Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing # 4–Birmingham, Alabama
February 18-19, 2016

Transcript: Panel 3—Views on Death Penalty and Capital Habeas Representation

Judge Prado: A panel of people involved in death penalty cases. Then I'll allow you all just to make a very short statement because we have a lot of questions for you and a lot of issues we'd like to cover and the panel wants to cover. I'll give you maybe an opportunity at the end to wrap up, if there is a situation where we have not covered what you wanted to cover or some points you wanted to make. I would ask you to please try to make your opening remarks as short as possible so we can get on with our questions. I'll let you start this side and we'll go down that way.

Rene Valladares: Thank you very much, Judge. My name is Rene Valladares. I'm the Federal Defender for the District of Nevada. I'd like to start by saying that I grew up in a dictatorship. I grew up in a dictatorship that utilized the criminal justice system as a tool for oppression and that has driven my commitment to excellence and indigent defense, as well as independence of indigent defense throughout my career.

Judge Prado: Does that mean you didn't grow up in Nevada, or are you talking about . . . ?

Rene Valladares: I did not Judge. I did not. I'd like to start by addressing a question that was asked to the prior committee and was asked by Committee member MacBride. That was whether restoring DSO to ODS to a directorate in the AO is going to go ahead and address the many issues that we have currently. The many problems that we have currently with our system.

It is my opinion that, that is not going to go ahead, and address the issues that we have. That we need something much more than that, that we need to secure independence from the judiciary in a structural way. I think that I started working as an assistant federal defender in 1993, that was the same year that the Prado Committee came with its recommendations and here we are twenty-five years later basically confronting some of the same problems that we had back then.

I think that it is time to go ahead and realize that, unless we have sweeping structural change of the type that was recommended by the Prado Committee and by that I mean, independence from the judiciary in a significant way, that the problems that we currently have and those problems are certainly heightened when we're talking about the death penalty, those problems will not be resolved.

Kevin McNally: Thank you for this opportunity. I'm Kevin McNally and I'm the director of the trial project. I've been doing this for twenty-four years now. Let's cut to the chase. Bottom line is that this Committee should recommend the appointment of a national committee to manage the defense function in federal capital cases and by that I mean the appointment of counsel and the allocation of resources.

An alternative would be for the judiciary to step back from management of the defense function in federal capital cases entirely. We have a national death penalty, but you can't tell it if you study it closely. There's vast disparity in the allocation of resources. Vast differences in the appointment of learned counsel, or what learned counsel is. You know, the Spencer updates found significant geographic variations in the appointment of counsel and in the allocation of resources.

For example, there is a Texas case that was on appeal on the Fifth Circuit in which the judge had an evidentiary hearing on the defense budget. She reduced the budget somewhat and then approved $187,000. The circuit reduced that by $100,000. So the total budget was around $85,000. Now to contrast that with a recent trial in Hawaii, where the defense was granted $1.4 million for defense investigators and experts. That's a factor of fourteen in terms of the disparity. This is a national embarrassment.

Judge Goldberg: Was that a death penalty case in Hawaii?

Kevin McNally: Yes. I'm only talking about death. That's all I know about. The Spencer Update in 2010 found a strong association between lower cost cases and outcome and it's critical that this Committee understand, that the resources and who the lawyers are, is directly tied to the outcome, life or death. Two essential points regarding the appointment of counsel. Number one, defendants in low cost cases were much less likely to have been represented by attorneys viewed as having distinguished prior experience. The funding in these cases is directly connected to who the lawyers are who are appointed. Secondly, judges in these low cost cases were significantly less likely to accept the recommendation of the Federal Public Defender Organization. The final thing I would say, putting aside these disparities is this Committee should recommend updating the research that was done in 2010 which ended with cases in 2004. It's been over a decade since we really looked at this question of funding in federal capital cases and there is much to study and we recommend that a study be conducted. Thank you.

Prof. Kennedy: Good afternoon. I'm Sean Kennedy. I'm a professor at Loyola in L.A. who actively mitigates death penalty post-conviction cases pro bono with my students. Before that I was a federal defender and I think I'm one of the only, if not the only appointed defenders coming from the ranks of a

Capital Habeas Unit. The Congress long ago allowed for appointment of counsel in habeas corpus cases and required it in death penalty habeas corpus cases. Despite that, the federal judiciary has created many administrative obstacles to federal defenders representing death row inmates.

It's a shame because . . . I'm sorry . . . it's a shame because those cases, capital habeas cases are often where some of the most important constitutional doctrines are litigated. I mean *Kyles v. Whitley*, *Brady v.* . . . well *Kyles* is a *Brady*. *McCleskey v. Kemp, Miller, L*. It's a shame that federal public defenders will be prohibited from doing that. Yet we have circuits who have unpublished rules or orders, banning federal defenders from doing that work even though it's a community with substantial experience and Capital Habeas Units throughout the nation and expertise and resources and independence to do so.

Even the federal defenders who are allowed to have Capital Habeas Units, the U.S. Judicial Conference has passed restrictions on their ability to fully and zealously represent death row inmates. I speak of a policy in which defenders are not allowed to proceed to state court in order to exhaust federal claims that they have already been appointed on without prior written judicial permission.

Many times the permission is not forth coming, but even if it were, it's a real threat to representation, because as in my papers I laid out, the law of federal habeas corpus has become so complicated and since the enactment of the AEDPA and the numerous supreme court decisions interpreting it, the decision to go back to state court is often the most important strategic decision of the case.

Yet counsel of record doesn't really make that decision. It has to be made by a judge under this administrative policy. I just really thank this Committee for the opportunity to implore the members to recommend that that policy be abolished or revised.

Dick Burr: My name is Dick Burr. I have been focused, my death penalty work has been focused since 1994 in Texas. I served during part of that time as a colleague of Kevin McNally in the Federal Death Penalty Resource Counsel Project and then since 2010, I've been a part of what we call a Regional HAT Project. The Texas Habeas Assistance and Training Project. Consulting with lawyers doing capital § 2255 cases in Texas.

What Kevin McNally said about who is appointed and the resources they have to work with are absolutely determinative in § 2254 cases as well. In Texas, things are changing, but until the *Penry* [*v. Lynaugh*] decision in 1989 and then the efforts by the Supreme Court finally to get *Penry*

enforced which went into the mid-2000s, the capital defense bar, trial capital defense bar in Texas didn't know what mitigation was and mitigation is the heart of capital defense. They didn't know what it was because it was precluded. Precluded from presentation and then consideration.

It's taken a long time for the Texas capital trial defense bar to understand the lifeblood of a capital defense effort. The other problem in Texas is, there is no public defender system that provides capital defense at any level. Although, at least there wasn't up until the late 2000s. At that point, an office for capital trial defense was created that accrued county by county contracts to provide capital trial defense.

Since about 2010, there has been a state capital writs office, which increasingly does better and better work, but there is no Federal Defender that can handle federal capital or capital § 2254 cases in Texas. There is no Capital Habeas Unit in Texas and so the § 2254 cases are handled all by appointed counsel. The problem that we have encountered with capital appointed counsel in these cases is that they do not understand the mission of federal habeas, which is to take into account everything there is to know about a case and bring it into the federal court system for litigation.

It is the last stop before the execution chamber, for all of our clients and many, many people, lawyers appointed in these cases instead treat them as another direct appeal. A direct appeal in federal court and they neglect to their clients great detriment, developing issues that have not been developed before, but are there to be developed. Developing issues that were somewhat developed in state habeas, but underdeveloped for a variety of reasons.

Working those cases with the notion that they have the gravest responsibility of any lawyer along the way. Who's appointed matters? We have worked time and time again with Texas lawyers appointed to these cases to try to train them to bring them to bring your own case conferences. Finally we've given up on training and we try to get lawyers to work with us one on one. At any one point in time there are 175 people on death row in Texas who are in the federal court system or passed the federal court system.

There are a lot of people and there are now eight members of the Texas HAT project, even with eight members we cannot begin to touch in a meaningful way, all 175 cases. We work with the lawyers who are willing to work with us and that is sadly only about half the lawyers appointed. We can make some difference when lawyers work directly with us, but no matter what kind of training we do, what materials we provide, how much exhortation we provide, many, many of the lawyers who are appointed

treat these cases as direct appeals in federal court and that is fundamentally what they are not.

The other problem is resources. Until the present chief judge of the Fifth Circuit came into his position, the previous chief judge virtually decimated the representation process in capital § 2254 cases, by cutting vouchers and denying tremendous amounts of resources. The example Kevin gave in the capital trial case has been replicated time and time again in § 2254 cases. What's happened is that ethic has filtered down to all the district judges and now, trying to get resources, $5000 or $10,000 or $15000 for a mental health examination is very, very difficult. It takes a lot of litigation to get it, because the other thing that's happened is the Texas federal habeas practice is now not to allow any of this to be done ex parte. So the state comes in, opposes every funding request and starts litigating procedural default issues or other procedural barrier issues, prior to the time that the resources were even gotten to fully flesh out the claims so that we can then argue to the court why they are not barred.

That has made litigation over resources very expensive because there is a lot of counsel time put in that litigation that is wasted effort, and in turn wasted dollars in terms of what the resources are that are needed in the cases. The combination of lawyers who seem impermeable to education and great difficulty in getting resources even if you want them, has created a system where by the mission of federal habeas has been decimated in Texas.

Could be solved by funding for capital habeas units in Federal Defender offices, but again under the previous regime of the previous chief judge of the Fifth Circuit that was not an option and we're hoping that that will change and that we may get capital habeas units in Texas. That would solve a lot of the problems that we face, but we're not anywhere close to getting that done.

Judge Prado: Thank you.

