Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing # 2–Miami, Florida
January 11-12, 2016

Transcript: Panel 1—Views from Federal Public Defenders

Judge Cardone: Okay, let's go ahead. I'm going to officially call this hearing to order. I'd ask everyone to please remember to silence your cell phones. I know that you were allowed to bring them in but I don't want to hear any of them please. This is the second in a series of seven public hearings of the ad hoc Committee to review the Criminal Justice Act. My name is Kathleen Cardone, I'm a United States District Judge for the Western District of Texas and I am chair of the Committee.

Before we get started, I'd like to introduce the other members of the Committee that are here with me today. I'm going to start with those that are a part of our first panel. Here to my left is Judge Mitchell Goldberg, United States District Judge for the Eastern District of Pennsylvania; Neil MacBride here to my right, an attorney with Davis Polk & Wardwell; Katherian Roe here from the Federal Public Defender for the District of Minnesota; and Dr. Robert Rucker who is an Assistant Circuit Executive for the Ninth Circuit.

Also present from the Committee are members who will be participating throughout these two days of the hearings. They include Judge Edward Prado, Chair Emeritus of the Committee and a Judge on the Fifth Circuit Court of Appeals; Judge Reggie Walton, United States District Judge in Washington D.C.; Judge Dale Fischer, United States District Judge from the Central District of California; Mr. Reuben Cahn, Executive Director, Federal Defenders of San Diego, and please note he'll be acting as Chair for our hearing tomorrow; Professor Orin Kerr, the George Washington University; Mr. Chip Frensley, national CJA panel attorney district representative; and Professor Jon Gould, way over there to my left. He is our reporter and he is from American University. Not with us today but always with us in spirit is Judge John Gerrard, he is a United States District Judge from Nebraska. Let me also introduce the staff of the Committee who will include Ms. Arin Brenner over here to my left, Ms. Autumn Dickman, and Mr. Mark Gable. I don't know if he is here in the courtroom.

The Committee is pleased to be conducting this meeting in Miami. In planning our hearings throughout the country, it was our desire to have the opportunity to hear from all of our diverse judicial districts by setting up regional locations that would allow us to address all matters before this committee. In particular at this second hearing the Committee wishes to have a focus on issues in multi-defendant cases, issues surrounding e-discovery and extraterritorial discovery, and issues surrounding the use of experts in criminal cases.

Now just a brief history of the Criminal Justice Act. The Sixth Amendment guarantees to the accused the right to counsel in serious criminal prosecutions. To ensure that representation, it is now well established that after assessing the financial condition of the accused, the government may bear some or all of the cost of the representation of that person. The responsibility for appointing counsel in federal criminal proceedings for those unable to bear the cost has historically rested with the federal judiciary. In 1964, the Criminal Justice Act or what we call the CJA was enacted. It established a comprehensive system for appointing and compensating lawyers to represent defendants financially unable to retain counsel in federal proceedings. It also authorized reimbursement of reasonable out-of-pocket expenses and payment of expert and investigative services necessary for an adequate defense.

Amendments to the CJA in 1970 authorized districts to establish Federal Defender Organizations as counterparts to federal prosecutors in those districts where at least 200 persons annually require appointment of counsel. It is now more than fifty years since the CJA was enacted. There are approximately eighty-one authorized federal defender organizations who employ lawyers, investigators, paralegals, and support personnel. They serve over ninety of the ninety-four judicial districts. Those federal defender organizations in combination with more than 10,000 private panel attorneys represent the vast majority of individuals who are prosecuted in our federal courts.

In April of 2015, I and my fellow Committee members had the distinct privilege of being appointed by John Roberts, Chief Justice of the United States Supreme Court, to serve on this ad hoc Committee to review the Criminal Justice Act. In doing so, Chief Justice Roberts listed fourteen specific issues for us to review. They include areas of judicial involvement in the CJA process, employment and compensation under the CJA, quality of representation under the CJA, and the CJA structure and effectiveness. This is not the first of a kind study. Judicial conference policy has long supported a periodic, comprehensive, and impartial review of the CJA program.

In 1967, the judicial conference and the Department of Justice gave Professor Dallin Oaks the sole responsibility of performing such an analysis. Then in 1993, a report authored by the committee to review the Criminal Justice Act, which was chaired by our Chair Emeritus, Judge Edward Prado, was presented to the judicial conference. It was a 212 page report and it described the historical evolution of appointed counsel in the federal courts as well as presenting detailed findings.

It made twenty-eight specific recommendations to improve the CJA program to include selection, training, evaluation and compensation of

panel attorneys, the establishment and management of federal defender organizations, CJA funding, and improvements to the administrative structure. Many of the Prado review committee's proposals were endorsed by the judicial conference. It has now been over twenty years since that report. This Committee is very thankful for all of the work that was done before us, before our report by our predecessors. In particular we want to recognize Judge Prado, his previous effort, and the efforts of his entire committee has been invaluable in helping us frame the work of our Committee.

I want to address for all of you a little bit about how this study will proceed. The study is expected to be completed in the spring of 2017 when it will be presented to the Judicial Conference of the United States Courts. Between now and then, this Committee with all of its collective experience and the views of all of its members intends to gather information, examine the CJA program, debate the issues, and after thoughtful consideration, make its recommendations to policymakers. These findings and recommendations will be documented and explained in a written report. As I said, this report will be prepared by none other than our reporter Professor Jon Gould.

It is the Committee's hope that in today's world of computers, email, and websites, we are able to sufficiently reach out to the stakeholders and give them the opportunity to provide us with ample information to document our study. For those of you who are not aware, the CJA Committee has set up a website at cjastudy.fd.org which allows anyone to inform themselves about the study and submit comment. The Committee will be conducting a series of seven public hearings. This series of seven public hearings is in an effort by the Committee to hear from a broad spectrum of individuals and organizations and to engage them in discussion of the issues.

The seven public hearings have been scheduled as follows. Our first completed hearing was November 16th and 17th, 2015 in Santa Fe, New Mexico. The current meeting today, January 11, and tomorrow the 12th, being held here in Miami, Florida. February 3d and 4th, 2016 in Portland, Oregon, February 18th and 19th, 2016 in Birmingham, Alabama, March 2d and 3d 2016 in San Francisco, California, April 11th and 12th, 2016 in Philadelphia, Pennsylvania. Finally, May 16th and 17th 2016 in Minneapolis, Minnesota. We are hopeful that the criminal justice community will come forward to present their views. All of these hearings will be transcribed for public record. The video and transcripts from our first hearing in Santa Fe are currently posted on our website. Today's hearing is also being broadcast live through our CJA study website. Once again, that is cjastudy.fd.org.

Before we get started, I'd like to explain a little bit about today's format. Each participating panel member will be given the opportunity to make a brief opening statement. We ask you please not to read from your written submissions as we've already had the chance to review them by the Committee. They will be posted as public information at the conclusion of this hearing. After each panel participant has had the opportunity to make an opening statement, questioning by the panel will begin. Shortly before the end of this panel's time, I'm going to stop the questioning by this current panel and I'm going to allow all of the Committee members to ask any follow-up questions that they may have.

Okay, we're going to get started. I'm going to start by introducing our first panel. Our panel participants are Mr. Eric Vos, Federal Public Defender from Puerto Rico; Mr. Parks Nolan Small from the District of South Carolina; sorry, Mr. Thomas McNamara, a Federal Public Defender from North Carolina, Eastern District; Mr. Louis Allen, Federal Public Defender, Middle District of North Carolina; and Michael Caruso, Federal Public Defender, Southern District of Florida. We'll get started. Mr. Vos, you may make a brief opening statement.

Eric Vos: Thank you, your Honor. First of all, thank you for having me here today. A little nervous. I don't usually testify in panels like this or at hearings. I started my career for fifteen years as an assistant federal defender in the districts of Philadelphia in our Eastern District of PA and in Maine. I then moved over to the training division at Defender Services Organization. That gave me the chance to have a tremendous amount of contact with panel members all over the country. In the training division, our primary focus is the panel. We do train federal defenders, but really what we concentrate on is the panel. Not only do we go out and train, but we listen to the panel who calls us every day. We have a 1-800 number and we get panel attorneys. Most of our calls come from that. We also receive a tremendous amount of email from panel members as we initiate contact and do follow up.

Lastly, I'm now the federal defender in Puerto Rico. A huge part of that job, and one that all defenders actually love about it, is working with the panel. They come to us daily with their issues and we help them in any way we can. Sometimes it is as mundane as voucher issues, and sometimes it is complex and deals with cases. I do not do vouchers. I have never done a voucher. The only time I ever did a voucher was, I did something in misdemeanor courts and felonies in the city of Philadelphia. Federal vouchers, it's not something I deal with. Yet I have a very good understanding of what they're facing, what the panel is facing as far as voucher submissions, voucher cuts, and how it impacts upon their practice and ultimately the representation that they give. That's where my knowledge basis comes from.

And I also looked at the '93 report. I read through much of the submitted materials that dealt with CJA vouchers and compensation and management of the panel that was submitted in Santa Fe. There is a threat from '93 to Santa Fe, and from what's happening in my district. That's what I'd like to address with whoever wants to listen, is that I believe that there is a problem and it comes from the how the panel is managed nationally, and who manages them. I strongly urge that management be actually with federal defenders or a like body and not with the court. I believe a federal judge said it was unseemly.

I do believe that having the court manage the panel and reviewing vouchers and deciding how much time should be spent, too much money spent, and so forth is really something that should not be with the court. I don't think we would ever expect the court to do that with the U.S. Attorney's Office, nor would they expect us to do it to the U.S. Attorney's Office or to the court. These are three very different groups. And I believe that panel attorneys or defense attorneys are best managed by the federal organization.

Judge Cardone: All right, Mr. McNamara.

Thomas McNamara: Judge Cardone, members of the Committee. I was the United States attorney for our district back in the 1970s. Then for twenty-four years while in private practice I was a panel attorney. And then sixteen years ago I was appointed federal public defender for the Eastern District. I think this 50 plus years of service has given me a unique perspective into running the federal public defender office. And It may have helped me I think establish a truly unique relationship between our office and the court. We have an outstanding rapport relationship. I have the support of all the judges. I think I'm fortunate to work in the Fourth Circuit where we have an outstanding relationship with the judges of the Fourth Circuit also.

