

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 4—Birmingham, Alabama

February 18-19, 2016

Transcript: Panel 6—Views from Federal and Community Defenders

Judge Cardone: Panel 6, the panel participants are Mr. Bruce Eddy from the Western District of Arkansas; Ms. Elizabeth Ford, Director of the CDO in the Eastern District of Tennessee.

Margy Myers: They re-arranged the order . . .

Judge Cardone: I know you're trying to confuse me here. Let me make sure, Ms. Christine Freeman, Director of the CDO in the Middle District of Alabama; Mr. Henry Martin, Middle District of Tennessee; Ms. Margy Myers from Federal Public Defender from the Southern District of Texas; and Ms. Doris Randle Holt, Federal Public Defender from the Western District of Tennessee. Our Committee members for this panel are Judge Dale Fischer; Katherian Roe; Dr. Robert Rucker; and Judge Reggie Walton.

We'll begin with a very brief opening statement. As I've said before we have received your written submissions, you don't really need to read from those or anything, we just would like a short introduction. Then after we'll be asking questions from the Committee. Ms. Ford we'll start with you.

Beth Ford: Okay. Good morning. I think this is a very exciting opportunity that everyone in this room has. That we're going to be able to contribute to what I hope are changes in the Criminal Justice Act that will benefit our clients, and that will benefit the Sixth Amendment. I think that there are many areas where the system probably needs to be just completely thrown out and we start over. There are areas that need to be overhauled to some extent. Then there are areas where things are going fairly well but I think that you can always improve. I grew up in a very small county in the mountains of east Tennessee where it was not geekish to be a member of the 4H Club and the 4H Club's motto was "To make the best better." I think that there are certainly some parts of the way the Criminal Justice Act is currently working that are good, that we can make better.

One thing that I have found to be extremely exciting about this opportunity was to learn and to learn more about how the system works. I took the list, the scope of the Committee's work and I prepared a report card. This was a great review for me to go through the list of things on the scope of study and to give a grade and then to try to justify the grade. I look forward to the rest of our conversation today. There were several things mentioned this morning, some unanswered questions that you all

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particular had of Judge Shirley that later on I hope that I can answer for the group.

Judge Cardone: Ms. Freeman.

Beth Ford: Thank you.

Christine Freeman: I gave you very lengthy testimony in my written remarks and I don't want to expand on that other than I'm looking forward to having questions and discussion. I viewed this as an opportunity in writing my statement to reflect on our work. I hope those reflections are of some help to you but I also hope very much that we can have a discussion about capital habeas today.

Judge Cardone: Mr. Eddy.

Bruce Eddy: Thank you for the opportunity to be here this morning. What I've come to know and to see is that the federal judges have been tasked with responsibilities to manage the indigent criminal defense system. We have the circuit court judges who appoint and re appoint the Federal Public Defenders. They also set the number of attorneys that a Federal Public Defender Office may have. Our budgets, Federal Public Defender Office budgets are now set by a committee of judges that's based upon a work measurement study that the judges mandated and accelerated for that purpose.

CJA attorneys also have a tremendous amount of judicial involvement. It starts at the appointment on being placed on the panel, there's judicial involvement in that to various degrees. It comes in with the appointment of cases once the attorney is on the panel and then it goes to the review of their vouchers when they submit that for reasonableness. The judges see these attorneys for only a very small period of time that the attorney spends working on the case itself, and that's the time that they're in court. The attorneys are not present. They're not able to see the time that's spent on discovery, reviewing that discovery, the necessary legal research, going to visit their clients in jail, explaining the Guidelines, the long conversations on whether you should go to trial, whether you should plea, the advantages and disadvantages to both. Working with those clients are mentally ill, not to the point of being criminally insane, not to the point of being incompetent to assist their attorney, but yet have a true mental illness and all the time that it takes to work through with that client to make sure they have an understanding of what is happening.

CJA attorneys also have to go and ask for experts if they need them. Based on the testimony I've heard over the last two days it doesn't seem that CJA attorneys ask for experts very often but when they do it's judges that

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decide whether they get that expert and then the budget for that expert. When you couple that with the fact that there are a lot of or many of the judges who are involved in this review process who were tasked with these responsibilities have never represented a criminal defendant and certainly have not represented an appointed criminal defendant.

We're placing a burden on the judiciary that shouldn't have been placed there. Judges need to be given more time to do what judges do, interpret the law, apply the law, have hearings. The accounting functions and that type of thing the judges shouldn't have to be spending their time on that. I think the time has come for both the Federal Public Defender program and the Criminal Justice Act attorney program to have it's independence from the judiciary and have the management and the implementation of those programs be done by other than the judiciary. Thank you.

Judge Cardone: Mr. Martin.

Henry Martin: Yes ma'am. It might come to a surprise given the color of my hair and the wrinkles in my skin I knew Judge Prado before there was a Prado Committee. He's weathered the storm since better.

Judge Prado: Statute of limitations.

Henry Martin: It goes both ways, I'm appreciative of that. I want to say that we disagreed on a number of issues at the time but I have considered his friendship to me personally and to our program over the twenty years or so since then as a real gift. As you know from my written statement I have a tendency to ramble almost incoherently. I'm going to be as brief as I can now and then available for any questions. What I came prepared to talk about are three or four things, but I've been around long enough that the odds are I've experienced most anything you have a question about and would share my perspective or experience on that.

I first want to agree with those of my comrades who have said to you that the most important challenge we think that you face is addressing the concerns of the panel lawyers, regarding the selection of the attorneys, the compensation and availability of resources to those people.

Secondly, I'll give you just a brief update of where the defenders are collectively in this process and what to anticipate in the future.

Third, I would add the treasure of information that you've been providing. My anecdotal experiences as a defender in the Middle District of Tennessee through the tenures of six Chief District Judges, I think at least six Chief Circuit Judges, I've lost count at ten United States attorneys. We

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have a vibrant and excellent panel and relationship with the panel and so I will answer any questions that you might have about that experience.

Lastly, I would like to share with you just a positive spin on thirty years under the supervision of the judiciary. You hear and have heard from what I have seen this week and in prior hearings the problems with supervision by the judiciary. It has not been in my experience a negative experience over the years, there have been an awful lot of positive aspects of that relationship. I would want to address just briefly if asked how I have seen that play out in a very crucial area, that's the death penalty litigation, and maybe some background on the people that you saw yesterday and what they represent in terms of the program structure today.

With those introductory marks I want to share also my appreciation for what you're doing in and the hard task that you face and the sacrifices that you make in your professional lives to do this. I am really impressed with the commitment that you have shown and are showing and I appreciate it.

Judge Cardone: Ms. Myers.

Margy Myers: I thought you were going to talk about everything. I'm Margy Myers from the Southern District of Texas and I echo the appreciation for the work that all of you are doing and my belief that this is an excellent program and as Beth said it's an excellent program that can be made better. I do think the Southern District of Texas demonstrates some of the issues and problems with the current structure and so I thought about highlighting that and then addressing some of the concerns I've heard over the past two days.

As you know from my written testimony the Southern District of Texas along with the Western District of Texas has an overwhelming case load, we're not alone the judges do to. We have been unable through the years to obtain relief. I believe we are essentially caught in a vise between a district court that really appreciates our work and that's a mixed blessing because they rely on us to do more than 75% of the cases. That is in part because some of those divisions at least in the past didn't have a panel and they feel confident that even when we're overwhelmed we will be best attorney by far of any attorney who could appear in their courts.

I adamantly am opposed to circuit control of the number of attorney positions. I think that the Fifth Circuit defenders are an example of the disparity that has been created by different judicial views of how many attorneys you should have. One needn't look no farther than Western and Southern Texas and Arizona which is in the Ninth Circuit. The number of attorneys that those defenders have and the number of attorneys that we

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have. It is controlled by different judicial philosophies that do not necessarily have any bearing on the quality of defense.

We have also suffered and I know you heard from Maureen Franco from the view of Washington. Not only have we traditionally not been given the number of attorneys that we needed but Washington at least until the work measurement study has let that continue. In my written testimony I talk about case-loads that were unbearable and when our case load actually went down from 30,000 to 27,000 Washington had the nerve to say, “Your case load is going down, you should get rid of attorneys.” When I objected to that I was told, “You’ve done it for years, you can continue to do it for years.” I think, as I say, this is an example of the way that neither Washington nor circuit control has been in our best interest or the interest of the clients.

There’s been a lot of discussion about the panel. I join everybody, I think the panel is the biggest issue. Just for what it’s worth I share the view I think of most of my fellow defenders that the judge in particular the trial judge should not be deciding who the experts are and should not be reviewing the vouchers. I think there is at least an appearance of a conflict of interest and I don’t think that the court should be involved in determining how the defense goes. I think there are different models, I see that Joe St. Amant says, “Who’s going to review it?” You’ve heard models today whether it’s the Federal Defender and I will say with my case load do not give me that task, unless you get me about ten other people to do it. I do think we’ve seen various models and they don’t have to be exclusive, which could be either the Federal Defender, it could be an attorney who works in the court similar budget attorney, someone with experience who could review those vouchers.

