

**Ad Hoc Committee to Review the Criminal Justice Act**

Public Hearing #7—Minneapolis, Minnesota

May 16-17, 2016

**Transcript: Panel 5—Views from a Mixed Panel**

Judge Cardone: We'll get started and we are missing one of the Committee members but I'm sure she'll be here. That's the dilemma when . . . we're all traveling so we don't have an office to go to, but Ms. Roe has so she probably had to go deal with some crisis.

We are beginning our afternoon sessions, I would remind everybody to please, if you have a cell phone, to please go ahead and turn it off, make sure. If you're either part of the Committee or part of the panel, just make sure you don't put it up by your microphones because it tends to pick up and make some noise.

We're here today, this afternoon to hear views from a mixed panel. We have Ms. Monica Foster from the CDO in the Southern District of Indiana, Alexander Reichert, is that correct how you say that?

Alex Reichert: Reichert, yes.

Judge Cardone: Reichert, CJ panel Attorney from the District of North Dakota; Jon Sands, Federal Public Defender from the District of Arizona; and Daniel Scott, CJ rep from the District of Minnesota. I will say to all of you, please we'd like an opening statement, make it brief because what we really, really enjoy is the questioning portion of this and so we'd like to get to the questions and answers. So you've gotten your written submissions, had the opportunity to review them, so if we could hear from you briefly and then we'll begin with opening statement. We'll start with you Ms. Foster.

Monica Foster: Thank you your Honor. As Judge Cardone indicated, I'm the Executive Director for the Southern District of Indiana, Federal Defenders office. I've had that position for about four years, before that I was in a private practice for thirty plus years where I devoted my practice to defending death penalty cases. So the death penalty is something that's near and dear to my heart and I'm concerned about. I submitted written testimony about my concerns regarding the work measurement study and some of what I believe are unintended consequences from the work measurement study. Specifically and I'll be brief, when you take a federal trial level case, death penalty case, in a Defender Office you get a one time, one year case weight of thirty-seven.

That's a pretty high case weight for federal defender cases but the fact of the matter is that that case is going to go on for years, certainly two years, two, three, maybe four years, but after year one, the Defender Office gets no credit for it. In a work measurement world, under the new formulas the Defender

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Offices are going to be wholly incapable of taking those cases for the simple reason that we cannot be devoting staff time and attorney resources to cases for which we are getting no case credit. What I am asking the Committee to do, there's been . . . when the work measurement study was initiated there were representations made at that time and I believe that they are true and correct, that there would come a time when tweaks would need to be made.

I think that the death penalty cases is a place where a tweak needs to be made and what I am asking the Committee to do is to recommend to the AO that they study this matter and that they correct the problems that I've identified in my written testimony in two ways. Number one, that the case weight should accurately assign the case weight to the year that the work is being done. So I think it is unfair to assign case weight only to year one if that case is going to proceed in year two, three and four. Number two, I would ask that the Committee would urge the AO to come up with a solution that allows for a temporary increase in FTE so that during the time that the office has the capital case, the non-capital work of the office can continue to be done.

What would happen now is the lawyers would be working very diligently on the capital case, getting zero credit for it, if it's in year two, three or four and unless you were intending to overload the death penalty lawyers, the capital work would not get done and that's not fair to our employees and I think it is an inefficient use of resources in the system.

Judge Goldberg: Did you say FTE?

Monica Foster: The Full Time Equivalent, that would be . . . I'm sorry, I've only been in the federal system for four years and already I'm using all of the acronyms.

Judge Goldberg: I beg of all of you, no acronyms please.

Monica Foster: Okay.

Judge Goldberg: We've got so many acronyms!

Monica Foster: FTE stands for Full Time Equivalency but what I'm really talking about is I think that what would be helpful would be if some entity, DSO or some entity, could grant temporary staffing to the office that takes the death penalty case, FTE Full Time Equivalency.

I know that you wanted to talk about remote detention, we have remote detention in our jurisdiction. We've got three facilities that we house pretrial detainees, one of them is local two of them are not. As I said I'm in Indiana, our two non-local facilities are in Kentucky. One is four hours away one way and the other is three hours away, one way. I know that you've heard about remote detention I'd be happy to answer any questions you have about that,

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it's very difficult for offices dealing with clients who are remotely detained and I would say even though Indianapolis is currently talking about building a new jail and there's still the political machinations that go along with that in our town. When I inquired as to whether they would be . . . whether the current plans have sufficient space to house our federal clients, I was told that we couldn't afford that. I don't know who can't afford that, but it is problematic with the Defenders, I think it's even more problematic with the CJA panel lawyers. Thank you.

Judge Cardone: All right, Mr. Reichert.

Alex Reichert: Thank you Your Honor, members of the Committee. My name is Alex Reichert, I'm a CJA panel and private practice attorney in Grand Forks North Dakota. I handle a diverse clientele in the area of criminal law in the northern half of Minnesota and all of North Dakota. Sort of what I am here, I think more than anything, to talk about it is representation in Indian country, in the CJA panel. I have argued a case in front of the U.S. Supreme Court regarding that very issue and as an area that is near and dear to my heart, I believe that there are significant problems with representation at all levels in Indian country and there are significant problems in Indian country, obviously some are within the scope of this committee and some are outside of that scope. That's all I have to say for my comments, I'd be willing to answer any questions that the Committee has as we get into this area. Thank you.

Judge Cardone: Thank you, Mr. Scott.

Daniel Scott: I'm Dan Scott, I'm the panel representative from this district and have been so for about a year. So I guess I don't yet know what it is that I do, if you listen to Mr. Richman. But, I'm here to talk about this CJA panel, I started as a Federal Prosecutor and when I wanted something I did this and it happened. I'd say to the agents, "I need an expert," and they found me one. I didn't have to do anything to accomplish the practice of law, except practice law. I didn't have to worry about administrative details, I didn't have to worry about anything.

When I was the Federal Public Defender in the District, I didn't have those same resources on hand, I didn't have agents who could find me experts. I didn't have that but what I had was I had a staff, I had investigators, so I would brainstorm a case, figure out what I needed and then I'd send my people out to work and only got involved in administrative stuff when I had to go outside to get experts. Again, very close to pure practice of law.

As the CJA Panel Representative, I don't have any of those resources readily available to me so that when I get a case, I look through the case, I decide what the issues are, then I have to go out and find the resources that are needed to be able to work on the case. Investigative resources, expert

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resources, I have to locate and identify those people, I have to find an investigator who works in the area where the case is. I have to be able to make sure it's an investigator that can work for the amount of money the federal government will pay, which is low. Then I have to justify every one of my decisions, so it's a different way of practicing, they really are a different way of practicing.

Now it's closer to what I do in private practice than with my private practitioners because I have to brainstorm with them, I have to tell them that I'm going to hire investigators, I have to tell them what the reasons are for it because they're paying for it as well, but it's different from what I did as a Defender. I think, to some extent, that is one of the reasons that you have seen a difference in how the panel is far more uncomfortable with the system as it is, than the Defenders are. Because some of them don't know how to ask, some of them are afraid to ask I've heard, some of them, let's face it, just . . . if we want to use a pejorative, they're lazy about it, it's easier not to.

But I don't think that that's inherently a problem in the system. I think the system . . . I think the Criminal Justice Act is the most spectacularly effective deliverable of services to defend the indigent anywhere in the United States. I mean you look over in the states, what there's happening in the states, it's just a disaster in terms of funding, in terms of what they're doing. You know, my state, the state of Minnesota says you can't sue your public Defender for incompetence of counsel, for malpractice because what do you expect? They're just . . . I mean, you can't expect that so they're just immune from lawsuit and our recognition of how bad they are.

So this system has been spectacularly effective and one of the reasons, and I think the major reason that's it's been so spectacularly effective is that we've managed to put a Defender in every district in the country. A Defender who is . . . receives enough money to do their job and to do it well, it is upgraded and what's happened in the smaller districts I think over the last ten or fifteen years, what's happened is that it's raised the bar in the district. The judges now see what competent counsel on the defense side is, and they are starting to expect it from all of their lawyers. They just didn't know in the southern district of Mississippi what a good defense lawyer was going to do day in and day out to make this system run better. I mean there's a reason that this system is well loved by the Department of Justice, they support us because they like to see a good job done.

It's the Defender who raises the bar for the panel and it's, I think, awesomely important and that's what I'll answer most of my questions are, that the Defender and the panel are integrated as closely as possible together. Because the expertise of the people who do it every day, who read the opinions every day, who don't have to be told what the law is because they saw it and they say, "Just last week the Eight Circuit decided this," or "I heard down in the

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Seventh Circuit they did this.” Those people are the ones that I rely on as a panel member, they tell me how to do my job, they tell me how to get my paperwork done and they ought to be helping me do my paperwork and then they run interference with the judges for me so that I can do what I’m best at, which is practicing law.