I think that it's important to have an effective and efficient administration of the Criminal Justice Act to be able to keep this type of a relationship here. Now, I wrote in my submission principally about management of the panel, because I really think we have a model to go by for other districts. My office and myself do everything from A to Z. We select the panel attorneys when we have conflicts, we work closely with them to give them advice all the time. We have extensive training sessions for them. We have a listserv, a newspaper, a newsletter rather, that we give to them.

I personally write every reasonableness review that goes to the judges. It's been hundreds and hundreds in the sixteen years that I've been there. It's very time-consuming, but I think it's an important relationship to have with the panel attorneys and the court. Luckily we don't have much voucher cutting in our district, because I think the judges respect the

districts, I mean the service I have provided to the district. I certainly know what criminal practice is like as well as prosecution and federal criminal cases. So, I think they accept what I tell them that we ought to do or what I recommend in the long run. And I think it helps to have such a strong relationship with the panel.

Everything I think is positive except one point is, I wrote in my submission. I really think that we ought to be able to give, be given, the right to help the judges selecting experts when the panel applies for experts. That's the one area that the panel members in our district are concerned about. This is something that's come up more over the last year and a half I think. The judges either deny them the right to have experts or they don't give them enough funds to really make them as efficient as our offices. Of course, we can spend our own money to hire whatever experts we need. I think it gives a sour taste in the mouth of the panel attorneys that we are funded much better than they are. That's something that in my letter I recommended that I have some input into that.

I could very well go to our judges and say, "Maybe we could work out something and maybe it could be worked out." I see that as a problem across the country. I've heard other federal defenders say the same thing. I'm sure I'm not the only one raising that concern. I think that particularly in the area of psychiatrists and psychologists, our judges seem to think that the panel attorneys don't need them or not need them as much. I think the panel attorneys are concerned, rightfully so, because we certainly hire a lot of those type experts in our cases. All in all, I think everything really is going well in our district. I don't have any complaints. And it's mainly because of the great working relationship that I have with the court.

This is just a personal example, but I plan to retire next year. But one of our district judges told me that I apparently didn't realize I was appointed for life. I said, "No, that's you, judge, not me." They're happy with the way I work. I'm happy to do this job. It takes a lot of caulking back and forth. We have to work together on so many things. And it's not that the judges just leave me alone, I hear from them frequently. We discuss things, we work it out. I really think they're pleased with the way we're running things in the Eastern District. I think it's a credit to the Criminal Justice Act. So, that's basically my opening.

Judge Cardone: Mr. Allen.

Louis Allen: Thank you Judge Cardone and members of the Committee for allowing me to come and speak to you today. Unlike Mr. McNamara, I am not an Article III defender as much as I would like to be. I have been the defender for the last eighteen years. The middle district of North Carolina contains the town of Mount Airy, fictionally known as Mayberry, the

home of Sheriff Andy Taylor and Deputy Barney Fife. When I began clerking for Chief Judge Eugene Gordon in 1980, we were still trying moonshine cases. The defendants would frequently walk into court or stumble into court, unencumbered by shackles or chains. I cannot swear that they were allowed to let themselves in and out of the cells by themselves, but it is possible it could have happened. It was a different time back then.

I was so impressed with watching the indigent panel attorneys, we didn't have a defender then, watching the indigent panel attorneys that I gave up my desire to search title for the rest of my career, and stayed in Greensboro. As quickly as I could, I got on the CJA panel where I was rewarded with a princely sum of $20 an hour for my work. There weren't too many attorneys on the panel because not too many attorneys could afford to be on the panel.

It became a source of stress between my law partners and myself that I stay on the panel because I was losing money every time I took a federal case. But I loved it, so I continued to take those cases. As a panel attorney I watched the moonshine cases turn into marijuana conspiracies and then the cocaine and crack leads to our beloved sense of Guidelines. Every time I came into court, I was quite nervous because we didn't have an office, a defender office in the middle district. We had no one. I think this is true throughout much of the country.

The CJA panel comes largely from small firms or solo practitioners. While I appreciate the role that the training division has played in training panel attorneys, and it is much more than it was twenty or thirty years ago. It's much more training. I don't think you can discount the importance of the relationship of the defender office as setting a standard, hopefully with consistent representation that all the panel members will see, will be able to know personally, will be able to contact and give advice, especially as the federal criminal practice became increasingly far more technical and littered with landmines.

I was thrilled in 1997 when my virtually pro bono calling became my livelihood and I became the defender. Going to the first conferences where the legends of defender-dom, the Terry McCarthys, et al. inspired and taught. It was a rowdy crowd in those days. There's no doubt about that. There was never an absence of purpose. But as s a newbie defender who had been in private practice for more than fifteen years, I was horrified when the talk at our early defender conferences turned to timekeeping. There had not been a serious timekeeping effort up to that point in the defender system, and it was just being instituted. They said it was becoming increasingly necessary that we would need to justify our budgets through data.

While I had watched as my father's wonderful practice had gone to billable hours. I had sat as a judicial law clerk and watched billable hours drive some of the most wasteful civil litigation that I could imagine. I spent a decade and a half billing those damnable hours and trying my hardest not to let it influence my decision making as a lawyer. I screamed repeatedly at these conferences, no, don't do it. Defenders are reactionary. We do as much work as is necessary to respond to the impetus of the prosecution, of the U.S. Attorney's Office. Our value can best be judged by our performance, not by our timekeeping skills.

I kept saying we should demand to know what is being spent by the Department of Justice on local prosecutions. A study should be done and our budget should be directly proportional to that amount. To do otherwise introduces a host of evils. It will waste our time, divert our focus, and produce aberrant, if not meaningless statistics. Unfortunately, not enough folks other than the late great Frank Dunham, had been in private practice, and had personal experience in how these data driven measures can work the profession. I became known as the crank from Mayberry. Wouldn't shut up about timekeeping.

In spite of the introduction of that insidious virus, the defender program with the benevolent and appreciated support of the judiciary continued to thrive. We would hear about Judge Prado's committee and that report at the DSAG meetings in the early 2000s. But I had no historical frame of reference, I was not a defender back then. And from my experience, the program really seemed to be running quite well. Ted Litz would sound repeated warnings about a lack of respect in certain quarters of the AO. But so far as I can tell, the program continued to receive support and to provide remarkable defense across the country.

I hate boosterism, but I could honestly believe that the defender program was the gold standard for indigent defense in the country, if not in the entire world. And then came the demotion. And then came the sequester. And then came the work measurement study. We had known all along that we could not survive without the judiciary in our corner. In this dark time, we were reminded that the judiciary could exert as much influence and control as it desired over the administration of the indigent defense program. Morale took a very dramatic and noticeable hit across the country. Paychecks took a dramatic hit, even though the sequester certainly was not the doing of the judiciary. Careers were derailed as career defenders, and assistant defenders lost their job. Now, that might not startle any passing observer who would note that the defender program is in the judiciary. Now, it might startle a law student who had imagined that an arbiter should not be able to exert more control over one side in contested issues than it does in the other. It was quite obvious to us that the Department of Justice, the consequences that they were suffering

during this dark time for us, we couldn't notice them at all. Certainly the judiciary didn't have any effect on that.

Wise judges are a large, large part of the reason defender program is what it is today. I believe it will require wise judges to exercise the wisdom and restraint to allow the program to exist with minimal involvement from sitting judges. That is not to say that defender offices should operate under strain with complete control of their funds. It is only to hope that within the AO, the administrative management be vested as much as possible in non-judge governmental employees who understand the vagaries of establishing personal trust with clients as diverse as the home schizophrenic, someone charged with massive fraud, or even terrorism.

In many respects, Mayberry is very similar to Middle District of North Carolina. We don't have a lot of the issues that are part of the focus of this Committee. Our judges are uniformly supportive and restrained in the way they do with our program and with the panel. You will see from the letter that our Chief Judge William Osteen submitted, that he understands and he is one of the few judges I know who was previously on the CJA panel. He understands and appreciates the complexity of finding the sweet spot. The delicate relationship between defenders and judges. I very much appreciate the effort that this Committee is going to try to find the sweet spot in the delicate relationship between defenders and judges. I very much appreciate the efforts that this Committee is going to to try to find that sweet spot. Thank you.

Judge Cardone: Mr. Caruso.

Michael Caruso: Thank you Judge Cardone, and thank you all members of the Committee from taking time out of your busy schedules to conduct these important hearings, and for having the good sense to have your January hearing in Miami. You know, I'm particularly honored to testify here today, because as a first year law student, my criminal law class was taught by Professor Francis Allen. As you know, I didn't know at the time, but I've since come to learn that Professor Allen chaired the committee that essentially created our federal public defender and CJA programs. Once I learned of Professor Allen's involvement and traced the history of our joint programs through the year, it seems to me, and it's not a tremendous insight that the issue of defender independence has been simmering for the last fifty years throughout all the committees have worked on this issue throughout the years. And certainly the issue came to a head when Judge Prado chaired his committee.

I think in reading the Prado committee's report from over twenty years ago, the bottom line conclusion was that there was no better entity to protect the defender program than the judiciary. And it seems that

conclusion or reasoning drove the result of that committee's work. While I was not in the program twenty years ago, what I have seen over the last few years, and ironically so because of the Prado committee's report that we needed more independence, I've actually seen over the last few years an eroding of the little independence that we did have. And I think the erosion of our independence has diminished the program. Whether it has actual effects or perceived effects, Mr. Allen is exactly right through the demotion of DSO, through the sequester, through the work measurement study. There has been a perception by many, many people in this program that our programs are under assault. And I think like the Prado committee and like Professor Allen did nearly fifty years ago, this Committee does need to seriously address whether there should be a restructuring of our programs, whether that restructuring entails a completely independent agency or whether that restructuring means that we at least assume the position within the administrative office that we had enjoined prior to the promotion. There certainly are meaningful structural changes that have to take place so we can deliver a better product.

Through my written testimony and what I hope to say here today, I don't want anybody to misunderstand that I believe that both the Federal Public Defender offices and the CJA panel attorneys provide an awesome product to indigent defendants. I'm in court nearly every day and have been for the last twenty years. You know, I'm simply awestruck by the work of everyone who's worked in my local federal public defender's office over the last twenty years and the work of our panel members. There is simply not in my estimation a better group of people providing indigent defense service to our clients.

