Ad Hoc Committee to Review the Criminal Justice Act
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Transcript: Panel 4—Views from a Mixed Panel

Reuben Cahn: Thank you for being here. I'm not going to give any kind of introduction because we gave one before as we found we have a lot discuss. We have changed the main panel slightly. We have Judge Dale Fischer; Chip is still up here, Chip Frensley; Katherian Roe, who's the defender in Minnesota; and Professor Orin Kerr. Pronounce your name for me, Orin.

Prof. Kerr: Kerr.

Reuben Cahn: Okay, I keep wanting to say Carr like Deborah Carr. I want to say we have all received, and I think we've all had a chance to read your written testimony. We appreciate it. It would be published on the public website if it's not there yet, so we don't need it summarized. We do want to give you a chance to make a brief opening statement to really direct this to the heart of the matter of the things that you're most interested in. I'm going to begin with Steve Bright, who I'm very happy to have here and ask you to give us a quick opening statement.

Steve Bright: Thank you very much. I'm very honored to be here and I appreciate the invitation, thank you. I'm one of the few people from the outside here that's not a public defender, or a judge, or a U.S. attorney, or whatever. My perspective is a little bit different. I spent forty years, a little over now, practicing law. Started out as a public defender in Washington, DC. Mostly for the last thirty some odd years, I've been with a non-profit organization representing people, almost all people facing the death penalty. I've been an independent lawyer.

As I listened to all this I realized that I've been an independent lawyer. I've never had to sort of play "mother may I" with regard to what I do on behalf of my clients and my cases. When I hear that some lawyers have to get permission from a judge to take their investigator to go see their client, I can't imagine doing that. I can't imagine what it would take to put together everything that we've done in a case, all our life history investigation, all our mental health, all of my experience over however many years it's been to that point, all the qualities that that investigator is going to bring to that by giving me insights and also being in a position to do her job or his job so much better. It would take a tremendous amount of time. I don't think the judge could possibly get up to speed on it, and this is just to go see your client with an investigator. We've always been able to do what we've needed to do for our clients without any interference. So I would say that first.

I would also say that the people I've been closest to are the people I think are the real stakeholders. We keep talking about stakeholders. The people who have the greatest stake in this are poor people accused of crimes whose stake is their life and their liberty. Those are the stakeholders and those are the people we ought to be concerned about and not all the people who are making a living off the system.

The next thing I would say is, since I became a lawyer, I have been extraordinarily disillusioned by how bad lawyers are for poor people accused of crimes. I wrote a piece in the YALE LAW JOURNAL in '93 called *The Death Penalty: Not for the Worst Crime, But for the Worst Lawyer,* and documented that pretty thoroughly; and am horrified to this day that people are sentenced to death when they're represented by drunks, and sleeping lawyers, and drug-addicted lawyers that don't know the law, and all these other things. You'd have to read the article because I can't summarize it here. But the long and short of it being that the Bar tolerates, and the judges, the judiciary tolerates that. In my view, the judiciary is responsible for a lot of that, for letting things go. I'll try to talk about the easy part of that because there are a lot of nuances if you get much beyond that.

It is a strategy in litigation today, which I think is unfortunate, unfair, unconscionable, but we still have one side trying to keep the other from being adequately represented so that they can win their case. Most civil people can never get into court because they don't have a lawyer so corporations or whoever win their case right there. It's bad enough when the lawyers in the case are doing it, but I think it really is unacceptable when it's the judiciary. The cases that I would just cut to because I don't think there's much argument about them are the statute of limitations cases.

We now have at last count, eighty death penalty cases, probably more now, in which court appointed lawyers appointed by federal judges have missed the statute of limitations for filing of federal habeas corpus actions. That is their clients will have absolutely no review of their conviction and death sentence because the lawyer was so incompetent that he or she couldn't file within the time limit of the Antiterrorism and Effective Death Penalty Act. I have two questions about that. One: I don't understand why those lawyers aren't disbarred. I don't understand that if you can't file your papers on time, whether it's an automobile negligence case or for goodness sakes if it's in a case where somebody's life is at stake, why doesn't the Bar Association have responsibility to get you out of practice so you can't hurt any other people. The second thing is why do the judges tolerate this, and don't even refer these people to the Bar? Then the third thing which is really the most remarkable is these lawyers get appointed

over and over again, even after they miss the statute of limitations, and cost their clients any review of their case whatsoever.

These are people coming out of the same courts where politically, state court judges and most places, they can't give relief and stay on the bench. They're elected. They're going to pass these cases on to the federal court. I attached Edith Jones' memorandum to my statement, one of the questions she asked there, why would we in Texas have a lawyer from California, from a Habeas Unit in California in Texas? I'd say one reason might be the lawyer could file within the statute of limitations because there have been a number of Texas cases, Jerome Godinich, missed the statute of limitations. No problem, give him another case, missed the statute of limitations. I asked the President of the Texas Bar a couple of years ago, how is this guy still practicing law? I don't understand it. He's settling 350 felony cases in the Houston courts and the state courts and he's still being appointed to handle federal cases.

If I could just give a couple of quick examples of how bad I think this is. It's no time to talk about it. The Supreme Court about a year ago right now, reversed the Mark Christensen case. This was a fellow when his case was affirmed in 2004, basically there was a year until April 10, 2005 to file his habeas corpus. That's a long time, a lot longer than you get sometimes depending on how much time is tolled in state court. The district court appointed two lawyers, Horowitz and Butts, were they named. They not only missed the statute of limitations. They had something like nine months to file within the statute of limitations. They didn't even go see their client until after the statute of limitations ran.

May 27, after the statute had run by about six months and finally filed four months after the statute of limitations, finally filed their habeas corpus. Finally after they lose in the Fifth Circuit and everywhere else, or Eighth Circuit, excuse me, they reach out for some help, and some other lawyers attempt to come in and represent them. Just very quickly, the District Court says you can't come in and represent this fellow because you're from out of state and we don't want to pay to bring you in from out-of-state. These were people who actually knew what they were doing, but we don't want to bring you in from out-of-state.

The lawyers quite graciously said we won't charge you for travelling to Missouri to represent this person. We'll just charge you for our time. They still wouldn't appoint them. They entered pro bono, and they still won't appoint them. That's upheld by the Eighth Circuit. My question is, even if you're not going to pay the person because you've got to pay to bring them to Missouri to represent people in the cases, for goodness sakes appoint somebody else. The district judge in this case didn't appoint anybody. The Eighth Circuit affirmed that and, of course, the Supreme

Court reversed and said you've got to appoint the lawyers. Then the lawyers submitted a budget of $161,000 and the district judge gave them $10,000.

The other thing and I'll end with this real quickly, these lawyers in Texas who recently . . . this is about as bad. I keep seeing worse and worse. I think it can't get any worse. It can't get any worse than people sleeping during trials and clients getting executed and all that. But these two lawyers who have taken cases in Texas, and the long and short of it is, wrote their client a letter on June 30 last summer. I can't imagine a lawyer in a death penalty case doing this. My client loses the final appeal that he has and I'm going to be at the prison the next morning to talk to him about that and go through and counsel him about the fact that his life is about to end because he's just lost in the court of last resort. These lawyers just sent him a letter. It said, so long. We're out of here. There are some other stages but we're not going to do it because it's hopeless. If you could get another lawyer, that's great, but we're out of here. We're not going to help you out anymore.

Some other lawyers tried to intervene in the case or tried to get him lawyers appointed. Without going into details, it goes all the way to the Fifth Circuit which—I think Judge Prado was on the panel—not only denied it but dropped a footnote telling the lawyers quit trying to get this guy a lawyer. It was a conflict. The lawyers had abandoned the fellow. Heavens it's a murder trial. They'd sent him a letter in June saying we're out of here, we're not going to represent you anymore. That time the Supreme Court didn't intervene and the fellow got executed. As did another person represented by those same lawyers. What's interesting is when the question of their lawyering came up, they actually took the side of the state and argued against their own client. That's really a conflict. When you're actually filing papers, arguing against your own client. Arguing against the stay of execution. Arguing against giving him a competent lawyer. That really takes the cake. It happened again in the *Roberson* case. The same thing happened again. He got executed.

I would just say having heard all the talk about incremental changes and all this, I would urge this Committee to be bold and to take some action that suggest that the Article III job of a judge is to solve cases and controversies. The responsibility of the lawyers under the Sixth Amendment is to zealously represent clients. Those two responsibilities never merged at any time in American history except when this law was passed. The defense function should be completely independent of the judiciary. It has the appearance of impropriety, that the judge has his or her thumb on the scale. Not only is it the appearance, a lot of times they do. I guess with Judge Jones you would say she has a tombstone on the scale of justice. People see that. Clients see that. Nobody's going to

believe in North Carolina that this is all about better representation. Nobody's going to believe that.

Clients aren't going to believe it. The lawyers there aren't going to believe it. It may be, be true, but whether it's true or not, it doesn't matter. I think real injustice is being done in these cases and we need things like capital habeas units. It's remarkable in the Fifth Circuit, not a single capital habeas unit thanks primarily to Judge Jones. No place needs it more to have lawyers that know what they're doing, that are specialists in representing people in capital cases that file within the statute of limitations, etc. Thanks.