Ruth Friedman: Good afternoon. I'm Ruth Friedman. I manage the part of the federal capital system that deals with finding lawyers for prisoners on federal death row and habeas and working with the lawyers and training them. We set out in our submission a lot of the experiences that we've had over the last decade and I just want to . . . I guess make one point while I'm up here. Our system, federal death penalty system including in habeas doesn't look like the Texas system that Dick described in his testimony where the same person is missing ten statute of limitations deadlines and raising no claims that are recognizable in habeas.

It doesn't look like the Alabama system where I practiced for fifteen years. I'm licensed here in Alabama where in habeas we had cases where lawyers were paid $40 an hour for the work they did out of court, with a cap and where in state post-conviction I was paid $1,000 for the entire post-conviction process which could have lasted six, seven years. We don't have that system. But that said, I don't think we can be taking any solace from the system that we do have and that's what I want to talk about.

We have a system that looks in many ways. First of all that has the hallmarks of the same systemic problems that these state systems which people recognize as being problematic, have. Federal death row is 62% people of color, which is even more widely disproportionate than Alabama's is. We have people who are still tried in 21st century by all white juries, where nobody makes any objection. We have a very geographically problematic death row.

There are fifty states and almost half of our row comes from just three states. I could go on and on. There are problems all over. I just did a consult on a case the other day, a federal capital case where the trial lawyer slept through part of the trial. I don't think we can take the kind of comfort that people would like, when they talk about the federal system. Why do I mention this?

I mention it because it has implications obviously for the system of appointing and providing counsel for these lawyers. I also mention it because people don't necessarily know. There was a candidate running for president who shall remain unnamed who was asked about the death penalty recently and she said, "The state death penalties have a problem. I think there is discrimination there, but the federal death penalty I'm completely confident about that," and I found that a little disturbing.

But, she doesn't know and to be perfectly honest, until a decade ago I didn't know. Unfortunately though, now I do and I'm glad to be here to be able to talk about it. Let me give one example of one of the problems that we see. There is a federal death row inmate who was tried in 2002 and I say that just because it was not twenty years ago. He had two lawyers at trial, who did not raise the issue or explore the issue of mental retardation and intellectual disability even though it has been precluded always in the federal system from the beginning.

They put on no mitigation, none. In post-conviction, two lawyers moved for appointment who are very well regarded. Capital habeas lawyers in our community and the district court said no, he wasn't interested and he appointed a local lawyer who then said, I need some help. I can't do one of these cases by myself and so appointed another private local lawyer.

But they got almost no resources. In this case, but they were able to raise that their client was retarded, intellectually disabled, but no resources to prove it.

This is a guy who, and then the case was affirmed, affirmed ultimately at the Eighth Circuit. This is a man who has IQ scores in the 50s and 60s. Even the federal government has found only IQ scores that satisfy mental retardation standards. This is someone who couldn't pass the first grade, left school because people made fun of him all the time, couldn't tie his shoes until he was over ten years old, is still illiterate, and can't tell time. The man is mentally disabled. But because of his lawyers who didn't raise the issue and then his lawyers in habeas who didn't have any resources to present the issue, he's waiting for execution. That's the federal system that we have and that is not an outlier. I can go on and on. I will save you that. I will say that, I guess because I'm not running for president people don't ask my opinion on this too often. So I'm glad to be here today where you are asking. Because like my colleagues who spoke before me, I think there needs to be huge changes in the way the system of appointment of counsel and resources are delivered.

Until there is, we can't walk around and say "I'm happy with the federal system, it does a fair administration of justice in death penalty cases,' because I'm here to tell you it doesn't. And I look forward to talking more and answering your questions.

Mark Olive: Good afternoon. My name is Mark Olive with the Habeas Assistance and Training Counsel. A national program for training and consultation in capital habeas cases. I'll be very brief. It has been mentioned how difficult and complex habeas corpus law is and that is very true, it is. It is manageable however and people can learn it and people can apply it and people do. The new people coming into the system have to have training in it, but ultimately most of the habeas principles you can learn.

Unfortunately it changes so rapidly once you learn it, it is as if the ground is moving beneath you. And I'm sure the judges and the courts know that just as well. I have several examples, but I won't go into them now. Folks that are conversant in it would recognize *Trevino* and *Martinez* has been seismic shifts that stopped people mid-stream in their cases and so they had to retool. Part of what we do nationally is train folks with respect to changes in habeas and not just black leather old habeas law and it happens over and over again. It's one of the most volatile areas of the law. But notwithstanding the training that we might provide in these shifting times, that training is only as good as it being put into practice and being put into effect. And some of the things that you already heard I'll echo and that is that you have to have resources and you have to have attorney hours. With respect to resources, 18 U.S.C. section 3599(f) has a presumptive cap of

$7500 with respect to resources in capital habeas corpus proceedings. It is presumptive and I can talk a little later about what might have caused this. But CJA panel attorneys are seven times less likely to use experts in habeas corpus proceedings or even ask for them as our capital habeas units, where they have their own funding and they have their own experts. That's a problem that needs to be addressed. I believe if we amended that statue and had more education about its utility, there would be more use of it and more resources and I have cases to discuss to show what happens when you do have resources.

With respect to experts and resources, I would propose addressing that section. Of course that's a congressional thing, it would have to be a recommendation to Congress to do that, but I understand that could be part of the charge of this Committee. With respect to attorney hours, I was here earlier today and heard that in some circuits, if there had been voucher cutting, it was over and I have a colleague who I spoke with and he doesn't really want this to be necessarily publicly aired and if it's deemed pertinent I can submit it confidentially if that's allowed later, but here are some recent voucher cuts. Anecdotally I don't have this information first hand or the vouchers in one district.

Attorney fee of $50,000 cut to $25,000 or a 25% cut. A fee of $38,000 cut to $3,500, over a 90% cut and a fee of $126,000 cut to $30,000. A $96,000 cut. Now there got to be something going on there that doesn't meet the eye. But that's a lot of cutting and with that cutting it's very difficult to recruit new people or to have very efficacious representation with the people that are committed to do the work.

I think what Richard Burr said a while ago about, just a few seconds ago, about a Capital Habeas Unit in Texas is a good idea, but it's part of a broader problem and that is that the Fifth Circuit and the Fourth Circuit, and until recently, the Eleventh Circuit has not allowed Capital Habeas Units. At least not in Federal Defender offices, as opposed to the offices that are non-profits and so I think it'd be good during this session if we could to explore ways of perhaps changing that culture in the Fourth and the Fifth Circuit.

Thank you, your Honor.

Judge Prado: Anyone wish to start? I'll ask this one and I don't know if it's a question or more of a remark or what, but as an appellate judge I have not had . . . I was trying to think of any direct federal death penalty cases, but tons of habeas coming from state court and in reviewing the record and seeing the representation that these people got on state court, the frustration I guess is because you have the case law, is that it meets the *Strickland* standards, but if it was me on trial, this might be the last person I'd ever hire.

The frustration that they are not getting adequate counsel at the very beginning and then you get it over here, several years later and you're trying to second guess someone on the state court level who maybe made some bad judgment calls, but doesn't meet the standard and then that's magnified, because then you have the federal habeas lawyer not as experienced in federal habeas as they should be as you are telling me so it's a double problem because they were not good lawyers at the trials court level and now they are not very good at the federal habeas level. I'm sitting there, you already have a habeas law that is difficult and an uphill battle to deal with and now you're dealing with two sets of lawyers that have not been as good as they could have been and its somewhat frustrating to me to be in situations like that and I have law clerks that are reviewing these things that are shocked at the caliber of representation and the caliber of briefing that is done on these cases where people lives are on the line.

It's none of you all that are doing it, but I think it's an eye opener for some of my staff coming out of law school. They say, "gosh, if I were to do this in law school I might have gotten a failing grade and here it is in somebody's life and this lawyer kind of doesn't know habeas law." Anyway the frustration that I have is that if we did have proper habeas training or resource centers, or something, we maybe wouldn't have these problems or even staring back on the state level.

I don't know that we can do anything about the caliber of lawyers that are there in the first place, but on occasion I've had a case where they were pretty good lawyers on the trial court level and it makes my job a lot easier because they got good adequate representation on the lower level, but a lot of these people don't get good representation on the trial court level. I don't know if anyone wants to comment on that.

Dick Burr: The problem Judge Prado is, you put your finger on it and that is, so many people go to their deaths without having had any adequate representation anywhere. With issues that have gone uninvestigated that sometimes we later learn could have made a huge difference. I gave one example of a man who was executed in Texas just this past November, who had lawyers representing him, one of the lead lawyers had, at that time, fourteen § 2254 capital cases and about a forty case non-capital appellate case load.

He did no non-record investigation. There was a little bit done in state habeas, but there was a lot more to be done, and this client died with no lawyer representing him ever asking him, what happened? What was . . . how was the state's case not fair to you? He had some real answers to it. He had a case that was far less aggravated than it appeared to be, and it was never investigated and never presented to any court. That's the failing

of a system. If we're going to put people to death, we ought to be doing it fairly. Sadly, in Texas and in many other states, we're just not doing that.

Judge Prado: What else?

Mark Olive: I have a, could I? In Florida in the northern district, between thirty-five and forty individuals forfeited federal habeas corpus review because of the attorneys that they had in state post-conviction who couldn't calculate the federal statute of limitations. And the AEDPA is tricky, but it isn't that tricky. The Chief Judge of the district, Judge Rodgers, Chief Judge Rodgers, did a study, was deeply disturbed by these circumstances and got all the judges in the circuit together to vote to get, asked the Eleventh Circuit to change its policy of not having Capital Habeas Units in the districts within the Eleventh Circuit and they did change their policy and there now is a Capital Habeas Unit there.

