, the AO has made sure that I received all the resources that I needed to run the office, and I appreciate that. It has been wonderful backing, of course, with the exception of the year 2013, when we had the disaster of sequestration. We're still experiencing a little fallout from the sequestration year, and all of our offices were going through what we refer to as the Harvey Jones study about our resources and the rebalancing nationwide of the defender resources amongst the various districts.

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Most of us lost some staff during sequestration, and the funding has been restored, but it kind of, at least in my district and I think that in a lot of others, it kind of clashes with the Harvey Jones study and the request to hire back up, because the money's there. I have two districts, the Southern District of Mississippi and the Northern District of Mississippi. Our cases in the Southern District of Mississippi are declining. If I go back to the sequestration level and hire back up, the charts that they are now providing us, these new employment charts based on cases show that, as early as 2018, I'll have to lay those people back off. There's a built-in hesitancy within the system to do that, to bring somebody in and then have to turn right around and lay them off. That's a concern we have within the office.

We've got a number of things that are working that kind of surprised me that I'd want to share with you. Judge Sharion Aycock, the Chief Judge in north Mississippi, has been pushing this cost-cutting from another angle, and that is using video conferencing with the jails so that probation can sit at their desk and do a pre-sentence interview with the inmate in the Bolivar County Jail, which is two and a half hours away. Our office can do that also, and, with the click of a button, the probation office and the Federal Public Defender Office can do a pre-sentence interview with the inmate in the Bolivar County Jail and never leave their office and never incur any travel expense, save about four hours of driving to Bolivar County and back. It is being rolled out to the CJA panel members.

I was hesitant about it and skeptical about it because defenders generally believe in one on one contact with the inmates. To my surprise, we've had a good experience in that the inmates like it, it's a secure system that the conversations are not recorded, and they feel like they get to see . . .

Judge Prado: At least that's what they told you.

Dennis Joiner: That's what they said, that's right. The vendor of the software showed us a button that will allow it to record, but it pops across the screen that this session is being recorded, and you're supposed to be able to turn it off. So it is, Judge Prado, it is possible to record it.

My two senior lawyers in Oxford have been using this, and they absolutely like it, even though I was kind of cold to the idea at the beginning, but Judge Aycock was not going to accept "no" as an answer, and she personally put everybody together. The key player in trying to do something like this, and we're looking at doing it in the Southern District of Mississippi, but the key player is the U.S. Marshal Service. Because of their leverage with the jail, they can get it done. If you can't bring your Marshal Service onboard, it's just not worth talking about. It's just not going to happen. But I've been very surprised about that.

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Some other things that came up in the previous panel session about the voucher review process, I came on, and we opened up Mississippi under the Federal Defender program in the year 2002 in the Southern District and then the Northern District came on in 2007. Sometime, and, Reuben, you can help me with this, but, sometime, about the year 2002, Steve Asin at the Defender Service Office commissioned a Vera Institute study for CJA representatives to have somebody serve as the panel representative.

They came up with three different models. One was to place the panel administrator in the defender office, another one was to have it in the clerk's office, and they call that the Maryland example. The panel administrator would audit the vouchers and would even go so far as to look at the reasonableness of the voucher, even not having signature authority at that time, and would go challenge the lawyer, "Why did you need to go to Mobile to get these medical records and spend all of this money?"

This study has already been commissioned, and it recommended basically all three of them would work depending on what the districts wanted to do. I would ask the Committee to consider looking at some type of a panel administrator for every district to maybe review—I've reviewed the vouchers in our district, and I don't like to do it. When we said that we would do that, our court clerks were immediately relieved because they didn't like doing it either and dropping it on us was just a great idea.

When the judges start talking about reviewing vouchers, I can't believe that they really enjoy that, even though it's their job to do that. But, to me, if you could create a panel administrator for each district whose job would be to do that along with other duties, in strict rotation, we call the panel members to get them assigned to the cases, but then maybe give them the right to review as to reasonableness, and then, any objections about it, the panel lawyer could appeal it to the district judge and let the judge then get involved as to whether that expense should be allowed or not be allowed.

Otherwise, the panel administrator would take over that responsibility and would build a expertise because they would be seeing these vouchers over and over and over, which normally would be spread amongst a number of judges, and, when I talk to the judges about the vouchers that we process through our office, they seemed almost excited but very thankful about me giving them lists of all the vouchers that are being paid by all of the judges. There's some comfort in there that, if I approve this voucher for \$10,100, that's not all bad because judge so and so just approved one for \$14,000.

But, if you had a panel administrator with the authority to audit that voucher for a reasonableness and then to take it up with the judge or have

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an appeal right for the panel lawyer to disagree with the panel administrator and say, “Let me go talk to the judge about it,” and maybe even consider appointing one judge to have a hearing on all disputes between the panel administrator and the CJA panel lawyer, I think that would ease the burden on the court, and it would streamline the process and get a more consistent review of these vouchers.

We had some voucher cutting . . .

Judge Prado: We’ll get back to that with our questions. Let’s go ahead and let everyone . . .

Dennis Joiner: I’m sorry.

Judge Prado: have an opportunity to . . .

Dennis Joiner: I didn’t mean to just take over the platform, Judge.

Judge Prado: Oh, that’s fine. Mr. Kelly, everybody in your office survive Mardi Gras?

Claude Kelly: We did.

Judge Prado: Good, good.

Claude Kelly: Thank you, Judge.

Judge Prado: A. J. Kramer claims to have pictures with me and him on Bourbon Street, but until he comes up with those pictures, I deny any such thing.

Claude Kelly: It’s the out-of-towners that get in trouble. We’re professional. Judge, thank you for the opportunity to be here, and thank you, Committee members. Just as a brief background, I was an assistant Federal Public Defender from ‘92 to 2000. Then, I was in private practice as a sole practitioner for fourteen years. During that time, I did a lot of state capital work with the Capital Defense Project of Southeast Louisiana. I was on the CJA panel for over ten years, and I was on a Fraternal Order of Police defense panel defending policemen that got indicted post-Katrina.

I was appointed by the Fifth Circuit, thank you, Judge. I took office in June of 2014. It’s funny how, when you are an assistant AFPD, you’re in your own little world, and, when you’re a panel attorney, you’re in your own little world. That’s all you think about. And, I must say, quite frankly, it’s kind of been an awakening and an education for me in the little over a year and a half that I’ve been the Federal Public Defender, particularly when I go to these other Federal Public Defender conferences because I



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realize that I thought everything worked the way it works in New Orleans, and it really doesn't.

You mentioned the Maryland model for one model. I think our model should be called the New Orleans model, because, from what I've been able to determine, it seems like our panel management is probably the most extreme I think in the United States from every other defender that I've talked to. I was a little surprised when I took office in June of '14 that the assistant federal public defenders kind of considered themselves to be the red-headed stepchildren to the panel.

Our office, I was not in there, I was in private practice when sequestration hit. It went from seventeen employees to eleven. They had two investigators, both were let go. I hired—that was my first order of business when I got in was to hire an investigator. They operated for over a year doing over 400 federal criminal cases without an investigator. Yet two of the employees, two of the eleven, and now I've built it back up to fifteen run the panel.

I think our model is very good because it works, and, when I go to these Federal Public Defender conferences, I feel like I'm in another world because I hear about complaints and voucher cutting, and it doesn't exist in the Eastern District of Louisiana. Our panel has no complaints. I have a file drawer of twenty lawyers dying to get on the panel. It's because of the way our office runs the panel, and I don't know other models. My only gripe, and it's not really for your concern, is that I wish we got credit for that with Defender Services, because I have FTEs, I have fifteen FTEs, full-time employees, and two, quite frankly, don't work for me. I have one paralegal who is our panel administrator. She's terrific, but I don't have a paralegal actually for my office.

There was a recent Federal Defender conference in Portland, and I met with my budget analyst from D.C., Andy Archuleta, great guy, and he told me that, due to the case weights and the numbers, that I should expect in 2018 like Dennis said, and I think it's skewed due to the Crack Minus Two that cases were inflated a few years ago, that are numbers now are back to basically where they are between 400 and 450 cases, although we're going to have 600 cases from four and five years ago drop off that I could expect fiscal year '18 to have to reduce to 14 FTEs.