In addition to the structural issues that I think this Committee needs to address, I think the special topics that you identified for this hearing are particularly important, not only to the lawyers and staff members of the Federal Public Defender's Office, but the CJA panel. Again, as Mr. Allen said, we stand in slightly different shoes. The Federal Public Defender's Office has the benefit of an infrastructure, both locally and nationally. In this district we have approximately 170 CJA lawyers. They are primarily solo practitioners. And when you look at the practice of our district, and these are all identified in your special topics, the large multi-defendant cases, the international component, and the e-discovery and the use of experts, all these factors provide a tremendous amount of stress not only to the assistant federal public defenders but to the solo practitioner. You know, it is not uncommon in this district to have fraud cases where three terabytes of information have been provided to counsel. The Internet is a wonderful thing. You can actually go to the Internet and find a terabyte calculator. When you plug in three terabytes of information, what comes out is 6000 filing cabinets.

You can imagine even if my office has two lawyers, a paralegal and an investigator assigned to that case, you can imagine the CJA lawyer who's a solo practitioner who has to make sense of 6000 file cabinets and not have the support staff. That lawyer has to ask the judge for a paralegal and for experts. I think this Committee is wise in identifying those topics. Although I am a believer in data and analytics, that can only tell so much of the story. You really have to see it from the ground level view of the lawyer who is confronted with one of these cases and forced to handle one of these cases on a very, very limited budget.

What is I won't say particularly unique to our district but another aspect of the practice in our district is that we are both a very trial-heavy district and a district that works at an extremely fast pace. For example, not only in terms of the mega cases, but I'll give you one recent example where a lot of these factors come into play.

Lawyers in my office recently tried a case. It was a relatively simple matter. It involved the importation of drugs by a person accused of being a courier. Our client lived in New York, flew to Peru, was arrested here in Miami to stand trial for possession with the intent to distribute and importation. The trial began forty-six days after our client's arraignment . . . and given that limited amount of time and given the circumstances of that case, to adequately conduct a defense or a defense investigation where we needed to conduct an investigation in South America and Peru, where we needed to conduct an investigation in New York where our client lived, we simply could not perform up to our standards with regard to those components of the case and the time that we were given. That's just one very small example of the stressors that are placed on both the assistants and the CJA lawyers in this district. And I know the Committee is going to consider those factors among others, and I look forward to your questions.

Judge Cardone: Mr. Small.

Parks Nolan Small: Judge Cardone, members of the Committee, a wise lawyer once told me that no lawyer should be on the witness stand, to stay away, but here I am. There are three words I think probably define maybe why we're here. One is quality, the other is independence, and the third is trust. If we go back to the original case of *Gideon*, we find in that case the court there was interested in having people without a lawyer to have a lawyer to oppose experienced and well-funded government prosecutors. After all, it was Abe Fortas that represented him at the Supreme Court. It was the best lawyer in Bay County, Florida that represented him on retrial and achieved an acquittal. And after that of course Congress created the Criminal Justice Act in the present model plan that we're working under. For many years, that plan has grown and worked and experimented and has become well accepted I think throughout the court system if providing the quality and

the type of representation that was intended by that original case. We have innovated, we have improved. The program has been repeatedly called upon to represent defendants in cases that we never even thought about when *Gideon* came along. Terrorists, large financial cases and fraud cases that take tremendous resources that we never even thought about.

The defenders have proven trustworthy and responsible in an independent setting with substantial budgets and decision-making authority. Just as a quick example, when I started some years ago, under the plan I could get any expert I wanted for $300. Otherwise, I had to go to the district judge or perhaps even to the chief judge and the court of appeals to get an expert. How unusual that would be if we had to do that today. How much resource and time would we take up of the court system if we had to do that now? I think that system has worked well, because now we have tremendous responsibility to manage these budgets and to manage them in a reasonable and substantial way. The model we have is a tested model. It provides efficiencies and experience based upon an exclusive focus. That is, we spend all of our time every day talking about federal criminal cases.

Our partner in this operation is the CJA panel. They are a group of wonderful people. They don't get to practice as much federal criminal law as we do, but they provide a very essential and substantial service in representation of cases, particularly in multi-defendant cases. It is vital that we support this CJA activity and panel activity with everything we possibly can. We need to give them as much training as possible, we need to give them as much support in voucher review as we can, we need to give them as much support in finding experts for their cases as we possibly can.

In the district of South Carolina, we have a panel administrator. I know that's done in some districts. I don't know how many. It has worked very well in the district of South Carolina. Panel administrator is revered by the judges and by the panel attorneys; it is much like an ombudsman. The panel administrator does the first review of vouchers and carries it right on through to the very end. I think that is one element that I would think this Committee might want to consider is urging as a practice in any other district they would like to participate.

The only other comment that I have is sequester was tough. That hit everybody and it hit the rest of the government as well as the court system. It generated some questions. Well, that's okay. Questions should be asked. The examination that resulted was an examination of the quantitative experience that defenders have, that is cases per lawyer. That is only one measure of the effectiveness of our system. The other measure is a quality measure. That was given less attention. It is very hard to judge quality. You know it when you see it, but it is hard to judge. Because of

sequestering, because of the study, there has been a feeling that the defender program has been reduced in statute. And I would ask this Committee to consider that we give more attention to the qualitative part of what defenders do rather than just the quantitative part. There has to be trust in this system, and there has to be trust in defenders, there has to be trust of CJA panel attorneys for us to produce the quality work that I think we all want and expect in this great system that we have. So, I would hope that you would give those things some consideration. Thank you.

Judge Cardone: All right. Ms. Roe, question.

Katherian Roe: Thank you all for being here today. The first question I want to ask is about is the issue we've been hearing about the, if you will, two-tiered system for expert psychologist investigators. Federal defenders obviously have staff investigators and also some staff paralegals and sometimes social workers, things of that nature. But the panel attorneys have to actually file a request of the court to be able to get folks to assist them or psychologists to evaluate their clients. Mr. McNamara, you spoke about, in your district you could see that there was definitely a two-tiered situation also, one of the chief complaints if you will of your panel. I want to ask you a specific question, but then open it up to the whole panel.

First want to ask you a question about, in your district the judges see that the Federal Defender and the assistant federal defenders obviously use experts, and fund these experts, and have the benefits of these for your clients. I'm wondering why they think it's so unusual or they're unwilling to give that same benefit to CJA clients. Also of the panel I would ask the same question, but also more broadly whether or not all of you folks think it's a problem in your district also this potentially two-tiered system where folks who are represented by the federal defender's office have access to experts, but folks who are represented by CJA attorneys have a much more difficult time getting that access.

Thomas McNamara: One thing Ms. Roe that I have seen in our district, we have the Adam Walsh Act cases. We've got probably 95, 98% of all the Adam Walsh Act cases in the Eastern District of North Carolina. We use psychiatrists and psychologists frequently in those cases. When we've had conflicts, the panel attorneys that are in those cases are able to get those type experts. I would have thought that that would have carried over to regular felony cases, but it doesn't seem to be. I don't know quite the distinction there. In fact, one of our panel attorneys just recently raised as an issue in an appeal to the Fourth Circuit that he was denied a psychiatrist that he had requested. And I thought, that's bringing it to the forefront. The Fourth Circuit wasn't impressed by that.

It could be that the panel attorneys are just not justifying their need, which they have to do in their ex parte motions that they file. I just don't understand why in a normal felony case when we use for mitigation purposes in particular, we use psychologists and psychiatrists, and the panel can't seem to get them. I don't know that I have the answer, but I see it as a problem and I wish there was something that could be done about that. If the judges would just ask me or some independent person, say: "What do you think about this request from the panel to get a certain service provider?" I think that would be helpful, but they don't. That slows the system down a little bit. That's one suggestion that I would have to improve it. We have input into everything else.

When the panel attorney gets a service provider, I review those vouchers and bills before they are sent on to the judge. I have no input into the selection of such a person. It's different with different judges, but it needs to be more uniform. I can certainly see where the panel is hurting if they can't provide the same effective representation that we are, because they are denied experts. I'm not sure I have the real answer, but that's what I see. Maybe some of these other gentlemen do.

Eric Vos: Ms. Roe, I just know numerically our office has seven full-time investigators. We have mitigation specialists, we have research and writing paralegals. We're spending over one million easy, probably closer to two million in the support staff which the panel would have to go to otherwise. I spent $325,000 just in experts. That was aside from my staff. You can easily be talking $2.5 million there. The panel in Puerto Rico spent around $100,000, that's what I was told, on third-party experts or professors. That is a colossal difference.

We got a case soon where we're going to have a mentally handicapped individual chat room with an alleged thirteen-year-old who's actually an FBI agent. I look at that, and I'm going to need a psychosexual study. It's going to be four to five thousand dollars, maybe six. There's going to have to be an IQ study, another four thousand. When judges start to see those numbers and they know that they are thinking this is a ten or twelve thousand dollar case. That causes them to really question why they're going to spend the money. Also, an expert sometimes tells you just where you are. We're attorneys. If you do a lot of these Adam Walsh cases, you may have that. If a panel attorney doesn't have that, they're not even sure yet where they're going until they talk to an expert. Experts aren't the end game, they're the beginning of the game.

There is no panel member out there, I don't care if it's in Puerto Rico, New York, whatever, who doesn't envy what we have because we're working these cases the way they should be worked. And the work measurement study, when they studied us in great detail, found out we

were doing this actually on the cheap, less expensive than we should have otherwise been spending money on this program. We're not just throwing money around, we're actually doing it very, very economically and very well. The panel just does not have those resources. Judges, even if a judge was a defense attorney at one point, what a case looks like today with terabytes, with child pornography, with the Internet, with *Booker* and mitigation, that's not what we were looking at in the 70s or the 80s. It's a whole different ballgame. There is a prejudice there in approving these funds.

There is certainly two tiers when you have to start to hire third party professionals. There's two tiers outside of that. I do not want to have to see anybody suffer that, especially the panel. We've talked about this dichotomy, the panel and the federal defender. We're really one. We suffer each other's prejudices. If the case can't be fought by the defense in that district, we all suffered. There's probably a lot of reasons. The bottom line is the panel is suffering, the defense function is suffering.