By the way, if want to ask, I’m the person who got cut \$45,000 by the Eight Circuit by Judge Riley and \$2500 more on an appeal that I successfully got the Judge reversed on, so I’ll answer those questions if you ever want to know the gossip about that, but I’m not here to say anything bad about this system. I think it’s really good and I really want to say Judge Prado, he’s the one who . . . in his committee last time around, said we’ve got to have a Defender in every district and that’s the one really major accomplishment from the Prado commission.

Judge Cardone: Mr. Sands.

Jon Sands: Thank you, I am Jon Sands, I’m the Federal Defender for the District of Arizona. I am Chair of the Defender Services Advisory Group that represents the Defenders and CJA with Office of Defender Services, now known as the Defender Services Office and with the Administrative Office. I’m also . . . I have been with the office for a number of years, I want to thank the Committee for having invited us and for giving the Defenders and CJA this opportunity to address important issues. You have been through seven hearings, you have heard all the issues as a son of Minnesota would say, “You don’t need a weatherman to see which way the wind blows.” But, I think it is important that we bring certain aspects to you attention.

My district is one that has Indian jurisdiction, we have numerous reservations, we have a large Indian population, our docket is heavily Indian crimes, this has an impact on both us and the CJA panel. We have a remote detention, which a good part of my life is spent driving to and from and recognizing all the cacti that we whiz past.

I want to though, focus for the brief time, on the Defender Services Advisory Group and what we, speaking for the Defenders and CJA feel is necessary. The big picture is that we have to move from what the Prado Committee asked for, into a[n] independent mode. We need a voice with the budget, we need a vote on the agency that will oversee us, we need control of our data, we need the CJA vouchers to be taken away from the Judiciary and placed in another agency or another overseer to administer. Because if you want to see fear, you can see it in a handful of vouchers and we need a selection that is not focused on just the court picking the Defender or picking the panel members he or she wants.

These are large goals and it will require planting a flag far in front and it may

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be a mountain or steepness that we will not be able to climb any time soon, but it is important this Committee, given the charge and given the responsibility, highlight and stress what is important. What is important about the CJA plan and what needs to be done. Defense counsel always has a plan B if their defense is ruled precluded and the plan B would be for a[n] interim approach and this approach which others have raised, would be for the Defender . . . would be for the CJA within the AO to have the Defender Services Committee moved to where it was prior to its jurisdiction being stripped by the administrative office and the Judicial Counsel.

The Assistant Director should have direct access to the Director and not be a Chief, we are not a service to the Court, we are the Defenders of the Sixth Amendment and we have that constitutional responsibility. We should have a voice in whatever agency or committee oversees us, we should have an ability to advocate for ourselves in front of Congress and the legislating bodies and we need control of our data both ethically and, because in this day and age, we need the analysis and the ability to see where we're going and what types of cases we have and to effectively advocate the resources quickly and efficiently. I will be happy to answer any questions that you might have.

Judge Cardone: All right, let's go ahead and start with Judge Prado.

Judge Prado: We have two Defenders and two panel attorneys, let me ask all of you if the Defenders . . . what kind of support are you giving panel attorneys, are you getting enough resources to give them what you think they need? Panel attorneys, what kind of further support would you like to see from the Defenders or anyone else? Do you think you're getting sufficient help, training, support, from the Defender's offices? Defenders, what more would you like to do for them, beyond what you're doing already?

Monica Foster: In the southern district of Indiana, we try to support our panel as best we can. We do a day and a half seminar every fall for them as well as brown bags that we try to schedule monthly, but we certainly do every two months. To the extent that we can, we answer questions and collaborate with them when they have problems. We've been able to . . . we always take the lead defendant, we take the most culpable defendant and then the CJA lawyers will frequently take the defendants down the line.

So, technically there would frequently be a conflict if they need to discuss something with us, but we've tried to have differently people in our office work with them when they have questions. We have tried as best we can to be as supportive as we can of the CJA lawyers and to encourage them to bring to us any problems that they have or any additional resources that they think would be helpful. We've also institute . . . we've hired recently two social workers in our office that are helping us with sentencing, because I believe that, at least in our district, by in large most of our cases go to

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sentencing. Most of our clients are guilty and more importantly demonstratively so and so we end up in sentencings.

So we've been able to hire two social workers and I've been working with the panel to try and help them figure out how to ask for those similar sorts of resources. But we try and keep the lines of communication open to make sure that we are serving the panel as best we can.

Alex Reichert: Our Defenders Office . . . in North Dakota we have a split Defender's office, we have one office that handles both North and South Dakota, they are primarily in . . . in the district of North Dakota, they are housed in Bismark and Fargo, I practice up in Grand Forks about eighty miles away, they have been a fantastic resource to me and to others. I think that they do the best job that they can, that entails approximately an eight hour seminar once a year, which quite frankly is nowhere near enough. The complexity of federal law and federal criminal law is far more than you could ever show in eight hours.

Luckily for me I started out clerking in the federal courts and have practiced for twenty years and have done . . . have been at least a number of CJA or private hire federal cases through my career at every single time. Where I really see the downfall is with new attorneys, I work very hard to mentor young new attorneys but it is often that I see a person one or two years out of law school, practicing . . . trying a case in federal court that they are completely out of water and they have no idea what is laying before them. Also, because there are so many different areas of law, it is impossible for the Defenders office to adequately train CJA counsel in all of those areas.

On more than one occasion I have raised issues in Indian country specifically, where the U.S. Attorney's Office has told me, "Well you're the first one to raise that and that's not just in the district of North Dakota, that's nationwide." I do have to say that the Federal Defender's system as a whole in both of those cases, did a fantastic job of putting that out to all of the different Federal Defenders around the country.

The case that I mentioned in my materials was *U.S. v. Cavanaugh* which dealt with the Violence Against Women Act and that was a case where our U.S. Attorney said, "No one's ever raised the issue of Counsel in uncounseled convictions out of Tribal Court being used to raise from a federal misdemeanor to a . . . or from a misdemeanor to a federal felony." But the Federal Defender's Office was able to then, from North Dakota, was able to put that out to all of the different jurisdictions and I believe the Federal Defender from Arizona actually brought the next case which was Shavanaux and then in the Ninth Circuit Bryant was brought, which is now before the Supreme Court.

So that is to show that that is an area when even our Defenders who practice

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in this area everyday, needed assistance and didn't know what was going on. So any help that can be given to the CJA counsel, any resources that can be given. I can tell you when I started, there was this book that we called . . . it was a huge volume, it was about three inches thick and it was, HOW TO TRY A FEDERAL CRIMINAL CASE, or something like that, which we affectionately referred to as the book of useless motions. Which would really . . . some sort of resource like that, a basic primer course updated, would be a fantastic resource, especially for young attorneys coming out because they really are often times in large firms and in North Dakota, that's not saying much. But they are in a large firm where they may be the only criminal person and the older lawyers in the firm who want to get into the good graces of the federal judge say, "Hey, you go get on this panel and basically do some pro bono work for the federal court."

These people quickly call the more experienced lawyers in the panel, such as myself or the Federal Defender's Office and we do everything we can to help them but it really is, and I'm sure you are all well versed, it is very complicated to practice in federal court, especially when you're used to practicing in state court, it can very different. So while our Defender's office does a great job and they help me every day with my CJA panel cases there is certainly much more that can be done, thank you.

Judge Prado: But you'd like to see more than just one annual seminar?

Alex Reichert: I would and what I'd also like to see . . . what I would like to see is some more case specific areas and maybe some clustering of cases. Like I said, for Indian country cases, if you could assign maybe panel members to Indian country as opposed to getting one Indian country case every couple years. Or to large drug cases or white collar cases and in your bigger districts that's probably going to be easier but even in North Dakota if you could give some more specific training in certain areas that a person could say, "You know what? That's an area where I have an interest or I'm getting a lot of cases and I'd really like to look towards that."

Judge Prado: Okay.

Daniel Scott: In Minnesota, the Federal Defenders Office as actually one lawyer who managed the panel, so the panel's always been directly connected by the judges in the judge's own mind that the panel and the Defender were basically one organization as far as they were concerned and that's continued through the years. So what it means it that everything that I do that has to do with paperwork goes through Federal Defender's Office. If I want a transcript, I send the request to the panel administrator that's in the Federal Defender's Office, if I want an expert it goes through there, even my vouchers goes go through for review except for the circuit vouchers and they make sure everything is done right, which is the hardest thing always when

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you're dealing . . . is the bureaucratic stuff, they make sure everything's done right and if there's you know . . . if my request isn't sufficient, they'll say, "You know the judge isn't going to approve this if you just have that, you need some more justification on what you're doing."

It's worked both ways, which means that if they're satisfied, the judges are satisfied. So then I don't have a problem with my district court judge saying to me, "Dan why do you need this?" Because it's already been through and the district court judge trusts the Defender or the panel administrator. I don't think the district court even knows there's a panel administrator, they trust the Defender! Then you're on to the circuit, because of course almost all of the money that you're spending for expert investigators is way over the top of the cap. I mean you just can't . . . you can't get a psychological report on your client for \$2500, it costs about \$5000-\$6000 in Minneapolis, could be more. Investigators are more, even with a circuit being so obnoxious about how much money they'll pay, you know so it's all done . . . that integration is really important.