Ideally, I don't want to cut one of the assistant federal public defenders. I certainly am not going to cut my investigator. I would like to reduce my panel administration from two people to one person. Quite frankly, I can run my office, I could run it with fourteen people for my office, and what I would do is add one investigator. Fourteen people, I could run my office just fine with the lawyers I have and two investigators.

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It's not a system I invented, it's a system I inherited when I stepped in there. The judges I think are very happy because, quite frankly, they don't really do anything with the panel. By the time the voucher gets to them, we deliver it on a silver platter and they sign it. We have enough credibility in our panel administrator, we have one young lady who has an MBA who processes the voucher, we have another lady who's the paralegal who, from the time of the appointment, we have a rotation system, but she selects the best lawyer. I mean, obviously, she knows who, if it's a serious case, we follow the order, but she makes sure the best lawyer is on for that defendant.

Our phone constantly rings with panel lawyers, "I need an expert for this," "I need an investigator for this," we always get it. There's never a budget issue. The other federal defenders have heard me gripe in the last conference that, when I took over in '14, my expert budget for my office was \$4500 for the entire year for every case. For '15, it went to \$5500. For the current year, it's \$20,000, whereas, when I was a panel lawyer, if I needed an expert, I just called, and I got an expert. Our panel lawyers are perfectly content and happy, and the system works very well. I just want to try to get more resources for my immediate office.

This past year, I have told my lawyers, historically, from what I understood, is, if they needed an expert or if a case was expert-intensive, they'd just panel it out. We'd get off the case and send it to the panel because we knew the panel would have the resources as opposed to my office, which did not. The last month of this past fiscal year, we didn't order paper. We didn't order legal pads. I'd go to debriefings in the U.S. Attorney's office just to steal their legal pads. They have good ones too, thick cardboard.

We have a great system for the panel. I'm trying to just pump up the resources for my office. As far as the voucher cutting, it doesn't exist. As far as reduced rates, we're not Boston in New Orleans. We're not San Francisco. We have a handful of lawyers that work for big firms. Normally, they're former AUSAs that leave the U.S. Attorney's Office and go for a big firm. They may operate at a reduced rate. But I was a private practitioner. I had my own shingle out as a criminal defense lawyer in New Orleans, and the panel rate's a good rate, because, one, you're going to get paid. When you're in private practice, the real world of criminal defense, you charge somebody \$5000, they bring you \$3000, you never see the other \$2000, and you know with the federal government you're going to get paid. It's a plum. It's a lottery ticket, the panel spot.

Judge Prado:

Thank you.

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Claude Kelly: Our relationship with Joe St. Amantis excellent. I've talked to Joe a lot. I've gone over and met with him. When we have budget issues when the panel's exceeding the \$30,000, if it's a capital case, we work the budget for them, we get the district judge to okay it, and Joe is fine with us. It's a good model.

Judge Prado: All right. How are things in Arkansas?

Jenniffer Horan: Well, they're good, but they could be better. For those of you who don't know me, my name is Jenniffer Horan, and I am very honored to be here to participate in this ongoing study of the Criminal Justice Act system, because it's my belief that the report, which this Committee ultimately submits for review and consideration, could have a profound effect for years or perhaps even decades on the fair administration of justice and the indigent defense system.

I don't intend to recite the things that I put in my submission to the Committee, because I know you guys have all read it and considered it. I will, however, give just a short history of my office, and then I'd like to touch very briefly on four subjects. First of all, diversity in the workplace, second, the CJA panels in the Eastern District of Arkansas, third, and perhaps the most important, the importance of strong court support for the work that we do, and then, finally, the dicey issue of independence.

In 1994, I was appointed by the Eighth Circuit Court of Appeals to serve as Arkansas's first Federal Public Defender. Prior to my appointment, I taught trial advocacy and appellate advocacy at the University of Arkansas Law School, and I maintained a solo practice for eight years. I also served as the training coordinator for panel attorneys in the Western district, and I served as the panel attorney representative on the Defender Services Advisory committee.

In my capacity as federal public defender, I established the Federal Public Defender Organization for both the eastern and the Western districts of Arkansas, with offices in Little Rock, Fayetteville, and Fort Smith. For the following eighteen years, my office covered both federal districts until the Western district was authorized to have a separate Federal Defender Office, and Bruce Eddy, who's also in the room today, was appointed to head the Western district office.

A few years after the Arkansas Federal Public Defender Organization was established in 1994, the district court began to ask whether we would be willing to accept appointment on the capital habeas cases as they moved from state court into federal court, and, of course, I said "yes," and the Federal Defender Office began representing death sentenced inmates as their cases moved into the federal court system and Arkansas's capital

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habeas unit was formed. Ours is the only capital habeas unit within the Eighth Circuit, and we have accepted appointment on death penalty cases in Nebraska, North Dakota, and Missouri, or “Missoura,” as well as both the eastern and Western districts of Arkansas. Altogether, we’ve been appointed to represent thirty-two clients in our capital habeas unit, and we currently have twenty-one active pending cases.

On the subject of diversity, there are now eighteen people who are in our trial unit and eleven people in our Capital Habeas Unit, so I have a staff of a total of twenty-nine, counting me, and a full 62% of the people who work in my office are racial minorities, and two of them are also disabled. We have achieved this level of diversity by widely advertising every single job opening in the office both locally and nationally and by consistently hiring the best qualified person for the job at hand. We are very proud of the results that our hiring and recruiting practices have garnered because we believe very strongly that diversity makes for a better office in every respect.

On the topic of panel attorneys, there are two CJA panels in the Eastern District of Arkansas, one to handle non-death penalty cases, and we refer to that as the felony panel, and one to handle death penalty cases, and both to be used only if and when the Federal Public Defender Office has a conflict, so we get those cases unless we’re conflicted out of them. Membership on the panel, on both panels, is by application, and the competition for a spot on the panel is pretty fierce in the Eastern District of Arkansas because it’s considered as a position of honor within the bar.

Membership on the panel is for a three year term, after which all the members have to re-apply and the application process is opened up to the private bar. Panel attorneys absolutely must be experienced and well-qualified. Applicants with strong skills but limited federal court experience are invited to participate in our mentor program, which lasts for approximately eighteen months, during which time the mentor program participants complete nearly thirty hours of federal criminal CLE training and are paired with federal defender trial lawyers on their first two appointments and on their first trial. Thus far, every single mentor program participant has been granted full membership on our district’s felony CJA panel upon completion of the program that we administer, and most of them now are among the best lawyers on the panel.

I fully support, as many other people who have come before you, a higher hourly rate for CJA lawyers who serve on panels across the country for all the many reasons that have been pointed out to you all.

Turning to the subject of court support, we are extremely lucky in the Eastern District of Arkansas to have the strong and consistent support of

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both our federal district court and the Eighth Circuit Court of Appeals in every respect. The court supported going to a merit-based application process for the selection of panel attorneys, the court supported limiting the number of people on the panel so that we can assure them they will receive at least four to six appointments per year. The court has fully supported the establishment of the Capital Habeas Unit in our office, and I have always had the support of both the district court and the court of appeals, when whenever we have needed additional lawyers to handle the workload in either our trial unit or our Capital Habeas Unit.

In preparing for this hearing, I watched and read the testimony of other federal defender and community defenders, and I was shocked and very dismayed to learn that such support does not exist in a number of other districts, so I urge you all to the extent that you can to please assure that there is parity in the form of judicial support among all of the Federal Defender and Community Defender Organizations across the country.

Finally, on the thorny subject of independence, I do not purport to know how or by what means organizational independence can be achieved, but I do know from personal experience that things were much, much better for all of the stakeholders in the federal criminal justice system before the Office of Defender Services was demoted or downgraded to its current status of merely one of many program services within the Administrative Office. It is uncontroverted that Federal Defender and Community Defender Organizations under the previous structure operated responsively, efficiently, and cost effectively. It is my considered opinion the Office of Defender Services should be restored to its previous status because its downgrade has severely compromised the entire defender system, in my opinion.

Now, I'm fully aware that undoing something is infinitely harder than mounting a concerted effort to prevent that thing from ever happening in the first place, but we were not given any say in the reorganization of the Administrative Office, which has brought us to this particular crossroads. It is my fervent hope that the hard work of this Committee will put us on the right path again. Thank you for your time and your attention.

