**Ad Hoc Committee to Review the Criminal Justice Act**
Public Hearing #7—Minneapolis, Minnesota
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**Transcript: Panel 2—Views from Federal Defenders**

Judge Cardone: We're going to begin with our second panel of the morning. This is like brunch. It's almost lunch. Our second panel of the morning, panel two, which is "View from the Federal Defenders," and let me introduce Ms. Melody Brannon, Federal Public Defender from Kansas; Carol Brook from the CDO, Community Defenders Organization, Northern District of Illinois; Neil Fulton, Federal Public Defender from the District of North Dakota and District of South Dakota; Thomas Patton, Federal Public Defender, Central District of Illinois; and David Stickman, Federal Public Defender, District of Nebraska. I don't know if you were all here when I previously explained that what we would like you to do is make a very brief opening statement. We have received your submissions and what we really enjoy and get the most out of is being able to speak with you and ask questions, the dialogue. If you'd make a brief opening statement and then give us the opportunity to address some questions to you. We'll start with you, Mr. Stickman.

David Stickman: Thank you. First I'd like to thank the entire Committee for all the work that you've put in in this project. It's a tremendous amount of effort. We know that and we really know that you've taken it very seriously. We appreciate it. I've passed out a handout that is untitled. It list all the vouchers that the district of Nebraska submitted to the Eighth Circuit, from my office, from fiscal year 2013 until the present. What it shows is a list of a hundred and thirty one vouchers that went up. Of that, thirty-nine or thirty percent were cut at the chief judge level. There's a couple of instances that were district court, but primarily at the circuit level. The amounts of the cuts totaled right at three point nine percent.

It gives you some quantification at the amount of voucher cutting which is something that I know that you've been interested in through some of the past hearings. I wanted to submit that and supplement my written comments with that information. I know every time that you've introduced these panels you've asked for brief comments and that's all I'm going to make. I'd be glad to answer your questions at the appropriate time.

Judge Cardone: Thank you. Mr. Patton.

Thomas Patton: Thank you your honor and thanks for the panel for inviting me and for spending all your time on this topic. Come August I'll have been with the defender services for twenty years. Eighteen of it as an assistant and I've only been federal defender for about a year a half. Especially just listening to the panel before us I understand the concerns that some members of the panel have as to whether or not people in defender services understand what we

may be getting into if we seek and get complete independence, that there are risks that come with that. The past twenty years has taught me one absolute fact when you're litigating against the government and dealing with the government is, never ever say things can't get worse, because they can and often do.

I know that it's risky but I personally do support independence. I think that that is the goal we should be working for and my hope would be that if the judiciary really does support the defender program and the defender concept that the level of support ought to be the same from the judiciary whether or not defender services is within the AO or whether or not it is an independent agency. Their level of support shouldn't depend on whether or not the judiciary has direct control over our budgets or not. Thank you.

Judge Cardone: Mr. Fulton.

Neil Fulton: Thank you Judge. I would like to, I guess, reframe the discussion a little bit from independence to what I think is really critical and what I think a lot of us are talking about when we talk independence and that's autonomy. It's autonomy of the lawyer representing an individual client in their case and it is autonomy of a constitutionally mandated but not self-executing right to counsel in the United States, that the people carrying that out need autonomy. Autonomy is different than independence. Autonomy is control. It is self-determination. It is not necessarily where you're located. I think the difference of those is important. We need to pick up on the analogy deciding which players and resources are available to a particular team.

I agree a hundred percent that if we went down the street to Target Field and we found out the umpire before the game told Joe Mauer what glove he had to use and whether he could play or not, we would all say that's ridiculous. At the same time, if we took the star player from the local Minneapolis high school team and said he's stepping in against the New York Yankees, we would say that too is ridiculous. When we talk about the notion of independence it is important to remember that as defenders we are advocating against two other coordinate branches of government and it's important to maintain that tie to the judiciary that is present in the tension between coordinate branches. I personally believe that if we stand alone we stand alone against both the executive and the legislative branches.

And I think that there is real value in maintaining the connection if not control by the judiciary. It's important that the Committee balance those two competing interests as it goes forward to the greatest degree possible. That's not to say there aren't real problems in the world today. I know that the Committee has wanted to hear specific examples, so if I could I'd just like to run quickly through, your honor, some examples of problems we have seen and they are through the lens of our practice in North and South Dakota. We

have a chief judge of the circuit who cuts vouchers as a cost cutting measure. He's open about that. Is it difficult to provide appropriate representation to a defendant who is charged with a mandatory minimum sex offense from Indian country, if one of the things going through the back of your mind is whether your voucher's going to be cut if the person goes to trial or you put the appropriate amount of time in to handle the case.

It is difficult to appropriately represent someone who is detained two and a half hours from your office if one of the things that goes through your mind is a practice that exists to say that two client visits is enough and that amounts after that were getting cut at one point. It is difficult to appropriately represent an Indian defendants who have a higher instance of substance abuse and mental health. As we know it in my written comments, if one of the concerns you have is whether your judge will approve an expert. The Committee is familiar with the *Dean* case that got mentioned from Indian country that Judge Bridance talked about, we retained an expert who is obviously not local. Judge Hovland who presided over the case said it was the greatest expert he'd ever seen in his courtroom.

We got to do that because we have control over our budget. If you were a CJA lawyer and you had to ask yourself, would the judge approve it, would they approve it at that amount, it's obviously difficult to appropriately represent that person. It is difficult to have a situation where a panel member who both judges and other members of the panel has identified as not providing appropriate representation needs to be removed from the panel and the chief judge of your district says, I want to leave them on. They're a friend of mine. That happened in our district. It is difficult to appropriately represent individuals and provide service to the panel when you have a remote courthouse in Aberdeen, South Dakota where the judge is concerned that the courthouse will be closed and refuses to appoint the public defender's office, because it takes work away from that local panel. That happened to us in South Dakota.

It is difficult to operate in a system where obtaining experts in two of the least populated states in the nation requires going outside your district. It is very different to practice at the level that is expected in federal court in South Dakota as opposed to Chicago where there are academics and other experts available. In the end it is very important that the community focus on providing a system that provides the time and the settings but also does not remove the protections that we have to acknowledge exist by being related to a coordinate branch of government.

Judge Cardone: Thank you. Mrs. Brook.

Carol Brook: Thank you. I want to save my thank yous for last of my very short, I promise, comments. Excuse me. In my written remarks I talked about both the model

of the community defender as a model for this community to consider and in listening to Mrs. Buchanan I was struck by how many similarities there are between the CDO model and PDS, with of course the major exception although they have the same issue, of judges systemically creating a disparity of resources between what's available to the staff and defender offices and to our panel of lawyers. I'm happy to answer any questions about the those issues and I'll try to answer any other questions that anybody may have, but I want to wear a different hat for a minute here, because as I said in my written testimony, our chief judge had asked me to speak on behalf of the district.

I said, uh. I'm already speaking as a defender but if you still want me to do that I will. He said, and what I really think is the best illustration, sorry for my voice. That's not going to work. The best illustration of how we work together in our district. He said, you go ahead and say what you want to say. I said, I'm not going to say very good things about how the CJA affects the panel. He said, that's fine. You go ahead and say what you want to say. I think that that is something you said Judge Cardone a while in one of the other hearings about the culture of experts and how it differs in different cultures, because of the way our office was set up this culture of the judges not even thinking about interfering with our work has been a forty-five or whatever the number is around here, culture.

That has continued on through whoever the judges are as a tribute, I think, to the importance of culture. We're talking about changes and people changing and through all the changes that I have seen in my forty plus years, that hasn't changed. Our chief judge was one of the first to ask for the *Johnson* lists, for example, from the Sentencing Commission and to push the commission to get those to us. We've had committees on crack one and crack two to make sure that no person, I guess I'm going to say this, fell through the cracks. The court has been very supportive and it's been very beneficial to our clients. That's I guess, what I want to say to you all. We're all here to benefit our clients and although I thank you for your time and I thank you for your effort I thank you most for what is obvious to me your sincere interest in how we can better defend our clients. Thank you.

Judge Cardone: Mrs. Brannon.

Melody Brannon: Good morning. I'm here from the district of Kansas. I'm very grateful to be part of the federal system today rather than the state system. There are many benefits to being in the federal system and I really appreciate what this study has undertaken because it can be better and changes need to happen. I have been with the defender's system for over eighteen years but I've only been acting as a federal defender for little under three years. My knowledge and perspective is a little bit less than some people that you've heard from and who are on this panel. What I can say is I have practiced under different models before us with the federal system and that I can speak somewhat to

those different models. The bottom line is that public defense cannot be judicially administrated.

There are too many problems with it. There are too many conflicts. We have an adversarial system that is not set up for that degree of overlap between the federal judiciary and defense lawyers. We've built a system that's based on judicial independent individual values and philosophies of individual judges. We need a system that is uniform that is structured, that is not influenced by bias. We were very fortunate in the district of Kansas. We have judges who've been overwhelmingly supportive of the defense. It has not always been that way and I don't believe it will always be that way, because we have a system that is built on individual personalities and values. Day to day from courtroom to courtroom, from district to district, from circuit to circuit, the quality of representation that we provide our clients is controlled at least in part by individual and unchecked discretion of the judges. That must change and I am very hopeful that this study will make progress towards those changes. Thank you.

Judge Cardone: Let's start with the panel of the Committee members. Judge Walton.

Judge Walton: Picking up on what you just said, and I don't necessarily disagree with it, but what would the model, from your perspective, be?

Melody Brannon: The models that I have worked under, I have worked in a public defender system where the public defender was hired directly by the local judges in that courthouse and answered directly to those judges so that if I did something in a courtroom that a judge didn't like he called my boss and talked to him about it. I've worked for two different agencies that were governed by boards that were appointed by the governor or some governor appointed commission and I have worked for the Texas resource center, which was an independent organization that was funded by federal grants.