There's also an integration in information. I can call the Federal Defender's Office and speak to one of the assistants and brainstorm a case. I can't call the assistant who may have the one that causes conflict, but I can call and talk to one of the other ones. I can brainstorm a case with them and they can offer me ideas, they can send me memos or they refer to me cases where it came up before and then I can go and pull down the memos and the analysis from those cases.

So in that way really good, I mean it would be better if . . . the only thing that would probably be better is if we really had a brief bank so that we didn't have to remember . . . I think somebody did that in the *Smith* case, go look it up and pull it down on PACER . . .

Judge Prado: Make sure you change their names when you use their briefs.

Daniel Scott: Right! And the "hises" to the "hers," I'm really bad on that! The brief bank would probably be about the one area I could say I wish, but I know how much work it is to do a brief bank, you know I wish you could provide me that as well. They also provide training and of course the AO provides those wonderful seminars. Those three day seminars that march around the country that I think somebody yesterday called them only the Big Speak and you have to know the history to know why that's true. But, those are also very good and I go to one of those about every four or five years even though I've been practicing in federal court for better than forty years.

Jon Sands: As the Committee well knows, every panel is different and every district has a different history. Arizona has two large panels, Phoenix and Tucson. Tucson's about 175, Phoenix is about 75, there's an appellate panel, Yuma

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has a small panel as does Flagstaff. To give the resources that are needed, is a . . . do I say, a full-time undertaking but it keeps us busy. First there is the national programs that Dan Scott has eluded to, there's the treatises that come out defending a federal criminal case. Reuben says that his office will be publishing one any week now, there's also the messages that go out. We have a national sentencing advocacy, Sentencing Resource Counsel which are national and they provide information to the panel on updates in terms of amendments, in terms of changes in legislation, in terms of issue that are popping up. With the internet and with electronic information we can get information out quickly and efficiently. We have a mandatory training once a year in Phoenix and Tucson and in addition we have one to two hour seminars once or twice a month, usually we run about fifty hours a year of training in each panel.

The advent webinars has also helped, so I can have a noon webinar which twenty or thirty people attend every other week. An example would be good, recently the Sentencing Commission has put forth amendments on the illegal entry guideline that will really change how we do things. That was a result of the Defenders advocating in front of the commission, but also getting feedback from the panel and from the panel reps. We would send out saying, "Give us your examples, what are you seeing?" That has come out . . . we've send out an email saying, "Our first trainings are going to be in the next several weeks," to alert the panel what's going on.

We will follow up with the mandatory trainings and to issue spot. We also tend to send out frequently asked questions, we also do case summaries of every Ninth Circuit criminal opinion that comes out. We also focus each week on a case of the week that's done by Steve Kalar, the Defender of the northern district of California and we have specialized training for each of the panels. Appellate, misdemeanor, Spanish speaking.

Judge Prado: I'm not as familiar with Native American issue but I don't know if there's a language problem there but I know that there probably is with Spanish speaking because such a large amount of defendants are Spanish speaking. Is there a problem in your districts, finding sufficient lawyers who might be speak Spanish? Or finding good interpreters that can assist in defending these people? And what efforts are being made to try to find Spanish speaking attorneys that might . . .

Daniel Scott: We have hardly any, in Minnesota you shouldn't be too surprised we have hardly any Spanish speaking lawyers. We've got a number of certified interpreters, you go out to the jail and there's a stable of them that we've called to go out there and in that way they're good. Spanish speaking lawyers, it's really hard they're just . . . we do not have a huge Spanish community in the state so you know, our problem with foreign languages is more with some of Somalian clients.

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Judge Prado: Canadians? No? Kidding.

Katherian Roe: Any problems getting them paid? As far as when you need to use interpreters for . . . as a CJA panel attorney?

Daniel Scott: No and I've had a number of Somali cases and we haven't had any trouble with them, all of the Spanish ones that we use are all certified, they get paid the standard flat rate. We had a kerfluffle I want to say ten years or so, because for a while there we could bill them daily and then we couldn't bill them daily and I don't know how it finally worked out.

Jon Sands: In the district of Arizona we have a very large client base who only speak Spanish. Tucson is completely bilingual so staff and lawyers all speak Spanish, same with Yuma. Phoenix about a quarter of the lawyers speak Spanish, about a third of the staff. We have four certified interpreters and another interpreter. The panel in Tucson is divided up in English speaking only and bilingual, if you're bilingual you get a number of cases.

They don't use interpreters there because of the Spanish speaking panel, in Phoenix the court allows for interpreters and they pay for it, there's number of lawyers who do speak Spanish.

Judge Prado: Is there any need for Native American language issues?

Jon Sands: Years ago we were seeing extensive Navajo language only but as the generations have moved on, as we've gotten older it has become less frequent. There are a number of Navajo interpreters who are used by both us and the panel.

Alex Reichert: We've got . . . we have no problem in Indian country with foreign languages or with other languages but as to Spanish speaking, we do get a number of Spanish speaking defendants, we have almost no Spanish speaking attorneys. Where it really becomes a problem though, we've got plenty of interpreters in the major communities and where the courts are. It's when we have these remote detention issues, which is I've got to drive three and a half hours to where the court is and the court is in Rugby . . . I mean the jail, the jail is in Rugby North Dakota, population 1100 people, there are no Spanish speaking people there.

There are no interpreters there so I have got to try and convince one of our interpreters who are usually a University of North Dakota employee, or just some other person that is doing this on a very part-time basis, that they should take an entire day off, travel with me to this remote jail and interpret for maybe an hour. What I try and do to save money for everyone involved and to use my time efficiently is, I will try and integrate a stop there when

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I've got some other court going on, some other place or another client meeting. But I certainly don't want to have an interpreter have to sit there with me for a number of hours.

We can also use, or have used in the past, using telephones. Using interpreters that you can get over the phone, that can just translate over the phone but a lot of times the jails won't let you bring a cell phone in or sometimes they'll let you in and then you're counting on that, you drive all the way there and, "No you can't bring y cell phone in and we don't have a phone that you can use." So there are some logistical problems that are compounded and this has become more and more frequent.

Because with the oil boom in western North Dakota, we are having a lot of people come up from Texas and Arizona who end up being defendants and so we've got a larger pool of Spanish speaking defendants than we have in the past.

Jon Sands: Judge? I'm going to jump in again and just mention that as the U.S . . . as the Department of Justice has gone into the terrorism prosecution business and expanded, we are seeing more and more different sorts of language. So we have a terrorism case now which we need an interpreter for Arabic, Turkish, Chinese.

Judge Prado: Foster? Anything you want to add?

Monica Foster: We don't have problems finding interpreters at all, I do have a hard time finding Spanish speaking lawyers. I look at that . . . I have trouble finding diverse people to add to my CJA panel period. I've got a very . . . I don't want to say elderly, but older Caucasian male panel and I've been working to try and diversify that. I've got trouble with that, I think in part because of the way the federal court . . . the federal system is viewed as juxtaposed against our state system. I continue to have problems trying to find Spanish speaking attorneys.

Judge Prado: Many years ago, when I was an Assistant Public Defender I was in the courtroom and the defendant stood up and said that he needed a lawyer and the Judge said, "I'm going to appoint the Public Defender," I was the only Public Defender in the courtroom so I stood up expecting that I was get appointed and the Judge said, "Oh no! Not you Mr. Prado, this man needs an English speaking lawyer." I don't think that's what he meant but that's what he said. I've learned a lot of English since then!

Monica Foster: You're doing pretty good!

Judge Prado: If you were appointed Defender General with unlimited resources, what would be the three major things that you would change? I'll give you a

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minute to think about it.

Jon Sands: The three things that I would change is one, to move out to the administrative office to be an independent agency. To have access to Congress and the ability to advocate for our program and our resources and to take away the vouchers from the court for CJA and to put it in this agency so the judges would not have to decide who gets paid and what amount. So those three things would ensure our independence and would further our mission.

Going with that of course, would be our data since we would be a separate agency and an ability to have the assessments and to control how we do our own allocations.

Monica Foster: If I could just jump in here I would just like to echo Jon's desire for big I independence, I think that would solve a lot of the problems that we currently encounter. I think it is problematic when the judges are reviewing vouchers and cutting vouchers without notice to the CJA lawyers and seemingly cutting vouchers for no rational, articulable reason. I think that independence would cure a lot of the problems that we see within the system. I would also advocate for no remote detention, I think remote detention impacts in a very, very harmful way, the attorney client privilege.

I think people go to trial that perhaps would not otherwise go to trial because of remote detention. I think remote detention puts a strain on the system, not just the defenders. But I think it puts a terrible strain on the United States Marshal and I think it also puts a strain on the court. In understand that there's fiscal reasons perhaps, why we remotely detain but I find it hard to believe that putting United States Marshals on the road, in vans with people who are charged with crimes, for eight hours a day, every day of the week is a fiscally responsible thing to do. So my . . . I only ask for two things, big I independence and no remote detention.