Judge Prado:

Thank you. Let me just ask this generally: Have any of you as public defenders ever been called by a judge to his or her office to complain about how your office is conducting certain cases or a complaint about a particular assistant in your office and tried to get you to change things? Anybody ever felt that you had anything like that happen, where a judge said, "Your assistants come in here, and I don't appreciate it, and I think you should talk to him about how he's doing things or she's doing things?" Or, on the other hand, if you handled a CJA list, a judge call you into his office and say, "Take this lawyer off the list. He came in last time.

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I don't particularly like the way he handled things. Take him off the list," maybe without explanation.

Anybody ever run into situations like that or feel comfortable speaking about them?

Kevin Butler: Yes. In this district, in the middle district that I used to practice in, on occasion, I'd say once or twice a year, a judge would express to me concerns regarding either the performance of one of the attorneys in our office and/or a panel member. In the circumstances that I was involved in, I never felt that it was a wink, wink, nudge, nudge, this guy has to or gal has to go. It was . . .

Judge Prado: Closer to the mic, sorry. Please.

Kevin Butler: more, "I want his or her performance to improve. This is where there was a deficiency." But I never felt that the court was improperly trying to influence who was either on the panel and/or who I was staffing in my office. It was just expressing a concern regarding the performance in court.

Laine Cardarella: I have nothing to do with our panel. I've tried, but that's not something I'm allowed to have anything to do with. I did get a list of the panel attorneys, and, sometimes, there will be a highlighted phrase next to an attorney's name, "Do not assign to a judge whoever case," so I know that there is some feedback going from the district court to the magistrate courts, "I don't want that lawyer in my courtroom. But I'm not privy to the conversation. I don't know if any explanation is given and whether or not it's a reasonable explanation.

I seek feedback from the district court and from the magistrate courts about the assistant defenders in my office when I do evaluations, and it's always been positive thankfully, but, sometimes, they're even reluctant to give me any feedback because it's just very well understood. I staff my office, the judges do not, and so I seek that feedback only because the judges are my audience. We want to be doing a good job for our clients, but I've never felt any pressure to not assign someone to a certain type of case or in a certain courtroom.

Dennis Joiner: We have a panel selection committee in the Southern District of Mississippi, and the Article III judge is the chairman, and all of the magistrates are on the committee, I'm on the committee, and the CJA panel representative for the Southern District is on the committee. We have been asked to take action against on infrequent occasions but, over the years, to remove panel members. Generally, I know about it before it

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ever comes to the committee. Most of our discussion and vote is generally unanimous, but it has come up.

Claude Kelly: Judge, I was recently called by a magistrate demanding that I take somebody off the panel for missing court for the fourth or fifth time. We have a four judge CJA committee, district judge, and so I concurred with the magistrate's opinion due to the fact that our office, evidently, when I investigated, over the years had been kind of covering for this person. The four judges, three of the four, said, "Give him another chance. In 1980, he and I tried a great case together."

Our problem, and it's on my list of things to do, our panel plan was last revised, I think in 2004. There's no procedure to take anybody off a panel appointment. It's kind of like a black robe. I've relied on other defenders to get their plans and model that it's for a certain term of years. As a result, due to our management, there's a portion of our panel that, quite frankly, I don't think should be on the panel. Other than call and say, "Will you get off the panel?" which they don't want to do, and, often, some of those people have contacts in the district bench that support them there.

It's tricky, but I mean that's kind of where our management of the panel helps, that we will pass those people over when a defendant needs a good lawyer. But we're working on revising the plan and having a procedure where it's a three year appointment and you have to re-up.

Jennifer Horan: In twenty-one years, I've had one complaint about an assistant public defender who was late to court once. That never happened again. I do not manage the Eastern District . . .

Judge Prado: It's okay for the judge to be late, right? Or going by the judge's watch?! [LAUGHING].

Jennifer Horan: Well, I'm taking the Fifth on that. I don't manage the panel, but I do sit on the panel selection committee, and I have, for the whole twenty-one years that I've had this job. There have been two times when the panel selection committee met that we had complaints from judges. One involved a CJA lawyer who appeared to be under the influence of alcohol when he appeared in court, and the other was more recent where there was a lawyer who had repeatedly missed court. What we did in the first instance, instead of removing that person from the panel, we suspended any appointments to him until he went through the employee assistance program that's run by the state bar. Then, he got back on the panel, and he's been doing great ever since. That's probably been about twelve or fifteen years ago.

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More recently, we did remove a member of the panel, and it was because there were three judges out of a total of five federal district judges in my district who said that they didn't want that person appearing in their court anymore for the reason that he doesn't return calls, he doesn't accept cases, he's late to court or doesn't come to court, or whatever. So, because there were multiple judges who were saying, and they weren't saying, "We don't want this person in our court," they were saying, "We don't want this person on the panel." When we met on the three year cycle to have the application process begin again, he merely was not placed on the panel.

Judge Prado: So I gather what everyone's saying is that, in the situations where this happened, there was some justification on the part of the judge of the court complaining about the individual.

Claude Kelly: Yes.

Jennifer Horan: Yes, and never any complaints about somebody being overzealous or using too many experts or anything like that. If anything, I mean the Eastern District of Arkansas is one of those that has such a low percentage of use of experts by CJA lawyers; that is a total mystery to me. I don't know why that is except that it could be cultural. I mean, when I think back, I did a lot of CJA work when I was in private practice, and I didn't have an investigator on staff or a paralegal or an interpreter, and, of course, we have all of those things now in the Federal Defender Office. So I think, "Gee, when I look back, I think I should've been asking for those things," but I just didn't know to ask.

Now, in the Eastern District, we have repeatedly had training seminars where we've talked about the importance of experts and the fact that our court doesn't deny them, our court just doesn't get the requests, so I'm stymied as to why that is, but I'm going to continue to try to change it.

Judge Prado: I mean but is it a question of the CJA lawyers not knowing what they're entitled to? That they need to be educated? Or is it a chilling effect on the part of the judiciary that tries to discourage requests for appointment of experts?

Jennifer Horan: It's not because the court wouldn't approve it. I think it's a cultural thing. Most of the people on the panel are solo practitioners, and they just do it all themselves. I mean it took me a couple of years after I became federal defender to even know how to effectively use an investigator because I had never used one before. That's what I think it is.

Judge Prado: Anyone else?



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Kevin Butler: I echo Jenniffer's comments to this extent. Well, maybe I'll first put it this way. In my office, every case, we have an investigator, whether it be a misdemeanor, theft of property on land, or a complex felony. We have an investigator on every case. We have a paralegal assigned to every case. It's my opinion that, in order to effectively represent an individual, you have to know his background, criminal history, medical records, psychiatric records, you have to have those. We have the resources to get those. I hired, when our office opened, a person who had been in private practice.

Like Jenniffer indicated, I had the hardest time, an experienced lawyer saying, "You've got an investigator now. You have a paralegal now. We have the resources to hire mental health experts when we need to. Utilize them." And, over time, he has started to use them. It is my hope that, in time, the panel in this district will recognize some of the things that we're able to do because of the way we're structured, and they will start to utilize experts to a greater extent. I realize that experts are not being utilized extensively in this district, but I think that comes from the history in this district.

Whether or not that history is also reflective of, I don't want to use the word "fear," but concern that the overuse of experts could impact a person's standing on the panel I can't speak to, but I can say that there is at least a history in this district of not utilizing experts, but it is our hope that, now that there's a defender office and the training that we're putting on regarding the availability of experts, that that will change.

Laine Cardarella: Judge, I invited a handful of CJA lawyers to come to my office so that I could sort of interview them so that I would know, since I don't have anything to do with the panel administration, and so it's very anecdotal. There's no empirical data whatsoever. The feedback that I got was a little bit of everything. They don't know what they need because they are in practice on their own, so there's no training at all for our panel. My fear is that some of our panel attorneys don't know when they need to bring in an expert to help them review records. They know to get records, but they don't necessarily know what to do with it after that, and there was definitely an undercurrent of, "I'm afraid to ask for that money because I don't want to get that reputation."

We have such a huge panel. Somebody could just be ignored for a long time on our panel and just not get any more appointments, and the attorneys want the appointments. There's definitely an undercurrent of concern, "I don't want that reputation of spending a lot of money or asking to spend a lot of money." I think there's a whole lot of reasons why.