Reuben Cahn: Thank you. Mr. Felman.

James Felman: I yield my time to Steve Bright. It's an honor to be here. I don't know exactly why I'm here. I would be shocked if you read my testimony because I didn't submit any. I am here, I hope, as a resource to your Committee to answer your questions. I've spent about thirty years practicing federal criminal defense work in my office in Tampa, but I've probably done cases in maybe, I don't know, fifteen to twenty other districts around the country. I did spend about fourteen years organizing and running the annual national program to train lawyers and probation officers on the federal Sentencing Guidelines. I have a particular bent on the need for people to understand the federal Sentencing Guidelines.

I was Chair of the Practitioner's Advisory Group to the Commission so I have some feel for the complexity of the guidelines and the fact that given that 97% of the case are guilty pleas, a lawyer who doesn't understand the guidelines is not a good thing. So I have some feelings about that. I do think I bring to the Committee some perspective beyond just my own. Having worked, I just finished up my term as chair of the Criminal Justice Section of the American Bar Association which is equal parts prosecutors, judges, professors and defense lawyers. I'm also one of the founders and on the steering committee of Clemency Project 2014 which is what we believe to be the largest pro bono effort in our nation's history. I've had the project of assembling an army of lawyers to do a job, and try to train them and manage them and supervise them and assign them cases. I have some perspective there.

I'm not going to make any further opening statement. I yield the rest of my time because I know your time is important and I just offer myself as a resource to answer whatever questions I can, given that background and perspective.

Reuben Cahn: Thank you. Mr. Milanes.

Juan Milanes: Good morning. Help me on this. I see that on my sign here it says panel attorney, District of Puerto Rico. I understand I'm actually here because I sort of bring a little bit of a different perspective in that I'm a member of the panel in both the District of Puerto Rico, but my primary panel is my home district in the Eastern District of Virginia. So I actually bring a message of both good and bad with respect to my experiences with respect to being a CJA panel attorney. I was with the Department of Justice for about twelve years. During that time, I had the privilege of serving in different capacities. I was an assistant director for the EEO for the Executive Office for U.S. Attorney's. As a manager, I had the opportunity to deal with U.S. attorneys throughout the country with respect to their personnel management issues.

One of the things that I ran into in that position was the fact that most U.S. attorneys would look at me and say, "Well, Juan, you really don't understand, well because you're a civil attorney. Civil attorneys will never understand." That started my transition into what is now what I find the most enjoyable part of my job which is criminal law. I asked for and received the opportunity to become a special AUSA in the District of Puerto Rico to become a criminal attorney, to become a prosecutor.

From that I sort of learned the gladiator way which was that, the criminal division, the reason why it was so difficult to get U.S. attorneys to go into mediation and to try to resolve problems without actually having to litigate. Now from that I had the opportunity then to go overseas and train federal prosecutors in Columbia, the Dominican Republic, etc., on the adversarial system we have in the United States. A number of those countries have been changing their criminal codes and putting into place a change from what was a civil law tradition form of the judge as investigator to that of the judge as neutral.

At the time I really espoused everywhere I went about what a wonderful system we had in the United States. How the adversarial system really gave a level playing field to both sides and how that allowed defendants to really set forth their rights, because we had a jury and we had all of these abilities for defendants to defend themselves. There finally came a time where I left the Department of Justice and I have been educated since then about the level playing field that I espoused for oh so many years. The truth of the matter is there isn't a level playing field for criminal defendants in the federal criminal system, justice system. When you represent indigent defendants, you're not even in the same room. It's one thing to be retained counsel because there you make choices. You can be independent. You can set your investigator to actually go out and get you what you need. You can find however experts you need. As long as you've got a paying client who has the ability to provide you with the resources. But when you are facing a system where you have to literally

beg for every little thing, it becomes a problem. Your independence really is challenged.

Many of you may have heard I just finished last week a seventeen month trial in the District of Puerto Rico. That was a true experience. The judge involved in that case is really probably one of the smartest members of the judiciary I've ever met. She has an ability to analyze any issue and provide very sensible, reasonable and hardly ever overturned decisions. She's very thorough but she takes her time. Unfortunately for a solo practitioner just trying to run an office, in two different districts, sometimes that can be devastating.

In our case when we started the case at trial, that trial started five years after my client was placed at the Metropolitan Detention Center for his pretrial detention. The Speedy Trial Act is not something in the District of Puerto Rico that is necessarily taken as seriously as it is in other districts. I can tell you when I walk into a courtroom in the Eastern District of Virginia, for that initial arraignment that judge gives me a trial date. I know when my motions' hearings dates are. I know what my deadlines are. Let me tell you in the rocket docket, they stick to the plan. I know if I don't meet my deadlines, I'm going to have hell to pay, so I stick to it. Generally speaking, that seventy days is that seventy days. When I'm in that District, people don't understand how I can be in trial for months and months and months in another district, when the longest trials in Alexandria may just take a few weeks in terms of criminal trials.

So we started that trial five years after the detention. We asked for interim vouchers and they were summarily denied even though the government at that time said we expect this is going to take about two months to maybe three months to try. That was the government. They wanted to present forty-seven witnesses. We said, your Honor, two or three months, that's going to be a long time. We'd like to get an interim vouchers. No, let's see how it goes. Nine days of trial went by with witness number one. We went back to the judge and said, judge there's forty-six more to go, can we get interim vouchers. At that point, the judge approved interim vouchers. Now it was an oral decision at that moment. Later, we got the court order, but the other question we asked at the beginning of trial was can we also get transcripts? This is going to be an extended trial. We really need daily transcripts to keep up. There's going to be forty-seven witnesses here. No, you don't need transcripts.

Meanwhile, the United States, of course, it's not regulated by the judges in any, way, shape of form, you just fill out a form and get whatever transcripts they needed for their case. As the case progressed, we were then allowed to file interim vouchers. We filed our pretrial time voucher which for some attorneys was five years' worth of work. I was the third

attorney assigned to my specific defendant who was defendant number one. We did engage in a lot of pretrial litigation during the year and a half, or almost two years that I represented him. It was a rather large voucher. As soon as those were filed and it took hours to put that together, we were then informed, oh no. I'm sorry, no pretrial vouchers, only trial phase vouchers. She returned all of our vouchers. We then had to do monthly trial phase vouchers.

For the next six months, we filed trial phase vouchers. After six months, we now got a new order. This is taking much too much of my time. I'm returning all of your trial phase vouchers. I'm only going to consider in court time as certified by the clerk. So, you can imagine. Six months have gone by. Now we're in month seven. We haven't been paid. Our offices are shut down. And now we're told the all the work you've done, save that for your final voucher and add your out of court time and expenses, we'll deal with that later, just in court time. Now we have to do monthly vouchers for in court time only. We submit those the following month. Finally, they begin to get processed. Then we get our final surprise to add insult to injury. The clerk's office lets us know, oh, well, pursuant to the cost containment memo with respect to the First Circuit, 20% of your in court time will be withheld so that it can be reserved for the final voucher.

You have to understand the way this case ran for a number of reasons, some months we worked two days. For a whole month I received a check for $800. I've got an office manager and an associate that help run my private side of the business in Alexandria. To say the least, I had to subsidize for much longer than I expected. I went in with a nice reserve. I knew I could withstand at least six months not receiving any payments. After that, payroll has to be made. Child support payments have to be made. I finally had to be placed in the embarrassing position of informing the judge, your Honor, I need this payment because at this point I've run out of all of the reserves. I've been borrowing money to keep up with this case. Quite honestly, this affects my client's Sixth Amendment rights. If his attorney is arrested by local authorities for failure to pay child support, that presents a problem to the court. We finally received our first interim voucher after I received [a] nice order letting me know that . . . you know, we were told this on several occasions, interim vouchers are not a right. That's a privilege. The court may authorize them. So you should feel happy that they've been authorized.

That is true. I'm not going to argue with anyone over those things. The truth of the matter is, I do this in part because (A) I enjoy the work; (B) it's a great way for me to see my kids. That's why I travel to the District of Puerto Rico because this allows me to do it. I don't receive any payments from travel. It's just part of my overhead costs. I'm on that CJA Panel. I realize I can't bill any of that and I don't. I look at it as an opportunity for

me to fulfill certain family needs that I have which is good. I am very proud to serve on the panel. And in Puerto Rico, I don't do other work. I don't do bankruptcy work. I don't do civil litigation like I do in my home district. Because realistically for me in that district, it's only about seeing my family.

But I'm here today to publicly talk to you about voucher averaging and all of the other problems in that district because I can assure you the vast majority of the members of the panel are not in a position to talk to you. Because they understand. They fear that talking to you publicly may result in them not being on that panel. That's a major problem. They want to correct the system for the sake of their clients, not just because of them. In Puerto Rico, given the economic situation, it's not like they have other places to go. On the bright side, CLE programs that are offered by the federal public defender service in both districts, outstanding. And in terms of the competence level for individuals who are accepted on the CJA Panels in both districts, best in the country in those districts. They really are outstanding attorneys who do the best they can for their particular clients. That's part of the good news.