In Portland, Judge Fischer raised a concern about if another judge says I don’t this expert, it’s my trial, and I appreciate that and I do think that virtually all of the judges want the trial to be fair. Perhaps we could have a review where if I was denied the expert as a panel lawyer I could approach the trial judge and say, “I want this,” and then as the trial judge you would have a second opportunity to decide what to do with that.

We’ve heard a lot about the rates and a lot of people saying, “Well, everybody wants to be on the panel anyway.” That is a true in the Southern District of Texas. We have one division where you don’t have a choice. I’m reminded of a conversation I overheard when my daughter came back from college and was looking for a summer job. She was on the phone and the employer asked her presumably how much she wanted to make and her response was, ‘I need to make as least minimum wage.’

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If you want the job and you want to be in federal court in many instances it is not the rate that is preventing that. What is a problem are the cuts, the lack of expert services, and I think, the lack and this is identify by the Prado Commission the continuing view of many members of the judiciary that this is partially a pro bono obligation. It is not. It should not be. Judge Crone talked about the awesome responsibility of presiding over a capital trial. It is unconscionable that the only person in the room, not the judge, not the prosecutor, is not being paid a full and fair wage to represent somebody whose life and liberty is at stake.

In terms of structure, as I've indicated in my testimony, not only have I been doing this work since 1983 and actually clerked on the Fifth Circuit when Birmingham was in the Fifth Circuit, that's the closest I ever got to being on the Fifth Circuit. I am a member of DSAG and have also been active in a number of other committees. I will say that the current structure I think untenable. Dr. Rucker you asked, I think, yesterday how changing the org chart might make a difference. Certainly at a minimum we need to change the org chart but it would make a difference not just in the perspective.

Also I do think that particularly since 2013 and sequestration the demotion of Defender Services has resulted in interference and micromanaging by judges who have no comprehension of what we do. Who are concerned about costs more than their own budgets, more than they are concerned about justice. I will say that we had an incredible support from the district court and most of the circuit judges during sequestration but sequestration was an example where we were not protected by the judiciary we were decimated and that cannot happen again. Whether we can trust Congress being from Texas, probably not, but it depends and we cannot be subject to some years we have judges who are completely supportive, some years we don't and it should not be the judges making those decisions.

There are other changes that could be made. I think I probably come down on the idea now of a center within the judiciary just because I do remember the Ronald Reagan era and legal aid although I do think that we have been effective with Congress. For example, we should be able as the Prado Commission recommended to directly argue for our budget rather than this antiquated budget process that goes through various levels. We should be able to speak on matters of policy for criminal defendants without the blessing of the Judicial Conference because there will be times when our position on matters of criminal law is not surprisingly different from the Judicial Conference. All of us want the best, but the view of judges may be different than criminal advocates. Again, I applaud your work. I think you have a tough job, but I think that there do need to be drastic changes.

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Judge Cardone: Ms. Randle-Holt.

Doris Randle-Holt: I promise I will be brief. I'm in the Western District of Tennessee where we have two offices, one in Memphis and one in Jackson, Tennessee. I've been the defender for almost three years, it will be three years on the 21st of April. In the Western District there are two panels and there's a panel of thirty-eight in Memphis, a panel of twenty in Jackson. The panel is managed by the district court in my district and it is preferred to be that way by our panel members and for two reasons that they announced. Number one is because they believe it's a conflict for the defender to manage the panel and number two, it's because of the past makeup of the panel. Today our panel is very diverse but in past years it was not. The panel members like it the way it is, but if for some reason this Committee recommends and it is approved that the defenders should manage the panel I would be glad to do that in my office.

Now, the defenders office plays in a key role in the admission to the panel in the Western District; admission is by committee. The committee consists of the district court judge, a magistrate judge, the defender and two panel attorneys. The defender is not really given any responsibilities to this panel unless specifically asked by the district court judge and recently we were asked if we would mentor young attorneys that were interested in becoming members of the panel. I took it upon myself to write up some rules of what the process would be. That we would meet with them on a Saturday. We're going to take them from beginning to end how to try a federal criminal case. I've put on seminars specific to training young lawyers how to try cases in federal court. We've started putting on at least two seminars a year, last year I did three seminars and four webinars in our office and we did the seminars at the law school. We're participating in some training for the panel.

In the Western District we do not have a Capital Habeas Unit. We do not have a non-Capital Habeas Unit. I was told during my interview for defender it was not likely that we would get one since there is one in the Middle District of Tennessee and the Eastern District of Tennessee.

As far as diversity is concerned in the Western District, as you can probably see from my materials I started with this office as an assistant in 1989. I was the only lawyer of color in that office and it's been that way for a long, long time, but from time to time we would have another minority to come through the office but they didn't stay. I was the only one that stayed. Today since I've taken over we have four African-American attorneys, we have one Asian attorney and out of a staff of twenty-three, eleven people in my office are minorities today.

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The last thing, I wanted to talk to you all about was transportation for unconvicted citizens. I think the transportation and subsistence are insufficient. Most of our clients in Memphis come from Texas. They're caught on forty with drugs, they're Margy's people.

Margy Myers: They come from Mexico.

Doris Randle-Holt: They're stopped, they have to get back home to Texas. I can bring them court, you all know, under § 4285, I can bring them to court, but they're stranded on the streets after court. As a lawyer I feel that I have to be creative in talking to my client to say, "Look, you think maybe you can get somebody to drive you? Because if you can get somebody drive you, I can put in my motion that you're going to come by car and we'll pay you mileage and it will probably be enough to get you back home." Why do we have to do that. That's not feasible when the client is from California. When he's from California you've got to bring him in by plane to try to get him there in time for court and then it's out of my pocket or my . . . everybody is pitching in to try to buy a bus ticket to get this person home. We're hoping that something changes there.

Judge Cardone: All right, thank you. I'm going to let the Committee ask questions, but I just wanted to follow-up on something that you said Marjorie Myers, because I think it's a topic that we've not heard before, but that you raised. That is, the ability to make commentary, in other words to take positions on things that affect your clients. Can you expound a little bit on what your concern there is?

Margy Myers: I actually wasn't even aware of this until Portland when people from Defender Services talked about it. That for example, when there was a debate about what the Judicial Conference should say about making "Drugs Minus Two" retroactive. My understanding is the Judicial Conference's concern was it would be too much work for the probation officers. Now, that is not our concern and that we could not take a position that was different. The Defender Services wanted to say that defenders support retroactivity of "Drugs Minus Two" it will reduce sentences for thousands of people who deserve it. That Defender Services was told you cannot take a position that is inconsistent with the Judicial Conference because you're part of the judiciary. I think that's an easy enough fix. It makes no sense to me the way it is now.

Judge Cardone: Well, is it also my understanding that not only, you can't take a position that's contrary to that even if it's contrary to your clients positions but that you are subject to all the rules of the judiciary?

Margy Myers: Yes. That also raises the other issue which I didn't read in my notes about which was a recommendation of the original report that we should be able

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to directly advocate for our budget at Congress, rather than going through the different committees because we're familiar with our budget and we know the needs leaving aside the competition issue, but yes.

Judge Cardone: All right, we'll start with Judge Fischer.

Judge Fischer: Thank you. We could probably use an hour with each of you so we'll do our best to get the information that we need, maybe do a little picking and choosing. Ms. Ford you started out, your letter was saying you are a want to be teacher and you flashed your report card. I don't think you included that with your materials but I saw a lot of Cs and Ds and that's not good. I don't think any of us would have thought that was good.

Could I just focus on your suggestions at the end and you called them musings, but they're far musings, they're important issues. Could you tell me specifically, I think Ms. Myers started to mention this, but you talk about reviewing the governing and advisory structure which included DSAG, could you tell me if you have any specifics about what we should be looking in the review or what recommendations we should be making with regard to that specifically?

Beth Ford: Well, I think this is also part of having to deal with the rules of the Administrative Office of the Courts. DSAG is the perfect current example. The membership on DSAG was evidently established many, many years ago when there were not very many Federal Defender offices in the country. As a result the membership is a conglomeration of we have a representation for the First, Second and Third Circuits, something that no longer makes any sense because there are now multiple defenders in those three circuits. When the suggestion was first made that DSAG should be expanded the response that we received was, 'Well, we've got to look at how the AO considers working groups and advisory groups.' I think that we need the flexibility to change how we provide advice and how we talk through and work through issues without being hamstrung by rules that really don't apply to us and our situation.

Judge Fischer: Anybody have any different thoughts or additional thoughts on DSAG? Okay. Ms. Freeman you talked about the § 4285 issue as well, and mentioned that you're housing some of your clients at the Salvation Army and halfway houses. Do you have any idea of how often that happens? We're trying to figure out the scope of the problem and the . . .