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Dennis Joiner: If I might express an opinion, I think it's a little bit of both. I think, as a magistrate, that has to do due diligence and inquire about the reasonableness of the request for expert services, and then, when they do that, it has an air of an ex parte hearing that's cross-examining the lawyer about, "Are you sure you know what you're doing?" kind of thing.

I can tell you from experience, when I was on the panel, I made a request for some money before a magistrate that was a friend of mine. We had previously been in the Army Reserves together for many years. I wanted two witnesses to be interviewed, and he started asking me, "Are you sure you need that much money?" and he approved like \$300. The investigators found like one in town. The other one had moved out-of-town to McComb and we couldn't do it for \$300, but I got paid as a lawyer the hourly rate to go do the ex parte hearing and to have my discussion with the magistrate and to go back to the office.

I was able to use a telephone to finally track down the other person and get what information I needed. But, when I was appointed in 2002 by Judge Carolyn King, she had the statistics for the Southern District of Mississippi, and she said, "Mr. Joiner, your district spends \$1.16 per case on expert services." That's our panel. "How do y'all get by without having ineffective assistance of counsel claims filed against you?" And I said, "Judge, I think that was my \$300 that I got from Judge . . . ." So I think it is a perception problem, some way or another.

Judge Prado: Mr. MacBride, you didn't get a chance to ask questions first panel round, so I'll let you go first.

Neil MacBride: Great. Thank you, Judge Prado. This first question is really for the panel broadly. It's a two-part question. The first one is really just sort of a yes or no, but, just to confirm, some of you have mentioned in your testimony restoring the Office of Defender Services to its sort of independent directorate. But, just for the record, is there anyone amongst the five of you who thinks that's a bad idea? That wouldn't support moving it back to its own prior status on the org chart? Okay. For the record, I think all five agree that that's something that they would support.

Jennifer Horan: I bet the audience would agree too.

Neil MacBride: Great. Well, we'll poll them if there's time.

Jennifer Horan: Okay.

Neil MacBride: So here's the question that some of us have been noodling on. In terms of the issues that have been identified at the committee in terms of concerns about independence of the Defender Service and the CJA panel and the

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typical issues that are raised are, cuts to vouchers, the awkwardness of appearing before a judge to sort of get resources approved in the same case that may be before the judge, sort of all the basket of issues related to that, I'm just curious, as a practical matter, how restoring the Defender Service to an independent directorate, is that going to address any of those issues on the ground?

I mean, in other words, is a federal judge with lifetime tenure really going to care where ODS sits in the org chart? I get that organizational behavior is important and it can send a message, and there may be other benefits, but, in terms of like the problems on the ground, when Mr. Butler said that his office is doing great but he senses a crisis of morale across the country from his colleagues about many of these issues. How does moving Defender Services back to an independent directorate address those core issues on the ground?

Jennifer Horan:

Well, I can only speak from my own personal experience, but, before the shakeup or demotion or whatever you want to call it, I could depend on knowing from year to year what my budget would be so that I could then exercise my duty as a fiscal officer to make sure that the taxpayers' dollars were spent well and not wasted. Ever since ODS got demoted, I haven't been able to know from year to year what my budget's going to be. I have not been able to run my office as efficiently as I did before because I didn't know what the parameters were with regard to money. Whatever the money is going to be, I mean it's got to go for salaries, benefits, travel, experts, rent, and that's not good.

It's not good to have people overseeing multi-million dollar budgets and not being able to know from year to year what the totaled amount of their budget is going to be. I mean I just found out a couple of weeks ago what my budget's going to be for this year, and I mean my hair almost caught on fire because I was expecting . . . our fiscal year goes from October 1st to September 30th. In October, we were told that, "Here's the first half of your budget for this year." And then, two weeks ago, I expected the second half of my budget, but what I got is \$1.6 million less than what the second half of my budget should be. How can I be responsible with money when we're already practically halfway through the fiscal year?

Now, I've been assured that we should be able to work something out, and I'm grateful for that, but it is so demoralizing not to be able to know what your budget is. I had just met with all my people and said, "Hallelujah! I feel like we finally are on solid ground now." That's just one example.

Neil MacBride:

Thank you. I'd be curious to whether any of your colleagues see how—I mean I totally agree—to have certainty to be able to manage your office and manage your resources and know what your budget is, absolutely

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important, but, again, trying to tie that back to the perceived problems with judges managing, particularly on the CJA panel side, I'd be curious if folks have thoughts as to how the restoring the ODS would address those issues.

Kevin Butler: It's my opinion that, no, they're two different things. Elevating ODS or DSO now back to a directorate, even though it's a different thing, it would send a message, number one: the court, the management of the court, the executive committee, the Judicial Resource Council respects what we're doing and understands that we know how to manage our money. Therefore, we're re-elevating you. What it also does, and I tried to comment on that in my opening statements, it gives the CJA and our offices a voice within AO. As I understand it right now, if there are issues impacting indigent defense, because we are a program service, there is a bureaucracy that has to be followed before those concerns make their way to the decision-makers.

If we are a directorate, I remember it was Ted Litz and Steve Asin, if there were issues regarding CJA pay, they could go, I mean there were still processes in place, but there was a more direct method of advocating for and on behalf of the CJA panel and defender offices under the prior system. Will it solve the issue of judges having control, for instance, in our district over appointments and/or pay cuts? No. But, if I, for instance, thought there was a problem in this district, I could contact Cait Clarke, and, if she saw that there was a national problem, she could possibly go more directly to the decision makers to possibly try to address those problems.

As it stands right now, we're a program service, and I know I'm exaggerating, but I feel we're kind of buried under pretrial probation and some others, so constitutional issues regarding representation are kind of muted. I think it also gives us more direct voice.

Laine Cardarella: I agree with Kevin.

Neil MacBride: All right. In the interest of time, Judge, just one more question if I may, and that's to Mr. Kelly. You described sort of the Louisiana model, which, if I understood you correctly, is working quite well in lots of areas. So, the question is, it's a three-part question if I may, number one, on balance, are you aware of a structure in any other district, in any of your colleagues' districts, which you actually think works better than yours? Or, at the risk of being immodest, do you feel like the Louisiana model is as good of one you've seen? And, then, the follow-up would be: Is there any reason why that model could not serve and be scaled across other districts? Or are there things sort of unique to the Eastern District that would make it hard to travel to the rest of the circuit or the rest of the country?

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Claude Kelly: Interesting question, because it's almost how I view my role. Is my role to look out for every indigent defendant who's charged in New Orleans or the ones that my office represents? I've gotten to be friendly with Jason, who's the federal defender in Dallas, and it's interesting because his office does nothing with the panel, and it's really two completely opposite models. As a result, I think the panel that exists in Dallas has a lot of gripes and a lot of issues and a lot of problems as far as getting budgets through and getting vouchers cut. So, clearly, our system for that aspect works better for those panel lawyers.

The flip side is his office has a lot more resources in his immediate office than my office does. I think our model for managing the panel seems to work, because I don't have the gripes that I hear that other defenders have from their panel. I think we have such a unicorn that the Defender Services does not, in the recent work study where they awarded new FTEs for things, I mean, if I had a satellite office, I would've gotten one, whereas I tried to raise my hand and say, "But I have two people of my," at the time, "Fourteen that work just for the panel. Can I get some kind of credit for that?" And, no.

But, to answer your question, I think for managing the panel, our system seems to work without the complaints. It's at the expense though that it kind of short-changes my immediate office. I think, if you could implement that managing of the panel with giving me more credit for doing that, that may be ideal.

Judge Prado: Judge Fischer?

Judge Fischer: You mentioned one of the topics that we're not hearing a lot about but we're concerned about is the transportation issue and you mention office pools for defendants who can't get home. How often do you know does that happen?

Claude Kelly: For defendants who . . .

Judge Fischer: Well, the transportation, the Marshal provides one-way transportation.

Claude Kelly: Yes. It's not often.

Judge Fischer: Okay.

Claude Kelly: I mean we recently had a defendant that my office represented, and he was in Florida, and he didn't have funds to get there, so the Marshal's would bring him there, but we actually got him probation, so he had to go home.

Judge Fischer: Right. Thanks.

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Claude Kelly: And the Marshal's have been very good working with us.