Louis Allen: Ms. Roe, I just can't think of another issue that is really much more important or that much more can actually be accomplished than this. I'm sure the judiciary is as well aware, as the defense lawyers, that the criminal justice system has also become the system for dealing with mental illness in the country. As more and more folks out there are unable to get their mental illness dealt with any other way, they run up against the law when they act out. Then they become our clients. The court sees them when they come before the court, and the court understands how difficult it can make a court proceeding.

As Mr. Vos said, many of the judges who may have been in private practice were probably in private practice before we had so many clients who present themselves with a serious mental illness, and how much more difficult that makes the representation of the client, how much more time it takes, and how much more we need the services of experts. I think as that has become more and more the case, then we came to the period of the sequester. Real or perceived, it was perhaps at least perceived by many of the panel attorneys, that district judges became more concerned with cost containment. During that period of time, perhaps it took a little more effort for a panel attorney to get a court appointed expert.

As assertive as criminal defense lawyers can be, it only takes being turned down a couple of times, which may make all the difference in the world in the next case as to whether you make the effort to ask for that expert. If you feel like, well this particular judge is not going to do it, then perhaps you will not make the effort, as Mr. McNamara talked about the consistency where we have remarkable consistency in the Middle District of North Carolina. If defense attorneys think this judge is not very ready to

grant experts, when they have a case before that judge, they just may not make that request. They may not make, it's either these little things that the fate of the defendant rises and falls on whether or not you feel good about doing it.

I disagree with some of the earlier suggestions that we should take on within our offices all the management of the panel and all these decisions. I think to some extent that is shifting the potential conflict from one place to another while it's still a potential conflict as we represent codefendants or maybe perceived as looking after our budgets at the expense of the CJA budgets. My idyllic view would be that there would be an independent. There would be an independent person who is responsible for doing all these things from CJA voucher review to reviewing experts.

Ultimately they may be approved by a judge, but having somebody outside of the litigation itself to review these things and have the same person review it for every case, for every judge. You would develop that sort of consistency. Then to have that person trained as a defense lawyer, to have that person with defense lawyer experience who has sat in a jail cell trying to get a mentally ill client to understand what is going on and to make decisions that are in his own best interest. I really feel like it should be a requirement that whoever does deal with that is thoroughly steeped in criminal defense work.

Katherian Roe: Thank you.

Michael Caruso: I would add, I would agree with what Mr. Allen and Mr. Vos said. There definitely is a two-tiered system. Whether we have those two tiers because of court denials, of appropriate motions for experts, or whether certain panel members are reluctant to ask for experts or a combination of both, I don't know. In this district I don't see the vouchers as they are submitted or when they are passed upon by the court. What I definitely can say is that the public defender office utilizes experts at a much higher rate. I know that just from being in this district and working on codefendant cases.

Clearly for all of our practice, mental illness that our clients suffer is a great issue. If you've ever had to sit in a jail cell with a person who's schizophrenic or bipolar or even has ADD and try to explain a plea or the consequences of allocuting a sentence or a host of other factors that are involved in the process of a criminal case, you know it's extremely difficult. Even if you think you've left that jail cell with an understanding that your client is prepared to go forward, you're often confronted at your next visit by starting off at square one. That's one issue. That's present I think in all of our practices.

The other aspect is the changing complexity of the federal criminal case in this district and most other districts. I point to one thing in particular. We have a very, very high incidence of fraud cases here. The cost of forensic accounting, which I think is critical in all of those cases, when I see those expert requests in my office, I see in the subject line, forensic accountant. I go get a cup of coffee because I know that this is going to give me a headache.

I think where the defender program is in much better shape is that we do have a certain amount of bargaining power. I personally approve all of the expert requests. If we have a roster of six to eight forensic accountants, they know this is not the only case where we're going to seek to employ them. That's built into their rate. They also know that we don't give them every case because that's not the appropriate way to go. When I look at the CJA lawyer, who again, mostly overwhelmingly solo practitioners, they don't have that bargaining power. They know that the judge is going to get a sticker shock, because even if you're talking about a relatively mind run case, the amount of documents and the document review that has to be done either to get the AUSA to agree to a loss figure, or prepare to persuade the district court judge that's sentencing to a loss figure, the costs quickly add up.

I'm in agreement that the vouchering process in particular with regard to experts be divested from the court and given to an independent administrator, whether that administrator is housed within the Federal Public Defender's Office or in some other aspect to avoid the conflicts that I think can be managed quite easily. I think that would have a number of beneficial effects. One, I think there would be a greater use and a greater willingness for CJA lawyer's to request expert services. I also think it would be part of a cost containment strategy in that if those expert's requests are funneled through a single administrator, then that administrator on behalf of the CJA could achieve some of the bargaining power that the FPD's have.

Parks Nolan Small: In South Carolina, in the audience there are two panel members here today. I can assure you they are not shrinking vows. When they want something, they ask for it. I think as a general proposition that maybe panel attorneys often may be a little bit more hesitant or don't know that they need an expert or what kind of expert they need or how to use that expert or where to find that expert. Which another example is like maybe in a drug case where the DEA has been following everybody through cell towers, is where do you find a cell tower expert and how do you use him and what's the value?

It's a matter of training and education. We make ourselves available if possible. In fact, we're available all the time to the panel whenever they

want to call and whatever they want to ask. How to resolve that problem of putting it in an independent context so that the judges don't have to be bothered with making those decisions, to me I think that would be a great benefit just not to have to bother with it, let somebody else decide.

Judge Cardone: All right, let's move on, Judge Goldberg.

Judge Goldberg: Thank you all for your incredibly thoughtful input. The wisdom and experience the five of you I wish I could, a lot of questions I could spend today and tomorrow just asking you questions. Mr. McNamara, congratulations on fifty years in retirement. Is it fifty years in criminal practice? Those are like dog years. Congratulations to you.

Thomas McNamara: Thank you.

Judge Goldberg: I want to shift the conversation if I can to independence, defender and CJA independence. I think each of you wrote a little bit about that and spoke a little bit about that. We've discussed it a lot privately at our first hearing and at other meetings that we've had. It's the spectrum I think Mr. Allen said that our goal was to hit the sweet spot, where is enough independence and where is there too much and where is there not enough. One extreme we've heard from one end is the system is fine the way it is and the Defender Services, the defender offices, and the CJA lawyers are fine under the umbrella of the court, and it should stay that way. The other extreme we've heard, I'm not saying extreme that these are unreasonable positions, I'm saying one or the other, is that it should be complete and total independence. There should be no connection whatsoever to the judiciary.

My question for all of you and whoever wants to speak first, I'm fine to hear from all of you in whatever order is, have you really, really thought through what that means as far as funding from Congress? I'm not wearing a robe today, I can talk about politics a little bit. I think I wonder, I don't have any experience on what it would be like to go to Congress hat in hand and say: "I need funding for my programs." I have never had an interest in being a lobbyist, if that's what it is. I don't know if you folks ever did. I think that that's those persons who advocate for complete and total independence should think that through and maybe tell us whether that's something that you really want.

If you had Congressman Fischer, and Congressman Walton, and Congressman Prado here, we'd say we 100% get the importance of indigent representation. Tell us what you need and we're here for you. We can probably all agree that there are members of Congress who may not be so reasonable. Maybe thinking about politics and reelection, before, as they make decisions on how they're going to fund people who represent

criminals. I'd like you all to comment on the perils of that. Is that something that the defender society and community really, really wants to do?

Thomas McNamara: I'll be glad to speak first, because I may be one that's against 100% independence. Just what you say judge, I don't see how we're going to lobby for funding by ourselves now. I know that a lot of defenders don't agree with me. I've been in the system long enough to be satisfied principally with what I see there. That's in the beginning. If you cannot get your money, you really are hurting. I think that stops it for me there. I have been very pleased with being selected by the Fourth Circuit and working with the Fourth Circuit. I always thought that's been an excellent relationship for my sixteen years.

I do think that there is a certain parts of what's been going on that needs to be changed. I think demoting Defender Services was a mistake. I think that that should be elevated to the former status. There are certain things, but I'm not in favor of total, and I think there's got to be other defenders like me that are just not in favor of trying to get out there and round up our own money. That's terrible. I'm not a lobbyist and I don't know who among the federal defenders are.

Judge Goldberg: Now we know what Mr. McNamara is not going to do in retirement. Not going to be your lobbyist.

Thomas McNamara: That's right. Maybe I'm speaking, because I am retired. I know a lot of defenders are in favor of that. Maybe we should see what these other panel members . . .

Judge Goldberg: We've heard that, from very smart, reasonable people say "total complete independence."

Thomas McNamara: I've heard it too. I'm surprised, quite frankly. Let's see what these folks have to say.

Eric Vos: I think that voice of total independence comes from a level of frustration. It comes from the demotion frustration. It comes from this wide understanding that we were targeted for cost containment, which was just really another word for cutting. I don't think there's, I hear what the politics have to say about federal judges and the judiciary. Not big fans of theirs. I wish I had that bench all the time. What the politicians have to say about the judges is scathing. They are a bunch of hippies. That's what it sounds like sometimes. I don't think there's a lot of friends there.

In the realm of things, we're talking about I think it was 2/10 of 1% was the judiciary. We're 1/7th of that. We're even a smaller sliver. When we

go asking or begging for money, we're not asking for a lot. I think we've shown our self to be excellent stewards of the money that we had. Our results are the gold standard. So, I'm not that scared of the independence. I think that there is an in-between model which they talk about, and I think the FJC was what they had talked about, this idea that we can be within the judiciary but be independent within the judiciary. That's the safest model for my money.

I definitely think that we have to remove at least portions of the defense aspect, and that's the CJA. There's this talk about conflict. There's this inherent conflict between our office and the panel. If we were helping to manage the panel, that conflict would be there. We are the major clearinghouse for most every panel to come and talk about cases, get briefs, get filings, experience. We have a conflict with almost every case they have. That's why they have it. Some of them they get when there is no conflict, but there are. It is a tough question and there's different points of view.