Christine Freeman: In our district it [INAUDIBLE] and I would say that . . . but with anyone who is from out of the district who has to return for court they will have a problem. I've had some clients who slept overnight in their truck, which I learned about later. Or who drove with a friend and the friend paid for the motel room. It's just not a good system at all right now.

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Judge Fischer: Thank you. You mentioned the ancillary service capture too low, we've heard a lot about that and I think Dr. Rucker has asked the question before but do you have a suggestion about what the cap should be and I'll ask if anybody does because you obviously see a lot of experts which strangely includes investigators and paralegals and may have a better handle on what it costs?

Christine Freeman: I heard Judge Shirley's comment about mental health experts and I completely agree with that. After evaluation process and writing the report and testimony you really are going to be paying at least five to six thousand dollars at a minimum for a mental health expert. I would also say that in any case that involves computer forensics you're clearly going to go into twenty or thirty thousand dollars. Why I understand that might be deemed an extraordinary expense, I think in that type of case . . . that's routine in certain types of cases and so it shouldn't be treated as extraordinary where you have to go through this layered approach to get approval for it when everyone know that's what will be needed in a certain type of case.

Judge Fischer: Does anybody have a specific number that you think make sense other than pulling a number out of the air for that count?

Christine Freeman: I would think at least eight thousand.

Judge Fischer: Okay, thank you. Mr. Eddy you mention arbitrary cutting and judges setting the hourly rate. Is the hourly rate in your district less than the \$129 now?

Christine Freeman: No ma'am it's not.

Judge Fischer: Okay. Do you have a suggestion and we talked about this in some earlier panels. Someone, I think it was Ms. Ford, mentioned let's have a base rate but maybe adjust upward for cost of living. Does everybody feel that the \$129 is either sufficient or it should be raised at least to the \$140 something whatever the maximum? Anybody think that shouldn't happen, I guess, is maybe a better? I'm not hearing anything.

Christine Freeman: I think the process for raising it should be different. It shouldn't be such a struggle. It should be tied to the cost of living increases, or there should be some pattern so that we don't have these tremendous fights periodically.

Judge Fischer: Okay, thank you.

Henry Martin: Can I add something to that?

Judge Fischer: Sure.

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Henry Martin: I've generally agreed with most of what I heard yesterday that the rate itself has not been a problem in getting quality representation of the panel. I'm not sure that's going to continue into the future. Most districts are seeing a decline in case-loads which is hurting our offices but is also hurting the panel lawyers, many of who don't necessarily live entirely on that but it's a substantial portion of their income. If they're getting fewer appointments it is going to be harder for them to maintain their familiarity with the cases and their interest in the panel. I think an increase in the rate will make a difference in that.

Judge Fischer: Thank you. Mr. Eddy you also mentioned we should consider the Sentencing Commission or FJC model § 501(c)(3) do you have information about how those work that you can say here's how it would work, here's how we would adapt to that model?

Bruce Eddy: No, I don't. I think that independence is necessary. I think that's the first decision that has to be made whether it's independent or not. If the decision for independence is reached then I think there'd have to be a hard look at the different models that are out there to see which would probably fit the best, but I wouldn't at this time have enough information to advocate one over another, just that there are a variety of models that could be studied.

Judge Fischer: Okay, thank you.

Beth Ford: May I add . . .

Judge Fischer: Sure.

Beth Ford: one thing to that. There is the PDS model and I've had several conversations with Avis Buchanan about the challenges that they face and her opinion about the success of that model. Of course, she feels very strongly that that is the best model for providing criminal defense services.

Judge Fischer: Thank you. Mr. Martin you talked about the morale crushing work measurement study and we've heard some sort of good things about it and not so good things. One of you mentioned how in the world can you tell us that we need to wait two years to figure out what's going on. Do you have some specific comments about how that work study impacted morale adversely?

Henry Martin: It was an insult to be the only party in the criminal justice system whose work efforts and value and efficiency were questioned and to have to justify and prove it. For me to be in a position to tell a lawyer when he or she has come back from a hard day in the courtroom or traveling across the state to a jail and explaining something to a client that doesn't it that

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before you go home, sit down on your computer and enter by five or six minute increments what you've done today because we're not trusted. It was an insult.

Judge Fischer: Well, as I understand it, and I'm not disagreeing with you, we don't like it when anybody tries to . . . they were marking down the number of minutes we were on the bench too. As I understand it the result of the study was that you were all incredibly efficient, good stewards of your money and probably needed more people than you have although they're going to cut almost all of your districts. Am I wrong about that or it was just still aggravating?

Henry Martin: I think the morale problem was pretty much what I described. It was laborious to do it. It was added on to, we already had too much work to do. The other reason that I think it did affect the morale and mine maybe more so than my staff, is that I really didn't see it ultimately as being a long-term benefit to us. It may have temporarily saved us because it showed that we do work more than they thought we were but all it did was measure what we've been doing not what we should be doing. It didn't have any way to address that or to anticipate the changes and new challenges that would come to us that in the past we've been able to adjust to.

Judge Fischer: Do you think there's a structure, I don't whether it's the FJC or the Sentencing Commission or some other independent structure where you're not going to be accountable in some fashion to the bureaucracy?

Henry Martin: Oh no, no ma'am. I have a fear of a bureaucracy of an independent organization about as much as I do of the Administrative Office of the U.S. Courts. I will say and I had promised in my opening statement to give you an update. The defenders, as I am sure you are aware, have been really active in this and on their own talking on telephone and meeting and exchanging emails. We are in the process of developing what we hope will be at least a consensus and maybe reflect the opinion of the majority of defenders on the key issues that you're addressing and in particular on the National structure. Our hope is that we'll get something to you that will answer the questions you just asked Bruce about what form this will take in addition to specific recommendations on things less centralized than that. Hopefully by one of your last couple of hearings there would be somebody here from the association having presented to you in advance and able to answer questions about it.

Judge Fischer: We'll take all the help we can get. Ms. Myers you mentioned a couple of things that suggest to me that maybe your relationship with the district court isn't the best. You said the district wouldn't give you the "Drugs Minus Two" or the *Johnson* lists and maybe the district and the circuit

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don't agree on what kinds of cases or how many cases should be given to the panel. Could you tell us a little bit more about those relationships?

Margy Myers: As I said, in general the relationship with the district court is very good. I think, as I've said, they have refused to give us the lists. The position of the district court and the district court in general what they did, which is what they always do, and our Chief Judges have always said, as anyone who's been a Chief Judge that being a Chief Judge is like herding cats. What they do is say, 'We won't take a position we'll let individual judges decide.' There were say three judges who gave us the drug retro cases.

It is the view of many members of our district court and I don't know about the circuit that our responsibility ends once the case is final. That is why they will not give us the list even on the Johnson cases because as far as they're concerned they are not our clients. Now, whether that's a CJA problem or a judicial view, yesterday someone was asking about whether judges had every called to complain or anything. I had a judge ban a lawyer for a year but I've also seen judges ban U.S. attorneys for life. I'm not sure that's a CJA problem as much as a black robe problem. I'm not sure that CJA can address that other than to recommend that, for example, on instances like clemency the statute to amended to specify that we could have done clemency because it's a disaster that the defenders were not permitted to do that.

Judge Fischer: Right. All right. I won't go into them. That's under the ancillary services.

Margy Myers: It's not, that's the problem.

Judge Fischer: It's related. Okay. Ms. Randle-Holt could you tell us just a little bit more because I think this is a very interesting subject. What we're hearing from a lot of defender offices is at least they have some input in the process, and the issue of the question of conflict, and whether the CJA lawyers would really like the FPD to be more involved is something we really need to take a look at because it's certainly something that's one of the alternatives. I'm interested to hear why if they express a view or if you have a view why the panel attorneys in your district don't want you more involved? Does that mean they're not having their vouchers cut? They're getting all the appointments they want? They like you gets put on the panel, that kind of thing? Are they just saying conflict or you think that's real?

Doris Randle-Holt: I really don't know. In the twenty-seven years I've worked in the office it has always been that way. There was a time when the defender played more of a role in admitting people to the panel. It wasn't a clear cut process like there is now with a panel committee. It think it may have been

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just a defender. Henry ran my office for a while. I think they could maybe contact the defender and he could get them on the panel.

It wasn't until maybe 2005, until a district court judge was assigned to work with panel admission because, I mean, the real problem was that we had an all-white panel. There was not one person of color on that panel and our judges in the district just decided this can't continue because we have minority lawyers practicing in federal court. A judge was assigned to work on this and lawyers that practice in federal court were admitted to the panel and the ball was rolling. It has always been that the court had more of an influence of people being admitted to the panel but they did give the defender some role. In the history of my office we've only had, I'm the third defender.