Alex Reichert: I think it would . . . looking at the rate that it's paid, I think we're very lucky in the district of North Dakota. We have the best and brightest attorneys are on the CJA panel and they do so as I said earlier, out of a sense of obligation to the court and I think that if one would raise that rate it would be much more fair and you would have the lawyers who are most experienced and most able to do this type of work, especially very complex and difficult cases. Would stay on the panel longer and would be able to provide much needed training to younger lawyers.

The next thing I would do is work with training in specific areas to be able to carve out in a niche in the panel to say this group of the panel is going to handle this type of case, this group of the panel is going this type of case. Let people self-select into that or be put into those categories so that they can take this enormous elephant that is the federal legal body and bring it down

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into bite size pieces for the cases they have.

Third, I'd put a massive retirement package together for that position.

Monica Foster: With psychiatric counseling!

Daniel Scott: Well money solves all the problems, I was just down in your court house in February and on a criminal case that you could see what unlimited resources could do and the U.S. Attorney's office got eaten for lunch, which they're just not used to. If you could put four or five different lawyers brainstorming together with unlimited amount of money, it's amazing what can be done. You know, this was King & Spalding that was running that show. There's a huge difference between even what the defenders do and what's absolutely possible to do. I almost got in trouble because all the defenders really wanted was we didn't want a Cadillac defense, we wanted a Toyota Corolla defense. Well-built, runs forever, efficient, it gets you where you want to go and funds are that. It's not three things, it's one thing. I could live with everything if I've got the funds necessary to do all the things that need to be done.

Judge Cardone: Judge Goldberg?

Judge Goldberg: Ms. Foster? Do you have a Capital Habeas Unit?

Monica Foster: No sir I do not, the . . . which is interesting because Terre Haute is in my district, which is where federal death row inmates are housed, but we do not have a Capital Habeas Unit.

Judge Goldberg: So the rating, the work measurement rating you said was thirty-seven for the death habeas cases and you're . . . as I understood it, your suggestion, your complaint was that while that was a heavy weighting and I'm not proficient with all the numbers, but it didn't account for the amount of time that these cases entail, is that right?

Monica Foster: Well two things Your Honor, first of all what I'm talking about are the death penalty cases that are assigned to the traditional units, which would primarily be trial level cases. That is where my concern primarily lies today. With the capital habeas cases, most of those cases are taken by the CHUs, the Capital Habeas Units that are set up around the country and the waiting system for those cases in those units is completely different and I think that it is adequately doing the job, at least if my conversations with my colleagues are to be trusted.

There's not reason to think that there's problems with the Capital Habeas Units taking those cases and the way that they weight those cases. The problem arises I think with either traditional units accepting capital habeas cases or what's more likely to happen is traditional units having a death

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penalty case in their district that they should take. My complaint is not actually with regard to the amount of weight the case receives, but rather my complaint is that the case gets that weight in one year only, even though the case lasts many years beyond that.

The way that measurement works now, if your numbers fall off, right? If you only get the weight in year one, in year two then you're not getting that weight but you're still doing the work. If your numbers fall off, in order to meet your bench marks, if you don't meet your bench marks you've got to let people go. So even though you're chugging along and doing a lot of work, a lot of important work, you're not getting credit for it and you're going to end up having to let people go and it just doesn't make any sense.

Judge Goldberg: Okay so I'm not sure our Committee is going to take up the issue of work measure, we may we may not, but it's my understanding that that's more of a Judicial Resources Committee issue. So, my colleague in Philadelphia, Judge Stengel is Chair of that committee and I'm sure he would be thrilled to get a short letter from you about that. I just think your well thought out concerns are better directed to him, but maybe us too. It's always good to have, you know this information.

Monica Foster: I will certainly send a letter to Judge Stengel, I think it would be . . . and I appreciate and I hear what you're saying. I think it would be really helpful to us moving forward if the Committee could just give some encouragement in that direction.

Judge Goldberg: Okay, noted. Yes?

Jon Sands: Judge? In terms of capital there's been discussions to use what's known as a toggle or to identify the capital cases and take them out of the work measurement and treat them differently. We're having discussions with Harvey Jones and with the statisticians in Washington, along these ways. Given how few death penalty cases there are in the federal system, we feel that we can possibly deal with this. I have a very large CHU, they're on a different work formula measurement than the trial units.

Judge Goldberg: Understood, so that aside were you satisfied with the results of the work measurement results?

Monica Foster: The work measurement results did not benefit my office in ways that I was hoping that they would. But that said, I think that across the board they benefited our agency, our Federal Defender program and I will work within the work measurement to try and get from my office more that I . . . additional resources that I think we're entitled to.

Judge Goldberg: That was the impression of our Defender Leigh Skipper, he was very nervous

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about it and I think he publicly testified to this, that he . . . that the results were he was surprised and happy with how it came out. He felt it accurately measured the work that they were doing and they actually some more resources.

Monica Foster: Well I would say this, I think that clearly going in to work measurement, the Defender community was very, very cynical and worried about how it was going to turn out and the people that we worked with in the AO I think were uniformly, at the end of it, thought to be very stand up, good people who were people of their word and I think that we were treated much more fairly than we certainly thought we would be going into it.

Judge Goldberg: Good. We've had some really interesting discussions in other hearings about community Defender officers versus Defender offices and the different dynamics with both, so I'd ask you to comment on which you think is a better organization and you also Mr. Sands and then to the extent that CJ lawyers want to chime in I'd be happy to hear what you have to say as well.

Monica Foster: Well my office is a community Defender office and I tend to prefer that model for the simple reason that I think that it's really important that the Defender office be and be seen as independent from the judiciary. I think that's critically important and dealing with our clients I think it's critically important as the public looks at the way that the criminal justice system functions. So I think that having the . . . you know we're one step divorced from the judiciary system so for example, I'm not hired by the judges, I'm hired by a board although my board is appointed by the judges. The judges in my district are terrific and I don't think that I would ever have any problem with them or they with me, we have a very good working relationship. But I don't see that when I look around the country, there's been some very, very disturbing things in some of the other offices, particularly in the south.

But I think that the level of independence in the CDOs is greater than the F-I'm sorry in the Community Defender Organizations is greater than it is in the Federal Public Defender Offices so I do prefer that model. The one thing I think that we are at a disadvantage with is that we don't have the same retirement plan and same benefits plan that the Federal Public Defenders have. So in a Community Defender, the defender has to go out and purchase these services. So we have to purchase health insurance, we purchase and IRA or 401k program for our people and what we're able to purchase . . . our purchasing power on the open market, particularly if you're a small office like mine, I've got fourteen employees, it's frequently difficult to mimic the resources that are available in the Federal Public Defender Offices.

Having said all that, taking into account all of that, I still prefer the Community Defender model.

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Judge Goldberg: Mr. Sands?

Jon Sands: In terms of what gets us to independence, I will favor whatever form gets us there! But, I don't think that the committee has to choose. There are advantages to both systems and there's actually a third, which is the grand-parented ones in Southern District of New York and Eastern District of New York and I think Detroit and Eastern District of Pennsylvania, these are sort of state and federal.

Part of the districts are historical, part of it is to have more local control. Coming up with the FPD, I am comfortable with that. I could also be comfortable with a CDO, I don't think the Committee has to choose one over the other unless we're going for a big I independence and then I will embrace whatever you want.

Judge Goldberg: So you're for independence? It was unclear . . .

Jon Sands: Excuse me?

Judge Goldberg: I was poking fun at you. We've heard, I think frankly, more complaints and concerns about the system you're in, the Federal Defender system, because it gives more control to the circuit and the judges. Have you had any problems with that?

Jon Sands: I'm in the Ninth, compared to other circuits, we have the respect of the judiciary and I've not felt the . . . I've not experienced the problems that my brethren have in other circuits. They have treated us well.

Judge Goldberg: Okay. Mr. Scott, I heard you mention that you had a \$45,000 voucher cut? Did you say forty-five comma?

Daniel Scott: Forty-five comma zero, zero, zero!

Judge Goldberg: Okay, you want to tell us about that?

Daniel Scott: Oh sure. I tried a terrorism case here in this courtroom, my client got a million years and you know, it was a long tough case. We've had big terrorism issues with the Somali diaspora here. I went in to the district court and then obviously up to the circuit, with the district court's full support. I'll tell you this, I came up at the wrong time. I came up at the wrong time because it was the end of 2013 and so the Judge just slashed . . . out of court time was \$90,000 my in court time was about \$15,000 and he just cut it in half and then he wrote down as ten times the limit cite, that stupid case that he wrote. I can say that about a Judge because as he said in the case it was an administrative matter...

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Judge Goldberg: Was this the trial judge or the circuit judge did this?

Daniel Scott: This was Judge Riley, as he said in the case...

Judge Goldberg: Circuit Judge.

Daniel Scott: . . . The underlying case, this is an administrative matter not a judicial matter so I can be semi-contemptuous of a judge when he's not operating as a judge. He has . . . you know there was no reason for it at all and he gave no reason for it all but it was a time, as it was the middle of the sequester. I was there in the wrong place at the wrong time with a very large bill, so I understand how that came together at that time.