That's a very stark and recent example of shifting from a CJA system in federal district court to a CHU unit in federal district court and it is roaring, doing roaring good work at the moment and making quite an impact. I'm not saying that all panel attorneys are incompetent. There are wonderful panel attorneys, apparently not in Texas, but there are. I'm not saying that the Capital Habeas Unit is the only way to go, but it certainly has proven to be a success of late in Florida.

Judge Fischer: Thank you and thank you all for being here. Ms. Friedman, I have certainly had my eyes opened much more recently than a decade ago, just a couple of months ago and what we're seeing is disturbing because of the nature and because of the breadth of the problems, and we're charged with coming up with some recommendations. I'd like to get from each of you if you have, and some of you have commented already both micro and macro. People have talked about for various reasons, about taking this whole system out of the hands of the judiciary and without . . . we haven't made any decisions yet, but that I think that is further down the road if it happens. What can we do now even on the micro? What small changes can we make that would make a significant difference? I'm glad to hear that some judges got together and made a change. Is it education of judges? Is it education of lawyers? Apparently some of them aren't listening.

You've great resources out there they are not taking advantage of. What can you recommend be done either through the Office of Defender Services or DSO or some maybe doable changes in legislation that would help sooner rather than later? Anybody? Why don't we start with you Mr. Valladares.

Rene Valladares: Yes, I think that two things. Number one, from the standpoint of our CHU, our Capital Habeas Unit, the one concrete thing that I think would advance this cause greatly would be the recommendation made earlier by Professor Kennedy and that is that we be permitted to go ahead and litigate our case like it should be litigated without any bureaucratic constraints, without having to go ahead and ask for permission to go to the state and that sort of thing. That's my first one.

Judge Fischer: Just let me intervene because I'd like to know how what your suggestion as to how we get to your recommendations. Is that something that DSO should get involved with going to circuits that don't approve them? Should the FPDs or CDOs be more aggressive in trying to do that? Where can we make the recommendation? How do we get that?

Rene Valladares: From my standpoint, I think that DSO certainly could be much more aggressive about this issue in pushing that ball forward. I think that that could certainly be accomplished. I can certainly tell you this is not for lack of trying in the part of federal defenders and our case would be very interested in that. It is a big impediment to the quality of the practice that we can render to our clients.

If I may go ahead and go to the other side of the coin and be on the side of the coin dealing with the panel. The panel I think and I am a firm believer that things do need to change at a big level. I already said that. I think that we need to go ahead and go with the recommendations issued by the Prado Committee and that sort of thing. There is amongst the panel, I believe that there ought to be at a minimum, a presumption that if a panel lawyer submits a voucher, that that voucher should go ahead and considered to be a valid voucher and that that panel lawyer ought to not be so concerned as to a voucher being cut. It is this individual's livelihood that is really at stake. I think that the voucher cutting is something that even a ripple, a small pebble being dropped in the pond creates huge ripples in the way of chilling effect for panel lawyers putting in what there would be, what their concern would be hours and would be further cut. They have to go ahead and they have to keep their families. They have to maintain their families and all that. I think that that would be again a very concrete recommendation that I would make.

Judge Fischer: Thank you. Mr. McNally, do you have something?

Kevin McNally: The universe of direct federal capital prosecutions is much different than the universe of state death sentences. It's frankly more manageable. We've already made our suggestion about a national committee to manage the defense function in these cases and it's manageable in terms of numbers because for example, recently the department of justice created a fast track

approach to the decision on authorization, so the number of cases you would have to actually look at is quite manageable.

The advantage of this could be efficiency. It could save money first of all. It could create a consistent approach to these cases. It could allow the committee members to develop an expertise that really is lacking when you have individual judges in different parts of the country just appointing the next guy that they know and then approving this or that and not that. There would be consistency across.

There would be equal protection of the law and when you're talking about the ultimate punishment of life and death, what is more important? If we're going to have a national death penalty, let's treat people roughly equally and that's not going on right now.

Judge Fischer: Professor Kennedy.

Prof. Kennedy: I appreciate the question. I think the Committee could shine a light on the unorthodox bans on Federal Public Defender offices from establishing CHU's in the Fourth and Fifth Circuits. Depending on the scholarship that you rely on, between 75% and 90% of all executions in U.S. history occur in the American south. The idea that the Fourth and Fifth Circuits would not have professional Capital Habeas Units demonstrating leadership expertise and independence in such an important area of law, is startling, in my opinion. The next thing is . . .

Judge Goldberg: Sir, before you get to the next thing. Could you explain to me how that comes about, the ban?

Prof. Kennedy: I actually . . .

Judge Goldberg: Logistically how does that occur?

Prof. Kennedy: Judge, I actually can't explain it because the bans don't work like any federal rules that I have ever experienced. I took a case at the request of AO officials, a capital habeas case in Texas and I was told that the federal defenders aren't allowed to do death penalty post-conviction in Texas. I searched up and down for the written rule against defenders doing it, and I was never able to find it. An inquiry was made to the circuit executive and the answer was that the rule was unwritten. That doesn't sound like a federal rule at all.

Judge Goldberg: Logistically, a case comes to the Federal Defenders Office and someone commits a murder, is accused of committing a murder and they can't afford a lawyer and they are appointed a defender and then the prosecutor

says this is death case. How is that case taken away logistically from the defender's office in those circumstance?

Prof. Kennedy: Well, I don't think there's a ban on direct federal death representation. But if the capital habeas case comes in as a final judgement is affirmed by the state Supreme Court and it's that clock is ticking, Federal Defender offices are told that they can't take it because there's a rule against them doing it so they refer it to the panel. In the Fourth Circuit, it's . . .

Judge Goldberg: Both direct federal charges, federal capital charges and habeas is the unwritten rule?

Prof. Kennedy: The unwritten rule is just as to death penalty, habeas arising from state courts.

Judge Goldberg: Ms. Myers, I don't mean to put you on the spot but you're a public defender in Texas. Do you know the answer to this question? I don't. Is there a rule and I know it's hard to get you on microphone here to put it on the record, but do you know why public defenders are . . . is there an unwritten rule about getting involved in these cases?

Margy Myers: I talk a little bit about in my written testimony. Historically we did not want to because we are overwhelmed and we didn't have staff. In terms of a CHU, I think at least the previous chief made it very clear that there would never be a CHU in the Fifth Circuit and when we met with Joe St. Amant a year ago and proposed a Texas CHU, we were told it was DOA.

I think that Professor Kennedy is right, it's unwritten. I don't know that there is a specific ban on if my office wanted to do one. I know of at least one office that is doing some, but we don't have the staff or the expertise. I don't have anybody whose death certified in my office, but it's clear that as far as I know, Judge that the Fifth Circuit has made it very clear that there will not be a CHU in the Fifth Circuit.

Prof. Kennedy: The Fourth Circuit while, there is no rule, has issued an order against it and of course the problem with it is at least when there is a rule, there's publication and comment, but the unorthodox bans on federal defender doing it in areas where it is needed most to effectuate the Supreme Court Eighth Amendment jurisprudence of heightened reliability in capital sentencing is really a sad statement on the quality of death penalty representation in America.

Those defenders then who are allowed to do it, Judge, should be allowed to do it the way the states lawyers do it. In capital habeas offices where they are allowed, the state's lawyers go to federal court or state court as they need to. They use the forum in the law and they make the strategy

decisions on behalf of their client as they should to defend the death verdict, but the defenders are hamstrung by a policy which essentially supplants counsel of records necessity, in my opinion, of making core strategic decisions in the capital habeas case and gives it to the court.

Long ago the U.S. Supreme Court in the *Scottsboro Boys* case, *Powell v. Alabama*, said the court can never fulfill the role of appointed counsel. It is not the court's role to be appointed counsel and it can't satisfy it. When a judge with almost no information about a particular capital habeas case and where one should go to fulfill and finalize the claim so that it can be heard in some court, should not be making that decision. It should be the decision of the Federal Public Defender appointed to represent that counsel and I know firsthand how hard this was. I was the lawyer who lost in *Cullen v. Pinholster*, a key U.S. Supreme Court case on this issue. I proceeded from state court into federal court fully exhausted under traditional federal exhaustion doctrines, but we did what good lawyers do in federal court. We played to win. We put on the best hearing that we could. It involved some new experts. The judge, the district judge said that it didn't violate exhaustion.

The U.S. Supreme Court said while it doesn't violate exhaustion, every piece of evidence presented to the federal court must first have been presented to the State court. These decisions that one makes are incredibly difficult strategic decisions where you never know if you're going to be right. I have scores of cases where I wince about strategy decisions in habeas that I made that were later proven not to be the best decision because as Mark said, the law is constantly changing.

It is not appropriate that those restrictions on federal defenders exist and the judicial conference recognized this. Originally the Defender Services committee in the late 80s brought this to the Judicial Conference saying federal defenders should not be able to go to state court and it was turned down. Then Judge Emmett Cox and the Defender Services committee resurrected the issue in the Defender Services committee as applied only to public defenders offices and did the exact opposite of what happened in the full Judicial Conference and applied the restriction despite the fact that the full conference had denied it only months before.

Judge Fischer: Mr. Burr.

Dick Burr: For Texas, the best and most efficient and economical solution is Capital Habeas Units, but there seem to be enormous political obstacles, judicial political obstacles. In the interim, two things could be done. One would be for federal district judges in appointing counsel to pay attention to recommendations from Texas HAT counsel through the federal defenders.

We're doing that and sometimes those recommendations are accepted. Many times they're not.

Judge Fischer: Are explanations given when they are not?