Judge Fischer: Is there anyone who actually reviews vouchers and the request for experts that feels that feels that there is a conflict?

Beth Ford: No

Henry Martin: We've reviewed just for mathematics and compensability at the request of a district judge on a fairly rare occasion for reasonableness. We also assign cases which would be a potential area for conflict as well. I've never felt conflicted to the extent that I'm involved in it personally and there's never been a complaint either from the court or the U.S. attorneys or panel members about the existence of a conflict or conflict being a problem.

Judge Fischer: Thank you. Thank you Judge Cardone.

Judge Cardone: All right. Ms. Roe

Katherian Roe: Ms. Myers I wanted to begin with you, I want to talk a little bit about you said that the Fifth District and the Ninth District, Texas and Arizona essentially, were a great example of the disparity when the circuit court controls how many lawyers are in a Federal Defender Office. Can you explain that more fully?

Margy Myers: It is a huge struggle number one to get the circuit to approve lawyers. I was thinking about that when there was a discussion about whether panel lawyers ask for experts because we don't always ask. The message has come down very clear. I did in my testimony give an example when we asked for twelve, we got nine and the message at that point was don't come back. We eventually did come back. Just the case loads. We have the same docket and the weighted case load in Arizona and even New Mexico is so much lower than it is in Western and Southern Texas and even throughout the Fifth Circuit. That's what I mean, I think when you

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have a circuit that basically if the defender says they need attorneys the circuit approves it which is my understanding of what the Ninth Circuit, some of you are from the Ninth Circuit, that it means you get what you need as opposed to having to struggle with less.

Katherian Roe: In Texas you ask for the attorneys or don't ask for the attorneys because you're told not to come back and ask anymore. You have more cases than the other border offices if you will in Arizona and New Mexico but they go to the Ninth Circuit, ask for the attorneys and they get the attorneys. Okay.

Margy Myers: It affects the nature of our practice. I'm very proud of our lawyers but I've had lawyers carrying 90 to 100 felonies. My lawyers every year write an annual letter talking about how they did. That one year in particular I got letters from three of those lawyers . . . lots of the letters are like this is my letter for the raise, these are all the great things I did. I ask them to talk about problems and one of the things the circuit always gets upset with us about is plain error and review. We are always the appellate division and always saying to the trial lawyers plain error review means our client was in jail.

A number of those lawyers wrote about reviewing everything for sentencing the day before sentencing again and noticing an error, usually a criminal history error and they said, 'I wonder how many other errors there are that I didn't catch, that no one will catch because there wasn't an appeal?' We had times on the border where lawyers were unable to attend PSR interviews. That's not effective assistance of counsel and I know that doesn't go on in the Ninth and Tenth Circuits.

Katherian Roe: Let me ask you about, I think, something you were talking about earlier was that sometimes the assistant Federal Defenders are really the only folks who are able or there to represent people in some of your divisions. Can you tell us why you think that in those divisions there are no more CJA lawyers available. Is the rate? Is it the pressure of having to handle so many cases? Can you give us an idea about that?

Margy Myers: There are CJA lawyers available. As I say, in one division you practice in federal court you are on the panel. I think that in some areas particularly because most of the divisions are trying to have a panel it's better. The district court continues in that in some ways it's a testament to our effectiveness but the district court continues to prefer to appoint us. Sometimes I think it's easier, for example, of those 30,000 lots of those are misdemeanor cases that come in that day. There are other places, I think El Paso, the defender doesn't do the misdemeanors at all, I don't know. When I . . . particularly during sequestration asked that the misdemeanors be reduced that we take half and it would be a good way to

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get new lawyers into court doing misdemeanors, can't do too much damage, we would be there, it was shut down. "We want the defenders, we don't have to worry about it."

Katherian Roe: Thank you. Mr. Martin, I'm wondering if you could just give us an overview of your administration of the panel. We've heard a number of different models if you will of how different organizations administer the panel. I know you talked a little bit about not feeling like there was a conflict, walling it off or whatever that you do to make sure that there's not a conflict. What do you actually do as far as panel administration?

Henry Martin: It's a limited size panel that now I think has sixty-five people on it. They serve renewable three years terms with the presumption of renewal. The selection committee now consists of a Chief Judge of the District, me and five senior panel members. We meet once a year to consider the renewal portion of the panel and any new applicants. In advance of that meeting we will have reviewed both a fairly comprehensive written application and the notes from an interview that would have been conducted with each applicant by me and at least one or two members of the selection committee or members of my staff. Then we'll make a decision based on the needs for more lawyers based on departures from the panel or increase in case load and the merits of the applicants. The people either go or don't go on then.

When they're on the panel, it's basically a rotating number, if you're up next you get the call then the call comes in. The committee and the court has allowed variation from that as basically as I deemed appropriate. That would more often be in reappointment cases when we're looking for the second or third lawyer because of failed relationships. That gives me the opportunity to select somebody that I know works well with difficult clients, that will spend the time with them and has the experience and that maybe rescue the relationship. If there is a particularly complex case and the next person up is a brand new member of the panel then I've been given the discretion to go to somebody else to make sure there would be an appointment.

We do make the assignments, we do all the paperwork to get them entered in the case. When they submit vouchers or when the experts submit vouchers we'll review those vouchers as I said earlier mainly for math and compensability. Then for the amount of the court and then contract them through the system they get the payments, make sure that they're processed appropriately. Then again on half a dozen or less occasions, I've either asked to be allowed to opine on reasonableness or had been asked by a judge to do so. On some particularly complex ones I have invited members of the selection committee to participate that as well so it wouldn't seem as something personal to me.

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I'm not reviewing interim vouchers other than my panel administrator, I have one full time person who administers the panel doing what I've described and doing all the CLE mechanics for the CLE programs we run. I don't know that an interim voucher and that's where I think a conflict in the voucher process would be most likely to occur. Then I would find out what somebody for a codefendant was trying to do.

Katherian Roe: What about expert vouchers, are you reviewing those?

Henry Martin: We're reviewing that. The ex parte submission is made without our involvement and if the judge, or it's below the limits of the initial retainer. Once the authorization comes, then the voucher will come to us. We can provide assistance on things like travel and stuff for experts, but we're not involved at all in whether or not an expert should be authorized or how much should authorized, it's just the administration of the payment of that expert.

Katherian Roe: How about if a voucher is cut, does that come back over your desk?

Henry Martin: It can. It does not automatically. Lately we've had very little problems with that. I've got one ongoing situation now that so far my efforts to come up with a solution have been unsuccessful. By enlarge there are not cuts made. My panel administrator may well see something that is either duplicative or not compensable and there will be a self-cut, there will be a correction of that.

Katherian Roe: My question more is when the voucher comes back from the circuit, if it's excess compensation, and it comes back from the circuit or even if it's not excess compensation it comes back from the district court, does it pass through your desk? Are you someone who has to sign and see that . . .

Henry Martin: No, my panel administrator will know about it and again we're not seeing circuit cuts now. We had a long period of time when even judges who were very supportive believed that there was a Sixth Circuit Appropriation that they had to keep track of. There would be cuts for that and we were unsuccessful in convincing them that there was not a Sixth Circuit Appropriation. Other than that and currently now the circuit clerk addressed this a little bit. The existence of a panel liaison in the circuit has made an extraordinary difference in the management of panel resources on big cases. It's worked very well.

Katherian Roe: That's a Sixth Circuit, is that Mr. Ranz that they were talking about earlier?

Henry Martin: That's right.

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Katherian Roe: You've seen the difference in the voucher cuts since the case budgeting attorney came on?

Henry Martin: Not only in the cuts, but in the authorization particularly in a timely way whether they're capital cases or just otherwise complex cases. The judges both in the circuit and the district have come to trust his assistants and he's worked well at moderating costs and in making sure that what was needed was authorized. It has smoothed that process and made the resources available in a more timely way and substantially if not entire reduced voucher cutting problems.

Beth Ford: May I interject one thing about Bob Ranz. It was asked earlier what his background is. He was actually a public defender and I think that that is the perfect example of someone who really understands what the work is. Being able then to do the job that needs to be done in that position with that specialized knowledge. He has a very good relationship with the panel lawyers all through the circuit and as Henry said, I don't think that there have been cuts to speak of as a result of his being there.

Katherian Roe: Mr. Martin let me also ask you. You've been the defender for thirty-plus years in your district. Has your office always had that same relationship with panel management?

Henry Martin: As the panel has grown and the work has grown, it's become a little more involved but the structure has been the same since the very beginning.

Katherian Roe: All right, thank you. Ms. Ford can I ask you a question about the PDS model you spoke of earlier. We as a Committee had the opportunity to sit down and speak with Ms. Buchanan also. The one thing that I think of when I think about the PDS model is, while it's certainly working well for the District of Columbia, it's also on a much, much smaller scale. Have you given any thought to that?