Judge Walton: What do you think the ideal system should be? What should we recommend? Are you saying that there should be a totally independent defenders services organization or should it remain under the judiciary, and if it does what should that structure be?

Melody Brannon: I believe it should be totally independent. I don't see another way of it working. I don't see a middle ground that would necessarily avoid some of these problems. Certainly there are things that whatever model is chosen must be addressed, including individual judge's involvement in voucher review and providing experts, including circuits selecting and retaining defenders who practice before them in determining what my staffing is in my office. In the end I think what David Patton has proposed and what we've heard from some of the different models that advocate for total independence from the judiciary is the best solution.

Judge Walton: Mrs. Brook, do you agree with that perspective? You seem to feel that there's a culture in your district that does in fact support providing quality services to poor people.

Carol Brook: It does, but it leaves all the problems with the panel. I can answer that question two ways. If you're asking me if I am for complete independence or something in-between, I still don't know the answer to that judge. I wish I did. I am completely conflicted, although I will say this, I did hear a judge at one of the panels say something that I have wondering about for decades. He said something about being able to control the money, because it's our money, the judge's money. That pushed me more towards independence than really anything else that I have seen because that is such a clear conflict.

Judge Walton: I assume that a judge not from your district?

Carol Brook: No, it wasn't. It was in one of the hearing here. Not from my district, no, but it makes sense. It is your money. You are the advocates for the . . .

Judge Walton: I don't feel like it's my money.

Carol Brook: That's good. I think about it as CJA money but I get where that would come from. That was extremely troubling to me.

Judge Walton: You attribute what the culture is in your district for the attitude about supporting defense services. How is that culture created in those districts where that culture doesn't exist? What could be done to try and create that?

Carol Brook: As far as defender offices go I think if we created community defenders with boards in each district and the boards were not perpetuated by the court, our board is self-perpetuating. It began with the judges appointing the board and actually the judges being on the board and then once they left the board the board self-perpetuates itself. You create a culture. PDS created a culture in that way and people come to expect it. The judges in our district when Terry McCarthy left as the head of the office, they did not expect to have something to say about who would be appointed next. You could create a board, I think, but the judges would have to be willing not to interfere. Now, I think about the situation where there was a CDO and the judges wanted to make it into a public defender office.

If that option didn't exist, even if they wanted to interfere, they really couldn't. We could make that happen by not giving them that option, but that doesn't solve the question of the panel. In my view you would have to take the judiciary out of the appointment of the panel which is true in our district. Our panel is completely selected by a committee without judges but they still have to pay the panel, review the vouchers, and approve the experts. Those

need to be changed.

Judge Walton: Is that a problem in your district with the panels as far as voucher cutting and approving of experts?

Carol Brook: Voucher cutting is not a significant problem. I could think of two judges who it is a problem for, but we have a lot of judges. The idea for the panel that they have to go for example, on experts, to the judge which you've heard over and over again now, and say could you please authorize this expert? They're not going to get the same experts we get in every case. When they get an expert and don't use that expert they're sending a signal to the court. They can't help it. I know you're very good at ignoring what's not relevant but some things are beyond humanity's abilities.

Judge Walton: Mr. Fulton, you've indicated a problem with voucher cutting in your circuit. Do you think the circuit should be involved in the approval of vouchers that are generated at the district court level?

Neil Fulton: No.

Carol Brook: No. I don't think there should be any judicial involvement in voucher payment.

Judge Walton: District court or circuit?

Carol Brook: District court or circuit court. Correct.

Neil Fulton: No. Voucher cutting is a great illustration to me Judge Walton, of why I say connection but autonomy. Judge Cardone you raised a very good point before that it flies in the face of what you believe about yourselves as judges that you are fair. We're not fair. As a defender I can tell you, I'm not fair. The last thing I think about when I wake up in the morning is how to be fair today. It's all about my client all the time. It puts judges in individual cases in an untenable position, because you are supposed to be fair in individual cases and if you are deciding the resources that go into a individual case, you have to abandon fairness, because you have to ask what is best to advance the case of this defendant, not what puts them on par with the government.

Why I part company on independence is that I believe when we talk about systemic fairness, vis-à-vis the executive branch, vis-à-vis the congressional branch as it relates to funding, I think that we have tremendous advocates within the judiciary. I believe that that protection of systemic fairness is something that the founders had in mind and the founders were onto some stuff. That's why I think as you move closer to individual case decisions judges primary responsibility needs to be diminished, although I think it is important to maintain their involvement as you move to a more coordinate

branch level. To me, Judge Walton, vouchers is just not something judges should be involved with.

Judge Walton: I think probably Congress is going to require some level of accountability as it relates to voucher payments to private lawyers in these cases. What would your structure be?

Neil Fulton: As I have tried to think about what a structure is, your honor, you need in most instances and proving that I submitted to being part of the federal government, I think you need more committees. Having panel selection committees made up of people in the criminal defense community, whether it is defenders or panel members who have a role to play in that, you can develop the best practices on building. You can develop guidance to people and you can set statutory caps but I don't think you can have the judges do it. I am terrified of the prospect of having defenders review bills and make panel assignments. You need to move to a group that understands criminal defense in the community but doesn't have direct responsibility in an individual case.

Judge Walton: I'm very sympathetic to your perspective in reference to expert witnesses and the specific dilemma you face in the jurisdictions where you've practiced and one of the questions is, from a funding perspective, how should that pool of money be available for the services or the hiring of expert witnesses. There'd have to be some limit on what that pool would be and how would that assessment be made and then what would happen if that pool was exhausted but yet services were still needed.

Neil Fulton: You know what, I would tell you Judge Walton it's very easy in my office. Any expert request in my office has to be approved by me. I have my foot on the brake and the gas where it's appropriate. I'm attentive to our office budget. I am attentive to the need of the individual client. I've turned down probably two, maybe three expert requests in my five plus years as a defender. However I have a dozen times talked to people about, do we need this expert now? I've gotten into the nitty gritty of the case and I've managed our budget. It is trickier. I agree with the panel because your obligation as a lawyer is to that client and that client only. It is harder to have the structures in place that you do within a defender office, to have your foot on the brake and the gas at the same time.

Judge Walton: Anybody have any views on this?

Carol Brook: There are other budget analysts in other districts and circuits that seem to work very well. I know in the Second Circuit, and you've all heard that actually, that budget analyst reviews those kinds of requests. I think, although it creates more employees if we had that kind of pretty much like what Neil is saying, in every circuit maybe every district, I don't know how far down to go, they would be able to have a list of experts like we have in our office and

people could go to them and they would get pretty quickly a sense of what's needed, what's reasonable, what's available. That would work.

Melody Brannon: We've done a couple of things in our jurisdiction. The CJA administration just recently moved into the FDO. We have a CJA supervising attorney who does reasonableness reviews of vouchers, including for expert services. That's proven to be effective because she served as a liaison between the CJA panel and the judges and have been an advocate for the CJA panel in getting expert services. We've tried to do some more along the lines of education, making sure experts are accessible and that they know about the experts and have access to them. The idea of having someone who reviews those vouchers and setting up a system so that those vouchers don't then go to the judges to approve and review would be good.

The idea that maybe moving that outside of the FDO would be good as well to avoid those conflicts. We haven't really run into any conflicts and we have a backup system for conflicts right now, but just looking down the road, what we've set up is what we could do within the system right now and take it the next step and have a dedicated CJA supervising attorney who could look at these things, who could evaluate it, who could approve it, in the same way that a defender would when I get an expert request, and to also be able to compare those expert request to what I would do in my office. That's proven beneficial in being able to do that and put that in front of the judges as well. There are answers to this that are available and that we've already taken steps towards.

David Stickman: I'm sorry. The system now has CJA budgeting attorneys. They could be the people who review budgets and review expert requests and approve vouchers as well. Just by background in the district of Nebraska, I review all the CJA vouchers that come through whether they're expert or attorney vouchers. That's probably not a good system because there is a inherent conflict and attorneys have an option to opt out of it and have the clerk's office review it. It's probably better than what was before when you didn't have anybody reviewing it or the person reviewing it was just within the clerk's office without any knowledge of the practices in the area. Nebraska may be a little bit different, where we get along, but I do think that the ideal situation would not be to have it within the office unless the alternative is to put it strictly within the court's domain.

For example, with respects to appointments, before there was a federal defender organization which was twenty-two years ago for us, we had courtroom deputies that would assign the attorneys. They did that without any understanding of the attorney's experience, the nature of the case or it was just a random or a favoritism situation. We eliminated that system when I came in and of course the federal defender office partly eliminated that too. It's not ideal but it's better than another system. One completely outside the

judicial system would probably be best. I say outside in the sense that the case budgeting attorney or whatever you want to call them, would still be, I suppose, within the system, but to have somebody like that to review vouchers, to review expert vouchers or attorney vouchers would probably be better.

Thomas Patton: Your honor I agree with that. For example the case budgeting attorney for the Seventh and Eighth Circuit is Clark Devereux. Clark was a CJA panel lawyer in the northern district of Illinois for a number of years. He was a practicing CJA lawyer so he has that knowledge pool to work from, and I think that's critical. I think many people and maybe even sometimes some judges can't really understand the amount of time it takes even fighting what you know is going to be a losing battle. If you have a client that's dead set on going to trial and you've begged the person not to do it because you know it's going to kill them on their sentence but they've made that decision and it's their right to make their decision and once you've gotten to the point of, okay, that's what you want to do you do everything you can to try and present the best defense.