Dick Burr: No. But if our recommendations for counsel were accepted, we would at least have counsel we could work with who know what the mission is. The second thing that could be done would be to give Texas HAT counsel the ability to work on budgets. Similar to what Claude Kelly was talking about this morning, their office doing in budgeting in capital cases. I guess it's all cases for panel cases so that there are at least a group, the Texas HAT Counsel, we all have twenty to forty years' experience doing death penalty defense work and we understand the notion of stewardship.

We are a cluster of people who could do budget reviews and provide informed recommendations to judges. If those two things happen—take our recommendations and give us some real role in reviewing budgets—things could work out better in the interim. I still think that's . . . if we had every lawyer appointed in Texas § 2254 cases doing the cases very well and litigating as well as it could be done, than it's going to be a lot more expensive than a CHU, or than several CHUs. It just will be. It's not the most efficient way to do it but it would be a way that at least would honor people's right to counsel.

Judge Fischer: Thank you. Ms. Friedman

Ruth Friedman: Judge Fischer, I'm going to make two points about the population I represent. The first is that there has to be some institutional defender whose purpose is to provide representation for the people on federal death row. We've talked about a defender tries to take all the cases that they can for felonies in their district, or a CHU will try to take all the § 2254s if they can or the amount that they have the staff for if they're not conflicted.

There's no entity whose purpose is to do that for federally death sentenced inmate. My small staff can't be doing that. Instead, if you think about appointment, it's an extremely balkanized system where each, even though it's a federal system, even though everybody is tried under the same statute and even though we have the Department of Justice who is litigating against us in all of these cases, it's up to each district and each individual to decide who to appoint.

Where do they go? There isn't a place to go that would be the natural place to provide this kind of representation and there's also not the expertise. Instead our small office goes about looking all over the country for people who may be able to do this, and we always go to some kind of institution because these cases are way too big. They are huge for local

appointed lawyers to do it or individual CJA panel lawyers to do without some kind of institution.

It's not the obligation of any of these institutions. They have other obligations. They are there to represent the felonies, or even the trial . . . capital trials in their district, or they have Capital Habeas Units, which is where we go, but their first requirement of course is to satisfy the needs in that particular district. Who is supposed to satisfy the needs for the people on federal death row? I think there needs to be an institutional defender that does that, that has the resources to do that.

With that is the second point and that's appointment authority. Judge Prado was talking about having available counsel to represent people in § 2254 cases and that is obviously a huge problem in Texas and elsewhere. We have tried very hard and in each one of the cases that comes along, to find a cost effective, qualified team ready to go within the time period, and a judge can and has just said no. The point that was made earlier, no reason has to be given.

Not only does no reason have to be given for why they are not appointing the team, but they can wait. We try and get all of these, the statute of limitations goes in these cases so quickly because they are so big and there's no tolling provisions—statutory tolling provisions—and so we get these ready. We get a team ready and it takes a lot of work and we give a lot of thought to it and it's not easy because it is nobody's realm to do it and if a judge wants to sit on that, he or she can and just eat into that statute.

They are not . . . they don't have to tell us why. They don't have to tell us in the appellate court why and over and over we see with these examples on federal death row for the problems that that causes. The same is true then goes towards the resources. I think you're hearing from me the same thing you're going to hear from everyone else, which is we need an institutional defender that has qualified counsel, that has resources, and that can make the decisions of who gets to be appointed.

Judge Fischer: Thank you. Mr. Olive.

Mark Olive: Judge Fischer. That is my answer, is doing that which would make resources more available. If I could answer Judge Prado's question before I directly answer your question about the history of why the Eleventh Circuit didn't allow those resources to be developed in Florida, it goes back to 1995 and I heard your comments earlier this morning Judge. I too remember when there was no Eleventh Circuit in 1981 or so in 1980. But now going to 1995, a small federal defender office in Tallahassee asked . . . and this is before there were any CHU units.

The Capital Habeas Unit was an unknown phrase. Just asked the Eleventh Circuit to hire a person to do a couple of § 2254s and the circuit approves hires and approves attorneys and the circuit said no, by way of a letter from the Chief Judge; Chief Judge saying "there'll be no attacking of state convictions in Federal Defender offices in this circuit." It wasn't until ten judges unanimously, including senior judges in the district asked the circuit in 2013 or 14 to change that policy because of the missed statutes of limitations and other problems that that policy was changed, so that's where it started.

It's changed episodically. You still have to apply individually to get another. There hasn't yet been another Capital Habeas Unit. Directly responding Judge Fischer to your question about what I would change, I'd go back to what is really a very modest, but which could have great implications change and that's to change § 3599(f) with the limitation. To give you an example of *Brumfield v. Cain*, a case in which the Supreme Court recently granted a habeas corpus relief after the district court found that the defendant was intellectually disabled or mentally retarded and thus his execution was barred under the Eighth Amendment.

There was no hearing in state court and when the case got to federal court, the judge did order a hearing. The type of hearing that the judge received was a full, fair, expensive hearing and it was funded and put on by CJA counsel but also co-counsel was the Federal Defender office. If that case had proceeded with CJA counsel on a § 3599 with a presumptive cap of $7500, I doubt the same result would have occurred, but the problem is by putting the dollar figure at $7,500, it implicitly, if not explicitly, undervalues resources in a case.

A person who takes a case in the federal court who is CJA counsel and sees that probably has been denied funds before under it, doesn't think $6500 will do anything and sees that that very dollar figure devalues resources. Just evaporating that 75 or raising the $7500. I know this committee can't do that directly, but certainly it could be a recommendation that might make it across to the capital.

Judge Walton: Mr. Valladares, you indicate that you believe this grand structural change needs to occur. Can you enlighten us as to what you would envision that structure needs to be once that change was implemented?

Rene Valladares: Yes, I do your honor. I think it will be of generally two types. One of them with some variations, but in essence the first one would be the one that was generally recommended by the Prado Committee in 1993 which would be basically a national center that would be comprised of a board. That board would have regional or local boards depending upon the necessity of the geographical place. Under this system basically still the

system would remain under the wing of the judiciary, but it would be an independent agency, even to the point that we could, the agency would have the power to deal with the budget and that sort of thing. I think it would eliminate a lot of the problems that we currently have dealing with the appointment of counsel, the removal of counsel from the panel, issues dealing with voucher cutting and the like. I think that, again the Prado Committee recommended that twenty-five years ago, near twenty-five years ago. We're still talking about the same problems. I believe that that in and of itself shows that we need to have something like that.

There would be a second model, which would be a more aggressive independency that would be totally removed from the judiciary. It would be in the way of an independent corporation such as, for instance, PDS or something to that effect, but again that would be removed from the judiciary. But even under the first model that I was talking about, which is more akin to what the Prado Committee recommended, I think that we would have significantly more independence. We would not have the judiciary micro-managing whether a panel lawyer requires to have a certain expert or a certain investigator and that sort of thing. I just do not think that that is the province of the judiciary to go ahead and get involved at that granular level on decisions dealing with a case. In short, Judge, those would be the two big frameworks that I would envision.

Judge Walton: I don't know if anybody else has any views in reference to that. I'm very sympathetic to the need for a greater independence of the defense function, but I guess one of the concerns I have is whether from a fiscal perspective you all would fare as well as you do now. I understand you need more and I appreciate that. If that independence was created, in the current political world that we live in, do you think you would be able to get from Congress more than what you get now?

Everybody admits that more is needed. That's a real concern I have because I don't think there is the level of sympathy there should be in the political arena at least in Congress regarding the Sixth Amendment.

Dick Burr: Your honor.

Judge Fischer: Don't everybody speak at once.

Judge Prado: Say you were asking for money and we were a committee from Congress, how would that go? Along those lines, none of you have put it pen to paper, but if adequate resources were to be given to death penalty issues, do you have a general figure of how much additional funding it would take to adequately service CHUs and training on habeas and things that you really think need to be done?

I know this might be above your grade level. You're more concerned about your regional areas, but on a national level, would you have any idea of how much funding would be required to adequately service people on death row?

Dick Burr: The Defender Services Office certainly knows how much is provided for CHUs right now. There certainly could be some work done with DSO and some of the folks experienced in the field to project those kinds of numbers. I don't think anyone of us could do it. That's my guess. But one of the problems, at least within our domain, our part of the country is that DSO says they have plenty of money to start Texas CHU's, more than one.

That's not the problem. Money is not the problem right now. The judicial will to allow it to happen is the problem. We don't have any political sway with the judiciary. We don't . . . we aren't friends with you all. I'd love to be, but there is a divide between you and us and we'd love to cross that divide if somebody could help us do it, because I think we could help persuade people that this political position should be changed.

Reuben Cahn: On a more micro level, on the very tentatively proposed Texas CHU, did DSO ever do a cost estimate on that CHU, annual budgeting?

Dick Burr: I don't know, Reuben. We have had heartening conversations with people at the DSO about this. There's kind of a loose working group of federal defenders and Texas HAT members and DSO members talking about this, but we are way far away from talking about a budget. Our plan right now is, who are the district judges that we can persuade to lobby with the circuit judges to open the door to a process of planning?

There's no sense in planning while that door is shut. But we've been assured by the DSO that there is ample money to start up Texas CHUs based on their experience and startups in other places and certainly the most recent in the Northern District of Florida.

Katherian Roe: Mr. Burr, I'm very unfamiliar with this whole area of law, so excuse my ignorance, but what I've heard . . .

Judge Prado: Why don't you do a death penalty case?