Beth Ford: I have. I think that their request was forty-eight million dollars last year. They received the forty-eight million dollars but to compare that with the one billion dollar appropriation I know is not comparing apples to apples. Yes. Depending on what day of the week it is I sometimes think that's the way to go and sometimes I don't think that's the way to go.

Katherian Roe: I think members of the Committee have similar thoughts about different models. It really depends on where we are in the country. It starts to sound good and then go somewhere else and it doesn't sound as good. All right, thank you. Mr. Eddy, one of the questions I wanted to ask you is the model that you were talking about and I know it's just in it's formative stage, but did you have a thought about how the funding process would work. Would it be that the defenders were under the arm, or the wing if

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you will, of the judiciary and so the judiciary seeks the funding or would the defenders seek their own funding and stand alone?

Bruce Eddy: I would think that it would be better if the defenders, excuse me, sought their own funding. They know what they're doing. They know what they're needs are. I believe they can be more convincing with Congress and in carrying the message to Congress than taking it through yet another layer. I would envision it where the defenders could directly lobby Congress.

Katherian Roe: Thank you. Thank you, Judge.

Judge Cardone: All right. Judge Walton.

Judge Walton: Ms. Randle you said something that I found very interesting. First I'd like to know, what is a racial demographic of your client population in your two offices?

Doris Randle-Holt: Well, in Memphis it is about 75% I think African-American. Now, in Jackson, Tennessee it's probably a flip, because Jackson has a lot of, it encompasses twenty-two counties and a lot of the rural counties is mostly Caucasian.

Judge Walton: You said something that was very interesting regarding diversity on the panel. You said that until this judge became active in saying that things had to change that diversity was not the norm.

Doris Randle-Holt: Right.

Judge Walton: Does that counter against judiciary getting out of the process as some suggest?

Doris Randle-Holt: Well, in my district I would say it's working. It was because the judiciary was in it that we saw the change. Now, that may not work somewhere else just like the New Orleans model may not work somewhere else as well as it seemed to be working in New Orleans. The panel members in the Western District appear to be very happy the way our panel is working. I'm a firm believer if something is not broke don't try to fix it, not in West Tennessee, I think they're happy.

I have not seen a lot of voucher cutting like some of the other people were talking about. Never heard the lawyers complain about that except one lawyer, I did hear one submitted a seventy-nine thousand dollar voucher on a case that was thoroughly reviewed . . . and but anyway, I don't think it every left the district because that lawyer was subsequently, he was murdered, so I don't think the voucher went anywhere.

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Katherian Roe: You're not implying it had anything to do with the voucher?

Doris Randle-Holt: [INAUDIBLE].

Judge Walton: His heirs didn't seek to recover it? [LAUGHING].

Speaker 2: I want to know what happened.

Doris Randle-Holt: The court didn't do it.

Judge Cardone: No one ever asked for \$79,000 again?

Judge Walton: His estate didn't seek to recover it though?

Doris Randle-Holt: No, not that I know of.

Judge Walton: Mr. Eddy you have expressed the same position that many others have expressed about the judiciary getting out of the process. From my personal perspective and the perspective of most of the judges I've talked to we'd be happy to accommodate you if Congress would be willing to do that. My perspective and projection is that I don't know if Congress is going to be willing to let us off the hook. If that is in fact the reality, what if anything would you recommend that we recommend be done to improve the process with the judiciary still involved in it's supervisory role?

Bruce Eddy: I think that independence needs to be at least given without the judiciary. Have it where Defender Services or whatever name that organization goes by is more responsive to the defenders and to the CJA attorneys. We sometimes complain about what Defender Services does, the positions they take, but yet they're an employee of the Administrative Office. Even if you're under the wing of the jurisdiction if you will of the judiciary there needs to be a level of independence. There needs to be an opportunity for the defenders to be able to put their budget together and be able to have a direct voice to Congress even if it's going in under the judiciary so that they can lobby for their own budget. Even if you were to stay within the judiciary, changes need to be made so that there's independence there, so that the defenders, CJA attorneys have a voice to whatever body, whether it's Defender Services or some other structure under the judiciary that controls them so that they have a voice in that organization and that organization reflects that voice and not that of the Administrative Office.

Judge Walton: One of the concerns I've heard expressed and it's a concern that I have, is the apparent arbitrariness of some of my colleagues in reference to the approval of vouchers. If judges are going to remain in the process, what if anything would you recommend to try and alleviate some of that attitude, I

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guess, of some judges of their desire to just cut indiscriminately for whatever reason. What could we do that could maybe put some limitations on the ability of judges to do that?

Bruce Eddy: There could be a variety of things. There could be some type of a review committee set up that looked at voucher before the judge received it to see whether the hours were reasonable. That would be people that had criminal defense experience that could look to see the time that was being spent, the other charges to the case, so that when the judge got it especially if they don't have a background themselves in federal criminal defense so that they would have some level of confidence that these charges that are going up to them are fair and reasonable. Then I think it just becomes education to the judges. The judges should not be required to reduce vouchers by any percentage because they're trying to save money. There shouldn't be a field between the judges you have to reduce all vouchers by 25% or 10% or by any amount.

Going back to the New Orleans the model that they use that seems to be working fairly well for them and I think some model like that could be used for other judges where perhaps it's not the defender office but it's somebody familiar with the defense function that reviews that voucher initially so that when the judge gets it the reasonableness of the hours that were spent, the activities undertaken, the judge isn't having to go back and try to come up with whether that's reasonable without any personal experience to base that on. I think that would be helpful to judges along with education that there is not a nationwide requirement that vouchers be cut a particular percentage.

Judge Walton: Should we be required that if we're going to cut that we articulate that in writing, otherwise if you're not willing to do that you can't cut?

Bruce Eddy: I believe so because if a judge is going to cut a voucher there should be and I would think there would be a reason for why that judge is cutting it. The judge ought to be able to articulate that. There should be some type of a review process of that judge's decision to see whether or not that is a legitimate and a good reason. I think that that would help tremendously because at least the panel attorneys then would know why their voucher is being cut. If they wanted to try to appeal that there should be some process whereby to do that.

Judge Walton: Thank you.

Margy Myers: Can I just add along, I think the intermediary model helps because there's been discussion about whether the judge should call the lawyer about the voucher and whether that's chilling and it really depends on the judge. The intermediary it sounds, like for example, in New Orleans can say to the

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lawyer why are you billing that. Work out the things that can be worked out before it goes to the judge without that inevitable chilling effect that all of you have whether you like it or not.

Judge Walton: Thank you.

Judge Cardone: Dr. Rucker.

Dr. Rucker: Thank you. I'd like to continue with this theme if I may about possible different structures that we may have or consider. I agree with Judge Walton I'm not sure where we can go with this and what we can really accomplish. Let me toss out one idea, and then ask you to respond to that, what your thoughts about that. I'd also like to ask you about if you have any ideas about what you would think would be the ideal structure. I know a lot of you issued in your writings concerns about the way the structure is right now and a lot of it is focused on the district court. One of the things with the excess vouchers it goes to the court of appeals and those judges really don't know very much these cases at all and don't have hardly any contact at all with the attorneys. Should they be kept in this process or should we recommend eliminating that? Let me start with Ms. Myers.

Margy Myers: I would take them out. That also comes from I would take the judges out in general and leave it to somebody like a former public defender, I think that works better. I think you identify the problem on the excess vouchers. My own experience with the circuit it's gotten much better but it shouldn't depend on who's in charge of the vouchers, whether it's gotten better.

Dr. Rucker: Mr. Martin?

Henry Martin: I don't think that the circuit review adds anything substantively other than a workload. There's a potential that a judge who had time and interest to compare what he or she was getting from the different districts might see aberrations in the practices and might take the initiative to try to address that but that's not really likely to happen. I agree with you I don't think the judge designated by the court of appeals is likely to have any insights into an individual case that hadn't even come before them yet.

Dr. Rucker: Ms. Randle-Holt?

Doris Randle-Holt: I really like that Louisiana model. I like that model. I think the judges ought to just be the final person to review it once the voucher has gotten to them. As far as going to the circuit, I like the model where the attorney reviews it and helps the lawyers with their budgets and review it. I think that one will work everywhere.

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Christine Freeman: I'd like to address this only because I watched the CJA attorney from Puerto Rico's testimony. It just seems to me there has to be an appeal process. There are too many instances where this is a matter that cannot be resolved in a friendly conversation and informally by people who both know what the case really involved and what they're talking about. There needs to be some kind of due process or appeal when someone feels strongly that they're being denied adequate pay.

Dr. Rucker: Mr. Eddy?

Bruce Eddy: I agree with Margy. I would think that eliminating judges from all of it would be the best but I certainly would encourage that it not go to the circuit. From my experience and it's been limited that most vouchers that go to the Eighth Circuit at least in the past have been cut without lots of feedback on why. Some of it has been that what you're supposed to do as a CJA attorney this is supposed to be pro bono. The fees that you earn are to help pay you back so it's not entirely free. It compensates you to some extent and so it's with that eye that my understanding has been that when the vouchers have been reviewed at the Eighth Circuit that they've been cut. I don't think that that is helpful.