If that requires putting on expert testimony you have to do it and a judge looking at it in retrospect who has heard all the evidence at trial, it could be easy to say, this never had a shot from the beginning and why would it take this much time to work on the case? Having somebody who has practiced criminal law in the positions doing it is necessary and I agree it should be outside the defender office. It puts a strain on the defender's office's relationship with the panel if the defender is being asked to review their vouchers for reasonableness. I've been asked so far only to review a few vouchers that are over the case maximum and every time the district judge has been supportive of the voucher. Basically they're looking for help in getting information to put in a memo to go up to the circuit to support recommending that the voucher be paid in full.

It's not been voucher cutting and I'm happy to do that because I want to try to let our CJA counsel get paid and get paid for all the work they do. I would hate to be in the position of trying to have to review those. If you do get given that responsibility than you have to take it seriously. You can't just take the situation that I'm going to approve every voucher that comes through in any amount, because then you may not be doing your job very effectively. I really think it's not a good idea to have the defender office have to have that relationship with the panel when you want to have the close relationship to try and support the panel, do training. If you have multi-defendant cases where you have panel attorneys on there you don't have this built in conflict of, the defender's office is going to be involved in deciding whether I get paid my full voucher.

Judge Walton: Thank you.

Judge Cardone: Professor Kerr.

Professor Kerr: I just want to make sure I understand the last testimony that was offered. In terms of having to review a voucher. We don't want the judges to be reviewing the vouchers. We don't want the FDO's to be reviewing the vouchers. Instead is the thought that there would be circuit executives or some administrative office within the circuit or is this creating a new position? More details would be helpful for me in understanding the nature of test run.

David Stickman: I could start with that. It really is going to depend on what kind of a structure that you have. If you're still with the judiciary system then that function is going to be within the judiciary somehow and the case budgeting person would be somehow within the judiciary, within the circuit executive's office. That's where Clark Devereux is who was just mentioned. I guess, just by way of background, I really have always thought that the federal defender program in general was really a great program. It still is a great program. It's the best program I can imagine. It's best because it's within the judiciary. However, things have within the last few years have come up which really highlight the problems with it being where it's at.

It can't be within the executive. It shouldn't be within the judiciary. Can it be within the legislative branch of our three branches of government? That's shifted me towards being in favor of this independence model now and whether you go there by virtue of keeping it within the judiciary and the federal judicial center and later work to something else. That's a second matter but really to answer your question, whether that case budgeting person is in the judiciary depends on do we have an entirely independent branch. If it's entirely independent than yes, it's yet another branch of the independence. You have your federal defenders. You have your CJA panel program and then you have probably voucher reviewing type of a thing.

Professor Kerr: Trying to summarize testimony not only from this panel but from many hearings. We've had several hearings and to some extent trying to get a sense of what's going on out there, it's the blind man and the elephant problem where everybody's got a little bit of a different perspective because they're grabbing onto different parts of the elephant, but one way of summarizing a lot of testimony from many people would be that the CDO's, FDO's by and large are working well. There are ways of potentially improving that but that primarily within the federal system it's the CJA panel system which is really probably the most in need of reform by virtue of it, and Mrs. Brook you had wrote about this well in your written testimony.

The difficulty is the CJA lawyers have in terms of getting experts in the cultures of not being as adequately prepared perhaps or not having the

structure for that advocacy that happens in the public defender's offices. Is that accurate? Would you all agree with that understanding that things are pretty good at the FDO, CDO level and really in the federal system the biggest need for improvement is at the level of the CJA lawyers? It seems to me that we're hearing two different stories this morning. One is that idea that the system is pretty good with this CJA panel system needing maybe some reworking in terms of, in particular, the judicial role, and then the second idea is that complete independence would be better. I want to make sure I at least understand the first part of this. Is that summary a fair assessment of where you all think of this?

Carol Brook: For me I guess I would say, kind of. There is still too much judicial involvement in federal public defenders even though it does seem that for the federal defender offices by and large it's working very well. Ideally, I guess there should be less even potential so that somebody outside the system looking at the system doesn't say the judges appoint the defender. The judges decide how many lawyers, those kinds of things. Whether or not we should stay inside the judiciary, that's a different question than you're asking, and clearly the most serious problems, there's no doubt about it, are with the panel. That seems clear to me.

Melody Brannon: When we look at what we're trying to do in taking care of clients certainly the bigger problems are with the CJA because that judicial interference interferes directly with representation of our clients. That is what it has to be about and that's what the focus must be about, from our perspective. Yes, you summed that part up very well that that needs to be priority, but I don't want the problems within the FDO's to be ignored because very fundamentally the circuits should not hire and retain the defenders. The circuits should not tell me how many attorneys I can have in my office. The circuit should not adjudicate employment discrimination problems within my office and to the degree that there are other sorts of involvement of the local judges or the circuit within my office, those are more minor, but I don't want that aspect of it to be ignored in whatever the study does.

Professor Kerr: Thank you.

Thomas Patton: I genuinely agree with what you said. I would say, I feel incredibly fortunate to have found my way into the federal defender system. I think it is a fantastic system. I love the fact that I've been able to make my professional career there. The CJA lawyers are at such a disadvantage going against the U.S. attorneys. At least in our district they don't get enough cases per year to stay at the same level of proficiency as the U.S. attorneys. The U.S. attorneys has the complete stable of DOJ experts at their beck and call. The CJA lawyers, in our district, most of them are sole practitioners or are in very small firms. It is just difficult for them and we in the defender office have such an institutional advantage over the CJA from what they face.

With the fact of the defenders being selected by the judiciary, obviously I've benefited from that. I'm not very happy that the Seventh Circuit selected me and appointed me, but I can tell you as a new defender, having to make decisions, it's there in your mind that the judges are the ones that have appointed you. Not that you made any conscious decisions that way but it's there. Maybe if you've been the defender for sixteen years and you have that comfort level, perhaps that recedes and it's not such an issue but it's present. I will say that.

David Stickman: I'll just say quickly, I agree with your summary but don't forget about what happened in 2013 because that was a terrible blow to the federal defender organization and the CDO's. That was something within the judiciary and at then at the same time or right about that time you have the reorganization within the administrative office, which hurt the defenders and both of those actions just cannot happen again. They were awful situations that should not have happened and really hurt the defenders and are still hurting the defenders.

Professor Kerr: Thank you.

Judge Cardone: Mr. Cahn

Reuben Cahn : First, Mr. Stickman, I want to clarify something about this chart. You said the cuts amount to three point nine percent?

David Stickman: I took the percentage of the total cuts by the total amount of the voucher.

Reuben Cahn : It's three point nine percent of the total vouchers submitted? The cuts are obviously a greater proportion of those vouchers that were actually cut?

David Stickman: You're exactly right. It's three point nine percent of the total amount submitted.

Reuben Cahn : I guess I'd like to follow up a slightly related line of questioning with you Mrs. Brook and that's you mentioned that there were only two judges in your districts that regularly cut vouchers. You said you had a lot of judges in your district. Do you know how many judges you have in your district?

Carol Brook: Twenty-four, twenty-five?

Reuben Cahn : Twenty-five? A little less than ten percent. I'm sorry. I'm moving over here. A little less than ten percent of the judges regularly cut vouchers?

Carol Brook: Regularly is an overstatement but if there's going to be a voucher cut I can predict . . .

Reuben Cahn : It's going to come from one of those two judges?

Carol Brook: Yeah. That's not in every case.

Reuben Cahn : If you're a CJA lawyer, as you put yourself in the shoes of your panel lawyers going into those courtrooms, getting appointed a client who's randomly assigned to one of those two judges, do you think those panel lawyers have any concern about whether or not they're going to, on average, in a difficult case that requires extensive litigation, maybe challenging not just the government but the court, do you think they have any concerns about whether they're going to get paid?

Carol Brook: Yes. Absolutely, but I think that's a bigger problem. It's magnified in front of those two judges but it's part of the problem that we're all talking about that the panel sees in every case. Yes, it's worse in those cases.

Reuben Cahn : Even in a district with a good culture you've got a difficult system and a difficult problem in ten percent of the cases?

Carol Brook: I would say more than ten percent. Yes, I agree with you.

Reuben Cahn : I was trying to understand exactly what your point of view was. I think I understand it now but I wanted to be clear on my understanding. Mr. Fulton, I wanted to turn to you and I'm a little bit confused by the position you've taken with regard to independence and autonomy. I guess I'm not quite sure I understand your testimony. I agree that operatively you'd need autonomy. How do you achieve that if you're dependent upon another entity? How do you exercise autonomy when for instance describing what we were just discussing, when somebody else controls the purse strings?

Neil Fulton: You need greater control on selection of defenders, of defender administrators from top to bottom. By that I mean as I've thought about this more, a model based on the CDO's where you have boards that are tasked with selecting the defender, tasked with selecting panel membership, tasked at the national level frankly selecting our representation within the administrative office, that insulates you from judges having individual control. There's a role that can be played for judges within those boards. What I am saying is that the notion that this is a choice between the status quo and total independence is wrong. What I am saying is the complete autonomy, complete independence where we are some stand-alone entity is fraught with dangers and anything that the Committee recommends is going to be seriously imperfect.

As I balance that out, and I have a different perspective on this. I am not a career defendant. I was in private practice for ten years. I was the chief staff

for a governor and now senator and now defender. I've been in the political process. I have written post cards that you drop on a political opponent. Senator so and so increased funding for child rapists. That's the reality of what we face if we go to the hill by ourselves. Everyone who is dissatisfied with representation and the budgetary process right now has to face up with that. I guess I don't want to make this sound as though I think that where we are at is at all perfect. Much like the FJC and much like the sentencing commission, being within the aegis of the judiciary is important but being dependent on the judges is flawed.

Reuben Cahn : Your real beef is with the idea of a fully independent agency versus an independent agency within the judicial branch?