In Virginia, I can tell you not only are they excellent lawyers, the system really works. I rarely receive payment on a voucher in less than three weeks once I submit it in Virginia. And the cases move. Like I said, we get Speedy Trial Act is observed. Now, at the state level it's the complete opposite. Virginia, unfortunately, has a reputation of having some of the worst compensation levels for indigent defendants in the country. So here you have a wonderful example of where the system works because the judges have taken the initiative to make certain that criminal defendants get representation at the level that they deserve. The attorneys are allowed to receive the resources that they need. I'll file whatever motions I need to, to get experts and that's usually respected. I've never had a problem of a voucher cut in the Eastern District in Virginia. I've never had a problem with an expert being turned down. I've been able to move those cases appropriately for those clients.

In Puerto Rico, I can tell you since sequestration, basically almost all vouchers are cut. They're cut two times. They're cut by a CJA clerk. Sometimes that can be $100, $200, $300 worth of cuts. Then it goes to the judicial officer. The judicial officer comes back sometimes with thousands of dollars of cuts based on reasonableness. In the specific incidence, where we had a major multi defendant case, on averaging, I had an instance where I had a seller, a low level individual in an eighty-two defendant case. That seller unfortunately in the indictment wasn't identified with any of the murders that were set forth in the indictment. But when we got to the discovery, when we got to plea negotiations, that played a role in terms of differentiating him from the offers that were being made to the other

sellers. That made it very difficult for my client to accept. His level of education didn't assist. At one point I had to consider whether or not I needed to bring in an expert on competency for that individual. I learned later, it really was more his stubbornness. It wasn't his mental capacity.

When the voucher went in for that case because of the time it took to get to settlement, I received a memo from the judge who instructed me that, well, that because the first twenty-two defendants who had pled out, had reviewed discovery up to so many hours . . . I understand that your number of hours of discovery in review is excessive and therefore I'm cutting it by something like fifteen hours. Wait a minute. I had to then research, I had to respond to the memo. I had to look up all these twenty-two codefendants on the docket to figure out most have pled out within five to seven months of the indictment date. Whereas mine took almost a year. And there were three additional discovery packages which had been issued since, five months had passed.

Again, once I laid out all of the differences between my client, between the murder issue, between the difficulty in plea negotiations, and set it up. That probably took about four hours of my time to respond. I would have at least expected a memo back from the judge saying, I've considered it and here's what we're going to do. I'll cut this or I won't cut this or something. No, once I submitted my response to the judge's memo, the next thing that happened was, about two weeks later, I received a check as cut by the judge, no response, no information, no nothing. Those are some of the issues and I really appreciate your time.

Reuben Cahn: Than you, Mr. Milanes. Ms. Puglisi.

Sabrina Puglisi: Thank you, I'm here on behalf of FACDL, but I am also a panel attorney and a former assistant federal defender, so I do understand the importance of indigent defense. For those reasons, I think the two most important issues that I would ask the Committee to review would be: (1) removing judicial involvement with respect to the review of vouchers, the appointment of experts and investigators; and (2) increasing the compensation for attorneys, but most importantly—cause I understand budgetary concerns—the fees that are approved for experts and investigators are subpar. The government has tremendous resources to be able to investigate cases. Hire the best experts. We as defense attorneys cannot provide the best defense for our clients if we are not able to be able to obtain the best experts and allow our investigators to do all that is necessary. That's all I'd say at this time and accept your questions.

Reuben Cahn: Thank you. Ms. Salvini.

Jessica Salvini: Thank you, it truly is an honor to be present here this morning, testifying—I guess it's the afternoon now—testifying before you. I want to begin first by giving you a little more information about my background. I'm licensed to practice in both South Carolina and California though my practice is wholly in South Carolina now. I have a small law firm, consists of myself, my law partner, an associate and two paralegals. Our practice is a general practice. It's both federal and state based. A wide variety of criminal and civil matters. Both my law partner and I are panel attorneys. In fact, I have served as a panel attorney for approximately twelve years in the state of South Carolina. In addition, I also serve as the chief judge for a municipality in South Carolina that I don't practice in where I do hold court once a week for bench trial and pleas and jury trials approximately once a quarter.

In addition, in South Carolina, our district panel representative has approximately three individuals who volunteer. Essentially they're panel attorneys to assist him across the state in addressing issues with panel attorneys acting as liaisons between panel attorneys and the court. As well as assisting in training individuals, lawyers who are seeking to be on the panel. I serve in that capacity and I do assist him. It's volunteer. It does not take much of my time. Essentially what it involves is panel attorneys calling me if they have an issue or problem. They have a question or concern about a voucher or a problem that may have occurred in court where they've had an issue. And then I've also had the privilege of training some individual attorneys who are in private practice. They're solo practitioners looking to be on the panel. Essentially what that means is going to the district court judges, asking that they be appointed as a second chair to serve in my cases and then walking them through a federal case from start to finish. Meaning from the time of my appointment to the conclusion of either the sentencing or for, if it's a trial, whether it's a guilty or not guilty verdict that occurs.

As a result, at least where I am at in the upstate of South Carolina, I've had the ability to at least hear what the complaints are. Be able to address what those are. There's two primary issues that I want to discuss with the Committee. I believe it's important that you hear from panel attorneys in the trenches on a day to day basis of what they're facing when they're appointed to represent individuals and what they're concerns are. I am fortunate enough to be in the District of South Carolina. I think this Committee has heard that we are doing very well in the District of South Carolina primarily because of our district panel representative, our Federal Public Defender's Office that provides some assistance to our panel attorneys, as well as we have a great working relationship with our district court judges. I believe that makes a very big difference in how panel attorneys address their cases, work their cases, submit their vouchers.

The two primary issues or the two complaints I hear from panel attorneys in my district or in my area with is the upstate of South Carolina deals with two primary issues. That is multi defendant cases where they've been provided with a substantial amount of discovery. I'm not talking about the terabyte of information where there's six filing cabinets that we've all heard about where there's a discovery coordinator. What I'm references is that there's usually five to ten defendants. The federal Public Defender's Office has been appointed to represent the lead defendant and they take on that task. The remaining defendants are then appointed a panel attorney. Essentially what happens in the upstate is our U.S. Attorney's Office takes all the information that they have related to that case. They try to organize it by agency. They place it on several discs that's provided to the panel attorneys, along with a program. It's a software program that the U.S. Attorney's Office represents to the panel attorneys is going to assist them in the review and organization of anywhere between 1,000 and 10,000 pages of discovery.

Essentially what it does it takes documents and has optical recognition software that's involved in it so that you can search it, you can term search it. You can decide to search by client name or if there's a specific term that you believe is related to the person that you're representing so that that way you can understand and organize a large number of documents in a way that will help you present it to your client, determine what you need to research, determine how you're going to proceed forward with the representation of your client in that case. The problem is, however, it's twofold. The software is obsolete. Most panel attorneys do not have the operating system to be able to use the software effectively. And there are instances in which the U.S. Attorney's Office represented that they have taken this large number of documents, placed it in this program to assist the panel attorneys, and ultimately it is defective.

To give the Committee an example, this past summer I had a panel attorney call me, inform me that she had been appointed to represent someone in a large, multi-defendant case, I believe there was about ten individuals. She'd been provided with nine discs of discovery. The first disc contained this program that the U.S. Attorney was providing to her, and she could not make it work. She'd spent several hours and that was it. She'd reached the end game at that point and asked if I could assist as her local panel representative. She came to my office. We loaded the software on my operating system. I do maintain a laptop that has an older operating system, so it worked. We got the program to work.

The problem was is that I was concerned about how the documents were appearing in the program. Essentially what happens is you put in your search terms. The documents are Bates numbered so this program will tell you which documents you should look to be able to find information about

your client. It gives you a list of Bates numbers and you can actually click on those links to get to the document in electronic format. We took two or three documents which I knew contained her client's name—it wasn't hand written so I didn't have any concerns about that—did our search term, they did not come up. Her question to me was, ok so now what. My response could only be one of two things. Go back to the U.S. Attorney's Office, who we have a very good working relationship with, ask them to reload it in this program and trust that it's going to work.

Or number two, you're always provided with a set of discs that has all the documents of discovery in a PDF format. So you can try to import that into a program of your choosing to see if you cans search it. You can print it and start reviewing it page by page. Ultimately what you're looking at is a document dump. It would be akin to going to the U.S. Attorney's Office and picking up six, seven, ten banker's size boxes of documents and going back to your office and starting to go through them one by one. Most of our panel attorneys are solo practitioners. I have two paralegals in my office. I just consider them to be overhead. When I get something like that it is easier for me to print off documents or identify sections of PDF's to look at electronically and have my paralegals get started. I do not bill for that. That is not on my voucher, but I have the ability to do that. I have built that into my overhead. Most solo practitioners who are panel attorneys do not have that ability. Likewise, panel attorneys are concerned that they do not have the ability to be compensated for that.

In that example, my understanding is she did not bill for the three hours she spent trying to get the operating system to work. I certainly did not bill for my time, we spent about an hour, an hour and a half trying to get things organized so that she could get started with the discovery review. The printing that she did of the documents that she did eventually take to the jail to show her client, it is my understanding that she did not submit any type of request for compensation for that. Certainly what this Committee has heard is that there has to be a way to level the playing field between the U.S. Attorney's Office, the panel attorneys, and even our Federal Public Defender's Office who has a lot of resources. It certainly shouldn't, in my opinion, fall on the federal public defender's office to then provide services for their panel attorneys, without there being some type of issue to address with conflict.