I think that that certainly as Christine said an appeal and review process is good but I would think that taking to the circuit would not be helpful. Should be review process down at the district court level and then if you want to appeal what the district court said have some kind of group or panel with expertise in criminal defense that could give an answer that could resolve that dispute.

Dr. Rucker: Ms. Ford?

Beth Ford: I would remove all of the judges from the voucher process and have someone like the case budgeting attorney who's knowledgeable, who can do the review, who can make the decisions. Then, yes I think that if there are decisions made against the attorney that there should be a process for maybe the panel selection committee to be the court of appeals. It seems like to me the judges would be happy to get of[f] the job and raise the caps. The caps need to be raised.

Dr. Rucker: How high would you raise them?

Beth Ford: I'd raise them to fifteen thousand dollars and I base that on an earlier question about what would a private attorney hire for a felon in possession case. I had the opportunity to text my panel representative and ask him what he thought the going rate was in Knoxville and he said fifteen thousand dollars.

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Dr. Rucker: Let me switch just for a moment. Ms. Ford in the written statements that you provided for us one of the issues that you raised was, that you felt there was a gap between the quality of representation provided by the federal public defenders and the panel attorneys. The surveys that we've seen of judges across the country have come up with similar kinds of results. They said that, really the gold standard has been the Federal Defender's and that there is a significant gap between the defenders and the panel attorneys, and even another gap between the panel attorneys and retained attorneys. What I would like to do Ms. Ford is begin with you and ask just about how can we decrease that gap? How can we make the panel attorneys more like the Federal Defender's, because I think they are at a distinct disadvantage possibly in terms of training but certainly in terms of resources. Could you speak to that please?

Beth Ford: I think the good news is that when you look at the previous surveys the gap has gotten smaller. There are things that are going on that are evidently making a positive impact on the quality provided by panel attorneys. There are several things that need focus. One is the training, making training available. The training division does a wonderful job, they always get great reviews; however, panel lawyers have a hard time closing up shop and traveling across the country or regionally for several days. I think there's a big responsibility on all of the defenders to provide good quality CLE.

I think that another thing that would improve the quality is to make it easier for panel lawyers to engage experts. I gave an example in my written materials about how easy it is for someone in my office to get approval for an expert above the twenty-seven hundred dollars compared to how difficult it is for a panel lawyer to get the very same expert. That would help to level the playing field and improve the quality of representation provided by panel lawyers.

Dr. Rucker: Let me ask the rest of you to comment on that, but you raise an issue too about the use of experts. From the data that we've seen and Professor Gould has referred to this before. The use of experts is shockingly low in a number of the districts around the country. What can we do to improve that? I'll open that up to anybody that would like to respond. I hope that all of you would like to.

Beth Ford: In my district several years ago we had one of the highest use of investigators in the country. I tried to figure out why that was and the only things that I can point to, or the biggest thing that I can point to is that we try to be sure that the panel lawyers know how helpful it is to have an investigator and other experts. That we include that information in our training materials, our orientation seminar, in our other seminars through the year. I think that a big part of it is education.

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Henry Martin: When the district specific numbers on the use of experts and investigators was first circulated among the defender community I was surprised to find out how little they were used in my district and education was the answer there. We had some seminars, we talked about it more, and I think the time was right too. In the past and naturally it was real hard to find a competent investigator, there were maybe one or two that were privately available. They're much more available now which is a combination of just more people going out and opening up investigative agencies and the demand increasing because the lawyers were now asking for and being authorized to get it.

Also, I would like address your earlier question just briefly. Right now although I think my lawyers across the board are frankly the best lawyers in the country. I think there are a substantial portion of the members of the panel in Nashville I think provide representation that is just as good as the lawyers in my office do. Not every one of them, but a substantial majority of them do. In some ways they're better. There are somethings they do better than the lawyers in my office. I think partly we're lucky, we have a supportive bench but it's a combination of the selectivity of the lawyers that get on the panel.

The continued monitoring of the quality of the lawyers. We actually now are removing lawyers who don't provide the quality that we expect. The training and relationship between my office and the panel members. We do monthly lunch and learns, monthly round tables, we have a list-serve that the panel developed now that's busy every day. The members are limited to my staff and to members of the panel. The interaction, we regularly take calls and visits and so it's really like one big office to a large extent and I really don't think there's a gap in quality of representation.

Margy Meyers: I think it needs to be easier to get experts including investigators. I think we saw that yesterday where the panel lawyer said, "It's easier for me to check the computer records than to go bother to get an expert or even an investigator. One way is to set those numbers . . . five thousand dollars for an investigator or something where they wouldn't have to go to the court.

I also think we have an advantage that I'm not quite sure how you deal with, which is we're in offices of experts. If I have a question I walk down the hall and talk to people who've had four arguments in the Supreme Court and as you've heard they're solo practitioners. We need to figure out not just training but build networks of people they can try to duplicate that ability to get advice on questions that can really help.

Doris Randle-Holt: I think we close the gap between the defenders and the panel, through education as the others have said and that's through training. What I do in

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our district is I get some of the premier criminal defense attorneys to participate in the training of panel lawyers and my staff. I think that's how we close that gap.

Now, as far as experts I've not heard any panel attorney say that they were denied an expert and they use them in my district. They ask the court for investigators and experts on cases. I heard lawyers talk yesterday about, "Oh this is just a gun case." Well, in my district we handle a lot of gun cases and I don't know of "just a gun case." I have gun cases that have robbery involved. I have a gun case that involves a rape. We have to use experts or just a gun case where there are five or six people in a room and everybody is arrested and my client says, "It wasn't my gun." I got to hire a fingerprint expert or DNA expert. I want DNA done on not just the gun but the bullets, we use experts and our panel lawyers do too.

Bruce Eddy: I think one of the reasons in my district that panel lawyers are reluctant to want to try to hire investigators and experts such as that is because they'd rather do it themselves. The majority of the panel attorneys this is their sole source of income is what they earn off of appointments. If they can do the work themselves and bill out that two, three, or four hours then they get money they otherwise would not. I've put on a number of seminars. The turnout for the seminars has been disappointing. I've sent emails to all the panel attorneys asking for what they want, the type of training they want and get very little feedback. It appears that what they're wanting to do is to try to maximize the amount of money they can earn on each case and one of the ways they try to do that is not ask for experts but rather do it themselves.

Dr. Rucker: Let me follow-up with that if I may. Do you think they're qualified to do that in all instances. For example, if they a big e-discovery case do they have the skills to actually do that or?

Bruce Eddy: I would say they do not. They need to be getting experts. We have a lot of child pornography cases in our district and rarely, I'm not sure I can even remember a time where panel attorneys ask for a computer forensic expert to go in and look at computers and to answer a lot of the questions that I know the defendants have in our cases where we do use computer forensic experts. No, I don't even think that unless it's just going and picking up a record that's close and readily available which you wouldn't need an investigator for that they do have the expertise to engage in the services that experts are needed for.

Dr. Rucker: All right. Thank you. I'm finished.

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Judge Cardone: Okay. Before I ask the Committee generally for questions, I had a question for you Ms. Freeman. When you did your opening statement you said something about being asked about the death penalty?

Christine Freeman: Yes.

Judge Cardone: Okay. What did you want to say, because I didn't hear anybody ask you anything about it.

Christine Freeman: No, it hasn't been discussed. Well, I thought that that was one of your focuses . . .

Judge Cardone: Right, and it is.

Christine Freeman: for this session.

Judge Cardone: It kind of depended on areas of expertise and some of the information that we felt we could get. You're in a CDO correct?

Christine Freeman: Correct.

Judge Cardone: Do you have a CHU available to you?

Christine Freeman: Well, in my testimony I described it at length. We have the Capital Habeas Unit and it's a statewide unit. We do all the capital habeas cases in Alabama, in the three federal districts.

Judge Cardone: And, how does that work?

Christine Freeman: Well, we're operating in a state that has no system for state post-conviction or for direct appeal or for public defenders. We have sixty some judicial districts in this state and each judicial district chooses their own system of public defender whether it's a case by case appointment or local attorneys who are probably over half of them are contract attorneys. There are now five public defender offices in the state but the absence of an institutional defender means that the quality of the trial work and the quality of the state post-conviction is nil. We don't have a system for automatic appointment to state post-conviction even in death penalty cases. The work of making sure that issues are adequately exhausted really isn't addressed other than through the ABA Committee, Equal Justice Initiative and our project.