Katherian Roe: I'm perfect for Texas, Judge. What I've heard over the last couple of days and in other hearings and from reading, it sounds like if you're in Texas and you receive the death penalty, that you're going to get an attorney who's appointed by the court and an attorney who is maybe not as well trained as others, that your chances of having a defense if you will or an appeal that really has significant resources or the necessary resources is

unlikely because Texas has apparently the lowest cost. They get done quickest. They're fast. I think one of the judges earlier had said something like it's just different in Texas, things go faster in the death cases, but no understanding as to why. What is the reluctance, if you know, if you have any feeling for it, other than just losing local control and maybe the machinery working efficiently and quickly to get the person to the execution? What's the reluctance in bringing in a CHU?

Dick Burr: I don't know. I can say what the former chief judge of the Fifth Circuit often articulated. It's been echoed here and there, but there is some sense that this work is partly, should be partly pro bono. I think that comes from a view of maybe fifty or sixty years ago when capital defense was done quite differently. I don't know. The person who says that is not that old, but that's what she has said. There's that sense.

There is also the sense that, again from the same chief judge that Texas lawyers are quite capable of doing these cases. That's just not true by any objective measure. It is just not true. There are . . . at least half the records that are made in capital federal habeas cases in Texas are made solely on record based issues that were exhausted on direct appeal and those issues cannot prevail. They just, they never do.

The issues that prevail when they prevail are based on new evidence about ineffective assistance of counsel, about *Brady* violations, or about science that has been eclipsed by advances in science, that amounts to having false testimony at the trial. Those are the areas that get relief for people and those are the areas that are largely unexplored in the whole Texas process. It's doing better in state habeas with the Office for Capital Writs. That's changing. But the cases that have not been the beneficiary of that office and still most of the cases in federal habeas have not been, are cases that were under investigated all along the way. Trying to get lawyers to see that and then trying to help them get the resources to do that, is nigh on to impossible. I know I sound like a broken record and I'm sorry, but I can't explain what is really underneath this reluctance to do it other than what I've said.

Judge Prado: It's a difficult situation. I think from a judge that sits on the court and I've been there almost twelve years, nothing has ever been presented to me or to us as a court. It has never gotten to that stage yet where the judges discuss and make a decision. I think there's a chilling effect and a discouragement from even making such a proposal that gets to you before it even makes it to the court.

Now, more than likely there is a prediction that if the court were to vote, it might probably, would turn it down, but it's never gotten to the point of the court, a group of judges sitting down and discussing the pros and cons

and deciding, if this proposal that's been made to us is a good proposal or not. I think you're discouraged from even getting that far, but perhaps if you get to the point of getting it before the judges, at least it would be discussed and open and we'd know for sure if the votes are there to establish a CHU or not, but it doesn't even get to that point.

Prof. Kennedy: I just hope that the discussion can occur because the chilling effect reverberates far beyond the three states of the Fifth Circuit. It's to the point where a very non-mainstream view of federalism is advanced to the point where the defender community, so many defenders when I was a federal defender, were under the impression that they were doing something wrong, that one has to do under the law to properly represent the client in capital habeas.

I list all of the U.S. Supreme Court cases. Mark has already named some, which require an integrated state federal approach in order to properly represent the client in habeas, but because whenever anyone tries to talk about it, there is such a hue and cry in the AO or the Judicial Conference or somewhere in Washington that we get these policies that apply across the nation and suggest that young lawyers vigorously representing clients who need representation the most are doing something wrong and the chilling effect of that and the low quality of justice that occurs when people think that way, is something that I hope this Committee will try to remedy.

Reuben Cahn: Can I ask you, if I understood your submission correctly there are two things standing in the way of proper representation, at least in regard to this particular issue. One is fairly poorly reason general counsels opinion and the other is a Defender Services committee policy. Is that right? There's no Judicial Conference policy that bars defenders from going into state court when it's subsequent to the filing of a federal § 2254?

Prof. Kennedy: This is true. The original policy was debated before the full U.S. Judicial Conference and there were proponents for a ban on it, but they lost. The full U.S. Judicial Conference declined to accept that. The issue was then resurrected by the then head of Defender Services committee Judge Cox who said, "even if we can't regulate everyone, we can regulate the federal defenders and we're going to prevent the federal defenders from using federal funds to litigate in state court until and unless they receive prior written authorization from a judge." That has been the case since 1998. The case law since '98 has more and more required an integrated approach, but it's not the U.S. Judicial Conference. It's the Defender Service committee policy.

Reuben Cahn: Has this issue been raised again post-*Pinholster* with the DSC, the Defender Services committee?

Prof. Kennedy: No, it hasn't.

Judge Walton: Of the significant cuts that you referenced, were those capital cases?

Prof. Kennedy: They were.

Judge Walton: Was there any written explanation provided by the judge as to why those significant cuts were justified?

Mark Olive: [INAUDIBLE] $100,000. Those were 2 that were a 50% cut and a 90% cut, I believe there was no explanation in the $100,000 cut, there may have been.

Judge Walton: What circuits where those? Do you know?

Mark Olive: The people who gave me the information prefer that it not be said in public because the cases are ongoing and they fear repercussions. They're more than happy to submit something if they could do it in camera, but they prefer not to complain and also these are under seal, some of them.

Judge Cardone: [INAUDIBLE] could I ask you to submit that confidentially?

Mark Olive: Absolutely or I will have, in collaboration with the person who gave me the information if that's permissible. Thank you.

Judge Walton: Was there at least an opportunity to be heard?

Mark Olive: No. No, sir.

Judge Walton: Should those requirements be something that we recommend that there be an opportunity to be heard and that the explanation be in writing as a predicate for reducing the voucher?

Mark Olive: I would advocate that and also an appeal process of some sort and that it be expeditious. I heard this morning a local judge, a federal district court judge saying that there was a method for objecting to a $200 reduction in a voucher. Nobody is going to take the time to do that. This vignette of the $100,000 according to the person who told me about it, the attorney lost her home through a foreclosure after this happened. That's a fairly dramatic and maybe not cause and effect story, but the appeal process should be expedited, I would think.

Judge Goldberg: Mr. Olive, while you have the mic, the legalese technical question here. I have 18 [U.S.C.] § 3599(f) pulled up here. What specifically about that language would you suggest that we change? The summary is, "The court may authorize in a death case investigative expert fees" and you've been

talking a lot about that statute. How would you recommend to Congress that that be changed, specifically?

Mark Olive: It would not be presumption. It would not be the district court judge would have to approve over that and then have the circuit also approve over that. It should be . . .

Judge Goldberg: Would you change that "may" to "shall" authorize?

Mark Olive: Could you read it to me? I'm sorry.

Judge Goldberg: Sure. "The court may authorize the defendants' attorneys to obtain such services on behalf of the defendant." It sounds like you're saying, make the language stronger, "shall authorize" and cut out the layers of checks of things that you need.

Mark Olive: Right and the discretion of the judge, district court judge.

Judge Goldberg: Okay, and I have a question.

Rene Valladares: Yeah, go ahead.

Judge Goldberg: How do you pronounce your last name?

Rene Valladares: Valladares.

Judge Goldberg: Valladares, I wasn't even going to be close. I have to first, it's such a serious topic, so bear with me for a second. I have to commend you publicly on your letterhead your . . . is that a ram here?

Rene Valladares: No, it's actually, that's a big horn sheep. That's a big horn ship is a state animal or mammal.

Judge Goldberg: My apologies. Just as an aside …

Rene Valladares: No problem

Judge Goldberg: No. I really like it. I was complimenting it.

Rene Valladares: Thank you very much.

Judge Goldberg: It's very dignified. When I was trying cases as an aside, was in one of those just incredibly contentious trials when I really didn't know that well. I was like, what, he wouldn't stipulate to anything. "Will tomorrow, will the sun rise?" "No, absolutely, we will not stipulate that." I went on and I looked up the law firm. I didn't recognize the lawyer and the law firm

comes up and their mascot was a snarling pit bull. I really have to commend you on this.

Judge Prado: It used to be a slot machine, but they turned.

Judge Goldberg: I have to say when we talk about this topic, I know you folks, a couple of you appeared before us previously, just a little warm up. I have to take a second and say, I so respect the work that you folks do. It's so complicated. At times we get together with judges and we talk about "Oh, this case is complicated and that and this patent case is really perplexing and so is this anti-trust case." Not only is this work so important for obvious reasons, but it's really complicated, all the layers that you have to go through. I just want to say I really respect what you do. One more question for you, or actually my first question for you. On your independent entity, who do you believe should fund that entity? I thought I heard you say it's underneath the judiciary. Is the funding coming from Congress to the judiciary and then to you?

Rene Valladares: Yes.

Judge Goldberg: That addresses or maybe does address Judge Walton's question of, if you're out there on your own, how are you going to fare with Congress? It was the silence here of all these trial lawyers and no one had an answer to that question. Is that how you envision the funding to occur?

Rene Valladares: Yes. That would be under the model that again is essentially what the Prado Committee recommended. It would be, again this agency would be part of the judiciary and that takes away from the concerns that Judge Walton had, or expressed.

Judge Goldberg: If you want to create independence from the judiciary, but yet you need money from the judiciary, how do you square those two concepts?

Rene Valladares: I think that the agency could deal with it. Again, this is something that would . . . that very point is something that would have to be studied certainly by this Committee in great detail, but as I see it, at least this independent agency would have much more of a direct voice to deal with Congress directly as opposed to having to go through the Judicial Conference to achieve that.

Judge Goldberg: What do you envision this independent entity would interact with congress on, on what topic?

Rene Valladares: I think that on a whole variety of topics …

Judge Goldberg: Everything except funding?

Rene Valladares: No, I think on funding too, honestly on funding too. I think that it would deal with Congress also with the issue of funding. There is a concern that if, and I'm sorry. Go ahead.