I don't know what the solution is with the exception of asking the Committee to consider a couple of things that you have heard. First of all, in the District of South Carolina, we have a panel administrator. I cannot tell you what a difference that has made and how valuable that attorney is to our panel in South Carolina. I have been a panel attorney for twelve years. I have seen from the start to finish exactly what the difference has been once she came on and started assisting panel attorneys with the

review of vouchers. It has been invaluable. I think the Committee has heard that in South Carolina, the amount of vouchers that are cut systematically has dropped drastically. We in South Carolina do not have the problem of averaging vouchers. Our district court judges, at least in the upstate where I am at, understand that our panel attorneys have issues like that described for you with this discovery review in multi-defendant cases.

If this was a law firm or this was a business, our panel attorneys would have someone that would assist them. We don't have discovery coordinators in the upstate for multi-defendant cases where the documents only consist of 1000 to 10,000 pages. We're talking on six, seven discs of documents, there is not going to be a discovery coordinator. What's going to happen is what I described for you. The U.S. Attorney's Office is going to try to assist. Our judges, at least in the upstate, recognize that there are going to be some problems with this program. Attorneys are concerned that they are relying on the U.S. Attorney's Office to tell them what documents are relevant to their client and they simply can't do that.

However, like our panel administrator, if our panel attorneys had an individual who was either on the panel appointed to represent an individual in that multi-defendant case or someone who was simply on the panel who could be appointed to serve to assist in the initial preparation and organization of the discovery for panel attorneys, it would be most beneficial for them. Especially if there was funding for them to be able to do it. I want to give the Committee an example.

In, at least in the upstate of South Carolina, civil litigation attorneys who deal with large scale discovery and civil litigation have the ability and often contract with different providers to take those documents, scan them in, make them searchable. There is actually a service provider who does do that service for those attorneys. It requires licensing for each attorney in the office who uses it, but it does result in a cost effective and time effective way to be able to review large scale discovery so that it isn't just a discovery dump of documents that has landed in the lap of a panel attorney who doesn't have the resources to handle it. If there were an individual who was appointed to handle that for the court even, at the outset I think I mentioned in my written testimony that I believe at least in the state of South Carolina, in our district, our judges are trying to help our panel attorneys. If they're made aware of what is required or what is needed in order to help level the playing field, I do believe that they would be amenable to holding . . . even if it's an ex parte conference to address what needs to happen in order for panel attorneys to have the resources they need to be able to proceed forward with effective representation of their clients.

This sort of spills over into the issue of voucher cuts because panel attorneys even in the upstate of South Carolina where I am at dealing with my list of panel attorneys, they still fear voucher cutting. Most of them do not bill for any of their administrative work. They do not set forth on their voucher having to print documents. They don't submit on their voucher anything that deals with the administrative aspect of the representation of their client even if they're struggling with the overhead in their office. It is a problem for them. They're not compensated for that. There's also the issue of whether or not they should be asking for that. We are very fortunate in South Carolina to have individuals on the panel that I feel privileged to practice with. They are seasoned attorneys. They are good lawyers. They are doing this type of work because they enjoy it. They want to represent these individuals. They don't have to.

They should be compensated for the amount of time that they put in handling the administrative aspect. Just in terms of in these multi-defendant cases which is what I'm focusing on, being able to have the ability to take these documents, organize them, be able to search them. We're in the day and age of technology that this is available to lots of attorneys, not to panel members. It's not available to panel members at least in my district unless they're willing to rely on the United States Attorney's office. I think that is something that has to change. If there is an individual like our panel administrator who can assist panel attorneys in being able to handle these multi-defendant cases and use the technology that's available to other attorneys in the civil arena, it will be more cost effective and time effective for panel attorneys. I'm not saying it's going to level the playing field, but it's certainly going to help. Thank you.

Reuben Cahn: Professor Bascuas.

Prof. Bascuas: Good morning. Let me very briefly touch on my background so that everyone knows how I'm approaching the topic. I was a white collar criminal defense young associate when I first graduated law school at Zuckerman Spader in their office here in Miami. After clerking, I was an Assistant Federal Public Defender for three years, again here in Miami. Since 2003, I've been a professor at the University of Miami School of Law. But in the last fourteen or thirteen years now, I've always practiced. I still do criminal appeals in the Eleventh Circuit. After getting tenure, I started a clinic at the law school where students brief cases that the federal public defender refers to us. They're very simple, single issue appeals, usually a Sentencing Guidelines issue. The students participate in the briefing of those cases to the Eleventh Circuit Court of Appeals. In addition, I have a very, very small private practice where former colleagues will ask me to help them with pretrial motions or with appeals. So I keep a foot in practice.

My perspective on the Committee's work is not one from anyone who's ever had to file a voucher or go begging to a judge for money. I sympathize with those who have done that because it sounds incredibly unpleasant. I think that clearly the Committee's going to have to deal with a lot of very nuts and bolts issues in, for example, multi-defendant cases and with electronic discovery. I know that the Committee has heard a lot about that already just from the conversations at the reception last night.

What I want to do is try to contextualize some of that because this has been evident to me for a long time, mostly from my appellate work which is that the attitudes that are reflected in the Prado report, the Judicial Conference report of 1993 in the Vera Institute report and most emphatically I would say in the NACDL report of last year are not unfamiliar to me. There are federal judges who do not really understand what it is that criminal defense attorneys do. I think that's simply the product of a lot of federal judges coming not from a criminal defense background or even a prosecutorial background necessarily. I think that's also, as my written testimony goes on and on about, a product of the Sentencing Guidelines regime that's existed since November of 1987.

The most pernicious part of that whole thing, and there's lots of pernicious parts, is the commentary to the acceptance of responsibility guidelines that says putting the government to its burden of proof is somehow a blameworthy act. As long as that is any part of the law of the United States of America, my position, my thesis to the Committee is that you cannot do an effective job if you don't address that. The reason is that we're talking about how much money and for what and experts and vouchers and reports. At the same time, the branch of government for whom all of this is done really doesn't appreciate the fact that defense counsel's role is a necessary one. In fact the law tells them that they're doing something that's censorable by making prosecutors work and write motions and draft responses and go to trial and bring in witnesses and prove their case.

As long as that is the ethos of the Judicial Branch of the United States of America, you can't fix the Criminal Justice Act problem because the judges who are the priests of the judicial branch and are always going to have the last word as long as Criminal Justice Act representation is in the judicial branch. You can put administrators and panels and boards and committees in between a judge and the attorney, but the judges as a group will always have the last word. It's the judicial branch. That's the way it needs to be.

I don't agree with Judge Gleeson's comments earlier in the previous . . . are we the panel? I guess we're the panel . . . in the previous panel that the appointment of attorneys is not a judicial branch function. It emphatically is. The Supreme Court routinely appoints attorneys to argue positions that

no one else will argue. I think the last time they did it was the Defense of Marriage Act case because the administration didn't want to defend the law, so the Supreme Court said that's not problem, we'll appoint someone who will. Usually it's a professor who they appoint. They do this in innumerable cases. This is the genesis of *Gideon v. Wainwright*. *Gideon* was not the first case where they appointed counsel. The appointment of counsel before *Gideon* was done on a case by case basis. But judges have always appointed counsel, expert witnesses. There's a case I teach from the 1870's where the Supreme Court of Wisconsin said yes the judge can appoint a forensic accountant in this case. Judges have always had the ability to draw on whatever professionals they need to have an adversarial presentation to get to the bottom of things.

So, I think there is a theoretically and traditional customary justification for the appointment of counsel in all kinds of cases, particularly criminal ones, to reside in the judicial branch. But that judicial branch needs to have a culture and an ethos that values and understands adversarialism and sees defense attorneys as a necessary resource for the getting of information. What the guidelines did is, they replaced both lawyers, prosecutors, and defense attorneys, with the probation officer who's presentence investigation report becomes the conclusive facts of the case. When the guidelines were mandatory, that was true even in cases tried to a jury. There was a case, I forget the name of it because I'm not good with case names, but where even acquitted conduct could be brought into the PSR and then you'd be punished for that. That is not an adversarial system in any way, shape or form.

As Mr. Milanes was discussing earlier, I too have gone to South America to spread the gospel of the adversary system with the Department of Justice and the Department of State. I went to Colombia twice. My presentation was different. I talked about how the adversarial system exists in all common law countries and is adaptable to every country's particular traditions and is different in all fifty states as well. That's the genius of the common law. The reason the common law has persisted for hundreds of year is because it is adaptable. But it's not adaptable so much that you can replace it with an inquisitorial system and not have consequences. We have a schizophrenic judicial branch that pays for a probation officer to investigate defendants and then pays for defense attorneys to contest those allegations. That makes no sense, I respectfully submit.

I think that the recommendations in my written testimony are sort of baby steps except for the last one. Which is that the probation office at this point in time, given that the Supreme Court has emphatically said, emphatically said there is no place in our system for this inquisitorial mode of justice. In other words, nothing in my written testimony is the

mad ramblings of a law professor. None of it. All of it is carefully cited to Supreme Court majority decisions. The law of this country is that the whole guidelines system is inquisitorial, non-adversarial and unconstitutional. The judicial branch is structured in a way that does not reflect those holdings.