Neil Fulton: I don't know that I have a beef. Yeah.

Reuben Cahn : Phrase it however you'd like and tell me, is that an accurate depiction of your view/

Neil Fulton: That's right. The reality is we have to recognize we are not going to get to some perfect system, regardless of what the Committee recommends, regardless of what the political actors in the process do with what the Committee recommends and for me, and reasonable minds definitely can disagree on this, but the dangers of true independence out weight the benefits of affiliation with autonomy within the judiciary.

Reuben Cahn : Again, the danger you see is a danger to funding?

Neil Fulton: Not alone. That is a primary danger but you become a much greater political football. The reality of being part of the judiciary is that the judiciary, "the judiciary," takes incredibly seriously the fact that this is a constitutionally mandated function. One of the things that exist by being part of the judiciary when criminal defense issues go to the hill whether it's positions on mandatory minimums on positions on criminal justice reform, positions on funding, you speak with the voice of a coordinate branch of government and if you are separated out as an independent agency, like Amtrak you go with a totally different level of gravitas.

Reuben Cahn : One of the issues we've heard raised by other who have testified is that defenders don't really have a voice on issues, either funding or other issues and in fact I think someone pointed specifically one of the sentencing reform acts that was in front of Congress whereas defenders position was, this is a great idea. We should do this. It benefits our clients and the judiciary position was, no, this will massively increase our workload and those who represent the judiciary before Congress were obligated to advocate the judiciary's position. I'm not quite seeing how what you're saying fits with the reality that we've heard described by other witnesses.

Neil Fulton: That would be an important part of it, is how do you give the defenders within the judiciary more autonomy to voice those concerns that are unique to the defense community? I don't want to portray that my vision of how the world works is shared by anyone else here and anywhere else or that it would be perfect itself, but I agree that there needs to be more autonomy for the defense community to be heard on criminal justice policy issues. I agree a hundred percent but I also don't think that to achieve that standing totally independently is the only way to achieve that. That's a non-answer but we are going to balance this out in the end and I don't look at independence as perhaps, A, the only way to achieve some of the goals we have or, B, as perfect as we might want to think it is.

I don't want to make it sound like I want to stay where we are. Things need to change and I feel like I'm in a tremendously supportive pair of districts. One of my chief judges is my predecessor's defender, but I can sit in my hotel room this morning, sit down and think of five concrete examples where having the judges responsible for individual decisions for us, policy and case related doesn't work, and I'm in great districts. Something needs to change. I view how far it goes and how you achieve as not devoid of risk.

Reuben Cahn : I have a question for the whole panel on a separate issue and that's the issue of quality of representation. Particularly in the panel, it's relatively easy for defenders to supervise their lawyers and work to ensure quality of representation but the panels a more difficult animal and we heard on the last panel somebody described Ms. Laden advocated competition as a means of ensuring quality in panel lawyers. I'm wondering if any of you have any ideas on that and particularly any ideas in the context of a system in which judges would not be looking at vouchers but rather administrators of the sort we've talked about, either CJ supervising attorneys or some other sort of administrator.

How do we get to those panel lawyers, ensure that they're providing quality representation and how do we do it outside of a once ever three year, either you're on or off the panel? We've got those three years worth of clients possibly getting damaged if nobody's looking at it in-between.

Melody Brannon: When I became defender, one of the things the judges wanted to do is completely revamp the CJA panel. That was because in part of concerns about the quality of representation. We'd had some cases where we had seventy or more defendants. They had to reach far to get attorneys to come in. As one judge said, we were pulling them off bar stools. The problem is they remained on the panel after that and there was no regulation whatsoever. We looked at the various models and we scrapped the entire panel. Everybody had to reapply. We calibrated the panel so they would get six to eight cases per year with the idea that they would remain proficient with that

number of cases, and we've provided expanded training. We have a third of the panel that's up for review every year.

They have to reapply every year. They have to attend a certain amount of a CLE. Those are the way we try to do it. Undertaking that though, I felt a responsibility to build a stronger alliance between our office and the CJA panel. We did that in several ways but we expanded the training we offered greatly. Last year we offered forty hours of CLE that my office sponsored and presented. We have a second chair program, a mentoring program where young lawyers who don't have the experience can come in and go through this year long program. The judges like that very much because there is some basis, there is some qualification before someone gets the panel. This has proven effective in the quality. It's not to say there weren't outstanding lawyers there all along. Just truly outstanding but it had become so dispersed and so unregulated that there were very real problems with that.

We had one case where the judge granted a mistrial based on ineffective assistance of counsel right after the jury verdict, because we had those sorts of problems. By undertaking such training we've tried to address that. The problem is, we don't get compensated for that training. All of those hours and all of those resources that our office puts into this are not credited in the same way that when we are representing actual cases and actual defendants. It's a worthy cause. I believe very much in the idea of a collective client within our district, but it's sustainability of that level of training and that level of support may be difficult if times change. That's one thing that needs to be addressed if we are going to undertake such a level of education and try so hard to be attentive to the quality of counsel, which the quality of counsel's dependent on our education and our support of them that there needs to be a look at how that is structured and what our responsibility is.

Reuben Cahn : One quick question. Who's providing the mentorship or support in that second share program you talked about? Is that your office?

Melody Brannon: Our office administers the programs. It has several different facets but as far as the mentorship, it's divided between experienced attorneys in our office and experience CJA. There are probably more CJA who are acting as CJA mentors, which I would mention that they're not compensated for that as well, but they've been very willing to step in and play that role. CJA also participates in the orientation we have as well as the guideline workshops. They've been very active in this. We have a fabulous panel representative. Puts in a great numbers of hours and is very active and vocal and who also is not compensated for that time.

Reuben Cahn : Do any of the others have any thoughts on that issue?

Carol Brook: You've raised probably the most difficult issue with the panel. We too have a

mentoring program. It works really well. We tried to pattern it after Katherian's gold star program. We, as I said, have a panel attorney selection committee that has no judges on it but has criminal defense lawyers from all aspects of the community, so they're in the courts all the time, observing the lawyers. That's one way that we try and continue to monitor the panel. Is that a perfect way? No. We provide, forty hours, that's very impressive, we provide about twenty-six hours of training a year and then we partner with lots of the other organizations, the Federal Bar, the Chicago Bar, the Association of Criminal Defense Lawyers, so that we are providing to the panel all kinds of training in a variety of circumstances.

That training is all very low cost but as many people have pointed out it's a day away from their practice and that's a problem. None of that is a perfect system for monitoring the abilities of the panel. We do get calls from judges. We always investigate when we get calls although we don't necessarily do anything. The judges are not really a part of any of that. To your basic question, I don't think it would be any different wherever our funding came from or whoever was monitoring the panel, then in our district how it is now.

David Stickman: Something I would add to that is that our panel has some absolutely outstanding lawyers on it and we have a panel of over a hundred people. Some of those lawyers have more experience than the attorneys in the federal defender offices. Some of them get better results sometimes than we do. When you think about the panel attorneys you need to understand that they are exceptional lawyers, the vast majority of them. One of the reasons for that is because we all provide training for them. One of the trainings that used to occur, some of you in this room will remember that, that got eliminated is they used to have panel attorney seminars in other areas where the administrative office would pay for panel attorneys to attend it.

They would pay the hotel bill and the airfare to go there. Those kind of got shut off after a while and then separate seminars that we called only the meek shall speak because before it was only the strong shall survive and then it was only the meek shall speak because one of the AO people at the time got upset that one of the speakers used a nasty word during his explanation. That eliminated an entire great program for panel attorneys. It's just too bad that right now we don't pay our panel attorneys to attend the same great seminars that we get to go to. I went to one before and I was a panel attorney for six years. I went to one of those and I thought it was a great idea and we got to spend a couple of days learning about the federal system from the experts and it was a great deal. If you can recommend that that continue that would be excellent.

Reuben Cahn : Thank you.

Melody Brannon: Can I point out one thing during the break? I want to see that our second

chair mentoring program is supported by the judges. They pay those lawyers to participate. They pay them seventy dollars an hour, up to a hundred and twenty hours for the year. That's a great deal of support and we really appreciate them doing that. It allows lawyers who could not otherwise participate because they couldn't afford to be engaged in it. That's a good model for paying CJA attorneys to attend training. We should follow it.

Reuben Cahn : Is that from non-appropriated funds?

Melody Brannon: It's from the Bench Bar Fund.

Reuben Cahn : It's from what?

Melody Brannon: The Bench Bar Fund.

Katherian Roe: Mr. Stickman I'm going to begin with you. In your statement you talked about Eight Circuit voucher cuts and you also provided us with this information about cuts from your district. One of the things that you spoke about in your statement was the rationale for the cuts by the chief judge of the circuit and the *In re Carlyle* decision. For the benefit of those of us on the Committee could you give us a background about that? I know Mr. Fulton also spoke about it a little bit in his statement. Can you tell us background of the *In re Carlyle* decision and the citing? I see it's cited many times in here.

David Stickman: The background probably goes back even to Chief Judge Loken who was the predecessor to Judge Riley in terms of the review of these vouchers. He had even issued a draft guidance to counsel at that time where he suggested lowering rates for certain types of activities. Windshield time, travelling to meet with clients, should be at a lower rate. That sort of thing. Then Chief Judge Riley because the chief judge who reviewed these vouchers and Chief Judge Riley's a wonderful man, a very intelligent man but he'd never, I think he has actually represented two people in a criminal case way back before there was a CJA. He didn't get paid and he did it pro bono. That's where the genesis of the *In re Carlyle* comes from.