I mentioned in our testimony that we created a separate project in order to recruit and support volunteer council in state habeas. What I think is that the effort to come up with a uniform system for capital habeas, and let me just pause for a minute and say, none of the problems that we've had in the

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our state they're just totally different from the Fifth Circuit issues and the Fifth Circuit capital habeas issues. That's another universe fortunately. We have this problem that I think the bureaucracy and the administration don't recognize as existing. If an issue is not exhausted in state court then we're a waste of time as a federal Capital Habeas Unit, there's no point to our even existing. I think there has to be some recognition that for the federal Capital Habeas Unit to be effective there has to be an awareness of what the state habeas practice is in that district. We have to be allowed the flexibility to address it. We have to be allowed the flexibility to work to make sure that the federal constitutional issues are adequately preserved in state court.

Judge Cardone: All right, thank you. Anybody? Mr. Cahn.

Reuben Cahn I don't have a mic and so I'll try and speak loudly. Ms. Freeman if you could follow-up on that, and I read your testimony. The stories you told are quite horrifying and most of the horrors are failures in the state system. I'm trying to figure out what are specific suggestions that you could make that we could possibly adopt.

Judge Cardone: I'll be happy to repeat your question.

Reuben Cahn What I was saying is that in reading your testimony it appears to me that most of the horrors you describe derive from the complete and utter failure of the state system. Of course we don't have any control over that. My question to you is, what are the specific suggestions you could make that we could consider that make affect us? I'm thinking one is possibly what Sean was talking about yesterday, about increased flexibility to go back into state court to exhaust matters but are there other things we ought to be looking at and trying to address what's going on in Alabama?

Christine Freeman: I think that when a Capital Habeas Unit is placed in a jurisdiction that has no system for state habeas we should be allowed to create a system for state habeas, at least for our clients, which is what we've tried to do through the non-profit that we created. I think that the . . . it's just been very clear to me that the Defender Services Organization just doesn't seem aware of what this question about being in state court means in a jurisdiction like ours. We have to have the flexibility to create some structure and to work with that structure. I don't mind it being measured and observed and having to report on that structure, otherwise we can't accomplish anything for our clients. The cases that I mentioned where procedurally they were dropped got no relief in federal court.

Reuben Cahn It's unimaginable to me even as I spend whatever dreams I have of what we might be able to accomplish that Congress would fund a system that would litigate fully in state court capital habeas cases. Can you try and be

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a little bit more specific about practical solutions we can adopt? Can you also address how *Martinez* affects that analysis because it seems to me like that has opened a door to allow you to go after the failures.

Christine Freeman: Yes, but you're aware that the Eleventh Circuit has a very restrictive view of *Martinez*?

Reuben Cahn I don't practice in the Eleventh anymore so I don't really know.

Christine Freeman: You know everything Reuben. In any event the Eleventh Circuit has a very narrow take on the application of *Martinez*. It's opened a little tiny door but it's just a crack. I think that there should be some requirement that we're reporting on how we are effective in what we're doing. I think that just as . . . it maybe inconceivable to you but I think that that has to be done. I just think it has to be done. You can't continue to pretend that we are addressing these problems when we're the icing on the surface of a garbage dump. That is just not appropriate.

I think that allowing us the flexibility to go into state court. Maybe we'd have to justify it to some extent or to some other way but we have to be able to preserve federal constitutional issues and they're not being preserved with the absence of any system. It might be that we would have to . . . that the CJA could be amended to say that if there is a state where certain requirements are met then the federal defender will not be permitted to go into state court, but where those requirements are not met we ought to be permitted to do that.

Henry Martin: Could I add something. In fact for eight years the federal judiciary did fund litigation centers that worked in both state and federal courts. Now, there was a requirement and that's the death penalty resource centers. There was a requirement of some degree of state participation in the funding but in a number of states and maybe even including Alabama that participation was the contributed time of the staff of the resource center, they essentially worked for half the pay of fully funded center. They were closed ultimately by Congress and by several states.

Also, I think and this extends maybe a little beyond your direct charter but the kind of litigation that Christine is talking about has significantly become more complex than it was twenty or thirty years ago even at the time of the resource centers. The federal government seems to have no trouble at all funding local and state law enforcement and prosecutorial offices through grants out of the Department of Justice. The need for the federal government to recognize that the states are unable or unwilling to fund the defense side and particularly in things like capital litigation and capital litigation that does ultimately lead to the habeas litigation a recommendation that Congress either through the Department of Justice or

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otherwise make more money available to state programs because it's not just going back into the state post-conviction. If you can't address things at the trial level you're going to continue to have poorly litigated cases coming through the system and with people being executed because the resources weren't provided at the state trial level.

Christine Freeman: There are millions of dollars that come to Alabama's law enforcement agencies from the federal government. I don't know if the pittance that comes other than to our federal defender offices that comes to the defense function. Why isn't there some requirement that if federal dollars are going to the law enforcement agencies, there should be comparable requirements for the defense function or there should be some measurement of process required to be shown in the state system. Federal dollars built some of our state prisons.

Judge Cardone: Did you have one Judge? Judge Prado.

Judge Prado: Somebody else has one.

Judge Cardone: Well, we have others but go ahead Judge Prado.

Judge Prado: Let me just congratulate Henry on all his thirty years of service as a public defender. He's been a leader in the organization and thank you for your service to the Sixth Amendment and the Defender Program. You and I go back a long way and there's the issue of whether the courts interfere too much or whether we need the courts to support us and be under the umbrella of the courts and there's always these problems. The committee that I was on many years ago recommended that we do this every seven years and it did not happen. I think one of the reasons that we are having this now is because of sequestration and the perception, I say perception, that Defender Services and public defenders and the whole program was treated unfairly by the courts when the budget crisis hit. Now, the whole court was cut across the board, everybody, even us judges, maybe not as much, but us judges, everybody had to bear the hurt of a budget situation.

Maybe Henry you have a better pulse of the national level since you've been around for so long, and are more familiar with it, but all of you, was it a real unfairness on the part of the courts the way Defender Services was treated budget-wise, is it a perception. Many of you are out in your districts doing work and don't know the heart of what's going on in D.C. When this sequestration issue came up and everybody had to be cut off many of you saw it as the Defender Services treated harder and harsher than other parts of the courts. Maybe that should not be the case because Defender Services and your responsibility defending people is different from probation or the clerk's office and maybe that enough is reason why you should not have been treated like everybody else. Was there an

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unfairness and was the program treated harsher than other parts of the court?

Henry Martin: Yes.

Judge Prado: Okay, next question . . . no.

Henry Martin: Until about three years ago I had every confidence that the position that the majority of the defenders took during your Committee's work was still the correct position. I think looking back even now there was a correct position at the time. I think we have been so mistreated by the Budget and Executive Committees of the Judicial Conference in the last three years that I'm not the only one that's reassessing that. I think we're nowhere near unanimity now on where we think this Committee should go on independence. There is a lot more frustration and feeling of mistreatment and abandonment among defenders by the way the judiciary at the very top has handled the CJA Appropriation and these programs. That we are troubled and are looking seriously at alternatives. The alternatives are not necessarily real appealing either but there is a real sense that we've been mistreated. That the leadership of the judiciary as it's currently constituted, no longer feels that this is a special program, that this is a special trust that they've invested with. There are a lot of individual judges that feel that way but they're currently not in leadership positions.

Judge Cardone: Mr. Martin can I make a follow-up question to that because one thing we hear is you weren't the only ones that were caught. Magistrates no longer have an office and certainly I would think that they would feel mistreated and betrayed by their judges. Why is it different? Why are you more victimized than anyone else in the judiciary?

Henry Martin: I don't know of any other agency within the judiciary or outside of the judiciary that suffered the number of personnel losses that we did at the time. My office was lucky that we didn't have to lay anybody off but for seventeen weeks we were paid four days a week and still working throughout that period of time. To my knowledge nobody in the probation office was either working for free or going home and losing the income and nobody in chambers, nobody in the clerk's office. That could have been avoided, there was money where that could have been avoided. That's why we felt like we were left unprotected.

Judge Cardone: Do you know if the CJA attorneys were ever reimbursed for the amounts that were cut?

Henry Martin: I don't believe they were. They were also mistreated, that also could have been avoided.