Whatever the fix is, we have to get independence from the judiciary that sees us as spending too much money, maybe wasting money. That's just not the case. Whatever the fix is, we have to get them out of the business of looking to see where they can save money from us. That was a major push right around sequestration, and it was documented that they thought that this was a really good area to save money. It's really not a good area to save money. The cost is exponentially larger when you diminish the defense capacity, either at the federal defender or at the panel. I would like everybody to know that when we say there's a two-tiered system, it is not qualitative as far as the lawyers are concerned. CJA panel is remarkable, but despite their efforts, they are severely handicapped. When they are limited to spending less than the $10,000 mark or not on experts, they're not going to be able to do the job that my office could do.

Judge Goldberg: Who do you think should seek funding from Congress? The AO? Who has your best interest? The AO or an independent entity to go ask for your funding? What's your opinion?

Eric Vos: I think it's an independent group. I think it was Delaware, the congressman from Delaware during sequestration had a hearing. I remember watching on T.V. That was put together in part by Edson Bostic, talk to Congress. They had a hearing on what the effects were. It really developed quickly. There's a lot of support there. I do believe, despite the cynicism and the politics that may run rampant, at the end of the day when you see the outlay of money and the air that we put into this Constitution, I feel confident that that money will get there. We're talking less than at this point $1.5 billion. That's a couple bombs. We're not asking for hundreds of billions, we're not asking to make a huge dent. We

are bringing life to the Constitution. And I don't care how cynical the politicians are. I feel very confident. There's a lot of people who disagree with me. They've been around doing it a lot longer. I am certainly, that's just my view. I feel confident that we can get the funding that we need to get. The benefit that we get of this independence is well worth that fight.

Louis Allen: Judge Goldberg, we did a little informal calculation when we all got together earlier today and figured out that between us Mr. Small and Mr. McNamara and I, we have over 70 years of experience, which is I think is 490 dog years, doing this kind of work. I don't know if it's the caution that comes with age, but I think if I pulled up in front of the Thurgood Marshall building and saw all the DSO furniture out on the curb, I would have to go increase my anxiety meds pretty quick. I would not feel particularly sanguine about that.

When I talked about a time earlier where it seemed like things were going well, the defender program was not at the associate directorate level then. There was a Defender Services committee, there is a Defender Services committee. That committee spent enough time with defenders over a period of years that they seemed, even if they may have come in hesitant at first or skeptical at first, they developed an appreciation of exactly what it is we do and how difficult it is and how much of it goes on out of sight of the court, and the judges, and their day-to-day work.

When that Defender Services committee seemed to carry great weight in budgetary decisions within the AO, things did, we didn't I think feel the same concern about independence that we made today. I'm not suggesting that the best thing to do is to go back to that old model, I'm suggesting this is an opportune time to tweak, to move incrementally in a direction that may draw on that experience and create a better paradigm within the Administrative Office.

Once again, my suggestion would be to appreciate how that understanding of the defense process helped DSC and create an associate directorate with a focus on a staff that has direct experience in the criminal defense process. Have that associate directorate level have an equal seat at the table beneath the director where hopefully it would carry greater weight so that when the ask is made of Congress, the defenders would feel like we had our best shot.

Judge Goldberg: Empower Defender Services, but continue to have the AO do your bidding in Congress. That's how I understand your position.

Louis Allen: Yes, your Honor.

Judge Goldberg: Thank you.

Michael Caruso: I don't believe there is a consensus among defenders as to what model we should seek to obtain in the future. I think that's because independence is an abstract principle. We all are by profession risk managers. For me, while I greatly cherish what independence I have and would like to see more independence for the program, the risk manager part of me is hesitant to commit to what people call full independence, without seeing the nuts and bolts. I think that's what's so difficult about this discussion.

What I would like to see going forward, I think the defenders are doing this among ourselves through research on our off time, and what I hope this Committee does going forward, is explore different models that have I assume different levels of independence. If you put those models out to the defenders, the risk managers and all of us, we can walk through different scenarios and see what the best model for us is for the next three years, for the next five years, for the next ten years. What we don't know is whether the problems we've had in the last five years, which have been significant, whether those problems are an anomaly or this is just how it's going to play out over the next few years.

What causes me great concern and why I lead to independence, I was greatly troubled in reading the NACDL report where I think a former chair of the DSC was quoted as saying that that chair viewed or saw the judiciary's view as a competition for dollars between the judiciary and the defenders. I'm not naive enough to think that the defenders have a partnership, and certainly not an equal partnership with the judiciary. But to say that we're in competition for the same dollar, then when it comes to the question of who do you want to do your bidding, I don't want someone to do my bidding who's looking out for himself first, right? I would like a more equal partnership where everything's on the table. Again, if you're asking me now what my view is that we have a transitory process to independence, that I think it would be a mistake . . .

Judge Goldberg: Could you spell that out in specifics?

Michael Caruso: Certainly. What I would be fearful of is two years from now saying, "Here you go, here's your independent agency." I think that may be a recipe for disaster. I think to use the tweak word, I think there can be a meaningful "restructuring" immediately. We can see how that system plays out. The problem from my vantage point, and I have not been involved in these budgetary decisions for very long, but what I see is a lack of trust coming from the judiciary to the defender program. You know, what I've heard for the few years that I've been involved is essentially that the defender program is a wasteful program and that we have no regard for fiscal responsibility.

I think that was the one upshot that came out of the work measurement study that showed exactly the opposite. The work measurement showed that we do this work and the CJA panel does this work at a tremendously high level at a bargain price. I don't see that part of it that we need a watchdog because we're wasting money. But what I have noticed through the last few years is a complete lack of transparency. It seems that we're caught off guard by a number of decisions that the judiciary makes, and that we only find out after the fact. That's true with the demotion of DSO, I imagine. I think it's true of a whole host of other issues.

One of the recommendations I made, and this is not my own idea, this is an idea shared by many defenders. The Defender Services committee prior to that restructuring, which is another issue, was the primary funding source for our program and why there's not a defender participant on that committee is astounding. When you're talking about oh, trust us, we'll do your bidding for you and we don't have a seat at the table, I think the bare minimum that should come out of this process is that we get a seat at the table. We see how a system with meaningful restructuring works for the next two, three to five years, then there's a reevaluation. Maybe then the cost benefit five years from now is that with restructuring we have the best program we can have. Maybe it's not. Maybe we move to a fully independent model. That would be my viewpoint.

Judge Goldberg: Mr. Small? Did you want and it add anything Mr. Small?

Parks Nolan Small: First of all, complete independence is a myth. We're talking about appropriated funds. As long as we are appropriating funds, Congress is going to have something to say about that money. I don't care who goes to Congress, whether there's review on the front end, we were talking about how can we solve this problem. Whether there's review on the front end and say you've only justified this much money or whether they review on the back end where it says we saw what you did this past year. We think it only warrants so much money for the next year. Somebody's going to be making those decisions. It doesn't make any difference who goes and asks for the money. Perhaps it's dependent upon whose ox is gored. If your ox hasn't been gored, you perhaps quite happy with things are in the present circumstances.

South Carolina I think has been very blessed because the court system has stayed out of our business completely. We don't have that problem. The people that have had it, it's certainly a different circumstance. I'm with Mr. McNamara that goes along. I would like to see things restored because we were very proud of the fact that the defender program had a hierarchy place in the system, and it doesn't anymore. That makes all of us feel a little bit unwanted or like a second-class citizen or something of that nature. Perhaps it's a feeling, maybe it's not warranted, but certainly I

think I speak for all defenders to say we feel like we've been put down a little bit.

Eric Vos: Also the way that it was instituted. Cait Clarke was hired at the higher level, and soon after she took the job or as she was taking the job, she was told that she was going to be demoted. It came as a huge surprise to DSO and that shift. I was actually working at DSO when it happened. It's extremely demoralizing to lose power that had been entrusted to us and that we had responsibly handled. On this overarching idea that the judiciary has said, we have to have cost-containment, and it was probably one of the reasons I suspect for the demotion to have more control over that, it is very scary. I agree with these gentlemen. Incremental would be probably perfection, take it as it goes.

To return the important independence, it's not some group that's doing it, it's the judiciary. Call it a tripod, call it a three legged stool, call it whatever you want. It's just not a good idea to have one of those people or one of those groups with so much power over the other. It would not work if it was the judiciary having that power over the prosecutors. There's no reason why it should work with as much power as they have now over the defense function. There has to be a pullback and there has to be room for each of these groups to do what they need to do.

Judge Cardone: Right, we're going to move on to Dr. Rucker.

Dr. Rucker: Thank you Judge Cardone. I'd like to pick up on a couple of points that several of you made. One of the concerns that I really have is the real inequity between the U.S. attorney, your offices as federal defenders, and especially the panel attorneys. Seems to me there's a huge decrease in the amount of resources available as you go down that line. I've heard some of you speak to that. I would like for you to address that a little bit, particularly in terms of a model if you will, sort of like what Mr. McNamara is talking about and what he does in his district. Think about perhaps as a model that could be expanded with some independence from the judges where you're doing a lot of, if I understand correctly, panel management. You're working with the panels, you're reviewing the vouchers, you have input on who's appointed to the panel, things of this nature. You're reviewing the vouchers, you work with the attorneys to do a lot of this work.

I'd like for you to think about that as a possible model taking the judges let's say out of it that you would have the money to look at the vouchers. I'd like for you to talk a little bit about how much work this takes in your office right now and what it would take to expand that model. I'd like to know how much time this takes for you and your staff to do what you're doing now, and if we expanded that more, what you would anticipate it

would take. I'd like to get some sense of the number of vouchers that you're reviewing per year.

If you make cuts, if you do so, if you talk with the attorneys about the cuts, would this be a better model to get resources to the attorneys for experts so that we wouldn't have to go to the court? We've heard a lot of complaints about hold backs, about cutting vouchers, about people not being paid more than 7 or $8000 when they should be paid 20 or 30,000 or maybe much more than that. I'd like all of you, but let me start with Mr. McNamara to give a little thought about that and see is this something that might be reasonable for the defenders to do nationally?