It cites another case. I think it's *United States v. Smith*, that was in 1980 that discussed, attorneys should do this as a pro bono aspect of their practice of law. We haven't gotten to the point yet where people are doing this as a living. That was in 1980. This is 2016 and things are quite a bit different. At a hundred twenty-nine dollars an hour, that's not covering the overhead of most offices. People are not getting rich as lawyers under the Criminal Justice Act. Many of them do make a living out of it. Many of them have a majority of there practice doing that. Times have changed since then. I don't think that Judge Riley is really recognizing that there has been that change. The level of complexity of cases is completely different than it was at the time of the Smith decision in 1980. That was before mandatory minimums, before the

Sentencing Guidelines. Before encryption.

Before mega cases. Before computers for crying out loud. Things have changed and it's not appropriate I don't think that when you see a hundred and thirty-one vouchers, Judge Riley, for you to produce thirty percent of those. Remember, a hundred thirty-one of those cases had district judges writing letters say that they made findings of fact that these were extended or complex cases and that that compensation was needed to ensure just compensation. Every single one of those and in thirty percent of those, Judge Riley who had never looked at a voucher before he became Chief Judge, other than I suppose, as an appellate judge, decided that thirty percent of those needed to be reduced.

Katherian Roe: Thank you. Mr. Fulton, I'm going to ask you a question also about voucher reduction, but from a different angle if you will. In your statement you indicated that in your district voucher cutting is not much of an issue. It's not much of a problem as far as voucher cutting at the district court level, with the circuit court being different. We've certainly heard that from other districts too, but more the flip side that the district court is the issue, if you will. What I wanted to ask you about is some folks talk about attorneys who do self-cutting. They cut their own vouchers to, one, so the voucher won't go up and they think that maybe the loss to them will be less.

I wanted to ask you about what you identified as at least one of your district court judges, who is now cutting vouchers in an effort to prevent that voucher from going up to the circuit. Not because the district court judge believes that it's not a legitimate amount to charge, or that the services weren't provided but to prevent the cutting from happening at the Eighth Circuit.

Neil Fulton: Yeah, in North Dakota, we have two article three active judges. We have no senior judges and Judge Hovland covers the western half of North Dakota and Judge Erickson covers the eastern half. Judge Hovland approach has been you submit the bill, he sends it up. He never cuts vouchers. Judge Erickson has taken the position that he is going to pre-cut with the notion that you're going to be better with him cutting at the staff level than you are going to be with Judge Riley. He has entertained from some panel lawyers the prospect of sending up for you really, but he calls you back and says do you really want to do this?

You are in kind of a funny spot that if you're a lawyer in Jamestown, North Dakota, right between those two districts just depending on which judge it is your vouchers are getting cut or not at the district level and even though Judge Erickson is doing this in his mind to support for the CJA lawyers he has created pressure to pre-cut on their own and just not putting through and cutting it. It reinforces limits that lawyers are putting on themselves to not bill that much. I have to say, one of the things about what we do is in North

Dakota we have no local detention.

If you're in Bismarck, North Dakota your closest detention facility is ninety miles away. The one where most folks are is two and a half hours away. That is before you get to the fact that in the Bismarck courthouse, most cases are coming from Indian country and those reservations are a hundred miles away. Windshield time is built into these cases in a way that it's just not in other places. There is a cost per case in a rural area that is greater than if you were in a major metro area.

Katherian Roe: That's something I wanted to ask you about, especially because your district or your districts, if you will, contain so much Indian country and the geographic locations of those places that people have to travel to. Do you think that there is a issue with attorneys not choosing to take those cases and therefore an issue with quality because of their choices not to take those cases because it's known that the Eighth Circuit will cut vouchers if it's excess compensation?

Neil Fulton: It certainly enters into it. There is an impetus to maybe take the nice clean drug case that there might not be to take the nasty reservation sex assault case. One, because of the subject matter and, two, because of the reality that you're going to have more overhead involved in those types of cases. In North Dakota in particular we've had an additional pressure that strange as this may sound, the CJA rate is North Dakota is now out of market because of the oil and gas boom in western North Dakota. There is other work including state indigent defense work where the rates are higher. There's are lots of pressures against taking those types of cases out there.

Katherian Roe: Mrs. Brannon, I wanted to ask you a question about an issue you raised in your statement. The issue was about the fact that the circuit chooses the federal defenders and also chooses to reappoint or not reappoint. You had raised the issue about how awkward it is to argue cases in front of that same circuit when you know that there's a conflict and how difficult it would be if your client knew there was a conflict. I want to raise the issue about CJA also. I know you've managed the panel and so you see the bills go up to the court of appeals, the district court bill, while the case is pending in the court of appeals. That person who's written the excess compensation document then has to go up and argue. Can you speak to that a little bit?

Melody Brannon: I will begin by a caveat that I don't actually review vouchers. That's done by the CJA supervising attorney but I have talked to the CJA about this conflict, partly because we've hired a couple of a CJA lawyers in our office who are now assistant federal defenders. That is a problem. That is a conflict. I know lawyers who have curtailed their research and the brief writing that they've done, because they know they're not going to get paid past a certain point. It does affect their representation. They don't necessarily want it to happen that

way but from a business perspective and what they can invest in a case, it affects how they approach the case, briefing it. It can affect how they handle the case at the district court level. We've started something new in the Tenth Circuit, where if you're the district court attorney you don't necessarily follow that case through to the Tenth circuit.

You have the option of getting off of it which I think is a good option and should be exercised more but I do know that because the Tenth Circuit is reviewing those vouchers that it has had an affect on how they present the case and what they can invest in the case. It is more likely that they'll get cut at the Tenth Circuit than it is in the district court. I don't know if that answers your question.

Katherian Roe: Close enough. Thank you, Judge Cardone

Judge Cardone: Anybody.

Judge Fischer: One quick question. On a much easier issue. Just briefly, Mrs. Brannon you mentioned it in your testimony but does anybody else have any problem stories, whatever, that would help us address the question of the transportation issue and the marshal's only paying for one way transportation under, I think it's forty-two eight-five, you had problems or issues.

David Stickman: That's a problem in Nebraska. We used to have a situation where the judges would authorize round trip travel, even by air and then the marshals went to the judges and said that they didn't have the funds in their budget so they couldn't do that anymore and then it became a one way only and then a bus ticket. Just recently I had a situation where my client was arrested in Nebraska in I think it was December.

I got him released in roughly March. He was from California with no money and I wanted him to be at least given a bus ticket or something back, and I asked the judge for that, citing the statute which I thought required them to return him and basically it was refused. He had said, why don't you see what the family can do for the next few hours? It was a Friday afternoon, one of those very difficult times. Otherwise, the client is going to be out on the street. His mother and some others from California were able to find the money to put together a ticket, but yes, what we have out of district defendants it often comes up and it's getting worse.

Thomas Patton: When I practiced in the western district of Pennsylvania. I was in Eerie. There was a medium security BOP facility there and we'd get appointed sometimes to rural five transfer hearings. If the person had a detainer against them they finished up their federal sentence. A lot of them were out of D.C. because they were D.C. guys. They had warrants from D.C. courts. They get pulled into Eerie and if you could get them out on bond to go back they don't

have any way to get back. If they go back with the marshals it's going to take a couple of weeks, they're going to bounce half way around the country and so I bought some people some bus tickets so they could get home. Sometimes some of them really good, they'd send you the money back.

When I say I bought them a bus ticket it's out of our personal funds, not out of office funds, but because I don't want to watch the guy have to spend a couple weeks of his life bouncing around twenty different county jails to get home and I'm not going to have them hitchhike. It seems like the only humane thing to do and it seems like there ought to be a better system for helping poor people get back to their home and their court where the charges are pending.

Neil Fulton: I would give three quick examples. First is five to ten poorest counties per capita are in our districts and they're all in Indian country. Take the difficulty of indigency and multiply it for those folks to get a hundred miles. I frequently say if you can get the first mile the other ninety-nine are easy. It's very difficult for those folks to get home. We pay frequently to help people get family members home. Second is with the oil and gas boom in western North Dakota we've had folks that are non-local and we've dealt with that issue to get you back to Georgia, Texas, wherever it is you've come from. The last they would give you is the district of South Dakota has more interstate failure to pay child support in prosecutions than the rest of the United States combined. It is a vestige of a U.S. attorney who is about five U.S. attorneys ago, but we routinely prosecute people who fail to pay child support from across the country.

Those folks who aren't paying child support who don't have money to pay child support are hailed to the district of South Dakota and automatically typically released on bond. As an example recently we had to get one individual from Sioux Falls back to Rapid City because that was the only place he could be released in the district of South Dakota. Who could we get him released to? His daughter who is has supposedly had not paid child support to. His daughter had to drive to Sioux Falls. Six hours if you drive aggressively like South Dakotans do, pick her father up, drive him home, and house him and he was charged with not supporting her. That's an example of probably some crazy not getting people back home.

Katherian Roe: Thank you.

Carol Brook: We have the same problem but ours are almost always from out of state because they're always for some kind of case where they've charged them in Chicago but they live in Florida or Alabama or who knows where. They come to us and we just pay. It used to be that the marshals on the court didn't fight it when the court ordered it and that was true up until very recently and the Marshals have changed their view on that and that has changed that.

Katherian Roe: Did you want to add anything to what you had?

Melody Brannon: Yes, because this issue bothers me a lot. We have some examples as well. We had a judge who issued an opinion saying that subsistence was our client staying at the local homeless shelter for a week long trial. We have a CJA who fronted a thousand dollars to put a client up for five nights. I think the judge helped work that out eventually with the CJA. We had a client coming in for a seven week trial. We were at the point of saying, we'll each take him home for a week. Eventually probation helped find him some housing but we were the ones going to feed and transport him for those seven weeks. Lawyers, investigators in our office take money out of their pockets to buy bus tickets and hotel rooms for clients because we cannot get the marshal's office to cooperate and when we can we still have some push back from judges, understandably because the law isn't particularly clear in this area.