Judge Goldberg: I thought your model is we're independent, but connected to the judiciary just through funding. Is that your model?

Rene Valladares: Again, I think Judge Prado would be in a better position to explain to me how.

Judge Prado: We're talking something like the Sentencing Commission or the Federal Judicial Center where they have their own separate board.

Rene Valladares: That's right.

Judge Prado: It's not a committee of the Judicial Conference. Right now, the Defender Services committee is part of the Judicial Conference and it's made up solely of judges, part of the judges, and you're suggesting a separate board that's somehow independent of the Judicial Conference?

Rene Valladares: Correct. That's exactly correct.

Judge Goldberg: When the funding, I should know this, but the funding for the Sentencing Commission comes from where?

Judge Prado: From the courts.

Judge Goldberg: From the court, okay. That would be the insulation, in addressing Judge Walton's concern, for you having to be lobbyists so to speak, to go to Congress directly and say fund us?

Rene Valladares: That's correct. Yes.

Reuben Cahn: Do you want to avoid defenders being lobbyists? There's a strong view among some defenders that we're better able to advocate for ourselves than anyone else is.

Rene Valladares: I'm sorry I didn't mean to cut you off.

Reuben Cahn: No. Is it your position that defenders should be barred from lobbying, advocating for their program, or do you think they should be freed to do that under the system you'd propose?

Rene Valladares: No, I think that under this system, we should be allowed to go ahead and lobby. Frankly, I feel much more confident as a defender to have folks such as yourself or other colleagues of mine dealing with Congress. I think

that we're exceptional advocates. I think that we have exceptional advocacy skills in our system. I'm very confident we can go ahead and deal directly with Congress successfully.

Prof. Kennedy: I agree. I was a federal public defender for a long time. I was proud to advocate for funding issues for my office. In any forum, including the Beltway because we were a great deal. I felt like I had young people working big firm hours for me for small amounts of money, relatively to what they were doing because the people at that office were not focused on making a bunch of money or checking a time clock.

They were pursuing a deeply felt mission and we were a great deal. Often, the judiciary or the AO really subjects defenders to a certain style that may work for the federal judiciary, but doesn't work and really shouldn't work for something like a public defender office.

Judge Goldberg: Ms. Friedman, I noticed in your bio you actually testified in front of Congress in 2005 regarding . . . you testified to convince them to not cut back on the availability for habeas relief for criminal defendants. How did that go?

Ruth Friedman: We won, so I guess it was effective.

Judge Goldberg: Congratulations. Since you've had experience, what would be your views on going to Congress on funding, more funding for what everyone's been talking about?

Ruth Friedman: Two things: it is scary. I don't think any of us knows really where we're going to do better and I think it is scary. On the other hand, absolutely. I'd like to be able to lobby. One of the reasons is we know this stuff. This is what we do day in and day out and we can talk about it. That happened a little bit during the sequester. We can talk about what it is we do. This happened actually when we were, when you mentioned this testimony. It's because I know habeas really well that I can answer the questions and that we really are in a position to do that, so absolutely. I think we would like to be able to talk.

As long as I have the microphone for a second, I'd like to just turn it back to federal cases for just a moment. Because Kevin McNally mentioned that it was manageable and I agree, it is manageable. Judge Prado, you asked about how much it would cost. I don't have a number for you, but someone could come up with a number because we know how many cases there are on the rows and what we're dealing with in habeas. It is manageable if there's a will to do it. The way it is now, it's almost, I think, there's an out of sight about federal death row as if it's being taken care of by somebody else or the trials must have been fine and so we don't really

need to worry about it, but we do need to worry about it. I think what we've got a system now, which whoever is funding it, where we just go to an individual judge who was the person who tried the case, that's the way the statute is written. That's the way the statute is, but that judge can decide who gets appointed in post-conviction, decides how much money they get and if he wants to appoint or she wants to appoint people who don't know how complicated this system is, who don't know what they're doing, who don't have time to learn it within the year, and then they don't get any services, and then a certificate of appealability isn't granted, and then the circuit doesn't grant one, what kind of review has there been?

There is no post-conviction review under that circumstance. I think the system is much more manageable in federal because it's a smaller, it's more contained, but whether it's funded through the judiciary or it's funded through the Congress, and that's a big if, there's got to be a will to do it. I hope that we don't forget the federal system in that, thinking that it's doing fine, because it's not.

Kevin McNally: On the federal capital side, I don't think the issue is the amount of money. It's how it's divided up and who divides it.

Judge Walton: As far as the litigation of federal capital cases, how long are we talking about in general from beginning to end? In that regard, is there a problem with interim vouchers being approved?

Ruth Friedman: Well, if you're talking about post-conviction, there's…

Judge Walton: I'm talking about, both when the case is . . . a capital case prosecuted in federal court, and in habeas.

Ruth Friedman: I think if we have panel attorneys and I think panel . . . it's a problem for these § 2255s to have panel attorneys to begin with. I think you have to have interim vouchers or people can't pay their rent.

Judge Walton: Is there a problem with getting interim vouchers?

Ruth Friedman: Is there a problem? It really varies from district to district, but I have to tell you since our project has been around, we have worked assiduously to bring in defenders and sometimes big law firms, but that's getting much more difficult. Law firms have to be paired with habeas experts because it's a complicated system and they may not have any experts in that field and usually don't. Some of them have been wonderful to step up, but that's getting much more difficult.

We see less of that in terms of voucher cutting because we're putting on fewer and fewer attorneys and it's a completely, as Kevin said, a

completely regional answer. The entire federal death penalty is done regionally. You can be convicted of the same crime in one state versus another state, though with a federal offense and the kind of process you get, particularly in post-conviction, is completely different.

What kind of lawyer you get, whether it's a lawyer with resources and whether you get a hearing, whether you get any discovery et cetera, is completely variable. But I think the basic answer to your question is, we are moving as far away as we can from trying to rely on solo practitioners. If for no other reason, these cases are enormous.

Reuben Cahn: Can we go back to the recommendation you made? I just want to make sure I understand you. It sounded like possibly you were recommending that there be a standalone project solely to do capital § 2255s. Are you recommending that over tasking the CHUs that now exist with having an explicit mission of actually doing § 2255s as well as § 2254s.

Ruth Friedman: I think we could do it either way, but there has to be an explicit mission because it's nobody's explicit mission right now.

Reuben Cahn: Right.

Ruth Friedman: What happens also is there's got to be some understanding, that we should be able to go into court because we can recruit a defender from Minnesota or from Philadelphia or from wherever and the district court can say, "I don't want you." There has to be some understanding that you sometimes do a lot better by having somebody from out of district. There are a lot of reasons to do it in these capital cases, in these § 2255s. I think we could work it out either way.

The benefit of having a standalone is that that's what comes first. Our cases don't come first really anywhere except for our project essentially and we're much too small to represent sixty people.

Katherian Roe: There also seems to be a new issue that's kind of rearing its head with the § 2255 and the issue of institutional program and that being, you said that you're starting to have trouble getting law firms to do the work, and that you like to rely on defender programs because there's no unit just for you. Now, there's the issue of the defender programs starting to back away because of the new work measurement formula. Can you explain that and your concern about that?

Ruth Friedman: Sure, to the extent I understand it. Talk about complicated. But my understanding if somebody gets credit for taking one of our cases in the year that they get it and so they get . . . I don't know how the credit system works exactly. We were not part of the work measurement study at all, but

what happens then is with a capital habeas case, they do go on. They can go on for a number of years.

Certainly, the first year that your statute of limitations is running is going to take a lot of time and money. Whether that's in the same fiscal year for which you get the credit from the Administrative Office, it may not be. But then you may find that you've got an evidentiary hearing to do, or you've got a series of hearings to do, or you've got a tremendous amount of discovery to get through. But, you get no more credit for the case and your number of lawyers in your staff as I understand it, is dependent on how many cases you have.

If you get no credit and you need a lot of staff in these cases to begin with, having our cases is a suck on the caseload of the attorneys, a suck of time and energy, away from the attorneys who've got felonies et cetera, et cetera, to do. That goes back to the point of, if it's nobody's responsibility, then the rules that work all around it are not going to be to the benefit of this population, which I have to say I think gets sidelined.

Our project was started when there was already a sizable row. One of the reasons that we do what we do in this project is because a lot of those people had lawyers who meant well, who really cared about their clients, but they didn't know how to litigate a habeas case. A lot of these people are again coming to the end of their appeals without issues having been raised for them.

Reuben Cahn: It seemed to me though when I was listening to your testimony also, and just to play devil's advocate, that a cogent argument could be made for dumping all this money and effort into the trial side, that so much of what we see is because no decent work was done on the trial side.

Ruth Friedman: I've been a habeas lawyer for twenty more years then I'm going to tell you and that's always the question that comes up. People would say to me, "Why don't you do trials?" If nobody got death sentences, we wouldn't have to worry about post-conviction. Yes, you absolutely have to be putting those resources into trial, there's no question, but it goes down to some of the same fundamental questions. Who's making the appointment decisions and who's making the funding decisions?

Kevin's testimony talked about death sentences coming out where there's a lot less funding given. That's the 2010 Spencer Study, Spencer Update and where the recommendations of the defender aren't followed. You've got a built in problem right there. If you're going to have habeas corpus, you've got to have the resources and the personnel to do it. Mark has talked about how complicated these cases are and they are complicated in

§ 2255 as well. They're different complicated, but they're an afterthought at the moment.