Thomas McNamara: Sure. I hope it would be, because the model has worked so well in our district. It is time-consuming. I probably spend a full day each week just writing these reasonableness reviews. Of course it causes me to work overtime to get them all in. Sometimes on weekends. The judges expect two to three pages of a memo from me where I analyze everything they've done, particularly looking at travel, conference time with clients. We have a large district, forty-four counties. Oftentimes the panel attorneys will turn in travel like fifty hours or seventy-five hours of just travel in one case. So, I have to take all that apart, and if I don't have the answers, I have to go back to the panel attorney and ask them, you better justify this a little more, because you may have a problem here.

Judge Cardone: Mr. McNamara, can I clarify something? Are you saying, how long have you been doing the voucher review?

Thomas McNamara: I'm sorry?

Judge Cardone: How long have you been doing them?

Thomas McNamara: Ever since I've been there for almost sixteen years now.

Judge Cardone: Okay, are you saying on every voucher you write, one of those, even though some of it with, you have to do a review of every voucher in a written report?

Thomas McNamara: The ones that go over the statutory maximum. I review the ones under the stat max, but our panel administrator does the math and the technical part of it. I just check off on it if it looks okay. I added up I think in my submission 135 vouchers in the last 3 years that I wrote. If you go back 16 years, I've probably written 1000 of them.

Judge Cardone: It's only for the ones that go over the statutory max?

Thomas McNamara: That's right. That's the ones the judges are principally concerned about. Our panel administrator will look at it and do the math and the technical part of it and make sure they have all the documentation they need. She'll give it to me to write the reasonableness review. Mine is more time-consuming than hers. It's worked in our district, but I know an awful lot of federal defenders don't want that much work thrown on them. Parks Small has a lawyer who is serving as his panel administrator. She does this work. . .

I just think that it's necessary if you're going to do it, to have a lawyer with experience as to what the panel attorneys are doing in their work. We have to look to see if they've over-billed, overextended themselves, done something they shouldn't do, because that's what the judges look for. It does result in our district with very little voucher cutting.

Now, there was more voucher cutting back in the sequestration year or years there. Of late, I guess it's 97% of the vouchers will get paid. And I credit that to me supporting the panel attorneys. I don't support everyone. That's why I think the judges appreciate my view on that. Several of the younger panel attorneys in particular are ones that are known to, one panel as an attorney example, made twenty trips from Raleigh to Wilmington, a two and a half hour drive, to see the client in a regular drug case. That was unnecessary. I called him on it. The judge reduced his vouchers. I think all in all it works. I hope I'm answering your question enough.

Can I add one other thing? It hit me as you were starting to talk. To be on an equal footing with the U.S. Attorney's Office, in our district we are not, they get lawyers galore for the asking. They don't get their lawyer status, I mean the number of assistant U.S. attorneys based on caseload. They end up with more prosecutors than we can get defense attorneys. Even if you match up the panel attorneys against them, they have more money than we can get. We're supposed to be on an equal footing. They say we are salary-wise, but we're not on an equal footing when it comes to running the office. That's just another side that hit me as you started your question. I know other defenders have thought about that. I better let someone else speak.

Louis Allen: Dr. Rucker, I'd love to speak to that. I think tomorrow one of our panel attorneys, Mark Jones, is going to testify before this Committee. Before he was a panel attorney he was an assistant United States attorney. He will have I think a very informed perspective on this. But when I first became the federal defender, shortly after I became the federal defender is one Frank Dunham became the federal defender in the Eastern District of Virginia. He had been the U.S. attorney for the Eastern District of Virginia. He was the first one to stand up beside me and be a co-

timekeeping crank about why that is a good measure of how we should be funded.

He recognized as well as anybody could that it is all in relation to the Department of Justice, what they are spending in that district. That is how we work. To divorce that from the budgetary process did not make sense to him. It did not make sense to me. I'm not suggesting that it should be dollar for dollar the same with defense attorneys, because as anyone would recognize, the U.S. attorneys don't represent a mentally ill client unless you talk to certain folks in Oregon. They have tremendous resources with multiple law enforcement agencies who are a phone call away. They rarely have to leave their desk to do their job until they go to court, whereas we have to go to a variety of facilities and deal with horribly mentally ill clients in many cases.

And we don't have, while we may have investigators or in-house experts to some degree, we certainly don't have the resources that the U.S. attorney has. Nonetheless, the budget, it always seems to me that Congress should be encouraged to understand that if they want to spend money on a prosecution, then they have to spend money on the defense, and that there is a correlation. If the federal prosecutor is becoming increasingly a part of the criminal justice system as it has been for the last thirty years, then there is going to be an increasing and corresponding cost and that it shouldn't be that hard to come up with a reasonable ratio of what that defense cost should be.

If, in my fantasy, of how we would ever get to independence if we were to get there, if on the way there we began to make that connection and make Congress understand that like them or hate them, the defenders are a necessary evil. If you're going to spend the money on the prosecution you have to spend the money on the defense. You set that as a pattern of funding over a period of years or decades, then maybe somewhere in the sweet bye and bye, there could be complete independence. I think it is incumbent to try and not separate what we do from the prosecution.

Eric Vos: I've taught a lot about experts, and as I wrote in my statement, 100% of the cases handled by the U.S. Attorney's Office has experts. You have agents, lab technicians, FBI. I remember when I was in law school we were being recruited by the FBI. They wanted agents to have law degrees. The depth of experience and expertise that any U.S. attorney has at their fingertips . . . Quantico . . . and it goes on and on. We are reactive. Also something that I learned recently, we are only given funding for what they say, butts in seats. They don't give us X amount of dollars and hire as many or as little as you want. We have to show somebody sitting there before we get the funding for an employee. We can't been shifting it around.

A number of federal defenders knowing that I was going to ask that the panel be shifted over to the Federal Defender's, wanted to shoot me. It's a lot of work. But that's what we do, is a lot of work. I know that in Puerto Rico they process somewhere between 110 and 150 vouchers give or take per month. A very busy district. I know that there is four people at the clerk's office who handle it. If you're talking about what's cost effective, what can be better than having a federal defense function who understands federal defense to look at a voucher and quickly assess, is this travel ridiculous? Is this expert ridiculous? Is the time that you spend with the family unreasonable? What did the case actually involve?

It would be a lot of work for us. It's not work that I want to do necessarily, but I think we are the best people to do it. I think that justice and the pride that we take in this system, that's where it comes from is doing this work. Unfortunately, I don't know of a group right now, unless we construct a new group that can do it, save what we have, and promote it.

Dr. Rucker: Mr. Caruso, you're in a high volume district. What's your comments?

Michael Caruso: I am a proponent of moving both the overall case vouchering and the expert appointments and the vouchering of experts to either the defender program or some combination of the defender program with CJA involvement. I don't think, to slightly disagree with Mr. Vos, I don't think the issue has ever been in this district or in other districts that people are making ridiculous requests. I think we face the other issue. I don't know whether CJA lawyers believe they have the resources to provide what is needed to the particular client.

Like I said earlier, I think by removing those decisions from the judge who is presiding over the lawyer's case, I think there will be a more fruitful back and forth with whomever is making those decisions, whether it's within the defender office, although that defender office would have to be staffed accordingly. This does involve a ton of work in addition to the work that we're already doing. The conflicts have to be managed. I think those conflicts can be managed within a defender's office. Defenders do that now.

I would also be comfortable with a model that includes an independent administrator, a representative from the Federal Public Defender's Office, and a member of the local CJA committee. I think all those voices need to be heard. There is a value to someone having a background in criminal defense but being independent. There is a value to having a public defender involved who has a significant amount of institutional knowledge. There is also a value from having a CJA representative weigh in on that decision because what is lost I think on that defender is how

difficult it is to practice criminal defense as a solo practitioner under the CJA model.

Now, the problem with the CJA aspect is all of our CJA representatives who do much of the administrative work, they're not compensated for that. That's an issue in considering whether that's an appropriate model would have to be factored in. For example in this district we have a local CJA committee that has I believe at latest count fifteen members. If there could be a rotating CJA committee member that's involved in those decisions for a period of say three months, that's not a tremendous amount of work for that lawyer for at that particular time. I think it would give much value added to the process.

Again as I said before, I think through this process, there can be cost containment, especially with experts with the gathering of institutional knowledge and bargaining power. I would echo with what Mr. Vos said. I don't think anyone again is naive enough to believe that we're going to achieve parity with the United States Attorney's Office, even if you include the CJA panel lawyers in the equation. In this district, we do about 65% of the cases. We take ordinarily the first name defendant. Ordinarily that's the lead defendant. We are expected to do that work. That work costs a lot of money, which we're more than willing to do. But, with regard to managing the panel, we absolutely can do that, given the resources.

Dr. Rucker: Mr. Small?

Parks Nolan Small: Our panel administrator is pretty much full-time because of all the work that's being done. To increase that workload a little bit, to give more assistance to the panel would not be a problem. We keep that particular position and really a separate part of the office completely independent from the other lawyers really doesn't have any interaction with the other lawyers. We pretty much have erected a wall to protect everybody. Someone else talked about the success of getting vouchers approved. I think all but 2.4% of the requested money is approved district-wide, which is pretty good. Half of that is oftentimes mistakes in math or other things that change the calculus. I think that's a pretty good record.

Eric Vos: I would just like to say when I talked about ridiculous, I don't mean to say that I believe that the panel, I've never seen panels do work that I thought was just a waste of time. I think that if you're on the panel, you're not in it for the money, you're in it because you truly believe in that work. No matter how you cut it, at the end of the day the panel attorneys are doing a tremendous service at a discounted price. They know that. You cannot be a panel attorney without having an unbelievable desire to work with those

clients and to work within the criminal system. It's not something they do for the economics. There has to be more than that.

Judge Cardone: All right, we're going to move on to Mr. MacBride.

Neil MacBride: Thank you, Judge Cardone. Let me just join my colleagues in thanking the panel for your testimony this afternoon. It's immensely helpful. Just picking up on Mr. Small's comment to Dr. Rucker and Mr. McNamara's earlier comment on voucher cutting or voucher averaging, that's something that the Committee has heard a lot about today in our prior public hearings and written submission from your colleagues around the country, your fellow brethren in the defense bar. Several of you referenced the NACDL report, which you've just talked about that. If I understood Mr. McNamara correctly, you said that upwards of about 95% of vouchers are approved in your district. Mr. Small, you said it was a pretty high percentage in your district as well.