It seems like it comes down against our clients routinely. That needs to change, staying in a homeless shelter and being fed by what we buy at lunch is not the way it should happen. These people, if they are employed, when they come out they are not working. They've either lost their job or lost their income during that time. Thank you.

Katherian Roe: When everyone said we just pay. Do you mean with the budget from the defender's office or when you say we just pay, do you mean from the people in your office collect things?

Carol Brook: Out of our pockets. They're paying out of their pockets.

Katherian Roe: Just wanted to be clear on that.

Judge Cardone: Professor Gould

Professor Gould: Thank you. I have several questions for Mr. Stickman about your handout which is very helpful. My mic. There, my mic is now on. Let's try that again. Mr. Stickman, some questions for you about the handout that you thoughtfully brought to us. The comments section, are those comments you put together or are those comments you pulled directly off the reporting system?

David Stickman: They're basically all from the voucher itself. One example, I don't mean to call out Judge Gerard but we added that, it was cut by Gerard to avoid having to send to circuit. Otherwise these are all the comments from Chief Judge Riley.

Professor Gould: The comment, withdrew, means what then?

David Stickman: That would be the attorney withdrew and another attorney was appointed probably because of a conflict in the situation.

Professor Gould: Then under the glossary you don't list two LES and LSCR.

David Stickman: They didn't have any cut, LES's Judge Wiley Strom and, I'm sorry, RGK would be Judge Cup was there, I'm sorry, the other. LSC would be Laury Smith Camp but she . . .

Professor Gould: They didn't have any cuts?

David Stickman: He did not have any cuts.

Professor Gould: Then finally on a clarifying question and then I'll get to something substantive. When you list the Eighth Circuit chief judge as having been the one responsible for the cut, are we to presume that the district judge found the voucher acceptable?

David Stickman: Yes.

Professor Gould: I noticed you didn't venture an opinion earlier as to how we should interpret what's going on in Nebraska. How should the committee interpret what's going on?

David Stickman: From what I've heard and this is anecdotally, the reason I provided this is this is some objective data here that you can decide what to do with. What I've heard though is that Nebraska is one of the better jurisdictions in terms of the number and amount of cuts. In other words, our district judges do not routinely cut vouchers. It would be a very rare event for a district judge to cut a voucher on anything other than something that they don't believe the CJA guidelines allow for is they spotted one of those, but unreasonableness our judges ninety-nine percent of the time approve the vouchers.

What you can see form this is that Judge Riley has taken thirty percent of those excess vouchers and determined that despite what the district judges found in terms of their finding that it was a complex and extended case and that this compensation was needed to provide just compensation. He didn't agree with that. The reason he didn't agree in the most typical case would be with respect to his citation of *In re Carlyle* which again has the quoted portion from my comments basically saying that part of CJA representation should be a public service, a pro bono aspect of it, should not be made to have a full employment for lawyers. That sort of thing.

Professor Gould: Right, but I'm still interpreting you as being descriptive. Do you not want to venture an opinion as to whether this comports with the Sixth Amendment or not?

David Stickman: It has a chilling affect on the Sixth Amendment, to have a judge reduce a voucher for no specific reason and it does tell CJA lawyers that their work is not fully appreciated, that they have overstated the value of their work and the value of the Sixth Amendment. You can read into that.

Professor Gould: As the federal public defender how do you navigate this territory in working with CJA lawyers because of course, you're not bound by those?

David Stickman: I am bound to the extent that we process these vouchers.

Professor Gould: No. I know, but you can if you want put additional resources on the representations that your office handles.

David Stickman: I see your point. I would disagree with the thirty percent of these. I'm sure that if I was doing the reasonableness study and whether that comported with the Sixth Amendment I would've gone for a fill payment of these. These lawyers deserve to be paid all of this money that they've submitted, under oath that they submitted this time properly. They're underpaid lawyers rather than overpaid lawyers. This is a below market rate. It's below what the department of justice would pay lawyers to represent people in department of justice matters. It's not right.

People who are charged with a crime deserve the best possible representation that they can get and sometimes the best possible representation costs money and it costs more than the statutory amounts in the statue. I'd rather have a system where people didn't get cut unless they were asking for something they were not entitled to be paid for. That's not what happened in these cases.

Professor Gould: Thank you very much. Judge Cardone I'm done.

Judge Cardone: I have a follow up to that and it's really for all of the panel because the one thing that I have seen in the *In re Carlyle* and other cases throughout the country is that some judges, not only, let me start with, when I have a voucher that I need to discuss with the lawyer I bring the lawyer in and I discuss it with the lawyer and I don't write an opinion. I've seen *In re Carlyle* and other opinions written by judges that essentially not only cut the voucher but explain why they're cutting the voucher and go into great detail about the responsibility of the judges.

I want to ask all of you, as defenders, what kind of effect do you think that has on CJA attorneys to be outed? First of all is it appropriate for a judge to write an opinion about this? Is this a legal opinion that should be written, number one, and number two is what affect does it have on a panel attorney to be discussed about their methods and the way they're representing and the money they're spending? Do any of you have any opinion about that? We'll

start with you Mr. Stickman.

David Stickman: It's demoralizing for the attorneys to submit a voucher. This shows that a substantial expenditure of time and effort on behalf of a client and then to have someone come by and say, no, I'm cutting that, perhaps your work just wasn't good enough. In Chief Judge Riley's case he doesn't give people an opportunity to discuss it ahead of time. Our district court, when there is a situation like that and again, its' a very rare situation. I can count them on one hand over the last ten years, the judge will give an order to the panel attorney or letter saying, I'm considering a reduction. Please respond to these particular areas. The attorney then responds and a lot of times the judge does not make the cut at that time. That sort of thing is in the CJA guidelines in terms of due process to the attorneys and it ought to . . .

Judge Cardone: Is it public?

David Stickman: Is it public?

Judge Cardone: The conversation between the judge and the CJA attorney?

David Stickman: No that would not be public.

Judge Cardone: Okay. Go ahead.

David Stickman: That would be between the attorney and the good judge. That's in the guidelines. It should be pursued. It should be a practice that Judge Riley does but it's not something that he cares to.

Judge Cardone: Anybody else have a comment?

Thomas Patton: We do not have a big problem that I hear from the CJA lawyers about our district judges routinely cutting vouchers. They don't do it but if a judge does have an issue my understanding is they basically will pick up the phone and talk with the lawyer or ask him to come in and talk. It's not done publicly in a way that singles that person out and then publicly gives this big explanation as to why they're not getting paid.

Neil Fulton: I would give you the concrete impact in our districts that some of the best criminal defense lawyers I know are the people I would refer someone to if they were going to retain, have walked because of the, I'm going to say, hassle. That's imperfect. The denigration of the defense function that they feel from that and they just don't want to deal with it. If you make it public it communicates that indigent defense is a low bed situation which is not how I read the Sixth Amendment.

Carol Brook: Judge, we had a new judge, this was maybe a year ago, who because I think

the judges get no training in criminal justice act now, wrote a very long minute order on the docket about why he was cutting a voucher and I called him and said, with all due respect this is probably a very bad idea because everybody in the district is reading this. I don't think it's true, number one, but number two, it's denigrating is a really, excuse me, good word for that. He's not going to do it anymore but I do think this points up the need for CJA training.

I also want to say the levels of payment for our panel and experts, one twenty-nine and twenty four hundred dollars, in most districts in the country and certainly in Chicago, twenty-four hundred dollars for an expert is the lowest amount you could pay rather than the highest. Every time you ask for an expert other than an investigator you're asking for over the cap, which raises its own issues and a hundred and twenty-nine dollars in Chicago isn't even close to paying anything like expenses. I would say a hundred and seventy-five would be a more reasonable rate.

Judge Cardone: Mrs. Brannon.

Melody Brannon: We have had more than one published opinion cutting in great detail, talking about the pro bono obligations of counsel. They were rather scathing. They were very detailed. At least in one of the cases the judge had asked for a written response from the attorney and then turned around and wrote another opinion quoting what the attorney had said. Judges don't have to do this more than once or twice to get the message across. The fact that it's not routine doesn't mean so much. One of the attorney's didn't take any more cases. It had a very direct chilling effect. Not on accepting cases necessarily except for that one attorney, but in how attorneys billed, there was self-cutting no doubt because of those opinions. There were three that I can think of that were published opinions.

Lawyers know about it. Lawyers across the district know about it. I don't think that that has happened as much since we have assumed to CJA supervising attorney who negotiates somewhat those conversations and helps make sure certain things don't happen. We don't have a lot of arbitrary voucher cutting, maybe because those opinions came out and it was a very clear message to the panel, this is not how it should be. You should not invest time in these certain things. That is something that would change if the judges were not involved in the voucher review and the judges were not involved in actually writing the checks to the attorneys in front of them.

Judge Cardone: My next question has to do with panel management. Which ones of you, actually, manage your panels? Ms. Brannon, Mrs. Brook, and Mr. Stickman. This question has to do with diversity on your panels. What would you say is the percentage of minority attorneys who do CJA representation in your districts? We'll start with you Mr. Stickman.

David Stickman: I don't have that figure available but Nebraska is not a diverse state and it certainly isn't diverse with respect to the attorneys. With respect to gender diversity our panel reflects the gender of the state bar. All I can say is it's not good enough. We've gone to speak to the local Midland's bar association. Every person who is a criminal defense attorney who's a minority is on our panel. Anyone who is in private practice, criminal defense work. Not a judge but statistically the numbers are very low. That really coincides with the state of Nebraska as well. It's not a acceptable situation but I don't know really other than trying to recruit people into the state and into the law schools, what else we could do. I don't know of anybody really other than actually someone who just left the panel, who's doing the work who's not on our panel.