I submit that the task this Committee faces would be rationalized and make a lot more sense if it were a step in the direction of divesting the judicial branch of the probation office which sees itself and says on its website we are law enforcement officers and U.S. district court employees. That's crazy talk. That is literally absurd and makes no sense. You cannot be both a law enforcement officer and a district court employee. That is why the U.S. Marshal Service is within the Department of Justice, where it's always been.

I think all the complaints in all those reports from 1993 forward, Prado, Judicial Conference, Vera Institute, NACDL, the Gleeson Report, all of them, are symptoms of what the Supreme Court dealt with in *Booker* that we have not The judiciary has not had to value defense counsel because in the vast majority of cases, which is the point of the large number of pleads and the very low number of trials, in the vast majority of cases, all there really is for defense counsel to do is object to the PSI. It is very difficult for a judge who doesn't have any criminal experience to take that, to look at that, and think, I'm going to give you a voucher for all this investigation and all this stuff and all you filed in this case is the objection to the PSI. Because they don't understand that the reason that defense attorneys are basically fighting with one hand behind their back because of the acceptance of responsibility guideline and the PSI and all the law built around that which my written testimony merely glimpses. That's sort of my macro view of the thing that puts all the little problems you're hearing hopefully in a slightly different light. I'm happy to answer any questions that might provoke.

Reuben Cahn: Judge Fischer.

Judge Fischer: There's almost too much to deal with here and we all thank all of you for being here and for your very blunt and frank testimony, which is exactly what we need in our investigation. Our Chair, Judge Cardone has indicated to us to find the facts and make the best recommendation that we can, bold or otherwise. I'll start with Mr. Bright. There are a number of concerns that you raised. Let me go to maybe a solution. You mentioned two things in your written testimony. One is the need to have a national system to evaluate capital attorneys and another talks about budgeting issues. So, with regard to the national system, could you tell me a little bit more about how you see that, if you've thought further and maybe come up with some concrete parameters or methods, and then your thoughts

about a budget. Because I've been thinking about this too and talking to my local public defender. Do you see that as some sort of a national budget or would we have individual local budgets as I think we do for our CDOs and FPDOs? How would they go about presenting that on their own if we made that bold proposal that you suggest? Could you address those?

Steve Bright: Thank you, Judge. I think with regard to the first question about the organization, we see that already on localized basis all over the country in two different ways. I mean, one, the capital habeas units that handle habeas corpus cases in say Pennsylvania, the Philadelphia capital habeas unit and others throughout the country provide lawyers who do nothing but represent people in capital cases, are absolutely specialists on it, have mitigation specialists, investigators and all those people in-house and provide quality representation, and have an expertise particularly in the habeas corpus law which is more important sometimes than the state law once the person's been sentenced to death. Because once you're in federal court, it's all just a matter of trying to get around all these procedural hurdles that the Congress and the court has created to try to get the merits. We have that.

I don't see why that can't be expanded. First of all I don't see why we don't have those in the places that need them the most. It doesn't make any sense to me, and why we have these totally incompetent lawyers representing people in those places, but I've already addressed that. The second thing though are the capital habeas resource counsel that have provided lawyers for example in federal death penalty cases, when there are obviously not that many federal death penalty cases, but I think David Brock and Kevin McNally and those few have tried to make sure that when there are those cases, there are capable lawyers lined up to represent people in those cases. Depending upon the size of the problem, you expand that to be as large as it needs to be.

My view about it is that you need to have people like them who know the qualifications of the lawyers recommending the people. My understanding is a lot of judges, even though it's in the statute that you have to ask for their input, don't even do that. Sometimes appoint whoever the local show horse is, but who often is a person who may be a show horse but does not really know anything about capital cases, has never handled any before. Sometimes that results in disaster. It has a number of times in both trials and post-conviction.

My view about it would be that you would have an agency that would actually provide the lawyers because I think we know now beyond any doubt that those agencies are able to provide competent, capable lawyers to do that. The other model that's sort of out there is the California Appellate Project which is an agency which provides lawyers in death

penalty cases in California and does use private lawyers who are carefully screened and capable, hopefully, of doing what they're doing but who also are supported by the lawyer of the California Appellate Project in what they're doing.

The budget question, I wasn't quite sure what you were asking me.

Judge Fischer: If we're going to take this out of the judiciary or at least take perhaps the budgeting out of the judiciary, how do you see that working? Will there be a national budget that somehow would be divided? Would there be local budgets? How would we support that process?

Steve Bright: Well the federal government, I would think it would be a national budget and I would think these agencies would be funded by the national government. We have now in some states and it's made a huge difference. We have in some states, we used to send a huge number of people to death rows. We now have capital defender offices. I mean, in Georgia we didn't have a single death sentence last year; that's because we have a capital defender office. Used to be we had fifteen or twenty a year when just anybody with a bar card and a heartbeat could represent somebody. But now, and same thing happened in Virginia, we now have four capital defender offices, trial offices and have all but ended the death sentences there. It seems to me it has to be nationally funded.

Obviously the funding has to be allocated to where the cases are and where the problems are. Certainly in post-conviction when we're dealing with cases out of state courts, that's the states of the old confederacy, the death belt, that's where the death penalty is being imposed. It's not being imposed in Vermont. But it is in Texas, and Alabama, and Georgia, in those states, Florida, that historically have been the states that kill a lot of people. That to me is not a terribly challenging thing to do. I think trying to get the whole system, where you had the whole federal defender system, that is a more challenging task. But it's not one that's beyond our capability to do it if we really put our mind to it.

Judge Fischer: Thank you. I don't mean to skip over anybody, but I'm trying to focus and I'm sure we'll talk to all of you. Mr. Milanes, we've heard some testimony, I don't know if you were here already, about Puerto Rico, and we have the written testimony. A couple of things that you said I'd like to follow up on. Do you personally, or do you have a sense that the lawyers bill differently in the two districts in which you work, especially with regard to requests? We've heard repeatedly about some lawyers now don't even ask because they know they won't get. Is that happening in Puerto Rico? Are they not putting in vouchers? Are they not requesting experts? What's your thought?

Juan Milanes: I think I put in my written comments the Spanish phrase "los golpes enseñan," you know, "the beatings teach." The problem is when you repeatedly ask for something and you repeatedly go through the route that we're told we're supposed to go through to obtain resources and you're constantly told . . .

Reuben Cahn: Mr. Milanes, can I interrupt and ask to pull that in front of you? Thanks.

Juan Milanes: And you're constantly told no, there comes a point where you get the message. The message is look, you know, you are here to provide the minimal service required to allow these individuals to be processed by the system. That's the message that is obviously sent in the district. Quite honestly, that's not the same message that I see in Alexandria at all. We have this problem where . . . you know, and it is judge specific. There are some judges that quite honestly in the district don't have this issue of, you know, arbitrarily cutting vouchers or refusing to provide resources. But ever since sequestration in particular, there seems to have been this message that went out to the judges: "cut cut cut, watch the budget, we need to make sure the money's not spent".

Suddenly, we started getting all sorts of memos and court directives. For example, right now in the district of Puerto Rico, if you do not reside in the metropolitan area or have an office in the metropolitan area of San Juan where a little less than half the population lives, well then you can kind of forget the idea of serving on the panel. The panel has had the problem of not having enough attorneys, because Puerto Rico's one of the few districts in the country that routinely has over 100 codefendants in one case. Well, you can imagine. If you have a panel with roughly seventy to seventy-five attorneys, you're going to have to go outside of the panel in order to find an attorney for each one of those defendants.

Now, there's a memo that came out that told us, point blank, doesn't matter where your office is located, the court's only going to pay round trip travel cost to and from an office of half an hour, point five. Doesn't matter where your office is, we're only going to pay .6 for travel to MDC. I find it absurd. I really do. In order for me to conduct an investigation and go find witnesses and go meet with people in Mayaguez or Humacao, which is outside the metropolitan area on an island that's 100x35, 100 miles by 35 miles. I have to go to the court and file a motion to request travel to go to that part of the island. Otherwise that travel isn't authorized.

In Virginia, it's a round trip of 104 miles from my office to go and see a defendant at the Rappahannock Regional Jail if and when he's not being detained in Alexandria. I don't have to file any motions for that. If the case has to do with an incident that occurred in Stafford and my office is in Reston and I've got to do 100 mile trip, it's of no concern to the judges.

I've got to do my job and it's never questioned. In Puerto Rico I know of a number of attorneys who have been told, when they filed their motions non pro tunc no, sorry, you didn't ask for it ahead of time and I don't see why it was necessary.

Again, this issue of things such as transcripts. 128 days of trial, it's very difficult for me as the attorney to remember everything that was said by all the 50 plus witnesses of both sides went through. The United States can ask for any transcripts that it wanted and it got all the transcripts that it needed for its case. Finally one of the defense attorneys at the very least filed a motion saying, your Honor, it's less expensive for us to get transcripts that the United States has already paid for. Can we at least get those, to level out the playing field, and the judge allowed us to do that. The United States didn't request the transcripts I needed. They requested the transcripts they needed. So it's very limiting. We ended up paying out of pocket for some transcripts that we just desperately needed even though the court isn't going to reimburse us for it. That's fine. I'm going to do what's necessary for my client.