Judge Goldberg: Did you ask to be heard? Did you ask for due process?

Daniel Scott: No I did not, he just did it to me and I heard from Katherian, I didn't even know until she told me, that it was coming down that way and I did not ask for due process. He doesn't give due process so I didn't ask for any. In that same case I took . . . I had a client in the courtroom refuse to stand up in the trial, you can imagine the effect that had. We went up in the Court of Appeals on all the contempt citations, at that point there were about thirty before she finally broke and I got the district court judge reversed on that and the appellate one's even more fun because they don't even tell you they cut it, they just send you a letter that says, "You got your money and here it is," and it was the max for a regular appeal \$6900 and my bill was about \$9 grand.

Those I understand, it was a great case we argued for an hour in the Court of Appeals, an hour. Fifteen minutes for each side we argued and hour, it was a wonderful case most interesting and . . . but otherwise it wasn't extended or complex so I could understand that cut without a problem, I thought I was probably correct under the law.

Judge Goldberg: You seem very good natured about a \$45,000 cut.

Daniel Scott: I've been pretty successful, my partners laughed at me instead of cutting my pay when it happened. Probably only four or five if the panel lawyers in my district could have taken that hit and Judge Riley didn't know that when he did it. So, I don't speak well of the decision he made at the time, I don't think it was thoughtful, I don't think he was thinking his way through anything and I know that he has a political agenda here which he cites constantly which is that we shouldn't actually be billing the government for any of this time.

But he's an outlier, I don't want to say this . . . as much as we're hearing this, you've gone across the country. There's really only one circuit in the country that had been bad about this and that's the Eighth Circuit and . . . okay, two you're ahead of me yeah, there's two. We've had two Chief Judges in a row,

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I don't know Judge Riley that well but Judge Loken's a friend of mine and it's a political agenda for him, it's just that's what it is and those things happen. I don't think you can get around that 100%, I don't think that indicts the system itself. I mean, you're hearing from me . . . I just want to say, a guy who's probably got the first or second biggest cut of a voucher in the country and I'm telling you that that's not evidence of a broken system.

I think that the way . . . I think that the problems can be solved internally, that is that the Eighth Circuit . . . just like the judges in the districts adopt a CJA plan and that could set up, and literally in some plans it does, it sets up how vouchers are reviewed and the judges can basically you know . . . they can allow other people to be involved in the decision, at the end the buck stops with the judge. But the judge can have other people involved in it and put it right into the system, so can the circuit courts. The circuit courts can set up a . . . within the court they can set up somebody who looks at them before the chief judge does and makes recommendations to the chief judge and takes a look.

That's just the chief judge seeding some of their authority, his or her authority. Then the other thing which I put into my papers is that they auto . . . they can do it by local rule or local policy, they should have the same kind of review they normally have in these kinds of cases from a district court which is the recommendation of abusive discretion. Then if it is, you better write an opinion explaining why and that solves the problem, because then like all human beings, then the judge looks and says, "Well I'm not real happy about this but I'm not going to do all the work of going through all this just to cut it \$1000." You know, if it needs to be cut a lot more than that, then whoever it was who looks at those the first time in his office should have told him. These are things that can be solved within a system that's already written.

Judge Goldberg: Mr. Reichert, do you agree with Mr. Scott that those types of cuts are outliers and the system's not broken?

Alex Reichert: Well, I'm a little bit younger than Mr. Scott and for my entire career I've lived under this draconian system in the Eighth Circuit and when I started out and I was making very, very little money those cuts from the circuit were very painful to me and it was very painful to my family and it was difficult. I have a little harder time being so glib about them because it was a significant issue. Now it's not, now I've been doing this a lot longer and the fact that they cut my bills . . . and they've cut my bills far more than \$45,000 over the years, they've cut just about every bill I've ever had. I have . . . the distinction has been noted that many times judges assign the problem clients to somebody? Well that's me, I get the difficult cases, I get the problem clients. My phones bills and my vouchers are usually very long and very complex and deal with a lot of difficulties.

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But I've learned to deal with it and it's fine, as we look back on it now. But, I feel for these young lawyers, that we are asking to jump into a very difficult area of the law that is becoming more and more complex with U.S. Attorney's offices that are becoming more and more difficult to deal with, with Sentencing Guidelines that come and go but are difficult. The vast majority of our cases are child pornography cases, massive drug conspiracies that are incredibly complex, both factually and legally requiring people to look through tens of thousands of pages of discovery.

I was involved in Operation Speed Racer in North Dakota which Chris Meyers who's now our U.S. Attorney then was our lead drug prosecutor often liked to brag had more discovery than the Enron case. We were expected to slog through 65,000 pages of discovery, not something that is a surprise to anybody on this committee. But then to have those bills continually cut with no reason given, is discouraging to say the least.

Jon Sands: It strikes me as a very strange system, in which CJA counsel are treated differently circuit to circuit and even within the district. A CJA lawyer gets one judge and she knows that her vouchers going to be cut 10%, she gets another judge and it will be approved. Is that any way to run a law firm or a business? We have judges whose primary job is to adjudicate and yet they are having to do this on a piece meal basis. That's for this reason, we should take it away the courts and centralize it so people are treated without unwarranted disparity.

The problem of course is, is the First Circuit like the Eighth Circuit? Maybe there should be regional or circuit cohorts, but this is an issue that we can deal with, but it should be taken away from the courts.

Judge Cardone: All right. Ms. Roe.

Katherian Roe: All right, way to jump in this pool. I'm going to start with Mr. Scott, Mr. Scott the voucher cut that you experienced was obviously very significant. I think, I'm not sure if it was the largest ever in this district but it certainly was the largest percentage, in a case that you did an amazing amount of work and the quality was exceptional. So I want to go back to this . . . you say that it doesn't mean that the system is broken, yet at the same time in your statement you advocate for the circuit court being taken out of the review process. Can you tell me about that?

Daniel Scott: Well it actually . . . what I really advocated for was within the system that we have now, we should add more to it. In other words, we should be able to . . . we should add more eyes that look at it and that we should add a different standard of review and that we could do that . . . . The court could that voluntarily, they don't necessarily have to get Congress to shove it down

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their throats. I mean the buck always has to stop somewhere, you know this is . . . it doesn't matter where . . . somebody has to finally have the final decision on how much money should be spent on anything and so if you're going to draw a line, where are you going to put it?

The circuit is probably a lousy spot, because there's no knowledge there but . . . well I take back Judge, but you're not the Chief either, you don't have to go through all of these vouchers! It's probably not the best spot, but there needs to be a spot because you know . . . I mean I'd like to spend the kind of money that King & Spalding spent on that case, it was tried down in front of Judge Lamberth a couple months ago, I'd like to be able to spend that kind of money and develop and throw eight to nine lawyers at it and I know the U.S. Attorney throws two to three lawyers at everything now. But there's a limited amount of money and somebody needs to look over the top to make sure that it's justified and my case now, it's my client.

In the case of the Federal Defenders, at a certain point they have to go back to Washington if they want to really spend a lot of money. I think that the circuits are moving by having the case budgeting people, there's now one for the Seventh and Eighth Circuit. Those people can be one of the buffers between them and the final person who does the review, because they can say to that final person, whoever it's going to be, you know, "I've had a chance to look through it, we worked our way through this all the way through the case, these are all justified, we really did need these experts, you've approved all of this before. So now even if politically it's a bad time to be paying out money, as far as you're concerned, you still need to do it because you've got all this inertia. That gets rid of sort of the whims and caprices that we have to worry about in any system which a human being has the final authority and there aren't. I don't want to give it to a computer because it's clear that nothing's cookie-cutter.

Katherian Roe: I want to ask you just another follow-up on this same issue, on the voucher cut. As you admitted to us, you are one of the few people on your panel who could probably sustain such a cut and not have to you know, take out a personal loan to pay your mortgage. But what about the people who can't? What about the other ninety-five people on the panel and other panels that can't sustain such a cut? And what about the fact that we really need to bring new folks in because of the . . . not just the panel in Minnesota that's aging but the panels throughout the United States that are aging? The other part of that is, I heard you say, "Well, the judge is going to have to put in an opinion. They're going to have to write exactly why they did something."

But that's in *In re Carlyle*, and what that turned out to be was not just writing why the court did something, but essentially saying you know, pretty bad things about the lawyer in an embarrassing way and I'm pretty sure that folks aren't going to hold themselves out to letting that happen to them? So what

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will happen is they just won't push it, they'll stop it and say, "Okay, if all I got was \$45,000 and my bill was \$90,000, well I don't want to take the chance of being that person," unless they you know, happen to be in a situation like you are, where you are one of the leaders in your bar. But they're a lot of other folks who are not in that position.