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- Judge Cardone: Their amounts were cut and to your knowledge they were not reimbursed?
- Henry Martin: Not for the vouchers that they submitted during that period of time. There were some, maybe they were paid late but I don't think they were paid during the time for the reduction of the rate. I don't think when that was restored it was not made retroactive.
- Margy Myers: If I can just echo that. The way we were cut and the fact that the Executive Committee and the Budget Committee ignored the recommendation of Defender Services which was to defer panel payments and not to take it all out of the defenders was the judiciary at least the top, and not those of you sitting at the table, completely ignoring how we should be treated. I think there was also it brought to the four statements by the leadership of the judiciary even to Congress that we were a spend thrift program. That a dollar for us was a dollar less for the judiciary which made us realize even more even though we're not supposed to that we were competing for the same funds. As any human being in that position would be, even judges, if there's a limited pot they're going to seek the funds for themselves. The whole work measurement was part of the judiciary's belief that we were a spend thrift organization.
- Beth Ford: I was going from there and then work measurement followed and work measurement showed that we were very hard working, understaffed organizations.
- Doris Randle-Holt: I was going to say, when I took over this job it was in the midst of taking eight furlough days and we lost seven staff members, but it hasn't stopped. With the work measurement I was given a budget, shared it with my staff, we were very happy, now the AO knows that we really worked and I looked in to the computer system and a million and some dollars of my money was gone. I start calling up people. I talked to Mr. Martin, I said, "Something is going on, there's an online monster eating up my budget, something is going on. The money is gone." They took back over a million dollars after giving me a budget to support my staff.
- Judge Prado: Just so I'm clear or it's clear. The money for Defender Services or for public defender is separate and apart from the main budget so it's not like there was intermingled money and money was taken away from defender budgets to hire probation officers or anything of that type. Money was still kept separate.
- Margy Myers: Just to give another example of the insult of sequestration and work measurement. We were told that everyone else had to work measurement, probation officers, court people and so we were just like everybody else and we're not. When they tried to do work measurement on the U.S. attorneys they couldn't do it and to be compared to court reporters and

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probation officers and to assume that our tasks can fit into widgets was devastating to morale.

Judge Prado: Where did the idea or concept come from to do the survey? Was it out of Defender Services or somewhere else in the courts that they decided this needed to be done? Do we know?

Margy Myers: You original report talked about how nontransparent the judiciary is, but I think it was the Executive Committee and the Budget Committee.

Henry Martin: The Judicial Resources committee which was given jurisdiction over our staffing size and budgets.

Beth Ford: Can I say one thing about work measurement formula. It is so inflexible. It does not recognize that we have to react to what other people do in the system. “Drugs Minus Two.” We have 1400 cases in our office to review and most of those will get motions filed. Johnson. We have 1700 cases to review and probably about 10% of those we want to file a § 2255, but we’re looking at this five year average that I can’t go out and hire people and Defender Services can’t give me people to deal with those cases. We’ll get it done but we’ll be working very long hours.

Judge Cardone: Professor Gould.

Prof. Gould: Thank you Judge Cardone. Dr. Rucker was mentioning this issue of the deferential use of experts by panel attorneys across the country. I’ve actually been chronicling the answers we’ve been getting from the various witnesses who’ve testified. To throw out what I have for you right now and I’d like to see if there are any other explanations that we haven’t heard from that you think about this, “Oh yeah, the Committee needs to know that this is another possibility.” I would put these in three broad categories. One is there’s something about the case. Things the Committee has heard from witnesses would be either the facts of the case don’t really lend themselves to an expert. We had one witness say that the discovery this person gets from the U.S. attorney is so sufficient that it’s really not necessary to hire an expert. One category would be the case.

The other category would be the lawyer, either the lawyer is not trained enough to recognize that an expert is needed or just doesn’t know. We’ve heard that a number of lawyers like to do the investigation themselves and Mr. Eddy you added a corollary to that this morning which is that there’s a financial incentive to do it themselves and not bring in someone else.

Then we also have the category or the judge/the process. The Committee has heard either that judges aren’t granting requests to have experts. The ex parte process is too daunting, lawyers don’t want to have to go through

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it. The rates are too low or it takes too long for the expert to get paid so it's difficult to find experts. That lawyers are worried that if they ask for experts they'll be seen as "the expensive lawyer" and they will risk getting future appointment. Or finally, that there is something about the culture of criminal practice in that district across the entire district that simply has all lawyers, except maybe you as the public defenders, simply not litigating at a certain level. Anything else that the Committee should hear as a possible explanation that isn't on that list?

Margy Myers: Experts may not be available. I think Judge Cardone referenced that in Portland depending on where you are, for example in Del Rio whether you can get certain kinds of experts.

Prof. Gould: Okay, anything else. All right. Then follow-up question. The districts you all represent all represent one of the very highest rate of expert use in the country and also either the lowest or almost the lowest rate of expert use. With all due respect Ms. Randle-Holt actually the panel lawyers in your district are near the bottom, they aren't using experts that often. I'm wondering of the reasons that I've listed that you all say there really isn't more to add to that, can you identify the top explanations for the use or non-use of experts, mainly non-use of experts in your district. I know it's tempting to say they all apply but certainly certain ones apply more in certain districts than in others. As you think about the panel lawyers in your districts to the extent that they are not using experts what are the primary reasons?

Christine Freeman: You'll be hearing from our panel representative later today so he may have a different perspective on this.

Prof. Gould: Absolutely, but because you get to sit back from it all and look at them you also have a very important perspective.

Christine Freeman: I think that at least in our district, in the Middle District of Alabama our panel lawyers none of them are full time panel attorneys so this isn't their only source of income. Many of them have a state criminal defense practice as well. The use of experts in state criminal practice is abysmal in our district and virtually non-existent. For example, one defense attorney had to litigate getting the copy of his client's video-taped confession for free in advance or would he be required to pay for it in order to get it up front before he could be reimbursed by it for any cost.

There's just a mindset that is mind boggling. I do think that we've done some education with our panel attorneys. I also think that we have an obligation to be reviewing the quality of the work our panel attorneys do and that their use of experts ought to be part of that. I think we've done that in the past in our district. We're definitely doing it more intensively,

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now that we have term limits and I think that the mindset that the CJA panel should be the best of the best, should be basically an expert panel of private council will help in the use of experts.

Prof. Gould: Mr. Eddy other things besides that it's not in their financial interest to hire experts?

Bruce Eddy: I think it's also that they've not used experts in the past. They don't know how to work with one, they don't know what type of information to give them. They don't know the advantages that an expert can bring to your case whether you're going to trial or whether it's mitigation for sentencing expert. They just don't know how to take the information that an expert can bring them and then what to do with it. I think there's a lot of that, they're just uncomfortable. They've never used them, don't know how to use them.

Prof. Gould: Mr. Martin I'm going to skip you because you actually have a high rate of expert use, but we'll come back to you.

Henry Martin: I'm just want to tell you how I think it got there.

Prof. Gould: Oh, okay.

Henry Martin: There are two things that just occurred to me as we were talking of part of the education process. One is, in the interviews we do with applicants we now go over with them what your experience is using experts. Generally that will lead into a discussion about you're in a different world now because they do come like Christine's from a state practice. The other thing is the List Serve that I mentioned regularly will have somebody saying I've got this issue, I need an expert, who's used so and so or what do I do? Just that interaction has raised everybody's level of awareness of the need.

Prof. Gould: Ms. Ford, I'm sorry, we skipped you is there anything? What's the story in your district?

Beth Ford: I'm looking at the summary of vouchers that were paid in 2015 for experts in our district and it looks like that we did fairly well in every category except psychiatrists, and that could be that that is just not an expertise that people look for, they rely mostly on psychologists. I would like to think that we're at least above average.

Prof. Gould: You are.

Beth Ford: Okay, good. And I would . . .

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- Prof. Gould: It's like "will be gone."
- Beth Ford: Yes. I think that it's because of the education and the kinds of speakers we've had at our seminars. We brought in psychologists and we bring in psychiatrists and computer experts.
- Prof. Gould: Ms. Myers you mentioned the physical difficulty of locating an expert, is there more in your district?
- Margy Myers: I think most of it is culture. I think most people are solo practitioners, come of state court where they just don't use experts much. I think all cases can benefit from experts. A significant portion of our docket is illegal re-entry and often the two issues in this case are the prior convictions which if you can get it on a computer you don't need an investigator. The other, of course, would be mitigation. A lot of that mitigation is not in the United States so I think people just rely on the letters from the kids saying, "Bring my daddy home."
- Prof. Gould: Okay. Finally, anything that you'd like to add.
- Doris Randle-Holt: I'm really shocked maybe it's because the lawyers are doing some of the picking up the record themselves since between federal court and where the records are kept in state court for prior convictions is just right across the street, it's a short distance. As far as other expert services I know that some of them use them, when I was in the courtroom . . . now I don't know what years we're looking at.
- Prof. Gould: The last three fiscal years.
- Doris Randle-Holt: That's what I was going to say, I haven't been in the court that much in the last three years, but prior to that they were using a lot of it. Even co-defendant cases and in the last three years they should have gotten a lot of cases because after sequestration, that's one thing about my court, they made sure that my office got out 75% of the cases. Our panel got a load number of cases so I'm going to say it's probably the facts of the cases that we got the most difficult cases they may not have needed an expert.
- Prof. Gould: Okay. Thank you. Judge Cardone, that's all for me.
- Judge Cardone: All right, did I miss anybody? Okay. All right, then we're going to go ahead and take a break, a short break, it is about 11:40 a.m. now, let's take a ten minute break so we don't run too far behind, we're going to resume at 11:50 a.m., with Panel 7.
- Katherian Roe: Thank you for coming.