But it's problematic that I should have to do those sorts of things just to be able to provide really what is the minimal level service. I don't think that's what we're supposed to be paid to do. We're supposed to be providing really the best defense that that client deserves. Thank you.

Judge Fischer: Let me ask Ms. Puglisi and then if Mr. Felman and Ms. Salvini have thoughts, please add. We've heard two different concepts from judges including those on our Committee. One is a level of discomfort in reviewing both vouchers that contain confidential information, not privileged information, but maybe things during the course of the litigation and in an interim voucher that judges are uncomfortable with, and a lack of comfort evaluating certain experts and knowing the lawyer is retaining an expert or wants to do that.

And on the other hand we've heard comments from judges such as, well, I review things like a motion to suppress when I know your client has confessed or the drugs have been found in his closet or whatever, and if I exclude that I still put that out of my mind. So what are your thoughts on those things? Even if you would prefer complete independence from the judiciary, if that's not to happen, what are your thoughts on the judge maintaining that kind of interim review especially. Ms. Puglisi, would you start?

Sabrina Puglisi: The problem is it would be nice to say that all judges are neutral and they can disregard when, let's say, an attorney is filing a motion because they want the appointment of an expert, let's say for forensic accountant or for any kind of expert. They're laying this out to the court. The court is now

privy to part of their defense. You know, we as defense attorneys, unless we're required by the rules or we choose to disclose what kind of defense we're having, what experts we're using, we shouldn't be forced to have to do that. While it's nice to say that a judge will say, okay, I can disregard that, it's human nature. In the back of their mind, maybe they'll be thinking of it. Maybe they won't. At the end of the day it is causing attorneys to be leery of requesting the funds for those experts.

That's not what a defense attorney should be thinking about. A defense attorney shouldn't be thinking, well, what is the judge going to be thinking if I file this motion? A defense attorney should only be thinking about how to defend their client to the best of their ability. So the best way to do that, my position is, you have an independent administrator and as Judge Williams said earlier, it shouldn't be an administrator or somebody who works for the judges. This person should be independent so that the panel attorneys feel comfortable being able to go to this person making that request knowing that the judge will not see the motion or the request.

And if there needs to be some sort of review, judicial review, my opinion is it should not be the presiding judge. It should go to either, and I don't how logistically this would work, but it should be a judge who's not presiding over the case, somebody independent. So that the attorney feels comfortable making all requests and the judge also isn't put in a position of having to wonder.

Judge Fischer: Thank you. Mr. Felman, we haven't heard from you.

James Felman: Well, thank you. I agree with what was just said. Obviously, in my view the location of the ability to control or have anything to do with the defense function within the judiciary is patently absurd on its face. History will judge it harshly. History will judge this Committee's failure to address it as a missed opportunity. But if we are going to continue to have the judiciary control or exercise supervision over one, and only one, of the adversaries before it, then obviously the greatest degree of independence and elimination of that influence that can be achieved the better.

Judges are going to take their jobs very seriously and they do. If it's their job to manage the vouches, if it is their job to make sure that the vouchers reflect that which is done appropriately and economically, they're going to do it and they should do it. I don't fault the judges for doing their jobs. It shouldn't be their job to do. So I think the more independent you can get it, the better.

Judge Fischer: Ms. Salvini.

Jessica Salvini: I have a different perspective, your Honor. I understand there is a difference across the whole United States in every district. I am fortunate enough to have district state judges in the upstate of South Carolina that understand the issue with having to be involved with panel attorneys and their requests and becoming privy to information. First and foremost, with respect to our vouchers and the information that may be included, for example, on an interim voucher, which is rare for us, we have a panel administrator who reviews that voucher. Our district court judges are satisfied that that panel administrator is ensuring that what has been set forth on that voucher is reasonable at an outset. The information that our district court judges require on our vouchers does not include attorney/client privileged information or information that would cause the judge to be prejudiced in any way or feel conflicted about it. At least in my opinion in the upstate of South Carolina.

Second of all, if the judiciary is still involved with addressing request from panel attorneys for experts, at least with respect to where I am at, my experience has been that is not an issue for the district court judges. This is not a fight between myself and the judge when I'm representing an individual charged with a federal crime. I'm fighting the government. I'm fighting the U.S. Attorney's Office. Simply because I prepare a request that sets forth the expert that I need, it's ex parte motion, it identifies why I need it, I don't have any issues when I deal with the judges. It may be more with respect to funding and how much money I get for that expert. Not with our district court judges feeling like they have been placed in a bad position or some type of position that causes a conflict for them. They're not requiring our panel attorneys to divulge information.

Quite frankly, if the judge knows what the defense is, again I can't reiterate it enough, my fight isn't with the court. I'm not fighting with the judge. I don't have any concerns when I request an expert in any of my cases whether it's because I need an interpreter or investigator or I need a forensic accountant or some type of psychologist. I don't have any issues or concerns that somehow the judge is going to be conflicted in ruling on motions in my case. If I file a motion, certainly what that expert has to say is going to be presented to the court. It's going to be dealing with more with the amount of money I'm going to get for the type of expert that I want to hire. So I don't think the panel attorneys in my district or even the district court judges have an issue with that.

It may be that it might be a better system to have the judiciary not involved, but certainly we have a good working relationship and the panel attorneys that we have in the upstate of South Carolina, I can't reiterate enough, they are seasoned lawyers. The judges have seen them in court. They're not the lawyers that are falling asleep at counsel table. They fight hard and really well for their clients. The requests that they make are valid

and reasonable. We don't have very many voucher cuts at least in the upstate where I'm at because we these attorneys know what they need to do. They present it to the court. The court sees exactly what they're doing and how they're representing their clients. So I don't see it as much as an issue for us, whereas other districts might have an issue with how the district judges handle these requests.

Judge Fischer: I'll volunteer a distinction that was made when I posed the question to my public defender in the Central District of California. She pointed out there is a distinction in that when you hear a motion to suppress the government hears about it and knows about it as well. On the other hand, when the expert requests are made, that's not something the government is privy to so that is a distinction.

Juan Milanes: Your Honor can I touch on that point very briefly? If we could give a specific example as to why this is so critical in terms of judge versus someone neutral to the case. In this specific case, I was telling you about in Puerto Rico, we asked for an expert prior to trial. It was denied. During the trial we were told okay, you're not going to be allowed to cross examine on this issue, it had to do with forensic chemistry, but you can bring your own expert down the road several months later. We found the expert. We negotiated an acceptable term. We were going to bring that expert in. We submitted another motion to bring in the expert. Again it was denied. Only after the expert provided free services in excess of fifty hours of work, which he was willing to do—God bless him, but most experts aren't—we were able to then submit a proffer which the judge saw was going to be going to the First Circuit and all of a sudden sua sponte decided, oh, well if you'll provide to me how this is going to be helpful to the jury pursuant to Rule 702, then I'll allow you to have an expert. The problem was we didn't have discovery necessary from the United States to provide the actual, the full expert's report. What I told the judge is, your Honor, I cannot tell you the answer to a 702 question as to how this is going to pan out until I've provided the expert the documentation for him to analyze it and give me his evaluation. For all I know, it could be negative. He could tell me there's nothing here. But what you're telling me is before you'll give me funding, before you'll give me a penny to hire someone I have to prove that he's going to provide information that will be helpful to the jury. It can't work that way. Whereas an independent neutral evaluation wouldn't have the issue of 702 because it's not presented before them.

Prof. Bascuas: Judge, I think it's very important to identify why defense attorneys have been saying increasingly since 1993 that they don't trust federal judges to supervise their voucher requests and other issues in the trial. So, in other words, Judge Williams who testified in the prior panel explained that she hadn't thought that when she became a federal district judge she wouldn't

receive FBI 302s, which are the reports the FBI agents file when they interview witnesses. So she understands that there's a lot she doesn't know about the request for an expert or request to travel or a request for whatever, because she has that experience. Judges who don't have that experience are not in any position to realize, oh, there's a lot I don't know behind this expert request. I think the mistrust that defense attorneys have of the federal judiciary and have echoed in report after report in an increasing loud chorus, culminating in NACDL's report which I think is very strident in tone.

That I think is the issue that we really need to explore and get to the bottom of. Because what all these reports have said and I tried to sort of summarize these quotes on page four of my written testimony, and I'm not going to read quotes now, don't worry, what all of these reports have said is that they're more concerned about the values, and they use that word which I found telling, of the person who's making these decisions than they are about the title. So I think if Judge Williams were passing on vouchers, people might be a little more comfortable with that because of her express humility about, look, I don't know your case, than if a judge who maybe came from civil practice and doesn't know enough to be humble about the request for expert testimonies.

So it's not, to me, after reading all these reports and thinking about it, to me it's not a matter of judges or an administrator. The pilot program proved very success and the Federal Judiciary Center's report said everybody liked the pilot program, but nobody could agree whether the person should be a court employee or not, and then we were right back to talking about, well, judges don't respect us, and they don't share our values. That to me is the fundamental issue here. Maybe the pilot program is exactly what ought to be pursued, and I don't know enough about the details to say yes or no, it seems like a good idea just having read the report. But even if that were to happen, even if you were to have an administrator in between defense attorneys and judges, even if it weren't as Ms. Puglisi suggested the presiding judge but a different judge; no matter how you rearrange these chips on the board, the federal judicial branch of government needs to be of one mind about what it is defense lawyers do and why it is it's valuable, and that needs to be an ongoing educational program for the judges reflecting the teachings of the Supreme Court and the Apprendi line, culminating in *Booker*.