Daniel Scott: Well, don't think I'll ever speak to Judge Riley again. I mean what he did was incredibly bad, I think it was a personal decision and not for me, just a personal decision that he was making at the time. You're right, there are . . . . One of the famous things that happened in the Eight Circuit was that they tried a case for nine or ten months down in St. Louis when St. Louis appointed the next person on the list, not on the panel there was no panel and there were lawyers who were declaring bankruptcy during the trial and that caused the Eighth Circuit to basically shove a Federal Defenders Office down their throats. Over their protests, the Eighth Circuit actually set up an approved CJA plan for the district. Yes, there are egregious things that can happen, but I don't know that . . . I've seen the discussions, is if we assign this to someone who's not a judge who's a bureaucrat, are they going to be any different in terms of being arbitrary and capricious they'll just be more evened out arbitrary and capricious so that they're going to try to draw a line here when the actual cases are like that.

You know, we've watched the Defenders have to go through all of their studies on their case weighting, that's sort of what a bureaucracy would do, is the case weighting. I also made the suggestions that you come up with a change in what the average case is and mostly by studying it. Because it's clear and it's been clear for years, that the cap just doesn't cover the average case. It covers, you know, a felon with a firearm case as long as it's not fifteen to life, it covers you know, an immigration case but it doesn't cover the average case in Federal court. It needs to change and that's been one of the major problems, one of the major problems is that the cap's so low.

I mean it's normal to have . . . you know, to be \$1000-\$2000-\$3000 over the cap on a plea case, that's normal now that we have sentencing advocacy again and then you've got to go to the circuit and if you saw the list that's now floating around, look at most of those cuts that were made by Judge Riley were \$1000 here, \$2000 there, \$3000 there on cases that were a little ways over the cap. You know, so there are ways to fix the problem, to take ... Or at least most of the problem, to take it out of the hands of one person and put it in the person of more than one.

I suggested that we have in our . . . . A real thing that happens in the district here and it happens elsewhere is that they actually have someone that recommends to the judge whether they should accept it or not in the district court. They have a panel that looks at it, maybe a magistrate and a defender or magistrate and CJA panel look at it and then go to the district judge and

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say, “Judge, we think this is justified.” For those districts, you know like Western District of Arkansas. Or, what was it Mississippi that had the \$3500 limit and never even knew that anyone else had anything else different.

Katherian Roe: Thank you. Mr. Sands I’m going to turn to you and ask you a question about . . . as we’ve referred to it a number of times and our witnesses have, big I independence. As you know, historically when the Prado Committee made their decisions the Defender community was not in support of independence. Independence, even though it was recommended by the committee, the Defenders were not in support of it and now it seems, at least from the information you’ve provided us and the letters that we’ve received, that the Defender community is leaning more towards the independence model even though they still have some reservations. The reservation always being about funding. Can you tell me or kind of give us an idea as to why you think the Defenders as a group, have shifted towards the big I independence model?

Jon Sands: The positive reasons are that the Defenders recognize that the original intent of the Criminal Justice Act was the have us as an independent agency. That is was a process, at the time of the Prado report, there was still concerns and reservations about funding. As the system has grown, as we have become adept at presenting ourselves as we have embraced data, we feel that we can advocate on behalf of our mission and on behalf of ourselves. The Defenders have the ability to run an agency and the Defenders have the ability with CJA to deliver the best possible defense to clients who are facing criminal charges.

The negative is that the defenders often felt that, at the time, the judges could protect us. As things have turned out, we feel that we are being perceived as a service to the judges rather than a separate constitutional mission. We believe that there’s a tension between the Defenders doing what they have to do in defense of their clients and the administrative office serving and servicing judges and the judicial mission. The Director in the administrative office looks to judges, we look to the client.

We are more akin to the opposite side of the U.S. Attorney’s rather than probation and pretrial. So for those reasons, positive because we can represent ourselves and we feel that we can make our case and negative that we feel there’s a tension within the AO.

Katherian Roe: Ms. Foster I just wanted to ask you one question about the Capital Habeas Units. As Judge Goldberg had said, perhaps the issue that you raise is more of a tweak or a toggle that can be dealt with by the AO but my question is more, is it really also a Capital Habeas Unit or lack of Capital Habeas Unit issue? You had mentioned that you’re in the district where Terre Haute exists, where all the folks are who have the federal death penalty. Have you sought a Capital Habeas Unit or is there one in the Sixth Circuit, which I believe is the circuit you’re in?

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Monica Foster: I'm in Seventh.

Katherian Roe: The Seventh Circuit, is there a Capital Habeas Unit in your circuit or have you sought to have one in your office?

Monica Foster: I have had informal conversations with people on ... I'm on the Death Penalty Working Group, I'm also on the Defender Services Advisory Group. I've had informal conversations with people in those groups that seem to have the ability and the knowledge for putting those units in the Defender groups. I have not received a very good reception with regard to that because I've been told it's not a good time for expanding the program in that way.

There is no ... I don't think that there is Capital Habeas Unit in the Seventh Circuit because the states in the Seventh Circuit have frankly, largely abandoned the death penalty. Illinois doesn't have it, Wisconsin doesn't have it, Indiana has it but we don't use it very frequently and the Capital Habeas Units would service both the § 2255s, the capital habeases from death sentences imposed in the federal courts as well as the § 2254s, the habeases imposed coming out of the state courts. What I have proposed is just a straight § 2255 unit in our office. I continue to think it would be a good idea for the simple reason of the facilities in our district. These are clients that are very needy because they're clients who come to death row largely with terrible mental health problems and living on death row does not help anyone to resolve their mental health problems.

So they're a clientele that needs to be seen a lot but as I've said, I haven't received a lot of positive feedback with regard to putting a CHU in our office.

Katherian Roe: Thank you. Mr. Reichert, just one question and you talked a little bit earlier about voucher cuts and in your statement you also indicated that there are some voucher cuts in your district. Are those . . . I know that you indicated that some of those are circuit cuts, do you also have district cutting or is that an issue?

Alex Reichert: Yeah we also have district cutting and our District Court judges are fantastic and advocate for us at the Eighth Circuit and in many times what they do or what they would tell us, they would call us and say, "Alex look, you're a few thousand dollars over the cap, we're just going to cut you down. You're \$20,000 over the cap, we're going to make some cuts in some areas," because even at the district court level, they didn't know why Judge Loken and Judge Riley were doing the things that they were doing but they were trying, at least they told us, they were trying at every point to cut our bills in a strategic way that it would hopefully get it through the Eighth Circuit and so I don't think that our district court judges were any way cutting in order to really cut, but were cutting in order to hopefully get us more money at the Eighth Circuit.

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Katherian Roe: So they weren't cutting because the bills weren't reasonable and necessary, the work done. They were cutting to try and prevent you from getting larger cuts at the circuit?

Alex Reichert: That's exactly right. That's exactly right and that's the way it was communicated to me and I have no doubt that that's the way that that happened. I had that in private conversation with the judge as well as in the public comments that he made to me when he made cuts.

Katherian Roe: Thank you. Thank you Judge Cardone.

Judge Cardone: Alright, Judge Walton.

Judge Walton: Good afternoon. As a society and I guess it's probably true for all societies that if you can get what you get on the cheap to the same extent that you can get it if you're paying a lot of money for it, we usually go for the cheap. I fully appreciate that money, when it comes to criminal defense, you know can make a difference. You indicated the King & Spalding case, I had presided over the Roger Clemens case where there was unlimited funds thrown at the defense so I know there can be a difference but, what I think would be helpful to us, if we had some information about specific cases where it's been documented that as a result of the problems the system has, people have been wrongfully convicted.

Do we know of any you know, situations where we can report that had a different system been in place that was providing the quality of justice that I hope we universally had would've made a difference and therefore someone wrongfully convicted that the conceivably or would not have occurred?

Alex Reichert: I would hope that if I knew of any that everyone would know about that already. The problem I think is not so obvious as it is a problem where I have addressed . . . like in Indian country, you have a person one to two years out of law school, trying a case of a gross sexual imposition on the reservation, which is a week-long trial where should clearly over . . . the person who was convicted, was that person guilty? Was that person not guilty?

I didn't follow the case closely enough to know, but those things happen on a regular basis and until you get a higher level of pay and a level of pay that is commensurate with what people are making or is high enough to get people who have the experience into the system, you're never really going to know that. You have to remember, we're already taking a 50-75% paycut just on our hourly rate and so that's before . . . that's if we get paid the full amount, we're already taking a 50-75% paycut.

There are a lot of lawyers in my district I know, that won't do it and they're

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very good lawyers.

Monica Foster: Go ahead Jon.

Jon Sands: Judge, on the issue of the wrongful conviction, the stories are legion. Money makes the difference. This is especially true in violent crimes and we have a number of those instances from the Navajo and other reservations. Who knows what difference an expert would have made for a killing of an infant or the death of an infant, or in a self-defense claim. Under the review, EDPA and other reviews, the real battle has to be with experts and investigators and unfortunately, the court is cutting our CJ down with those.

But putting aside the wrongful conviction, we also see this in sentencing. If you can save someone a year, a month, even weeks it is a victory. It makes a difference for them, all of you know if a person is in for more than five years, the rates of recidivism climb. We are seeing these matters and so having the ability to go out and meet with the family, or just being able to advocate for sentencing is a difference and makes ... And is morally right.