Judge Cardone: Mrs. Brook, on the panel.

Carol Brook: Too low. We did a study, I don't know, about three years ago and we created with the help of our chief judge a diversity subcommittee of our panel attorney selection committee. We went around to all the minority bar associations and we had a big meeting and a luncheon where they all came to us to talk about what we need to be doing to improve representation. One of the things they said was, because you require to get an interview a letter from a judge in the federal courts, lots of people don't have that. We changed the plan to say that if you can't get a letter from a judge you can call the chief judge who raised his hand and volunteered and interview with him and he will give you a letter based on that interview assuming that you make it through the interview. That's helped. I'm not going to say a lot. It has helped some. We've continued to work through that sub-committee and to reach out and we're trying but it's certainly not where it should be.

Judge Cardone: You actually have a committee that appoints the CJA panel attorneys? Your judges do not make the determination of who's on the panel? Am I correct?

Carol Brook: That's correct.

Judge Cardone: How about you Mrs. Brannon.

Melody Brannon: With the same frustrations. All available minority attorneys are on the panel. Developing that has been very difficult. We are trying to encourage that through our second share program which is more diverse than the panel. We're trying to develop it with an internship program in our office that is in the very infant stages but we are trying to do outreach thought that. I also believe that this ought to start in our own office. We've worked on that in our own office. It's surprising because we have a very diverse bench and yet it's been a continuing struggle. Beyond recruitment and trying these training programs, I'm not sure that I have any answers for that.

Judge Cardone: Anything else?

Judge Gerrard: Judge Cardone, can I ask one last follow-up? Two of the areas that we're focusing on in these public hearings were remote location or rural representation and Native American representation. Judge Fischer brought up a very good question as far as transportation and you've covered that. Other than windshield time and transportation issues are there any other unique or systemic issues that we should hear about that we can do something about within the CJA act with respect to remote location representation or Native American representation? Anyone can answer.

David Stickman: With respect to the remote detention it would help if we had more local jails housing people. I know that there's been efforts in Nebraska to try to do some funding ideas but perhaps other ways to encourage local facilities to detain, entertain people locally would be one idea. I personally am opposed to the video conferencing. Maybe at some point in the future that might be a way to help out but it's fraught with problems right now, both technological and with personal issues as well as, I don't want to have clients get railroaded and in Nebraska we have so many different facilities that it's just not really a good option for us.

Judge Gerrard: I know one of the issues that I've run into is I have used intermittent confinement as part of punishment in certain cases which makes sense in a number of cases and yet if I run into a defendant that is west of either Omaha or Lincoln, Nebraska it's very difficult or even in Lincoln, because Lincoln itself does not have locale. It's very difficult for the district judge to use intermittent confinement or even some alternatives that are provided by the statue. Has that been a problem anywhere else?

Thomas Patton: We don't get very many intermittent confinement sentences.

Judge Gerrard: Then that's a problem.

Thomas Patton: Some of the remote detention problems, especially when I was in Eerie but we have in an central district is just cost shifting from the marshals to us. Marshals find a facility that's willing to provide the transportation so the marshals don't have to do it and I went to having people housed literally five minutes from my office to people housed an hour and forty-five minutes one way because that facility would do a contract where they would transport the people as part of the daily contract case and the marshals are like, works for us. Now we don't have to transport the people and it shifted a lot of cost and time to us to make up for it.

If the Marshals could be some kind of, I don't know, it's fine with me if you want to call it pressure or whatever, you could put on the marshal service to say a factor that ought to go into the decision of what jails they will contract

with and use should be that jail's proximity to the courthouse in which that defendant is charged out of. That would be helpful because otherwise they're just looking at what helps their bottom line.

Judge Gerrard: Mr. Fulton.

Neil Fulton: You had me until this Committee can do something about, I will tell you, trying to get pretrial release, trying to do reentry in Indian country has most of the problems you've talked about the people, and its magnified by poverty, by geographic isolation, by the absence of reentry facilities. We see dozens of cases a year that are charged as escapes because individuals from their Rapid City office are detained and the community alternatives, the Black Hills, halfway house is their reentry point, that's ninety miles from their home. They have a pull to home. There is an absence of appropriate facilities out there in people's communities that impacts Indian people in a way that different.

Judge Gerrard: We can be making recommendations in certain of those areas.

Neil Fulton: To the degree that recommendations can be made about halfway house placement for reentry within Indian country communities that would be an enormous benefit to the community. One thing that I will toss out too that not everyone agrees with me about that practices in Indian country, because I've thrown out a lot of ideas that everyone's agreed with here today. The ability to appear ancillary in tribal court would for us, in North and South Dakota, provide a huge benefit. I have seen since I was a panel lawyer and even as I have been defender, more instances where parallel prosecutions continue. It used to be that if a case was referred to federal court the tribal court would dismiss. That doesn't happen as much anymore.

We frequently are very frustrated in that. We can't get someone out because there is a tribal bond or tribal detainer. We see people whose security classifications are bumped because they've got an outstanding tribal charge that is for the same conduct. We see folks who can't go to a halfway house because it's not resolved. For us, and not everyone would do this, having the opportunity to appear in tribal courts ancillary to the federal representation would provide a real benefit. I don't want to mandate it and we wouldn't do it in every court but there are places where it would really make a difference, and it would put us on par with the U.S. who has AUSA's to appear in both.

Judge Gerrard: Is there some specific prohibition on you doing that? Normally we determine what's ancillary.

Neil Fulton: I guess I don't see us fitting within, but if you say it's okay Reuben I'll start it.

Carol Brook: You're now on video saying that.

Judge Gerrard: That's going to be your good faith defense? Advice of counsel?

Carol Brook: Going to run the tape. For us what we see are the most troubled clients and I don't know why this is. Clients who have need of psychologists or clients who speak Spanish rather than English, those tend to be the people that go to the outlaying jails which of course racks up the bills pretty quickly both for the panel and for us. Then we're taking out our psychologists and interpreters with our investigators to the jails, that for us the outlaying jails are between an hour and a half and two hours away from the city. That's going to go down as the case load goes down because the MCC in Chicago won't be so crowded, which is happening now.

If there could be something in the act, I don't know if it's appropriate to say not only that they should be housed or at least considered to be housed closer to where they live or to where they're charged but also it could be a consideration as to what kind of other issues might be involved in their cases. That would be helpful to us.

Melody Brannon: It's rather frustrating because in each of our offices we have a jail that's within walking distance but we have to drive at least forty-five minutes to an hour and a half to see our clients. I know it's much worse in other areas but as Carol pointed out it's not just us, it probation officers. It's experts and interpreters, all who have to be paid or are on the clock to do this.

Judge Gerrard: That's because there's not an agreement with the marshals? Is that correct?

Melody Brannon: Right. If there is one thing, if there could not be a quota or a limit on CJA attorney client visitation, sometimes it is necessary for them to see a client more than twice. Judges don't like to pay necessarily for the travel time, but sometimes you need to see a client six or eight or ten times in order to get a case resolved or to prepare for trial. That shift and that change and at least recommending or encouraging judges not to have a quota . . .

Judge Gerrard: I take it then that there are quota's in the district of Kansas?

Melody Brannon: With some judges, yes.

Judge Cardone: How many other of you have judges that have quotas on how many times they can see their clients?

David Stickman: None that are announced or public or known.

Carol Brook: I don't think we have quotas but I do think not every judges pays all of the travel time.

Judge Cardone: Do you know the reason why? Is there a stated reason why?

Carol Brook: No. There's no stated reason. I don't know why.

Judge Cardone: That's even though the attorney has no control over where their client is housed?

Carol Brook: Correct.

Judge Cardone: Anybody else?

Melody Brannon: We have had judges question why the attorneys aren't visiting more than one client at a time to consolidate. I don't know if that's an issue. Not every attorney has more than one client or it's not necessarily convenient or what needs to be done in that case but that is one thing that has come up.

Thomas Patton: I have run into two different districts I practice in some judges, not all, but some judges who view multiple client visits as hand holding. I could not disagree with that more. Some clients are more needy than others but some of these people, you're trying to convince them to go in and plead guilty to get a twenty year sentence. You're not going to be able to convince somebody to do that by spending a half hour with them. You have to spend. There's no substitute for spending time with a client to establish a relationship to then try and get that client to accept your advice when that advice sometimes is you got to go in and eat a ton of time, because if you don't you could be doing the rest of your life in prison.

To any extent a message can be sent out that judge you need to respect it, yeah it cost to pay travel time to go and see clients, there's no way you can do that. I don't know any person who in their personal life if they were dealing with a professional doesn't want to spend time with that professional and have that person understand them as an individual. I don't think it's right to expect a poor person to be treated differently.

Judge Prado: Along those lines of communicating with your client, we talked about diversity. It's a little bit different about the need for Spanish speaking lawyers. Do you have Spanish speaking clients? Do you have enough Spanish speaking lawyers and do you see that if you have go through an interpreter that it's more challenging and difficult? Is there a need? Is there a problem here in trying to recruit and obtain Spanish speaking lawyers, not necessarily minority lawyers, but Spanish speaking lawyers that can communicate directly with some of your clients?

Thomas Patton: It was yes, no, yes.

Judge Prado: Thank you.

Thomas Patton: We have Spanish speaking clients. In the central district of Illinois it is virtually impossible to recruit a Spanish speaking lawyer. We have that problem. We hired an investigator who is bi-lingual. He does a far amount of interpreting time. In a big issue we face is there are no court certified interpreters. We just lost an appeal where the issue's on appeal where there were sidebars and objections at the trial where one of the interpreters it wasn't working. She wasn't doing real time interpreting and there were communications problems. It is a big problem in our district anyway. There's no court certified ones. There's just aren't, so you're not using it. I've worked with no court certified interpreters who are very good.