Judge Fischer: I appreciate that. Judge Prado . . .

Claude Kelly: It's a less common problem.

Judge Fischer: since I'm not actually on the panel, why don't I defer to . . .

Judge Prado: Okay, I just wanted to give you . . .

Judge Fischer: come back to me.

Judge Prado: an opportunity because you were kind of left off last time around.

Judge Fischer: Thank you. I appreciate it.

Judge Prado: Professor Kerr?

Prof. Kerr: Thank you, Judge Prado, and to all of you for a very helpful panel. I wanted to go back to the question of the disparity between FPDs and CJA lawyers in terms of use of investigators and experts. There has been some very helpful testimony from you about why that disparity exists now, and I would love to get your help in terms of how you could structure a system where that disparity doesn't exist or at least is greatly minimized or thinking beyond . . .

One possibility was training to let people know that this is possible, but it seems to me that there are other ways that you could do it. Just thinking off the top of my head, you could have a presumption that an investigator is going to be assigned to every case, every CJA case, unless a CJA lawyer expressly waives that grant. You could have published standards for different kinds of cases where, "Which kinds of cases generally use experts? Which kinds of cases are going to need certain investigators to do certain things?" In other words, instead of just saying, "Here's training to help you figure this out," you could actually make that the standard. You could have a separate office which consists of investigators for CJA cases.

There are lots of different structural ways of doing it, and I'd love to get you your thoughts, from any of you or all of you, as to: Are some of those ideas going to be more promising than others? Is there a way of structuring this to eliminate that disparity? Or is it just inherent in the idea of having a private attorney that that disparity is going to exist and you merely try to minimize it rather than eliminate it? Any ideas that you have would just be tremendously helpful for us.

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Claude Kelly: A lot is education. I mean the idea of presumption of investigators is a good idea, and, from a personal note, I thought the same way. Quite frankly, it wasn't until I started doing capital work that I really learned as a defense lawyer just the real, how to use an investigator, how to use other experts, and you incorporate that into all of your work. But it took my involvement, extensive involvement, in capital work to learn that.

Prof. Kerr: One concern that's been raised is that asking for experts, asking for experts, asking for investigators is something that some lawyers might be not so happy to raise with a judge because they don't want to seem like somebody who's sticking out? Maybe, if everybody starts to do it, then they're not sticking out, but do you think some sort of, not necessarily a legal presumption, but just some framework where that becomes the standard as a way of addressing that beyond education? Or is that not as useful?

Claude Kelly: It could be. I mean I can only speak for our district. In our district, the judges don't give them any. There's no difficulty with the judges because they ask our office, and our office gets them the expert, and then the judge relies on us saying, "This is appropriate."

Jennifer Horan: And we make slow but steady progress through our mentor program because, when we work with the private lawyers, we make our investigators, our paralegals, we have mental health specialists in the Capital Habeas Unit, we make all of those resources available to the new CJA lawyer, who then knows, "Well, there's something mentally off with my client. I need to try to figure out what that is," and we make our mental health specialist available. I mean she's very good. She can do an assessment on a defendant and then say, "This is the type of expert you want rather than this," which saves money. I think that, if the court could look at it as a cost savings, because that seems to be all anybody looks at anymore, and that is so sad, because really we should be sitting here talking about how we can better serve the defendants that we represent, not how we can save money.

But, anyway, it's cheaper for an investigator to make that trip down there to wherever it is to interview a witness or to go and see a client to get certain types of information or whatever. We're all cost-conscious now, so that could be something that I think would be well-received by at least the judges in my district. And I can tell you this: Judge Holmes is going to go back home, and he's going to talk about, "Why is it? Why are we on that short list for not doing experts? We need to have more of this."

What I'm thinking is, "Maybe I'll get him to come and speak at a seminar that we put on," but I'm going to re-double our efforts because there should be parity of representation. A person who's charged with a crime in

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federal court, oh, and just to correct the record from earlier, there are no simple federal cases, not a single one. No matter what the charge is, you have to work the case up in order to know whether to plead, in 97% of the cases, or whether to take those cases to trial. I think it's a combination of educating the CJA lawyers and educating the court to the cost savings that could be had.

Kevin Butler: The only thing I was going to add is this is where there is an intersect I think of your point and Mr. MacBride's. By that, I mean, as long as final say over pay and the use of experts remains with the judges, having set standards that, "In every case, this money is going to be sent," will probably meet resistance. It has been my experience in this district that the best way of encouraging the use of experts in addition to training is our office in the sense that I have received lots of positive feedback over the last three or four years from Judge X, Y, and Z that, "I'm glad you utilized expert X. This expert really brought home this point and supported the variance that I've been thinking about doing but I never really had the information to do." We take that information, disseminate it to the panel, then we'll use it.

There's a downside to that. On the flip side, if judge X sees an expert in every case, "Expert X was really good for that one case. Now, I'm getting her in every case. This is a waste of money," so we have to be careful about forcing the use of experts in every case. Even within our office, we staff, "Do we really want to use expert X here? Is this a case that is going to be persuasive and beneficial to our client?" Just utilizing them to utilize them could have problems, especially in a system where the court still retains the final say.

Judge Prado: Dr. Rucker, do you have questions?

Dr. Rucker: Let me sort of pick up on that point, if I may. We've heard from a lot of people, and particularly from defenders and panel attorneys, that they'd like to see this system taken away from the courts and from the judges, to maybe place it with the defenders. I mean you know how these cases should be litigated, when experts should be used, things of that nature. What is your thought about that? Would you be willing to take that on?

Let me start with Ms. Cardarella, since you're not doing any of that now. Would you be open to that possibility?

Laine Cardarella: I would be, because I think it's the best way to serve the clients. I can't remember who, I think it was Jenniffer, maybe Claude, my attitude is everyone who is charged with a federal offense in the Western District of Missouri deserves my attention. If I have a conflict, it's going to be a limited amount of attention. It's the attention I give to training the panel,



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to working towards getting a greater structure for our panel, but my mission in life is to serve the indigent accused, now, in the Western District of Missouri.

So, now, having said that, yes. I would take that on, but I echo what Claude said. I don't have any extra staff as of now. As of next week, I am fully staffed with my work measurements, and I mean I have eked out, I've got part-time employees, I mean I'm just nickled and dimed my FTEs, and I'm fully staffed, and we don't have any room for panel management. So we would have to figure out a way where the work measurement studies that are going to continuously be done on us to take into account that non-case related work we would do managing a panel, but I would be happy to help.

Dr. Rucker: I would be interested in the comments also from Mr. Joiner and Mr. Kelly. In this area, you said you may be losing staff positions. Would this be a way to retain staff positions? Would you be willing to do this work?

Claude Kelly: Would we do the work? And I agree with Laine. I haven't lived the other models, but, in a sense, it's kind of a no-brainer because that's what we do. I mean to say that someone in the clerk's office can run a federal criminal case better than we do is illogical, and the judges, I mean they're judges. Their plate's pretty full to begin with. I mean that's what we do. So I think our model is good, I just wish we had got credit so it didn't short-change my office. I can't think of another entity that could do it better.

Dr. Rucker: I also meant by that not only that but signing the vouchers, have the authority and responsibility for that as well.

Claude Kelly: Well, we do do that. Well, we don't sign the voucher . . .

Dr. Rucker: That's what I meant.

Claude Kelly: but the voucher comes through us, and every day, my panel administrator and my panel budget person is on the phone with lawyers, emailing lawyers, "Wait, why are you charging this? You know that it's not going to get through." They work with them, they massage it, and, as a result, it 99.9 percent of the time flies through because, the judges, they trust us. They know that we're managing it well.

Dr. Rucker: Mr. Joiner?

Claude Kelly: There's an observation to make that, with a judge, whether it's a magistrate or the district judge on the front end controlling or denying the funds or resources necessary to develop the defense, that that judge could

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or magistrate could be hampering the defense. So, from that standpoint, I would think that a better business model would be warranted. It would seem to me like the magistrate and the judge would not want to be seen in that position of making decisions that ultimately would affect the defendant's representation.

So I think there's got to be some other reliable source out there, and I think that the request for investigator or experts for psychiatric evaluation and all could be rolled into the panel administrator position with the overview or the right of appeal if it's denied to a judge then. They could view it more as an independent hearing and not be seen as managing or limiting the defense capability of representing that indigent person.