There's no way I'm going to say you don't need to have the resources in post-conviction. Particularly in federal court, you get one shot. One. There's no state post-conviction and federal post-conviction. There's one shot. As I said, it goes back to the same court who is making the decisions about what kind of funding you get. It's a big burden and also we have the burden. People talk about the comparison between the U.S. Attorney resources and our resources and say we can't make the comparison.

We have to. We have the burden here to prove to a judge who has already seen the case that the outcome could have been different. That's a big burden and you cannot do that. Under the law, under *Strickland,* you have to prove prejudice. Under *Brady* you have to prove materiality and these, there are only three issues essentially you can raise in habeas, in federal post-conviction § 2255s. If you don't have the funds to do that, you can't do it.

If we're going to have habeas corpus, if we're going to say someone doesn't get executed at the end of the direct appeal, you have to have the resources to do it.

Judge Prado: Outside of your group of people that handle these cases, is there a habeas corpus bar; a specialized group of people that could take this on beyond the people that are involved in y'all's work? It seems to me it's such a specialized area that it's really a narrow area that it's really a challenge to go and find good people that know this area of the law that are not involved in your projects?

Ruth Friedman: It's a very good point Judge Prado. We are very reliant on these Capital Habeas units because they're a big percentage of the way there because they do § 2254s and they have resources. Some of them have taken several of our cases and a number of our cases and we work to train them et cetera, because this is what we do and this is all we do. But that does go exactly to the point I was trying to make before that, we need an institution where we can bring people up and train them or maybe pull from some of these units that have taken these cases now, because of the problems that Katherian mentioned in terms of not getting any credit and therefore being at risk for losing staff if you don't have one of our cases.

It's harder and harder to get that. I think we can find and train and cobble together a unit of people who in time can do it, but that would be a lot better than relying on the system we have now. It is very specialized, but I think it's doable.

Reuben Cahn: Mark, can I follow up with you on a question that should be quick. You mentioned the forty people who did not have petitions filed before the statute of limitation's expired in Florida and this is, pardon my ignorance of habeas law. We now know every single one of them was sentenced to death under a system that denied them their Sixth Amendment right to a trial by a jury. Are those people out of court completely? Do they have any ability to raise those issues any longer?

Mark Olive: This is one of those questions, one of these issues of law where the ground just falls out from under you, like the *Martinez* case. Right now Florida in state court is in total disarray. What happened in *Hurst* was that the United States Supreme Court ruled that Florida's unjudged sentencing was unconstitutional under *Ring*; thirteen years after *Ring*. We were going to have issues in federal court about retroactivity and federal courts have already said *Ring* is not retroactive, but the Florida Supreme Court had eight arguments between February 3d and 5th with supplemental briefing on *Hurst* to determine whether it's going to be retroactive under state law.

It's going to apply to all direct appeals or cases that aren't final on direct appeal. They've recalled the mandate in several cases. It may or may not apply to everyone in federal court and we are waiting to see what the court is going to say in state court about retroactivity.

Reuben Cahn: Just one other question, do we and you may not have an answer to this question, but I'm interested in knowing, is there any national count of how many times individuals have been barred from filing a § 2254 because their lawyers have failed to file within the statute of limitations?

Mark Olive: Nationally?

Reuben Cahn: Nationally.

Mark Olive: I'd read in Dick Burrs' presentation or maybe Mandy's presentation a number, there were ten in Texas, is that correct? Those are the big two. I have not . . . there isn't a tabulation that I know of nationally.

Reuben Cahn: Okay, because there were some in California as well, weren't there?

Mark Olive: Sean, do you know that?

Prof. Kennedy: Yeah, I suspect there are many in California.

Reuben Cahn: Thank you.

Mark Olive: Florida by far is the leader.

Judge Prado: How difficult is it to recruit lawyers and get lawyers to take on these cases? Is that a challenge?

Dick Burr: It is a challenge. We have been . . . our recruitment efforts of late have been energized because we've had more people added to our project. We've really focused on this effort. Within Texas, most of the lawyers who are really qualified and understand the mission of federal habeas can't take any more cases. We are full, so we are looking out-of-state. There are lawyers in-state who could do a great job, but to a person, they will not take on another case, until they know they can get the funding to work with. It's not for themselves, it's not their fees, it's funding for investigation and experts. We know that that's been a huge difficulty within our circuit and within our state.

That's been a huge barrier within state. When I get somebody interested from out-of-state, whom I've known either by my own contact with people over the years, or from reputation through people I trust, I get them interested in taking a Texas case and then I have to talk with them about the battle to get funding for resources for investigation and experts and that is a huge deterrent to people coming in. Because people understand that without those resources they cannot do their job.

Judge Walton: Getting the resources, are you talking about getting the resources from the district court?

Dick Burr: Yes. Well, it's both.

Judge Walton: Worried about them being cut at the circuit.

Dick Burr: It's really both. You're always are way past $7500, so you have to have the district judge approval and the district judge then recommends to the chief judge of the circuit or designee to approve that budget. Those budgets sometimes get cut. They're not cut nearly as much now as they were under the prior chief judge, but they take a long time and the clock is running on the statute of limitations. It creates a terrible vice when you're working against a one year statute of limitations. You need the funding, the district court has recommended the funding, it's way over $7500 and you're waiting for the chief judge's approval, or cut. You can't hire people until that's done. When you do finally get word that it's been approved, then you have to have a time to catch back up with your investigators and experts because their lives have gone on and they're continuing to work on other cases. It's a very difficult process.

Judge Walton: The recommendation and the funding takes place before the services are actually provided?

Dick Burr: That's right.

Ruth Friedman: In our cases it's very difficult as well, to get . . . most private lawyers at this point won't take on a case unless they're accompanied by a Capital Habeas Unit of a federal defender for the reason that Dick was saying is they're not going to get the resources paid. Then on the other hand, there was a lawyer I'm very fond of who runs a Capital Habeas Unit and says when he hears that I'm on the phone he picks up the phone and says 'no'. It's true. Where do we go? I'm worried too that people who've taken these cases and now are dealing with the measurement study, I'm not going to be able to go back to. I literally don't know where I'm going to go when the next cases come.

Reuben Cahn: In fact I've told you I wouldn't take your calls anymore.

Ruth Friedman: You are not the person. There is a line of nos. You see what I'm facing?

Judge Prado: Any other question from any committee members?

Dr. Rucker: If I may Judge Prado, I'd like to follow up on a comment several of you have made about this $7500 cap. Everybody says it's too low, so what should it be? We've heard $15,000, $20,000, $25,000, what? What's a reasonable number for these cases? $50,000?

Ruth Friedman: One thing I'm going to say, you can look at both of us because they're completely different cases. The cases in § 2255 $7500 it has nothing to do with these cases. There is a point too for § 2255s, they are sort of cobbled on to what happened in § 2254s and I think our experience now, I think we are the only people who've actually and some Capital Habeas Units who have taken on these cases, they're just not comparable. You can't have the same rules apply because they're completely different animals. It's got to be a hell lot of higher in a § 2255. That's again why we need to go to an institution that's able to do it more cheaply and within their own independent budget.

Dr. Rucker: Can you put a number on it?

Ruth Friedman: No. Let me let Mark answer that question, but in many ways it's just a different animal so I don't know that we'd have a number that's the same, but let me think about that and answer you in private session.

Dr. Rucker: Mr. Olive? Mr. Burr?

Mark Olive: I was trying to pull out of my memory how this cap came about. I think the Anti-Terrorism and Effective Drug Penalty affected death penalty after 1988 contained this provision originally in section 848(q) if my memory

serves correctly and I don't think there was a cap at that time. Then the cap came in with the AEDPA as well as the getting rid of the ex parte proceedings to get the funding. I'm not sure why all of that happened in 1996. I guess it was just part of the tightening of the reigns under the AEDPA.

Let me give you an example on why I think it's very difficult to put a cap on it and it ought to be left to the discretion of the district court judge. There is a recent case, *Barnett v. Roper*, 941 F. Supp. 1099, where Senior Judge Richard Weber granted relief on a 60(b) motion. It's a *Martinez* case where, and *Martinez* quickly is, the Supreme Court reversed its decades long precedent that attorney ineffectiveness in state post-conviction could not provide cause for a procedural default in federal court. In *Martinez*, the court said, well, if you're raising a claim of ineffective assistance of trial counsel in federal court that wasn't raised in state court and the reason it wasn't raised in state court is because of the ineffectiveness of state counsel—that's kind of a mouthful—then you do have cause. This judge found that there was cause and then this judge held an evidentiary hearing. How do you put a limit on the experts and investigators to prove the ineffectiveness of that evidentiary hearing at the outset, when you only learn as the case moves along, have several ex parte hearings, we've discovered this. Ultimately, the judge granted relief on this 60(b). That decision is unreported, but I could provide it to see the sorts of information and testimony that was required. It's very difficult for me and maybe you could schedule for the first stage of the case, sort of like the Ninth Circuit, for the first stage—or used to be, I don't know if it still does this for the first stage of the case from here to here, from the petition to a motion to dismiss, you can apply for funds. Then from motion to dismiss being denied, to the evidentiary hearing, you can ask again. So for some kind of staggered thing might be a reasonable way to do it, which you're familiar with.

Dick Burr: One thing that, at least one of the circuits, I think it was the Second Circuit did, when they first got budgeting attorneys in federal death cases, direct death cases, not § 2254s, was to say, preliminarily you get X amount of money to work with, $50,000 or something like that. You have it to work with. You don't have to apply for it, it's there. When you get to that point, then you have to start making showings of need for additional funding.

That process makes a lot of sense to me. If you're given, so that the structure is not to set a cap, but to simply to set an amount up to which you have that to work with. Beyond that amount, you have to make some showing of need. That's not a problem, as long as it's set up that way. If it's set up the way it is now which is, this is what you get and if you're going to get more, you have to show more is very difficult, because it's

hard to show a need, if you haven't had the resources to work with to develop your case enough to show a need.