Judge Prado: This was a trial in which there was a non-certified . . . ?

Thomas Patton: Yes.

Judge Prado: Then didn't bring in a certified interpreter from another district?

Thomas Patton: Correct.

David Stickman: We've never had that experience. In Nebraska over thirty-three percent of our clients are Spanish speaking and we have a full time interpreter who is federally certified on staff. He also has a PHD. In our district court we have a federally certified interpreter. We've had a bilingual attorney in the past. The one attorney that we have speaks Spanish. I'm very hesitant to have them use their Spanish skills because I personally don't believe that unless you are certified that you are able to communicate adequately the concepts of pleading guilty, your rights to trial, constitutional rights, that sort of thing.

Even if an attorney would be speaking Spanish I'd want to have that interpreted by our interpreter. We have a number of states certified interpreters and one federally certified on her list of interpreters in this state. There are people who are bilingual attorneys. In Nebraska I just wonder with some of them the level of their expertise and I always feel more comfortable if they're using a certified interpreter because I have no way of knowing otherwise whether the accuracy of the interpretation is good or acceptable.

Neil Fulton: It's incredibly difficult where we are, unsurprisingly. We've had one Spanish speaking lawyer. He speaks enough to have biographical conversations with client but he doesn't feel comfortable going over a plea agreement or something that's really substantive. It's helpful but it doesn't solve the problem. One of the biggest problems we run into is availability of interpreters. Generally there is, for example, in Fargo, one interpreter who is relied on and the court uses them as well so we run into massive scheduling problems. Then two, confidentiality issues when we want to sit down and

meet with somebody and go over things, it's not our interpreter so it's a huge problem.

Carol Brook: This is another disparity between the panel and the staff. We have three Spanish speaking lawyers, four Spanish speaking investigators and a number of Spanish speaking support staff. All of which are extremely helpful to us in working with our clients but the panel does not. We do have certified interpreters and they can take those interpreters with them to the outlaying jails which again is very expensive. They have minimum hours and minimum charges and makes for a much more difficult attorney client relationship, much more time required. As far as diversity on the panel that's a part of what we're still working on with the help of our chief judge and the committee.

Melody Brannon: We only have one investigator who's bilingual. We don't use her for interpretation but she's very helpful in communicating with clients and family. We have very good interpreters available to us who we have to contract with and who are also available to the CJA panel.

Judge Cardone: Dr. Rucker

Dr. Rucker: Do we have time?

Judge Cardone: Yeah.

Dr. Rucker: I apologize for this. I want to go back to actually some of the written statements Mr. Stickman made and also some of the things Mr. Fulton made. One of the things that I found troubling was talking about cases coming out of, and I'm not sure what the correct term should be, Native American, reservations, Indian country, whatever, of panel attorneys being reluctant to take those cases because of the types of cases in the distance and things like that. I wanted to talk to the two of you about that very quickly and maybe Mrs. Brannon or maybe all five of you have that. I know that there are reservations and Native American populations in Kansas but how much of an issue is that?

David Stickman: We have three reservations in Nebraska and they're all remote, at least an hour and a half away, to about a little over three hours away. They have unique problems. Our panel attorneys have no real expertise with Indian law issues at the reservations because we don't get that many cases to the panel. Mostly our office will take those cases and of course we can when there's a conflict or a multi-defendant case. There's a level of education that we have to try to give to them and then there's the investigation which is absolutely critical in every one of those cases and we're not an area that's known for our attorneys hiring investigators. They tend to do it themselves, but the issues in Indian country are very unique.

They're completely different. The types of cases are different. They tend to be violent crime versus drug or immigration or white collar type crimes otherwise, gun crimes. I guess I'm saying there are problems with representation and people in Indian country on the panel side. Some panel attorneys will not accept the cases because they have no level of comfort with representing people there and others are certainly willing to but they don't get the number of cases to really develop any expertise there.

Dr. Rucker: Thank you. Mr. Fulton.

Neil Fulton: In three of our offices, Pierre, Rapid City, Bismarck, Indian country cases, violent crimes from Indian country represent seventy-five percent or more of our total cases. It's more time than you've got to talk about the issues in Indian country quite frankly. Start with the geographic isolation. These are incredibly isolated communities. Put over top of that these are rural communities. There aren't there many lawyers. If you look at my written testimony the hundred and fifty panel lawyers in South Dakota, a hundred and ten of them are located in Sioux Falls and Rapid City. The vast majority of those in Sioux Falls, if it's exactly right the issues are incredibly complex at the Yankton Sioux Indian reservation which is a diminished reservation.

A couple of you know what that means. Many of you don't. It's a big deal. Literally what side of the street you're on can determine whether there's jurisdiction or not. That is something that you have to know. I would tell you, one of the last big thins is many of these cases are incredibly difficult subject matter because I'm the defender, I don't have as many cases. In the last fifteen months I've represented three homicides of children under two. I sentenced the other day a defendant of mine who killed his five week old. Those carry thirty year mandatory minimums. We routinely have dozens of open sexual assaults on children. Those carry mandatory minimums.

We get assaults of young men on other young men. I had a case a couple of years ago where my client, eighteen, developed mentally delayed was celebrating his marriage to his girlfriend. His friend got mad for whatever reason, walked down the street, grabbed a pipe, walked back to my client's house, starting smashing the window in. My client went outside, was assaulted with the pipe, got the pipe, hit his friend and beat him incredibly severely. Because his friend was seventeen that carried a ten year mandatory minimum. That's an attention grabber. This is probably one of the most unnoticed and unfair areas of federal jurisdiction. Indian country cases. It doesn't get a lot of attention but these are folks whose street crimes come into federal court. The penalties are incredibly disparate compared to the comparable case in state courts. The resources available for prosecution are incredibly disparate compared to state prosecutions for similar offenses and the risk are incredibly high compared to case to case. We don't have enough

lawyers to staff them when we are unable to take the cases.

Dr. Rucker: You said diminished community or diminished jurisdiction?

Neil Fulton: A reservation can be disestablished or diminished meaning that it's been eliminated or reduced in its effective size. To come into federal court we represent twenty-seven percent of the Native Americans charged across the country. I would bet if you narrow that down to the number of Native Americans who come into federal court because of Indian country jurisdiction, not because of general commerce clause jurisdiction like failure to register as a sex offender, guns, drugs, that that number would go up a lot because we have so much Indian country. Most reservations in our area are still in the status they had when they were created. Yankton was diminished meaning by actions of the federal government it's effective size and scope was reduced. In those areas what is Indian country as that term is defined under federal law is very dependent because it's checker boarded and it becomes very complicated. I hope that's an answer.

Dr. Rucker: Mrs. Brannon.

Melody Brannon: It is very rare for Indian territory cases to be brought in federal court in Kansas. That's because our counties have concurrent jurisdiction. I've seen very few of those over the years. That exhausts my knowledge of the jurisdictional reasons that we don't do them.

Dr. Rucker: One other question if I may very quickly, Mr. Fulton, and if any of the others want to comment on this as well. You mentioned that there's a very limited number of qualified investigators and experts that you're seeing in the Dakota's. How much of a problem is that? I ask that not only in terms for the defenders but also especially for the panel attorneys.

Neil Fulton: If you were a panel lawyer in Pierre which is the central division of South Dakota, there are to my knowledge currently two active people who will take investigative work. Two. We have two investigators in our office alone. You have to track down witnesses. You have to go into remote areas. You have to find itinerant folks and there are two people who are able to take the work and one of them frankly is an FBI retired agent. He was great. He's also seventy-five. What he can do has gone down dramatically and Rapid City, which is the second largest municipality in South Dakota, a town of seventy-five thousand people, I'm aware of three investigators who will take work. It's a massive problem. There just aren't people. Then add on to that the fact, if you look at my written testimony, I have identified the higher instances of addiction and mental health issues and PTSD are part of being a colonized people, a oppressed sovereign nation here in the United States.

There are about two psychologists or psychiatrists in Rapid city that we can

use. We have one in Sioux Falls. We have none in Pierre. We have to bring folks to Pierre for that and in North Dakota I'm aware of two psychiatrists who are able to do competency evaluations, psycho, sexual or others, psychological work in Bismarck. There is one in Minot which is about an hour and fifteen minutes away and then we drag people to Fargo. That's to the courthouse. That's not out to the reservation where these people are and where their families are.

Thomas Patton: One team of experts in the panels and it's not, the office that I'm now the head of, for various reasons the original defender didn't like to spend money on experts. We've used a lot more experts now than we have and lawyers have to learn how to use experts. That's something for the panel. David talked about how there used to be training for the panel. The expert utilization in our district is very low. Something like eight percent of the cases.

The panel cases are expert services requested. I really think training on how to use experts, to figure out which experts you need and how to use them, especially in sentencing advocacy because that's a lot of what we do is mitigation and sentencing advocacy and training for the panel and if we could get the judges from not being involved and having to okay the experts that that is something that I think would be very helpful and would really help the sentencing advocacy.

Dr. Rucker: Thank you.

David Stickman: The only thing I'd add is in Nebraska we don't have any experts or investigators that are actually on the reservation. They have to all come from Omaha or some other area.

Neil Fulton: That would be true of us as well.

Dr. Rucker: Thank you. Thank you Judge Cardone.

Judge Cardone: On behalf of the Committee I want to thank all of you for being here or thank you for our testimony. I want to remind you that if this conversation stimulated any further thoughts please feel free to submit them to us because we want any information you can give us. We're going to go ahead and take a break at this time, although my Committee doesn't get a break. We're going to have a working lunch so if all the Committee will join me for the working lunch and we will resume here at, let me see, two-thirty. Thank you.

David Stickman: Thank you.

Reuben Cahn : Let's just bring lunch.