Dr. Rucker: Judge Prado, if I may, just one more quick question I think. Several times we've heard in our other hearings, and it was mentioned again this morning, and Miss Horan mentioned this as well, that the panel rates are too low. What should they be? Give us some idea. Or should they be regionalized as well? Or should they be continued at a national level? But we've heard it's just not good enough right now to have it at the rates we currently are at \$129 and \$183. How high should they go?

Jennifer Horan: Well, they should at least be funded to the level that I think Congress has approved. And I'm sorry I don't have those numbers right in my head, does anybody . . . ? What would they be instead of \$128 and \$18 . . .

Laine Cardarella: It's 140-something.

Kevin Butler: 146.

Claude Kelly: I don't know if it's a regional thing or not. I know, first hand, in New Orleans, it's a rate that people are clamoring to get on the panel.

Dennis Joiner: I think I wrote in my paper to the extent that Mississippi, as a rural state, some of the young attorneys are running around with their office in their hand being an iPhone, so, taking the rate into consideration, it seems to be adequate at the present time. I was a panel member when it was \$20 an hour, and we were struggling, and it stayed behind the overhead curve for a long time, and I think that we're ahead of the curve, but I don't want to speak for the east coast and the west coast, San Francisco, New York, and places like that where I think some locality adjustment might be warranted.

Kevin Butler: I really can't speak to that. Our office has no management of the panel. I know it sounds simple, but I just believe the rate should be fair. Given the studies, I believe the Congressional rate recommended is \$144? I'm not sure why there's a cut of . . .

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Laine Cardarella: Use the mic.

Kevin Butler: Oh, I'm sorry. Simply put, I can't speak to that, but I do believe that the panel should be adequately compensated for the amount of work that they do.

Laine Cardarella: You know, I just did the math to see what I make per hour, it's not that much. So I'm really happy with my salary, so I think the key is to pay them. I don't hear, and, again, I have nothing to do with the panel management, I don't hear the panel attorneys complaining so much about the hourly rate, it's about the cuts. They fairly bill. They're told this is what they're going to get paid. They do the work. And, then, inexplicably, their voucher is cut. I think that's the problem.

Judge Prado: Mr. Cahn, Ms. Roe, do you have any cross examination of your colleagues? I'm kidding.

Kevin Butler: I'm getting nervous.

Reuben Cahn: Let me bring up a point. One of the issues that I think we've got a group of people, with the exception of Claude, who are primarily from rural areas, and we're talking about adjusting pay for panel lawyers on a regional basis. Of course, you're coming from relatively low cost areas. I've asked this before, but I put this out to each of you. One of the concerns I have when we talk about this proposal is that many of the low-cost areas in our country are historically areas where relatively poor defense was provided, border areas, the south. It's concerning to me a proposal that we would now begin to pay lawyers less in those areas. That would be saying to these historically underserved communities, "Your defense isn't really worth as much as the defense of somebody in New York or San Francisco or L.A." Do you have any thoughts on that? And I'll start with you, Kevin.

Kevin Butler: Well, I strongly oppose that notion. What I think was proposed was something, I'm just making this figure up, if a figure of \$150 an hour is determined to be appropriate given the level of expertise that's needed, the work, that'd be the base figure and that there'd be some cost of living adjustment based upon where you live. It's not that we should pay you less, it's that there is a base rate of pay for the quality of work that you provide that may be adjusted upwards based upon where you live. I think a similar thing is done by way of, oh, goodness, I'm forgetting it . . . the geographic cost adjustment location that's done, for instance. I believe the defender in San Francisco may make more than me.

Reuben Cahn: No.

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- Kevin Butler: Oh, really? Oh, he doesn't. Oh, okay. Well, it was my understanding at least, maybe some of the assistants, that the assistants may make more based upon the cost of living in their location.
- Laine Cardarella: I think Kansas City's a big city, Reuben, because . . .
- Kevin Butler: So is Birmingham.
- Laine Cardarella: I just wanted that to be clear. We got the locality increased this year, so I agree with Kevin. It's not about decreasing for those of us that are in the smaller areas, it's about increasing. I think just, they have to pay more rent in New York and San Francisco and Boston, their rent is higher than the attorneys in Kansas City. That's just a simple fact.
- Reuben Cahn: Do you think that, though, if we were at the \$144 or 47 I think it may be now, would that be an adequate base to move up from for more expensive areas?
- Laine Cardarella: Yes. I think so.
- Claude Kelly: Reuben, it's an excellent point you brought up. All I was saying is that the rate is not an issue for me. I mean, I agree, the whole geographic, having different rates is kind of a dangerous proposition to make, but it's just not a complaint in my district from any panel lawyer.
- Dennis Joiner: Claude and I were not talking about a locality decrease . . .
- Claude Kelly: Yeah.
- Dennis Joiner: we were talking about a locality increase to get the guys more money, similar to per diem. You have locality adjustments for that.
- Claude Kelly: Right.
- Reuben Cahn: I mean, Kevin, can I close the loop on something that came up with you when we were talking about expert services and the use of investigators and paralegals, and you stated that you assign an investigator and a paralegal to every case. Just to be clear, I assume you're doing that because you believe it's both necessary to effective representation and an efficient way of doing things. Is that accurate?
- Kevin Butler: Very accurate.
- Reuben Cahn: So, would any of you be satisfied if the use of investigators and other experts in your office was sitting at 3%?

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Jennifer Horan: No.

Kevin Butler: No.

Claude Kelly: No.

Dennis Joiner: I've told the judges that, if I had to lay somebody off, I'd lay off a trial attorney before I would my investigator. They're incredibly valuable.

Reuben Cahn: Laine, can I turn to you, and I want to ask you. One of the focuses of this hearing is death penalty representation, and I'd like to talk briefly about your district, because it's a district that in the past has had some real problems. A number of death sentences have come out of your district. There is one attorney in particular who's represented a number of individuals on death row, has in their capital habeas cases filed lengthy affidavits opposing the granting of their petitions and has in no way, shape, or form ever cooperated with the Federal Death Penalty Resource Counsel that is a resource provided by the Administrative Office of the Courts to improve the level of representation in capital cases around the United States.

Do you see any way that we can improve upon situations like that without taking the appointment and management of the process away from judges?

Laine Cardarella: I do. I hope that I'm making a change in the Western District of Missouri. As I mentioned in my written submission, my predecessor just absolutely had no interest in being involved in that process. We did have one death qualified attorney in our office. We would occasionally not have a conflict and get an appointment. But, if it wasn't our office on the case, he just didn't want to be involved. I made it clear from the moment I got sworn in I do want to be involved. I have made contacts in the death penalty community. I meet fairly regularly by phone or in person with Capital Resource Counsel and Appellate Capital Resource Counsel, and someone else, death penalty something. I mean everybody knows about the Western District of Missouri, so they're so happy that I want to talk to them.

I've let the judges know I want to be involved in the appointment process. The statute says they should ask me who I recommend. I've asked them to come to me. I try to keep my ear to the ground to see if there's a murder case coming. All of that assumes that the court will still be making the appointments. I think it's my responsibility to become more involved, and I'm doing that. We did some targeted by-invitation only training last year. We're going to do that again. We don't have a lot of qualified people on our panel because most of the death cases in Missouri, and there are a lot of them, are handled by the state public defender, and they don't leave. They stay with the state public defender's office when it comes to

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qualified people. That's why I'm reaching out to resource counsel, getting to know them better, and getting their assistance.

We have a wonderful resource expert counsel in our district, Sean O'Brien, who's just a nationally known death penalty attorney. I work with him a lot just to educate myself so that I can then try to educate my judges when those cases come up.

Reuben Cahn: Claude, can I ask you one additional question about capital cases? You've described a system for your panel lawyers that really is very different from anything I've heard about in any other district of the Fifth Circuit, including that, on mega cases where they're budgeted, that, once you have reviewed and approved those in your office, that they seem to go even through the circuit level without problems. Is that true also in capital cases? Do you have experience in budgeting capital cases for your panel where you can speak to that issue?