It's virtually impossible, so if there were some way to structure $50,000 that you get simply because you've been appointed, you could then put that money to work and then have something to work with to come back and try to persuade the judge that you need more and here is why and here are the very specific reasons why. If it's still in the hands of the judiciary to make those judgments. Something like that would work far better than just picking a number out of the air and saying, this is the new $7500.

Kevin McNally: It's called a seed money budget and all of the circuits with budget attorneys now use that procedure.

Prof. Gould: Thank you Judge Prado. I've been looking forward to this panel because as many of you on the panel really have a national perspective on what's going on. Some of you were here this morning to the extent you weren't, but you've been following the Committee's deliberations or hearings, you've undoubtedly heard some of the information about differences in resources that are brought to bear in cases.

These are the data that have been presented have been in non-capital cases, but the differences in resources that are brought to bear in various districts, and then Mr. McNally referenced the differences in resources that are brought to bear by district in capital cases. I'm wondering if you can help the Committee understand, what are some of the reasons why certain districts have a higher use of experts or attorney time than others?

I can certainly put some possibilities out there, but I suspect knowing some of you, that you can help the Committee answer this. How should the Committee understand what's driving these differences in attorney time and differences in experts across various districts?

Kevin McNally: The national standard now is to appoint learned counsel from out of district or out of state. By national standard I mean, the prevailing practice in direct federal capital prosecutions is to do so. The standard is to appoint a third attorney. Everything flows from the attorney that's appointed. One of the more difficult situations I've run into is a case where the defense got a blank check, but the counsel were not learned.

They were not learned in the law and so they didn't know how to spend money. That's one important thing to remember. The, who the lawyers are, everything follows from that. Including the access to funds and understanding of how to spend tax dollars.

Prof. Gould: The rest of you?

Dick Burr: In my experience, it's the leadership of the circuit. If the circuit believes that this is an important, not only legitimate, but an important use of public funds to provide fair representation in capital cases, then that message comes through loud and clear to the district courts. When the circuit does not believe that or gives the impression through however that impression is given, that it does not believe that, then that's the message that's followed through with the district courts.

One of the things I've experienced over the years I've done this since 1979 is, there are probably two or three times in my nearly forty years of doing this where I've had the chance to sit down and talk with judges about these issues. Generally, I am seen as a renegade, as an outcast, as somebody who is trying to disrupt things, as an abolitionist who is trying to screw up the judicial process. I'm not invited, much less listened to.

If there is any way that this committee could encourage judges to quit doing that and to listen to the people who have labored in these vineyards so long that we now, when we have some time off, can't do anything, but fidget because we've been under stress for thirty or forty years. I can't sit still. I have a meditation practice, but in my meditation practice I'm thinking about my cases and there is nothing going on in my cases.

There is a kind of chronic PTSD that many of us suffer. We don't get any sympathy for that, we don't get listened to, our experience with how this process works is devalued and to simply come into a room where we have a modicum of respect and some collegiality and some sense that what we have done and experienced is valuable to learn from, is extraordinary. It's almost unique in my experience.

That's part Jon, that's part of what happens is that, those of us who do this work full time and for many, many years have become renegades in the eyes of people who control the processes in these cases. If we could somehow do something to overcome that barrier, then the cause of justice would be well served.

Prof. Gould: Ms. Friedman, can I put it to you? You used the expression earlier that we have a regional, basically that the federal death penalty is regional, which seems to me to be consistent with this idea that there are differences in the use of experts and there are differences in attorney time in various districts. What's driving that? How should the Committee understand what it means for there to be a regional practice?

Ruth Friedman: Those are two different questions. What's driving . . .

Prof. Gould: Answer both.

Ruth Friedman: I think as Dick said, and I would echo his eloquent comment to the Committee because we all value being here. I do agree that it's driven in part by the circuit and it's also driven by the bar which is not an unconnected situation. Our biggest challenges in the federal row are in the Fourth Circuit, the Fifth Circuit and the Eighth Circuit and that's true across the board. It's true in terms of money spent, it's true in terms of whether the courts listen to or accept our recommendations. It's true in terms of who gets sentenced to death and how many. There is a history, there is a culture. I'm not sure I can fully answer what that's about; I can talk more about where it should go. For us it's a national, death penalty, it's one death penalty and it's one jurisdiction. There are U.S. attorneys obviously in all these different districts, but they're aided constantly by the Department of Justice.

There is a capital case unit that is deeply involved in certainly the post-conviction cases and I would imagine a fair number of trial cases as well. It should be uniform. What's driving the differences? Certainly in habeas cases and many of these certainly in the Fourth, the Fifth and the Eighth there are a history of state habeas and a history of state post-conviction and state death penalty, which, how the bar came up, what the culture was with the circuit, I'm not sure I can comment on because I don't know exactly where it came …

Prof. Gould: When you talk about the culture, is it attorneys not asking or is it judges not giving. Or is it something else?

Ruth Friedman: It starts with who the judge appoints as Kevin said. We start right there and sometimes, I've had a judge say to me, "I want somebody local." What does that mean? With somebody local goes somebody who doesn't have any resources and has to come to the court for all those resources. What does that mean? It sounds like control. How is it different? On all those realms, they don't ask. They may not know to ask. In our cases there is a big learning curve. As I said, these are big cases. The § 2255 statute is different in many ways from the § 2254. There is no tolling provisions, so the time goes quickly. There is a learning curve there; they may not know to ask in our cases. They may not be used to asking, they may know the judge doesn't want to hear about it. They may believe the judge isn't going to give them money or time. I've had cases where the lawyers won't ask for continuance because they don't think they're going to get one and then there is no record or there wasn't even a chance made to get one.

Certainly there are different cultures and I think I don't know how much that answers it, but I feel very strongly in the federal system. At least there is no state law issues going on, there is no state practice issues going on, but there is nobody also looking at how those cases are done. If a judge

wants to appoint somebody without resources, who is going to tell him or her that she shouldn't do that?

Prof. Gould: Okay, let me, if I may Judge Prado one more question. If my memory is correct in all of the hearings that we've had, we've only had one witness come in and say the state of practice in his district is sub-par. The Committee obviously is trying to figure out what good practice or better practice looks like, than worse. I'm going to ask the Neil MacBride question, if you'll excuse me for asking your question. If the Committee is trying to identify factors that would reflect better practice over worse practice, in your area, what should the Committee be looking for?

For example, Mr. McNally I think one of the things you've said is, in the appointment of counsel is the court looking to the recommendation of either the local Federal Public Defender or Defender Services. Am I correct? That was one thing you said. What other factors should the Committee be considering or looking to, in trying to identify better practice over not as adequate practice?

Kevin McNally: You can start with result. The level of practice in the cases that produce life sentences is dramatically different from the level of practice in the cases that produce death sentences. It's all linked together. You can see a track record. Distinguished prior experience means excellent. It doesn't just mean experience. Just because you have three clients on death row does not make you a learned counsel. You can study these things and see them and the Spencer Update did so. It's knowable.

Prof. Gould: It's the appointment of counsel who have gotten good results. What other things should the Committee be looking for?

Ruth Friedman: The ABA standard set out a lot of what should be done in these cases. They're not surprising to us because it's what we've known for all these years, in terms of investigation, hiring experts, what kind of rapport you have with the client, how to involve mental health people in your case because you don't know about them and you don't know about those or bringing in people where there are subjects that you're just not familiar with.

A mitigation specialist is critical in every case. That really sets it out there and I think it would take a long time for us to go through all of those things now. We could certainly do it, but it's out there about what somebody should be doing in a case. It's not, these standards are not imposed on the court in terms of appointment, but I certainly agree with Kevin. It's not the number of cases that you've done.

That is not . . . somebody was saying earlier about, I think it was Judge Prado about who they'd want to have represent them. You don't want somebody who has got ten death sentences on the state row to come represent you in federal court. By the way, in federal court, we often have the same people who do the cases in state court come into federal court and do them. It's not some other bar.

Reuben Cahn: I recall that Sean when he was in charge of the Federal Defender Office in Los Angeles adopted a policy that he would only recommend his learned counsel, individuals who committed to following the ABA standards and to communication with resource counsel. We have to adopt some mechanism that works with courts. Would it be adequate for courts to adopt that same mechanism that they would only appoint individuals who pledge to do that and do as well consult with resource counsel about their abidance by those policies?

Prof. Kennedy: Sounds like a great standard to me.

Kevin McNally: Who could argue with that?

Ruth Friedman: I could, because I think the appointment has to be moved. You can say to a court, you ought to follow these things and then the judge may say okay and then do something completely different. Certainly in our cases, we go out and find people who we believe are committed to that, to the ABA guidelines or they show that they've done that in other cases and it doesn't matter all the time.

Rene Valladares: I think that's a great suggestion that you have made, but the problem is that that again presupposes that you have a system where vouchers are not being slashed or people are being, are having their experts funded, or people are getting investigators because the problem really is going back to the question that Judge Prado asked earlier about recruiting lawyers that know this area is that many of the lawyers that are very, very good lawyers, want nothing to do with this because they figure they get themselves in a morass in which their vouchers are going to be cut, they're not going to go ahead and get experts, they're not going to go ahead and get investigators and who wants to deal with that?

Prof. Gould: Anyone else?

Judge Prado: Thank you, panelists for being here. It's been very informative. My hat is off to you for the work that you do. It's tough work. Hang in there and we'll see what we can do for you. Thank you very much. We'll take a short break.

Participants: Thank you.