Judge Goldberg: If you have a moment, it's just a follow Judge Walton, and you could give this a little more thought after we're done meeting and send us, if you can think of situations where there's opinions or something that we could look at. An opinion, district court opinion, appellate court opinion, something rather than an anecdote where it would show either lack of resources, wrongful conviction, or lack of resources much higher sentence, that would really be helpful to us.

Jon Sands: Sure and the Ninth Circuit has a series of opinions which indicate where mistakes have been made and we will send that to you, but a lot of it can never be found because the judge is looking at a defendant, the probation is recommending mid-range, the government is recommending high-range and the defense lawyers just arguing instead of putting on a case.

Judge Walton: Yeah, I don't think we're questioning the accuracy of what you're suggesting. You know living the process I think we appreciate that money makes a difference but from the standpoint of a politician who's removed from the process, you know they always want to know, "Well, would you have gotten a different result?" If in fact what you're talking about it being provided.

Jon Sands: It's very interesting because when I was . . . when congressmen asked me for information during the sequestration and we provided it to them and to their staffers, we were greeted with an understanding of what our role is and what we have to do. The skepticism that we thought we would meet, was not there. It is a constitutional right, now obviously there has to be limits on expenditures, but I believe Defender Services Committee and the Defender

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Services Office have been good stewards. We have followed it and we have been responsible in how we spend and I believe that we have done a good job.

Judge Walton: I don't doubt what you're saying, that there were congressional members and staffers who were sympathetic to what happened as a result of sequestration but did that result in them saying, "Okay, now we're going to appropriate more money in order to have those services recouped that were lost," and they really haven't, have they?

Jon Sands: We did get the anomaly, we did manage to staunch the bleeding and we managed observe the . . . to preserve the Defender's system.

Monica Foster: May I add something there? There's 140 people that were formally on death row that have been exonerated. Now those aren't federal cases, but they are cases I think that are important and are illustrative of the issue that you raise Judge Walton. I think part of the problem, a large part of the problem is that when you look at innocence clinics throughout this country, they're all cherry-picking cases. I don't say that with the cynicism that it sounds like I am but they're looking for DNA and frequently if you don't have DNA . . . if there's not DNA in your case they don't want to know you, whether you're innocent or whatever. So those are the cases nationally that are getting attention and I don't mean to blaspheme here but I'm not sure that the federal system of justice is the right place to reveal innocent people who have been wrongly convicted.

Let me tell you why I say that, under the Jencks Act we're not entitled to get information with regard to people that the government is calling as a witness until after they've testified. In most jurisdictions we'll get it, but we'll get it right on the eve of trial. I came from a state court system where we had full civil discovery in criminal cases and yet guilty people still went to prison and the system carried on. I can't believe what's happening in federal court with regard to the paucity of discovery that the defense gets and I know this is well beyond what your charge is.

Judge Walton: Some federal courts, because the government doesn't play that in my courtroom, they give that information up early on, if they don't there's consequences.

Monica Foster: I wish you were in my district because we don't get that in my district. So then you go on direct appeal and then § 2255 which is the place where we would test whether an innocent person has been wrongly accused, but unless the person's still incarcerated there is no § 2255 and unless there is a mechanism for those people to test their conviction, an agency that will take up their cause, there is no institution that will look at those cases, look at those child pornography cases, look at those Hobbs Act robbery cases, to

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determine whether these are innocent people or they're not innocent people.

As I said, the quote unquote innocence clinics don't want to know them unless there's DNA that's going to exonerate them and DNA has been wonderful. It has shown us that our criminal justice system in many ways, is broken. But what about the poor person that is innocent and convicted, not based on DNA but based on erroneous eye-witness identification? Based upon over zealous agents that are insinuating evidence into a case that ought not to be there. I just think that you know, in the big cases we're going to find evidence of innocence, I'm not sure that we're going to find it on a broad scale in Federal court and I'm not sure that that's because we're doing such a great job of only convicting the guilty.

Judge Walton: So if you were in our shoes and trying to convince cynics that additional funding would make a difference, what approach would you take? If you don't have documented incidents of individuals being wrongfully convicted because of the problems of the system.

Jon Sands: Judge? Several weeks ago we . . . one of our clients in federal habeas walked out of death row after twenty years and for successor petitions. The Ohio courts found that there was DNA and Brady that was not turned over. We were able to do that because we were the Federal Defender and we had the resources. If it was a CJA panel, would they have been able to have the experts, the tenacity, the investigators? Would a court have allowed them to do what we have done over the years? That person is out now because of the dedication of the Federal Defenders, but when you have a judge making a decision, "Well, I've given you money for this, why do I need to give you money for that?" It . . .

Judge Walton: That would be a helpful example to us!

Daniel Scott: Let me just raise a couple of . . . we don't have that many where we've turned around and won it later on, partly the reason of course is you've got a year to do it too. But here's the ones that come up when we had the right result because we had money. In Katherian's office, her first assistant tried a case from the Reservation in which there was DNA to back up the testimony of a young lady that said that she had been raped. They came in and testified, the normal thing which is 760 billion to 1, and they went and hired an investigator to review it because . . . I won't get into all the reasons, but they brought in an expert from the West coast who testified, in fact it was based upon flawed reasoning which was that on an Indian reservation, you're working from community standards which is you take this huge thing to do this statistical game that they play and . . . but everybody's related on the reservation, so that you don't have the right population you're running from and that the odds were actually one in four.

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In other words 25% of all of the men on the reservation could easily have supplied that DNA and in fact there was evidence to suggest that she was covering up for her boyfriend and blaming somebody else and the jury acquitted. If a judge had not authorized . . . well they didn't need a judge to authorize, if they hadn't spent the money to bring in an expert from somewhere else, that would've been a slam dunk conviction.

Mr. Richmond you saw this morning, Mr. Richmond is one of the finest trial lawyers in the United States, in the last year he has had an expert . . . he had a police brutality case who was being charged on a civil rights case in a federal court and the government brought in a well-qualified highly . . . I wouldn't say highly but testified a lot, expert to testify about excessive use of force and Robert went through several different people and found an expert who had far more hands-on experience and a lot less professorial experience. Brought that expert in, and the experts disagreed with each other entirely and in essence the jury wrote off the experts. His client was acquitted of six of the nine counts and the jury hung on the other three at nine to three for acquittal. The government's busy now trying to figure out if they want to retry the case.

If that expert hadn't have come in there, they jury would've bought the testimony of the intellectual who was offering instead of the person who had actual police experience so bringing that expert probably helped, if it wasn't the clincher it was very close to that for his verdict.

He just has a case that he had CJA, which was an attempt to overthrow the government of Gambia, it has a little blip in the news about two years ago, and there were actually people who died in the actual attempt, I think three people died in the attempt to overturn the government of Gambia, why it was charged in Minnesota you'll have to ask Robert, I have no idea. Now I will tell you that the government of Gambia is run by a horrible dictator and they put together for sentencing purposes, they all plead, they put together for sentencing purposes, a video about Gambia and the conditions of Gambia and the you know ... Basically the reasons why these people thought that they needed to do it, to help ameliorate the sentence. The CJA paid for \$2400 bucks because it there was no way anyone was going in front of Riley with that attempt!

So the two CJA people got \$2400 bucks a piece and the main defendant who was privately retained and they raised some more money and they got some discounts and the judge sentenced them to ... The four defendants to one year, two split sentences at six months a piece and a time served for the final person who had turned over and agreed to testify. Look, Katherian pointed, probably her client! Public defender always rolls their clients! That's why they get the best sentences! Sorry, shouldn't have said that.

But what I'm saying is, this is the same district that the sentences are coming

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out for you know, eight years, ten years, twenty years, for people who were going to fight to kick the Ethiopians out of Somalia, so in other words, the difference in being able to make that presentation helped give the judge an out to not have to follow his colleagues here who are increasingly harsh on these cases, so that's the kind of thing that money makes a difference. Now that one would never have been approved by the Eighth Circuit but there was enough to put it together and at least the CJA paid for part of it but the first one ... I mean the experts are what can win these cases so they won because of spending the money. Money that they might not have asked for, by the way.

Judge Walton: Well, I mean I really have found this discussion helpful, I don't know if this the statistics exist but we can show a comparison between the result that the Defenders get with greater resources as compared to the result that the panel lawyers get with lesser resources but I guess that's something we can look at to see if that does exist, because I think that could be very convincing.

Jon Sands: Well it's been a problem how shockingly low the use of experts and investigators have been on the panel and a good part of that has been the reluctance of courts to approve such expenditures.

Judge Walton: That's true but unfortunately we've also heard that it's just sometimes a perception on the part of the panel lawyers that they're not going to receive the services when in fact, they're not even making the requests. So, you know I'm sure that might be a blow-back that we might get. You know I philosophically appreciate the perspective about wanting independence and why that's important, but I keep grappling with the demise of the legal services corporation and I know we're talking about civil rights as compared to a constitutional right under the Sixth Amendment. But it just concerns me that flying alone could conceivably result in the same consequence.