Claude Kelly: I've been there. We've had one, which it was not certified, but, for about a year, it was on the capital track, the capital crimes, it does not go in-depth on it, but the budget is substantial. I've been involved in it some. I actually, when I was on the panel, had one of the death-eligible defendants. So, once I joined the office, I got off, and Rebecca in Lafayette, the other defender in Louisiana, who was the acting defender in New Orleans, kind of is still kept as the- she's monitoring the vouchers on that, although the two people in the office who are in my office, so I know exactly what's going on with it.

But, to answer your question, we've gotten the budgets through by dealing with the district judge and with Joe St. Amant. And I mean the cost of that case will be my entire annual budget probably by the time it's all over.

Reuben Cahn: After this is over, I probably have some other questions for you, but can you just speak, do you have any idea why so many other districts in the Fifth Circuit have so many problems with their capital case budgets and with getting adequate amounts approved?

Claude Kelly: I don't, I'll be honest with you. I may be too new on it. We don't have, I mean in the year and a half that I've been there, there's obviously not a lot of death-eligible cases coming through. We have multiple defendants, twelve defendant, ten murders, guns, drugs, murders, we have huge cases, but they're just not going death on it. I think, traditionally, our defender office, if it was a death case, would not keep it. They would give it to the panel. I mean my plans is I'm death-certified, we have, three of our five lawyers can do capital cases, so, if we ever get one and we're not conflicted out, my plan would be to keep it just because we get a lot of points for them. And we do a good job!

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Reuben Cahn: Yeah.

Katherian Roe: I want to direct my questions, at least first questions to Laine and Jennifer because you're both in the Eighth Circuit. We've heard some discussion, in other hearings, about folks in the Eighth Circuit who have had significant cuts from the chief judge of the circuit. The first question I have is about your districts individually, and that is I know that neither one of you manage your panel, but do you have any kind of statistics or data about what the voucher cuts actually are, not just the folks that you've spoken to, but do you have any data in your district about what is submitted as billed and what is actually paid?

Laine Cardarella: I do not.

Katherian Roe: Jennifer?

Jennifer Horan: I don't, except just what I've heard that . . .

Katherian Roe: But you haven't seen any data at all, statistics or anything?

Jennifer Horan: No, and the reason for that, I think, is because the lawyers on the panel who get their vouchers cut, they take their concerns to the panel representative rather than to the Federal Public Defender Office because, even though we have stood ready, willing, and able to manage the panel for twenty-one years, we just haven't been asked to do that.

Katherian Roe: Is that something that, during the course of those twenty-one years that you've been the defender, have you ever asked your court to allow you to participate in that?

Jennifer Horan: Yes.

Katherian Roe: And so they've been reluctant to allow you to do that?

Jennifer Horan: Yes.

Katherian Roe: And did they ever express why they were reluctant to have the federal defender involved?

Jennifer Horan: No, but I always thought it was because they had a court employee who was doing it and doing it exclusively so that, if we took the job over, that court employee would lose her job, and she had been there, she was an institution at the Eastern District court. Those are my thoughts.

Katherian Roe: Did you hear Judge Holmes, who I believe is a judge in your district, is that correct?

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Jennifer Horan: Yes.

Katherian Roe: Did you hear Judge Holmes saying that, when a voucher is over the statutory maximum, that he calls the lawyer and talks to them about it and that they then usually agree to reduce the voucher? It's what we refer to as self-cutting. I'm sure that has other connotations, but did you hear him say that earlier?

Jennifer Horan: Yes, but I also heard him say that he almost always approves the amount that's on the voucher. I think, what he does, it's when he has a legitimate, and he is a great judge. He was the chief judge until fairly recently. He fully supports the work that we do, and, if you read what he submitted, he says that most of the CJA lawyers do a good job. He would like, I think, to see the lawyers have more experts and that type of thing, but I was not aware that he would send a letter. And I don't think he calls them in, I think he sends a letter saying . . .

Katherian Roe: I heard him saying he called them up, but . . .

Jennifer Horan: Okay, okay, perhaps so.

Katherian Roe: What I heard him say, and I could be wrong about this, is that most of the vouchers he sees he approves, but, when he was referring to the ones that were over the statutory cap is the ones I'm referring to, and then he calls folks up and has a conversation.

Jennifer Horan: Right, yes, and I was not aware of that. Today was the first I've ever heard of that.

Katherian Roe: Have you had any information or have you seen any statistics or data about Eight Circuit cuts to the vouchers from your district?

Jennifer Horan: No. No data, just a horrifying story that there was an expert that was approved at the district level, but, when it went up to the circuit, \$10,000 was cut off of the expert's fee, so the private lawyer had to come up with the money to pay the expert. But that probably happened ten years ago. The panel rep also put together some information for both Judge Holmes and me to review before coming here, and she says that she has seen fewer and fewer voucher cuts at any level over the past two or three years in the Eastern District, which is music to my ears because people need to get paid for their work.

Katherian Roe: Do you know- Well, I'm not going to ask you that question. All right, Laine, I'll come back to you on it. You had said that there are a few cuts at the district court level. Do you know what the percentage of cuts actually are?



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Laine Cardarella: Yeah.

Katherian Roe: And do you know anything about what's happening to those vouchers, the excess of statutory number vouchers, that go to the Eighth Circuit?

Laine Cardarella: I don't. Everything I know is just anecdotal, and, understanding we have over 200 attorneys on our panel, I certainly didn't even speak to 15% of them. What I hear though, as things trickle, and our panel rep I don't think . . . he doesn't have the same role that it sounds like Jenniffer's panel rep has, so it's very minute information that trickles its way to me. But, from what I understand, generally, if you're under the statutory limit, it's going to go through. If you're over the statutory limit, it's not, and you're probably not going to get the excess. I have heard, if you go and you speak especially to the magistrate and your magistrate advocates for you and with you and explains the budget, that that is helpful.

But what I'm hearing now really is that they just self-cut to stay under. They don't even submit an over-the-cap voucher, they just limit, and that all flows together. Why aren't they hiring experts? Well, they want to keep their money here. They don't want to be the red flag voucher. I don't know what the percent cuts is, I don't know how often it's happening. I know there's not a process in place for appealing a voucher cut. Whether you can go to the court individually and talk to him or her I don't know, but I know that there's not a process in place.

Katherian Roe: Thank you. One of the things that we've heard in other hearings is that the CJA committees, when they sit down and talk about who should be assigned or selected, if you will, or retained on the panel, one of the things that's considered is how many excess, over-the-statutory-maximum vouchers they've had. Has that been an issue in your district that you know of?

Laine Cardarella: We don't have as many.

Katherian Roe: All right then. Then perhaps it is.

Kevin Butler: We have a committee, but, as you know, the level of expert use is very low. That's not a consideration.

Katherian Roe: Thank you.

Judge Prado: Judge Goldberg, Katherian, I didn't want to take your time. Do you have any additional questions?

Katherian Roe: No, I'm fine. Thanks.

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Judge Goldberg: Okay. Just one quick one. It seems to me that the consensus among you folks is that the rates where they currently are . . . am I being heard?

Kevin Butler: Yes.

Claude Kelly: Yeah.

Jennifer Horan: Mm-hmm (affirmative).

Claude Kelly: Yeah.

Judge Goldberg: Are the rates where they currently are satisfactory? And that your CJA panel members are okay with the rates. We have, obviously, an opportunity to make a recommendation to raise the rates. In my district, \$129 an hour, most medium-sized firms are charging more for their paralegals than that. This has been a great education for me to hear that and to hear comparisons from other districts. So, my question is: Are you folks satisfied, whoever wants to answer, answer, are you folks satisfied that you're getting the best lawyers or the best criminal federal lawyers on these panels and would raising the rates significantly, in your opinion, attract better lawyers for indigent defense?

Jennifer Horan: Absolutely. In my district, it would. There are some people that I have tried to recruit to be on the panel because they do such a good job, and they won't do it because the pay is too low.

Claude Kelly: For me, we absolutely, I mean maybe with one or two exceptions, have the best criminal defense lawyers in New Orleans on the panel. I think one thing you said that just stands out is that, and maybe New Orleans is a different animal, I don't know, but when you said a medium-sized firm. In general, criminal defense lawyers in New Orleans are not in firms. And, as I said, we have a few panel lawyers that are in firms. They're mainly former AUSAs that have gone out and joined a big civil law firm and want to just kind of keep their hand in criminal law, so they are on our panel, and they're great, great lawyers for our panel, so they are clearly doing it at a reduced rate from their firm.