One thing that maybe we've just been trying to nail down it's seemed a little elusive today, but it's trying to get hard data on voucher cutting and voucher averaging and how big of an issue it is in different districts. Today it seemed largely anecdotal from CJA represents or defender reps. that may be with good reason, because many defenders do not have a role in voucher approval, unlike Mr. McNamara. A quick question for Mr. Caruso, Mr. Allen, Mr. Vos, just curious, what is your sense of how big or small the problem of voucher cutting or voucher average be in your respective districts, and whether your basis on whatever you will say to that part of the question really is anecdotal or whether there have been efforts in your district to try and get some of the data behind whatever your ball mark is. We'll start with Mr. Caruso.

Michael Caruso: I'll answer your question I don't know. This is something that has been discussed frequently because I don't have a role in the vouchers. I have very sporadic contact with the vouchering process. I do here anecdotal evidence and stories from CJA lawyers about voucher cuts. I've been contacted on a number of occasions by judges who have received a voucher and want my take on the voucher, and then sometimes my assistance with interfacing with the CJA lawyer regarding the voucher. This is my sense of the issues in this district. There doesn't seem to be any issue with vouchers under or slightly over the statutory cap for relatively simple cases. There also don't seem to be issues with the mega cases. The mega cases are budgeted up front. Everyone's on the same page with regard to the work that needs to be done and what's ultimately going to be paid out. Of course, case specific things can happen from time to time.

I think again based on my informal knowledge, the issue occurs in the mid-range case that's a plea but has a fairly large bill, forty, fifty, sixty

thousand dollars. I think what's happened in the past, and I think there was some discussion of this in Santa Fe. I think in the past judges could be fairly confident by looking at the docket sheet or recalling what happened in court to get a general sense of how complex the case was and what type of work went into the defense of the case.

Because of the change in our practice, I don't think that's any longer the case. For example, as you know, we have a high volume of fraud cases in this district. Cases where $100 million loss is seen as a normal and ordinary case. Those cases come with a great amount of discovery that has to be reviewed even if there is not a trial, because again as you know the primary determinant of the person sentences is the loss figure. You have to go through all those documents to get a handle on the loss figure. The U.S. Attorney's Office is in a much better position because their case agent is either a lawyer or an accountant. You're well behind the curve. You need to do a substantial amount of work that's unknown to the district court judge even to have an intelligent conversation with the prosecutor. Sometimes you can convince the AUSA, sometimes you can't. When you go to court for sentencing and there's litigation about the loss figure, the district court is then more aware of what type of work went into the case. But I think there is a particular issue with the plea and you're able to convince the AUSA about the loss figure through hundreds of hours of research, not all you've billed for. You go to court and it's either in the plea agreement or there's a stipulation at sentencing that we've agreed. Then the judge has no idea all the work that went into convincing the prosecutor. If you are able to convince the prosecutor, then you have to get the prosecutor to convince the probation officer to support that figure in the PSI. I think those are the areas where district courts struggle with a change of plea that there's not much pretrial motion practice. There's a relatively high bill because of document review. I think that's where either an independent administrator or an FPD or CJA representative, I think we can really work through those issues better than the court at this point.

Neil MacBride: Mr. Allen or Mr. Vos, any thoughts?

Parks Nolan Small: I think it is a highly unusual occurrence, voucher cutting in the middle district of North Carolina, which is a wonderful thing. Since I don't deal with the vouchers directly I might not know. In some cases I spoke with our CJA panel rep about this. She was aware of one instance where it was a multi-defendant case and one voucher came in significantly higher than the other vouchers in the case and that the voucher was cut. What was troubling as I heard it related, was that there was no hearing about the voucher cut to determine what was unusual about this particular defendant that would cause him to require so much more attorney time. That is the only instance I'm aware of.

Eric Vos: I was told by someone who works at the circuit level that they rarely if ever see a voucher that's gone above the limit where it's going to the circuit that hasn't previously been cut. I do see voucher cutting when the panel comes to me with an issue and they want me to look at it, they know that I worked at DSO, how do they take care of it. I see a lot of averaging. What troubles me is not only do I see averaging within a large indictment, I see averaging across cases. I saw a case recently where the case had a lengthy suppression hearing, government insisted they would not give a plea agreement that preserved the issue. They went almost to trial. Finally the government backed down, so the attorney prepared for trial. It was a around $20,000 voucher. The judge just looked at it with no explanation, said, "This is a run of the mill case. I'm only giving 7000."

It is not extraordinary in our circuit, which means that it's happening to a degree where it's become, not common, but it's accepted practice. My fear is that we will devolve into this system where there is a known number for a certain type of case and then all the defendants become, our clients become the same person, despite mental illness, despite family issues, mitigation. *Booker* is a fantastic case for us, but *Booker* has brought a dynamic into this that the court needs to hear about all these things. What is average for one case is not average for the other. It is something that is complained to continuously to myself.

I recently interviewed someone from the panel to work for us. I said, "Why is your average case X amount of dollars then?" They're talking about how, they said, "That's what we have to bill. If we bill more, there will be a delay." The economic pressure on not to wait long periods of time for it to move up the chain be cut back and forth creates a self-imposed, it's imposed upon them. Is it our biggest problem? Maybe not, but it is a problem. It just has to be done a couple times in my estimation for it to be a big problem. It seems that they call them outliers in our district. Again, it is anecdotal, but there's enough anecdotes out there for me to really think it's a problem. It's an accepted practice by the court in our district. If it's accepted, it means that it's been done enough not to raise concerns.

Neil MacBride: Thank you.

Judge Cardone: All right. I'm going to go ahead and let any Committee member ask questions. I would ask since we have a number of you that if you have a question you direct it and ask your question and then get the answer, and then we'll move on to another Committee member. If you have a question, raise your hand, I'll try to recognize you. Any Committee members have a question you want to ask? Judge Fischer.

Judge Fischer: Several of you have mentioned the volume of discovery that's provided by the U.S. Attorney's Office in multi-defendant cases, extraordinary numbers, like my district in Central California has dealt with both sides of these issues. How do you see, how are committees assisting with that issue, if at all?

Michael Caruso: That's a difficult question and one I've thought about quite a bit. I think the Federal Rules of Criminal Procedure have to be amended to recognize that we're more like civil cases now than we've been like criminal cases in the past. In fact we just had a lawyer retire from our office who's one of the original lawyers from 1974. I wanted to pull out his first case file that's still in storage, which is another cost issue I have to address, right? It's a complete case file, and it must be twenty pages long.

I think that there has to be a serious attempt to look at the Rules of Criminal Procedure, Rule 16, and recognize that criminal cases are more like civil cases at this point, and there have to be fuller discovery protections for our clients. We've actually come to a point here in this district where the process is quite haphazard. We may have a case where you just get a document dump. You're getting terabytes of information with no clue as to what that discovery contains. We have other cases where prosecutors will provide a skeletal index. We have other cases where the prosecutors provide a full index and will sit down and talk with you and walk you through everything that's in the 1000 PDFs that's contained in this one particular folder. Unless there is a uniform standard, especially in the area of electronic discovery, I don't know if there's much we can do except bargain on a district by district and case by case basis for a better outcome.

Judge Cardone: Anyone else have any questions?

Dr. Rucker: Can I follow up on that?

Judge Cardone: Sure.

Dr. Rucker: Follow up on that if I could, Mr. Caruso. You've dealt with some really huge cases. You've talked about three terabytes and things like that. Is it reasonable that the defender offices, because of the resources you have in working in these big multi-defendant cases and big e-discovery cases, could work as a discovery coordinator to work with the panel attorneys on this as well? I know sometimes there's conflicts. Could you set up some kind of a wall or something to do that?

Michael Caruso: I think not under our current structure. I've highlighted some of the cases in my written testimony, but we have others. Mr. MacBride knows from where he practices, I didn't even mention the national security cases that

we've had where we get that same volume of discovery but the lawyer and the investigator have to go to a SCIF where they have no contact with the outside world. Under our current structure with our current level of resources, I don't think we could do that. When I assign those cases, it's really like moving chess pieces around a board. The lawyer who handled the three terabytes case, she worked with another lawyer. Her caseload was reduced dramatically. Her second chair didn't really have a reduced caseload until shortly before trial.

Having that same lawyer still have other cases when the office, trying to defend that case and acting as a discovery coordinator I think would be an impossible task. I think that is a good model to help the district that there be some avenue for a CJA discovery coordinator. I think there would be tremendous economies of scale. That CJA coordinator who would have no relationship to any particular defendant in the case would be hopefully conflict free or could manage those conflicts. I think that would have two impacts, right? The discovery could be processed in a more beneficial manner to the lawyers, and I think it would be a cost savings mechanism as well.

Eric Vos: There's already a group through DSO. I think they work under the training division. There's three full-time people. They're in Oakland. I have directed many CJA attorneys when they get these large cases. They will work very closely almost as experts non-billing. That's something that I think it would be a great idea. It began small, it's still pretty small, but they have been fantastic. I know that they have some agreements already with the U.S. Attorney's Office on the way in which electronic discovery should be provided. It's very difficult to have that in-house expertise for us to do it. There is a national group through DSO who does it.

Judge Cardone: Anyone else? Reuben? Judge Prado, go ahead.

Judge Prado: Some of you aren't involved in the vouchers, but I'm just wondering maybe in defense of some of my colleagues, I don't know. How much of the voucher cutting is due to the lawyer's inexperience in filling out the voucher or not knowing how to make a proper request for an expert that maybe the cut was justified or they didn't explain themselves properly enough, whereas if they would have had more training and experience in how to fill out the voucher or how to make the request, maybe it would have been approved? I guess it works both ways. A lot of it is the judges cut it just because they think it's too much, and they don't offer an explanation. You're stuck with I don't know why I got cut. Would education of CJA lawyers on how to fill a voucher or how to make a request for an expert, would that help the situation?

Thomas McNamara: Judge Prado, I think it would if they would listen. We try to convince them that they need to fill out their requests better than they do. You're right, sometimes they're denied because the judge looks at it and then I see it later and say, no wonder the judge denied it. It's not everything. Some of it is further problems than that. Some of it is definitely from that. We try to put that into our training. We give sometimes three of these large training sessions per year. I send out emails all the time trying to educate the panel attorneys. Most of them have come around that do better. Some of the younger lawyers, they're the ones getting cut for sure.