If you don't have that, it won't matter who you put where. It's the values that everybody's complaining about.

Reuben Cahn: [Cross talk] I've got to give . . . Professor, do you want to?

Prof. Kerr: I do, thank you. This has been a tremendously helpful discussion and I wanted to focus it a little bit more by dividing the issues here into two questions and focusing on only one of them. So one question is who decides, right? Is it a judge or is it someone else? That's its own set of questions, costs and benefits of both. Then there's a separate question of what is the standard that whoever has this power applies. So, we could have a system where whoever decides say voucher cutting, that they could decide whatever they think is reasonable and leave it open. Or if there's a request for an expert, whoever decides says, is this necessary, or is this appropriate, or is this reasonable? Or we can have a system where the default is that the defense attorney gets the request granted absent of some clear indication it's an inappropriate request. Similarly for vouchers, we could have a rule that unless there's clear evidence of fraud for example the voucher is granted, the full amount. We could have lots of different ways of actually implementing what is the standard for approving or disapproving any of these requests.

I'd really appreciate help for the Committee on what your recommendations would be on what the standard should be. So just assume someone is making the decision, judge, not judge. What should the standard be? Should we have some reasonableness standard? Should it be a more limited role of the decision maker? What's the best approach that whoever the decisions maker is should take? Anyone who has thoughts, I'd really appreciate it.

Juan Milanes: First I'll say that federal public defenders know what we do. Federal public defenders many times and part and parcel of the cases we're involved in. They know the discovery that we're dealing with. They know the number of hours that has to be put into the case to properly prepare it. In other words, these are individuals who are intimately knowledgeable about what are those reasonable standards. I would feel far more comfortable knowing that my requests whether it is for services, investigators, experts, what have you, are going through someone who is that knowledgeable as opposed to the judge because they're in it. They're in the battle, at the battlefront. That's someone who can judge what the standards are and it's someone who can say what's reasonable or not.

The other thing, I don't want to give the perception that most CJA attorneys are out there constantly requesting these additional services. The truth of the matter is, I think the vast majority of cases CJA attorneys are very conservative about what requests we put in. First of all, it's red tape. It's bureaucracy. We're trying to run businesses. Bottom line is we don't like bureaucracy. We're doing what we have to do, but if I don't have to go and do a bunch of paperwork that I even question whether or not it's even going to get me anything, I'm probably not going to do it.

Prof. Kerr: Just let me come back though to the question. I think this is within the scope of what the Committee can look at, is recommending an entirely new approach for how these requests are reviewed, different standards, a more limited amount of discretion for whoever's the reviewer. What do you think the standards should be? Is some sort of reasonableness decision by whoever makes the decision appropriate? Should we just focus on who makes the decision and not try to define what the standard is? If we do define that standard, what do you think it should be?

Juan Milanes: I think whatever standard, and again I can't tell you what the standard's going to be because there's many issues out there. Whatever the standard is, needs to be clear for both the reviewer and for me the CJA panel member so that I understand going forward that in a case where I'm being handed fifty DVDs of discovery material that I'm not going to be judged as the same kind of case that's an immigration re-entry case. Because sometimes I feel like there's this arbitrariness with how the vouchers are cut where bottom line, I have one judge who will tell me point blank if you spend more than two hours in any given day reviewing discovery, it's excessive. Now, that may be the way that judge works. That he will only put two hours worth of work on any given case because he has such a large volume of cases that he can't afford to do more than that. I understand that.

But if I don't have that case volume at the time, the truth of the matter is it's more efficient for me to spend an entire day reviewing twenty DVDs and getting at the crux, I shouldn't be penalized that I put down on my voucher, I spent eight hours today working on this case. Because the judge automatically says once you go over two hours, it's unreasonable. That's not the sort of thing I should then have to write a memo about.

So those standards need to be clear.

Prof. Bascuas: Professor Kerr, I think the Federal Judiciary Center's report of the pilot program is actually pretty instructive on this. And I think Ms. Salvini's experience with an administrator . . . she was telling me it's presumptive reasonableness.

Jessica Salvini: It's a presumption. If a voucher comes in from a panel attorney, it's presumptively reasonable. And our panel administrator . . . and it is time consuming, but you're looking at somebody who is with the Federal Public Defender's Office. She's an attorney. She's on staff there. She gets paid. That's part of her job is to go through vouchers line by line reviewing what the attorney had indicated on there. She may ask for clarification or have an attorney maybe explain a little more in detail so the judge understands. But it's presumptively reasonable that . . . I don't know how it is in other districts. In the district of South Carolina if you're

selected to be on the panel, you have been selected because of your experience and the representation you provide to your clients. You have an outstanding reputation in the legal community. There isn't any issue in the district of South Caroline whether or not a panel attorney is padding the voucher at all.

It is presumptively reasonable when a voucher comes across that panel administrator's desk, that that voucher is reasonable. And the only time a memo is written is if the voucher exceeds the statutory maximum.

Sabrina Puglisi: I would agree with that, that it should be presumptively reasonable. Obviously the Committee's trying to get suggestions and figure out how to make things more uniform throughout the country, cause I think if nothing else, what's been learned is that problems vary from district to district. Luckily, Jessica here practices in a very good district. It sounds as if this administrator is, you know, essentially really helping the practice for the panel attorneys. I think what's most important is when . . . if there is a panel administrator appointed that this person is an attorney. And not just any attorney, but a criminal defense attorney. Somebody who understands the practice of criminal defense. Because they need to know what it's like to be a defense attorney, and in this day and age of new technology, it's not like it used to be. We are getting huge discovery dumps, and we are having to practice differently than in the old days. So for those reasons we need somebody, now . . . the person is a public defender who is the administrator?

Jessica Salvini: Out of the public defender's office.

Sabrina Puglisi: I think that's a good decision; however, I understand there could be conflict issues, so I don't know what they do when there's conflicts that arise.

Jessica Salvini: But this person does not represent individuals in the public defender's office. This person is not appointed to represent indigent clients. This person, their sole purpose is to be a panel administrator. They're completely, I believe y'all heard from our public defender. This person is walled off. That's what they do. That's what her job is. That's what she's paid to do. She's been budgeted to be able to provide that to the panel attorneys. There is, while I understand that maybe public defender's offices don't want to have to take on this type of role, it has been extremely beneficial for us. The number of vouchers that have been cut . . . I think you heard from Parks Small. It has been reduced down substantially simply by a panel administrator who is reviewing these vouchers, assisting panel attorneys in submitting them to the court. I believe it's invaluable, especially if the system stays this way with the

judiciary being involved. You need to have somebody who's going to help.

Sabrina Puglisi: And if there are issues . . . if that panel administrator finds that there's any kind of conflict with the public defenders for whatever reason, there is the committee that appoints the panel attorneys. What the administrator could do is consult with the other attorneys that are on that committee if need be.

Prof. Bascuas: I think the conflict is . . . look, there's always going to be some level of inherent conflict when the government is providing your defense lawyer. There just is. It's not a matter of eradicating all trace of conflict. It's a matter of deciding which conflicts we're willing to tolerate and which ones we're not. Because you can't get rid of it. It's built in.

If the administrator works out of the public defender's office or works out of the courthouse or works out of their own little office, that to me, is a difficult choice, but at the end of the day what I heard Ms. Salvini and Ms. Puglisi say is that person needs to be a criminal defense lawyer who thinks like criminal defense lawyers do. And so we're back to values. The conversation's going to keep doing that. I want to keep pointing that out. The real intolerable conflict in my mind is the judicial branch is spending all this money on probation and that office only performs law enforcement functions. If we could get that money and use a sliver of it, an infinitesimal sliver of that gargantuan waste of resources to pay for an administrator to oversee CJA vouchers, then you've not only solved the money but you've cut the budget of the judicial branch by a lot and rationalize it so that it makes sense and does its job, which is to seek justice, not investigate people.

James Felman: Professor, I have trouble answering your second question without knowing what the answer to the first question is. Because if it's a judge looking at my voucher I want deference. I want them to respect my judgment. On the other hand, in a better system where it's outside the judge, you're really just talking about a management question. You're probably going to have a finite pool of resources and I would think you'd want to have some central person that would be looking at the management of those resources. Maybe a little more top level management would be called for than deference. So I think it's not so easy to slice those two questions out.

Reuben Cahn: Chip, you want to . . .

Chip Frensley: Yeah, just to continue that conversation, I'm curious. Do you think, Ms. Salvini, that there is importance or significance to the panel administrator being an employee of the Federal Defender's Office, meaning that that person is theoretically, or well clearly, selected by the defender or someone with a defense function, as opposed to, if that panel administrator

were an employee of the court, selected by the court, made up of the judges who may have intentions other than what you might think are the best intentions.