But most criminal defense lawyers in New Orleans are either sole practitioners or it's two people working together, in criminal defense law in general, in New Orleans at least, other than larger white-collar, but I mean we deal with guns and drugs and murders. You don't charge by the hour. I mean, private practice, you charge them by the case, and so I hear no complaints on the rate.

Dennis Joiner: I would just say that it would be common sense that the more pay you put out there the bigger the crowd you'll attract and a larger selection of

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lawyers you'd have to pick from, but I haven't heard any complaints about the rate.

Judge Goldberg: [INAUDIBLE]

Kevin Butler: Just on behalf of the Northern District, I have not received a single complaint from the panel regarding the rate, but, I can't remember who said it, I do believe that we would have a larger group of people interested in being on the panel if the rate was higher. That said, I believe that the lawyers that are on our panel are very outstanding.

Laine Cardarella: Judge, one of the questions you asked was whether or not we thought we were getting the best federal criminal defense attorneys, and I don't. We just get everybody. So I don't think we necessarily have the best. In terms of raising the rate, I mean I don't want to do a disservice to my panel people, sure, raise their rate. That'd be great. But, again, if they just got paid what they said they were going to get paid, I think that would be great satisfaction. The people I'm thinking of that aren't on our panel, that are fabulous criminal defense attorneys, you can't raise the rate high enough. They're just not going to take the cases because they're getting paid, as you said, by the clients that are able to pay a lot more, they just can't do it.

So I don't think it would impact quality, we have other ways we need to address the quality of the representation in our district.

Judge Prado: Anyone else?

Reuben Cahn: Can I follow-up on that? Because something struck me. I heard all of you say, "We're hearing no complaints about the rate." It occurs to me I've never heard a complaint about the rate, but I also can't imagine why anyone would come to me, who has no power over anything, and complain about the rate. Have you ever inquired of your panel lawyers, "Do you think the rate is adequate? Would it be easier for you to continue providing service on the panel, if the rate were raised, could we attract better people?"

Laine Cardarella: I was a rookie last year, so I went to the panel rep. I was the 8th Circuit FPD rep at the National Panel Reps Conference, and all they talked about was money. I had no idea that that was such a huge topic. Frankly, I had no idea that there was a panel rep conference, so, like Claude said, when you're an AFPD, you just do your job, and then, all of a sudden, the whole world opens up when you become the defender. That is all they talked about was voucher cuts, raising the rate, getting at least what's been approved by Congress. So when I say I don't want to do a disservice to my panel and say, "Oh, no, they're fine at \$120 whatever," of course they

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would want at least what Congress has approved and more if they could. Absolutely, positively.

But, having said that, I do think that the first step is at least paying them what we told them that we were going to pay them. And I agree. Nobody comes to me with that kind of a complaint. They know I don't have anything to do with the panel.

Katherian Roe: I think something we also easily forget, and I often have forgotten this, and I think, Laine, you just forgot a few minutes ago when you said that you don't get paid that much an hour, is that we get another 33% for benefits and we don't have to pay the 40% for overhead, so it makes a very big difference in what that rate really is when it comes down to, "What do they actually get paid for the work they do?"

Laine Cardarella: Yes. All of the equipment that I have, I didn't have to pay for that. I don't have to go looking for my investigator, and I know that I'm never going to have to pay him out of my own pocket. So, absolutely. In our rent, all of those things.

Judge Prado: Me, back when a long time ago when I just started, federal court was mostly tax fraud, white collar crime, white male defendants. Things have changed, and it's now mostly minorities that are being charged because we now have drugs, guns, immigration. What efforts are being made to diversify your offices to be the same as your clients? And is that an advantage or disadvantage? Does it help for the black defendant to have a black lawyer or Hispanic defendant to have a Hispanic lawyer? I'm guessing, but I think Kevin might be the only African-American here, and I know we have several women, but I don't think there are that many percentage-wise part of your clients. And the choosing of all of you is the judges, so, if there's any problem with who runs the office, it's the judges that are picking the public defenders, but your office you're in charge of.

Just any comments or thoughts you might think with regard to diversity in the office to be like that of your clients. Is that something you're trying to do? Is it hard to recruit minorities? Or is it an advantage or not an advantage to have blacks and Hispanics in your office?

Laine Cardarella: I think it's a huge advantage, and I do try to diversify. I even made a note, when Jenniffer said how diverse her office is, I made a note to talk to Jenniffer, because, when we have a position open, I try to advertise. I go to the Hispanic Bar Association. I go to our Black Bar Association. I try to reach out nationally. So I'm really trying to diversify our office. I do think it's important for the client to, at some level, believe that his or her attorney, there's some commonality. Whether or not there really is any commonality other than race or ethnicity, I think part of what we do is to

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bring some level of comfort to our clients. Sometimes, that's all we can do. I mean, sometimes, these guys are just really in a pickle, and, for that client to at least not only know but feel that there is a personal interest, a vested interest, I think that's important.

I think diversity is important in all respects, as Jenniffer has said. It just makes life better to be in a more diverse situation, so that is something we're trying. I still have a pretty darn white office, but I keep trying.

Kevin Butler: To follow up, I agree with everything Laine said, but I also personally believe that the diversity within the office also helps improve the quality of representation provided. Yes, an African-American many times feels more comfortable with the fact that an African-American lawyer is sitting across from him or Hispanic, Hispanic. But, within the office itself, I think minorities, a diverse staff, brings a various end of diverse perspectives on what we're doing, and that improves the office internally as well. I think my office is similar to Jenniffer's. I think we're about 60% as well of diverse staff. And I think I and most defender offices are making concrete steps to try to diversify our offices.

Jenniffer Horan: And it's really important too, I think, for our offices to look like private law offices, which is what we all try to do, and the reason is our clients don't get to have any say in who represents them. We have to start building a level of trust immediately in order to be able to get to the point where, when we have to deliver what is very often terrible news about what the possible sentence is going to be, our clients will have a high enough level of trust in what we're telling them that they will accept responsibility for their actions and get a lesser sentence than they otherwise would. I think that diversity is part of that.

In my district, not many people are detained. The vast majority are released. So they do get to come into the office, and they can see that I have a paralegal who can work on their case, an investigator. We have all sorts of resources, and it immediately raises the level of trust. I've even had clients to say, "Well, you worked like a paid lawyer does," or, "a real lawyer," or whatever. But it's part of trying to build that level of trust. That's imperative to have.

Claude Kelly: Judge, I think that I'm confident in all my lawyers that they deliver great representation to the client. I think Kevin's point is even more important though than even with the client. I think it helps the office so much more. Three of my five lawyers are Spanish-speaking, just because of the huge, as you know, Judge Prado, in our district, in our circuit. We're fortunate that the Orleans Parish Public Defenders Office since Katrina has become kind of a place to be nationally for, I mean we had all of these incredibly young, bright Harvard, Yale, NYU people that it's almost like they're

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coming to do their Peace Corps work in New Orleans, and they start in the state system, and they get burned out after three or four years, and then they apply to my office. We're really fortunate that, when we get an opening, we get overwhelmed with great applications.

Dennis Joiner: We have a good diversity program in Mississippi, Judge, but we sometimes kind of feel like we're a farm team for the court with them hiring Kathy Nester out of our office to be the public defender in Utah and the court hiring Omodare Jupiter to be the federal defender in the U.S. Virgin Islands. And then one of the district judges hires our paralegal to be the courtroom deputy, and that's happened twice. But we're able to find good replacements, and we maintain, I think, a good program. I think the test is when they get arrested for the first time and get put in the Madison County Jail, they're leery of having a "federal pretender" is a word that they use, and then the other clients convince them that they've got the best representation they can have. So, we're proud of that.

Judge Prado: Thank you all for your testimony and for the work you do. It's important work. It's supporting the Constitution. Sometimes, you don't get enough praise or credit for the work that you do, but we all, the judges do appreciate the hard efforts that you and your staffs give us in court, and thank you very much. Ms. Meyers, you came up for reappointment a couple of weeks ago. It was a very close vote, and, if it wasn't for me, you would not have a job. You owe me lunch! We'll be in recess till about 1:45 for our next panel.

Reuben Cahn: I suspect everything you just said was a lie. [LAUGHING].