Parks Nolan Small: In South Carolina, we give the panel attorney every chance. When the administrator gets the voucher, if she doesn't like the way it looks or it's out of whack or some way, she calls the attorney. Says, "Look, we need to get this thing in shape before it goes to the judge." We give every opportunity, sometimes we'll have two or three conversations with the panel attorney saying, "Look, you need to do more, you need to explain this, explain why you did that. It'll be okay." And it is. That's our solution as to how we get the panel attorneys in line to get what they're entitled to get.

Judge Prado: Does the administrator work for your office?

Parks Nolan Small: Yes.

Judge Prado: Okay.

Judge Cardone: Reuben?

Reuben Cahn: Two questions, one is really quick just from Michael. The original idea behind these coordinating discovery attorneys was that they would actually be appointed in individual cases to manage discovery. The Southern District has got a huge volume of these cases. Are you seeing that ever? Are there ever appointments in the coordinating . . .

Michael Caruso: You know, I've seen that process used very infrequently. The one that comes to mind is we had a very significant health care fraud case where Judge Seitz appointed I think Russell Aoki, I think he was appointed the discovery coordinator. Very infrequently.

Reuben Cahn: Did you get any feedback on how it worked in that case?

Michael Caruso: I think everyone was satisfied by the process. The CJA lawyers and the judge, what the CJA lawyer's and I think the judge's fear is uncertainty. By having a discovery coordinator come in at the beginning of the case and manage that process is very helpful. You also have to understand, you know this and most of the Committee members know this, is that the

technology and the delivery of the discovery varies from agency to agency. The FBI and the DEA and homeland security and the IRS, they all use different formats. If you're a CJA lawyer on the panel who receives between four to six cases a year might not have had a case with the IRS for five years. I think the discovery coordinator is very important. I also think a budgeting attorney that deals with cost issues on the front end rather than dealing with them all on the back end would also be extremely useful.

Reuben Cahn: The other question I had really goes back to this independence question that we were discussing earlier. I'm trying as a member of the Committee who's a defender and who I think should represent defender views to better understand the community. I'd ask you everyone to engage in a thought experiment for the moment and imagine that defenders were like the Federal Reserve and we could print our own money. Would anyone continue to support judicial involvement in the program under those circumstances? If so, can you tell me why?

Parks Nolan Small: I don't think it would last. You could start out like that, but it wouldn't last because sooner or later Congress would say no.

Reuben Cahn: I'm asking you to imagine the process for the moment. Is there anything other than money that would prevent you from supporting that independence?

Louis Allen: I would say . . .

Reuben Cahn: More to the point, is there a reason you want to continue judicial involvement other than money that's really [INAUDIBLE] . . .

Judge Cardone: Reuben, I can't hear you very well, and I'm sure . . .

Reuben Cahn: Is there a reason other than the fear of loss of funding that would lead you to support continued judicial involvement in the management of the program?

Eric Vos: I would say no. I'm sorry, I would say no. My confidence in the way in which the defenders have handled their money came out of the work study. Judges have a tremendous amount of control over us in the courtroom. That's where it should stay. Outside the courtroom, this idea that you can take hats off and put them on, I don't understand it. Maybe that's my limitation. I don't see, there's a tremendous amount of control over us in the courtroom, and that's where it should remain.

Judge Goldberg: Should judges have any input whatsoever in the makeup of the CJA panel?

Eric Vos: Absolutely, absolutely. I think that judges should have, there's a committee that we have in Puerto Rico where they have to come in. The panel members, they have to initially be interviewed, and then they have to be approved. We have a magistrate judge and the Chief Judge is there. Their involvement is critical. They understand what it's like to look at these attorneys from a judicial point, which is critical. I think that they should have a voice, as the CJA rep is there. We have people on the panel, there's actually someone on our panel who is not even on the CJA. Yes, they should be involved, but not in the way that we're doing our defense work.

Thomas McNamara: Reuben, could I answer that? I guess I have a unique district that, put money aside, I still don't see problems with judge's involvement because we get along so well together. They respect me, I respect them. It may be very unusual from what happens in a lot of districts.

Judge Cardone: All right, we have time for two more questions. I'm going to have Chip and I think Professor Gould. So, Chip?

Chip Frensley: This is for Mr. McNamara. I think one of the hesitations that defenders might have taking on more of a role like yours is the incredible amount of time that you spend doing it. I'm curious if you were the final decision maker, meaning that you weren't preparing these three or four page memorandums to go to somebody else to make the decision, the buck stopped with you, how do you think that would affect the time that you spend? Would it be less, more, or about the same?

Thomas McNamara: Probably less. Chip, if I had the ultimate decision that the judges have, I guess I wouldn't have to write myself all these reviews. I just look at it and say this is okay, this is not okay. I think that would make a big difference.

Chip Frensley: From a resource standpoint, if you cut yourself out as the middleman and made yourself a filing person, then that wouldn't be such an extreme resource burden?

Thomas McNamara: Maybe not, yeah. I realize that's a heck of a lot of work. A lot of defenders don't want that work. I've gotten used to it over all these years. I've taken pleasure in being able to help the judges with my view of again, my fifty years of service, I can look at a case pretty easily and say whether it's appropriate or not appropriate. It just takes longer to write the memo.

Judge Cardone: Professor Gould?

Prof. Gould: I'll try to do this without a microphone. Can you all hear me? I know one of the things that the community is interested in is not simply voucher

cutting but the extent to which attorneys in the upper end are seeking experts in the first place. I have data here from your districts of how panel cases in the fiscal year of '15. If we look at some of your cases in which panel lawyers are seeking experts across your five districts, the average is 19% of cases. The low, and I'm not saying which district it is, but the low is 1% of cases with the average expert agreement being $19.00. I have two questions for you all, and I'm sorry to be the person to ask but number one, can you explain it, and two, what does this say about what I hear about the broad conclusion from all of you that representation is of high quality in your districts? Does this challenge that or not?

Thomas McNamara: Let me go first then. I hear from defender services that the panel attorneys are not asking for enough experts. I do preach that to them frequently and frequently. I hope I'm not the 1% one, but if they're not asking for them, that's their problem. 19% is still too low. I don't know, I think in my district they are reluctant to do it because I think they'll get turned down. I don't know what some of the other thoughts are.

Eric Vos: I suspect ours is around 5%.

Prof. Gould: Actually, you jumped up in FY '15 to 11%. You are correct, previously you were at 5%.

Eric Vos: A lot of it is education. A lot of it is, as someone pointed out, if you get a lot of no's and told that it's not necessary, you're asking for those experts is time-consuming. It sometimes is back and forth a number of times before you get your final no. When they're already being cut at other areas, I don't know about everybody else's economy, but ours has hit rock bottom and now we're digging to Puerto Rico. People are making really tough decisions. If you can't get an expert, you haven't been able to get experts, you may be reluctant to again ask. Again, we don't have a problem with experts. The U.S. Attorney's Office certainly doesn't have a problem with experts. A lot of people are having problems with experts. I don't care if it's 1% or 19%, it's a problem.

Katherian Roe: Judge, may I follow up with that?

Judge Cardone: Hold on, I think Mr. Allen wanted to say something, and then . . .

Louis Allen: That's okay Judge, thank you.

Judge Cardone: Okay, so go ahead.

Katherian Roe: We heard at the Santa Fe hearings and we've heard from some other lawyers, CJA lawyers, that one of the issues for them is to try and keep the cost if you will of the case lower. When you use an expert, obviously the

price of the case goes up. Folks have indicated some reluctance to do that. They perhaps wouldn't get paid, their voucher would get reduced. Does anyone think that that's an issue or has anyone heard anything in their district that CJA lawyers are concerned about that?

The second part of that is any concern about the cost of the voucher and self-reducing the voucher? I know in the two districts, Mr. Small's district, Mr. McNamara's district, you've indicated that the vouchers are being processed and to a great percentage being paid. I'm asking whether or not you know of any indication that the attorneys are reducing the vouchers themselves perhaps below the statutory cap, statutory maximum, in an effort to make sure that the vouchers get paid.

Thomas McNamara: They do that frequently in my district to stay under the cap. Then they can get paid quicker and they don't have to risk any reduction. I do know that. I'm not sure about . . .

Parks Nolan Small: We've got a rule that if it's only $200 over the cap, we'll call the lawyer and say, "Look, we're going to have to go to the circuit with this one. Do you just want to voluntarily take a $200 cut and get your money now, or do you want to wait?" It's not as a threat, but the process of going to the circuit just takes a lot of time. Oftentimes they would prefer to go ahead and just take the cap rather than wait on the money. It's not used as a threat at all, it's just a courtesy.

Judge Cardone: Can I ask, I know I said we're going with it. Now I have a concern because the cap for experts is $2700, or it goes to the circuit, right? How is that, you guys all have experts at your fingertips. How do you see that cap? Should there be a cap? How high should the cap be? You're in the process of beginning a case and you have to somehow ask for this cap to be raised? Is that a realistic cap at all? If not, what would be?

Louis Allen: I think the Chief Judge Osteen from our district, that was one of the specific things that he addressed in his letter to the court that he saw from the bench, and he certainly has even more experience watching this than I do, he saw that there was a problem with the cap and getting the quality of mental health expert services that the court feels like the case deserves. When the bench recognizes that, I assure you the panel feels it as well.

Thomas McNamara: I agree on that. I think the cap definitely needs to be raised for experts. It's just getting more expensive these days.

Michael Caruso: I agree. Under the current cap, I don't think you can hire a mental health expert for that aspect of the case without busting that cap. I think the cap should be raised.

Transcript (Miami, Fl): Panel 1 -- Views from Federal Public Defenders

Parks Nolan Small: One of our themes is trust. Raising the cap just places the trust where it ought to be, and that is in the lawyer.

Judge Cardone: Thank you. All right, we're going to go ahead and break this panel. Again, on behalf of all of the Committee I want to thank you all. I don't know, we're going to be writing a report. If we need any follow up, we may reach out to you. In the meantime, thank you very much for your time. We're going to take a short recess. We're going to resume at 3:30 with Panel 2.

Speaker 1: Thank you.