Jessica Salvini: I think that's a difficult question to answer, and the reason is this. The public defender's office . . . if I think about when I first started in criminal defense work, in California and working with the Federal Public Defender's Office in the Northern District of California, what I saw when panel attorneys had basically a home to go to. I don't know if it's like this now, but at least back then it was. So when a case came in and I was brought in to assist with document review or assisting a panel attorney, we would all show up at the Federal Public Defender's Office and we were able to use the resources of the Federal Public Defender's Office until a conflict was identified. I mean, know that's, we're talking about this is about fourteen to fifteen years ago, that this was occurring sixteen years ago. And it was very collegial. It was great, by the way. You could access their investigator. You could access the attorney that they have on staff to write motions to help you with some research. All until there was a conflict which was identified. Then it got a little strange and then you had to go out . . . in one of the cases I worked in we had to apply for a separate investigator, but you at least started out in the home of the Public Defender's Office.

Fast forwarding now to having this panel administrator who is in the public defender's office who is an attorney and she understands what it takes to represent an individual charged from the beginning to the end of a federal case whether it results in a plea or it goes to trial. And she assists the panel attorneys with identifying issues that they may or may not have with the court, how they prepare their vouchers or their ex parte requests. It's working. It's a system that's working for her to be a part of the Federal Public Defender's Office versus a part of the judiciary. It does work. I think it is a system that can work that way. It certainly for us is working.

Although, I have to say, that my heart goes out to . . . I have to, to the extremes that I hear from the start of these public hearings to now. To sit here at this table where I'm at and one person over, right . . . I drive all over the state sometimes I'm appointed in a the case. I never have an issue with any of district court judges. I don't ever submit a request prior thereto asking for travel. I don't have any issues when I file an ex parte motion for expert services. This extreme seems to be the major problem. I'm pointing to the fact that South Carolina has . . . we have implemented things that are assisting our panel attorneys, which I think in turn trickles down and assists our judges with having our panel administrator.

My gut reaction is to say, this should be a function of the Federal Public Defender's Office and I hope that Park Small, our public defender doesn't

want to hit me for saying it. It's working for her to be a part of his office. Sixteen years ago, fifteen years ago, being in the Northern District of California and having the public defender's office at the outset sort of organize how discovery was going to be and getting everybody started on the case. The issue became whether or not there was going to be joint defense and how long that was going to last. They handled conflicts pretty well. I have no idea how they handle it now since I've not been there is so long.

It does seem to be, and I hope I'm answering the question, this could essentially be a function of the public defender's office. It's working in South Carolina at least with the panel administrator. There is no conflicts that I see with what she does, at all.

Chip Frensley: For those who either would advocate for a similar situation of a panel administrator or who have come around and decided, hey, it does sound like a good idea: Would you have concerns about the courts appointing and having responsibility for management over that individual and the potential impact or influence that they could have over their own employee in terms of ultimate outcomes?

James Felman: Well it's sure better than what we're doing now.

Juan Milanes: Amen.

Steve Bright: That's sort of damning with faint praise though, I must say. You know, the real answer to this instead of all this running around the mulberry bush on panel attorneys. What really works is to have offices like public defender offices that know what they're doing that have capable people that can out of their own budget hire the experts and have on staff the investigators and people they need. I don't understand why there's only one federal defender in each district. There could be two or three or four. They could handle conflict cases. The states have situations like that and it works. And it makes a lot more sense to have people know what they're doing running these things.

I'm also surprised. I mean the panels are paying . . . I don't know if I heard this right. $129, less than half of market rates. The people that I know on panels are all trying to get off. Get into private practice where they can make some money. This is just practice. They're just practicing on the panel. As soon as they build up enough of a reputation, they're out of there. They're going to go off and make some money somewhere. They're sure not going to make it doing court appointed work. And at least for the complex cases for something like death penalty case, the idea that a sole practitioner is going to be able to handle a complex capital case . . . a person who has no investigator on staff, no mitigation specialist . . . maybe

doesn't even know what a mitigation specialist is. Has no real understanding of intellectual disability, mental health issues and all that.

We've had a number of cases where the lawyers didn't even realize their clients were intellectually disabled because they didn't spend enough time with them. They talked to them so little that they didn't even pick up on that. That's what you get. You get what you pay for as they say, and you're not paying very much. It's going to have some real problems.

Sabrina Puglisi: I have to respectfully disagree because I think we have the best attorneys in the district on our panel. They're not attorneys who do it because they need $129 or whatever it is. They do it because they want to help indigent people. They do it because they can. They are successful private practitioners and they don't have to be on the panel. We have, and I don't know exactly when it was, and I don't know if this is uniform throughout the country, but we have a process by where every three years you have to refile your application for review to see if you should be able to remain on the panel. Once they started that, they weeded out a lot of those people who were only on the panel just because they needed the money and not because they really wanted to be on it.

I think that if there's not that kind of uniformity throughout the country, there should be. There should be a process of review where panel attorneys are reviewed every few years to make sure that they are the best of the best. But it sounds to me like in the South Carolina that they also have the best of the best.

Steve Bright: I'll you that in some parts of the country, lawyers are greedy. Maybe that doesn't happen in South Carolina, but where I am the lawyers are greedy. They want to make a lot of money, they want to drive Mercedes and Jaguars and things like that. They want money. They want to make money. They make a lot of money in the drug business and all the other private practice that there is for lawyers. If you want the really good lawyers, they're in private practice.

Prof. Bascuas: I agree with both Mr. Bright and Ms. Puglisi. The panels . . . I think there's a mix on the panels. I think that some attorneys think that being on the panel makes them less attractive to clients with a lot of money. There's a lot of debate. People are not of one mind about that. I don't think Mr. Bright is in any respect wrong though. People want money. That's America. But to answer Mr. Frensley's question, you know, you can put neutral, lay people or whatever who aren't judges in whatever position you want. But at the end of the day it's the judicial branch and the people who get the last say in that branch are the judges. That's why the Chief Justice chairs the Judicial Conference. That's just the way it's going to work.

So I don't have a problem with judges appointing the administrator or the public defender because I recognize that at the end of the day, this is a judicial branch function and judges run the judicial branch. To the extent that they hire administrators or people to help them, that's just because they have other things they'd rather do that are more important. Ultimately though, the judges are necessarily going to have the say. There's no other way to do this. Unless you, you know, agree with Mistretta's view of a federal agency outside of all the branches of government which I find as preposterous Justice Scalia did in that case. The United States is three branches. You've got to be inside one of them. And in this one, it's the judges who are in charge.

Again, I think the judges whether there's six degrees of separation or two degrees of separation removed from the people making these decisions, what matters is that everyone inside the branch, employees, judges, clerks, everyone understands the defense lawyer is just as important as the prosecutor and we can't do without either one of them.

James Felman: I was going to add. I'm breaking my own rule today which I was only going to answer that which I was asked. From where I sit, the CJA lawyers are generally pretty poor quality lawyers. Most of them are state court practitioners who make a living on a high volume of cases. They're willing to take the federal court appointments because they'll pay more than they can make doing something else, that's what the market tells us. They don't have enough experience day in and day out with the federal Sentencing Guidelines to do an effective job plea bargaining and in representing their clients. That's why the federal defenders are uniformly the best lawyers that you judges are seeing appearing before you probably.

Now, some of us retained lawyers think we do a good job too. But frankly I call the federal defender with frequency to ask them questions because they are doing it day and day out as am I. You want to err I think on the side of having a smaller number of people on the panels so they're doing a larger number of cases. I think in general that's going to get you a better class of lawyer given what you've got to work with. So that they can do more cases more frequently and learn the system and be more effective.

Juan Milanes: For the record, I could not more emphatically disagree with the statement that the CJA lawyers are generally of poor quality. On the contrary, my experience on both panels, and I say this on both panels … in Virginia, you've got to understand, we're in Alexandria, we're right next to Washington, D.C. We have the highest concentration of per capita attorneys in the country. You don't get on the panel … we've got a three year waiting list for people trying to get on that list. Only the best of the best get on the panel. And every three years people get reviewed. If you're

not going to cut the standards, the judges aren't going to allow you to stay. And that's reviewed all the time.

And in Puerto Rico, there's 13,000 lawyers on the island, but guess what? There's only seventy something attorneys on the panel. Why? Because the standards are there. When you don't meet them, attorneys are removed. So in my experience, the training that the Federal Public Defender's Office has served us as panel members, outstanding. Excellent, every single one. I don't miss the Frank Dunham Federal Criminal Defense Conference in Charlottesville. I go every year because it's such a great program. Not because it's free. And as far as the people, why we do this? No, the truth is I make a lot more money on just doing the bankruptcy, civil litigation, what have you. But I enjoy this and that's why we're here.

Reuben Cahn: We are at 1:03 which is somewhat past the time 1:04 when we were supposed to conclude. I'm sorry to the panel members who didn't get to question. I've obviously not managed this very well, but let me thank everybody for their assistance here today, it was very valuable. And let me make an observation of my own before we close, which is that I've seen a lot of the country and there are places where the defense culture is strong, and where the defense culture is strong the panel is strong and the defender is strong, and they function well together with the court. Where the defense culture is weak, the opposite is true. The problem we have is we're looking at a national system and we have to worry about what to do. Not just where the culture facilitates good representation, but where it doesn't. Thank you very much.