Alex Reichert: One of the comments that you made there raises a point to me which is . . . and I realize I'm sitting here with three people who decide how this training is conducted, so I don't mean to blaspheme them in any way but I can tell you that some of the . . . most of the young judges and certainly some of the even more experienced judges are often surprised at what services are available and how easy they are to access and that's just simply a training issue and that's an information issue. Part of that comes from the fact that again, our CJA panel are not specialized in any way, they could be handling an illegal reentry one day, a massive drug conspiracy the next day and then an Indian country case the third day.

I think that while many believe that the training is there and the access to these things is there many lawyers are not used to that and sometimes don't know that it's available and I've told them many times, you know this or this or this is available and the people that have been doing these cases for ten

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years are often surprised by that, so I think that there are some simpler solutions in that area that there are a lot of things that are available that simply aren't accessed. Because panel members are not given the training that they need and I really think that more training needs to be done and that more specialization is required on CJA panels as well.

Judge Walton: You initially said some young judges aren't aware, are you saying some young panel lawyers aren't aware? Or judges too?

Alex Reichert: I must've misspoken, I'm pretty sure there aren't any young federal judges.

Monica Foster: I think that Mr. Reichert is actually right about that, I think that ... I know when the numbers came out showing the really extraordinarily low numbers of CJA lawyers that were even requesting money for experts, I was stunned and immediately sort of put that on my list of things that we're going to train about. So I think that there is an education issue there, I think there also may be a culture issue there. I think that with education, hopefully we can get past both of those.

Judge Walton: Just one other question, you indicated the difficulty you've experienced in diversifying your staff, do you have any recommendations about what we should recommend that may ameliorate that situation?

Monica Foster: I think that it would be helpful, sometimes I think that what is helpful is to just recognize the problem so I think that if you . . . if the Committee recognized the problem and provided suggestions on how it could be resolved. I know in our district, one of the things that I've done is I've started a developmental panel and I know that that exists in some other places as well. But we train the developmental panel, we go out and we seek those people out and we are seeking out younger people, people of color and women because our panel is really so older, Caucasian and male.

I have some problems in my district though, because of the differences between state and federal court, getting young people to want to come to federal court, even though the pay is much better than in state court, for the simple reason that it is perceived that it's an unfair system, because as I mentioned earlier, we have full civil discovery in state court in Indiana and so for them to switch over to a federal system where the Jencks Act is applied in our district, and you don't get information until the eve of trial and when you put that on top of young people who are struggling to learn the system to begin with, they're frequently overwhelmed. So we're working really hard with our development panel and that they may be something that the Committee would want to recommend that the Defenders . . . to the extent that some of them may not be, that they work on that.

But I think recognizing the problem and encouraging solutions is a good first

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step. I would also say that the Defender Organization has been very, very proactive I would say in the last eighteen months in doing training on implicit bias in the justice system as well as reaching out and trying to hire more diverse people, not just on our panels but also in our offices. I think that there has been great strides made in that area, again that was an education issue I think with many of us and we're working on it and I think we could use the encouragement of the Committee.

Judge Walton: Thank you. Thank you Judge Cardone.

Jon Sands: Judge? As DSAG we have encouraged and mandated that our training have special sessions on race and bias both in the criminal justice system and in the workplace. The Defenders have been approving and have been very good about going out and diversifying our offices. More can be done but we're aware of it, the same with the panel. Turning to your questions about the fears of the legal services, one . . . only those who risk going too far will know how far that they can go. We are not saying that tomorrow at the end of the tenure of this Committee that we will leave the AO, but that is a goal that we have to strive for and in our letters that I've sent, there are these specific goals that this Committee can recommend which will help us toward achieving a special relationship within the AO. I won't repeat them, they were in my opening statements, but that would be a halfway house let's say.

Judge Walton: Thank you. Thank you Judge Cardone.

Judge Cardone: All right, Dr. Rucker.

Dr. Rucker: Thank you Judge Cardone I'd like to ask a series of short questions and then give other people time if we can. One of the things I wanted to ask about came up yesterday and we've heard a little bit today about it as well, and this is issues of getting representations on the Native American, the reservations. We've heard from people yesterday saying that there were panel members who did not want to take those cases. Are you seeing that in your districts?

Alex Reichert: I actually find that in our district, people are longing for them because they are very interesting cases, that's certainly been my experience that I would rather have more of those cases, I'm tired of multi-defendant drug conspiracy cases and child pornography cases. I would much rather see cases in Indian country, I think that there's a lot more good that a person could do. If I'm going to be getting paid less and working harder, I'd just as soon do something that I really believe in and that's Indian law cases for me and Indian country cases.

But again I think the problem there is a lack of training in that area, it's intimidating. They are very . . . it is the most complex area of law that I've ever dealt with and when I went to the Supreme Court I couldn't believe the

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morass that was federal Indian law and so to expect somebody new or young or somebody that . . . you're not going to have a lot of paying cases in your portfolio to draw on, when you go into that. Whereas in a federal drug conspiracy case, I do those all the time in private practice, so it's not a huge leap for me to go into federal court and do that as a CJA counsel. But to do an Indian country case, it's starting from square one and for me, I've been immersed in it for decades, but for others it's very intimidating.

Jon Sands: Most of the Indian cases come to the Federal Defender, when we do have to panel out they are taken by the panel but it goes to the fact that we need experienced panel members to do these homicides, aggravated sexual abuse, child abuse.

Daniel Scott: In Minnesota it's a relatively small group of the panel who gets those cases. As you've heard several times, the Federal Defender selects out and so they keep the number of lawyers who take those cases from the rest relatively small so that they can get enough cases and get enough familiarity with the reservation. It is a complex field, I was in the Eighth Circuit a year and half or so ago and they were arguing about I think whether a railroad right of way was diminished out on the reservation or not and I will tell you, I was sitting in the back and saying, "Boy is this a loser," and . . . especially in front of Judge Loken, and they came down in favor of it and said that they hadn't proved it was part of the reservation, so that it's really ... It's a field you have to keep narrow because it's a specialized field. It's another reason not to have random assignment cases, that's all you have is one Indian case after another. Which may be true now that we're getting two more reservations, retro-seated here.

Monica Foster: Even though I'm from Indiana, we don't have any Indian reservations.

Dr. Rucker: Let me shift to some money questions if I may. One of the things that we've heard repeated out in our hearings is the hourly rate and that it's not high enough. You've got four different districts in front of us now, where would you recommend the hourly rate being to attract more people to the panel? Higher quality people to the panel. Should there be regionalization or locality pay adjustments for that?

Daniel Scott: I think you should pay the same as you'd pay . . . as the federal government pays for outside counsel and their regular cases. I don't know how much ... You know the judge who used to sit here got held in front of the Senate for some remark he made and I think he may have spend two million dollars of the AO's money, so that might be a little over the top but I think that what the federal government generally pays for lawyers in private practice to represent them, is the number that you should suggest. Because then it's tied to something else the federal government does and with the same assumption, that if you work for the federal government, you're giving them a discount

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because they're the government and because you a Patriotic duty to do so.

I think that it's the same argument that is used to justify the below rate pay for the panel. I think that's the number, I don't know what it is and I think it's a varying number, but a lot of agencies hire outside counsel to represent them and that's what . . . in their regular work and that's what you ought to shoot for and ought to look for and I just don't know the answer to it. But rather than picking a number like \$175, which we've heard bounce around, you know in a few years won't count. The real thing is what does the government generally contract for lawyers and that's what they should contract for these lawyers.

Dr. Rucker: Can I go to Mr. Reichert and then Mr. Sands?

Alex Reichert: Yeah I would concur with that but I think more important than the hourly rate, I think the hourly rate becomes somewhat unimportant unless you raise the cap, I mean the cap . . .

Dr. Rucker: That was going to be my follow-up question but go ahead and address that too.

Alex Reichert: Yeah I think the cap is more important issue because you run into that cap, as was mentioned earlier by Dan, you run into that cap so quickly in every case that if you raise the rates all you're going to do is run into the cap that much quicker. So the first thing you're going to have to do is find more money and then you're going to have to raise the cap and then finally the third thing I think you need to do is raise the hourly rate.

Dr. Rucker: Want to give me a number as far as what the cap should be both for attorney fees and for experts?

Alex Reichert: In that I don't know and I would leave that to the Committee because from North Dakota it's so much different than it is everywhere else. I am certainly in a different market than you are everywhere else and I think that that expresses a difference that needs to be looked at. I also think you may want to look at different caps, whether something goes to trial, what type of case it is, more differentiation in the caps, if you're going to have caps which I think is really sort of arbitrary. When you have such a wide variety of different cases and a wide variety of different dispositions of cases, you might want to look at different sort . . . more classifications for caps as well.

Dr. Rucker: Okay, Mr. Sands?

Jon Sands: The rate needs to be raised, the Defender Services Committee and the Defender Services Advisory Group, it's very hard not to speak in acronyms, have asked the administrative office to raise . . . to present to Congress

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raising the rates and each to the fully authorized level that Congress has set and the Administrative Office and the budget committee have not, it wasn't prudent. This is one of our contentions with the AO.

The issue of locality pay is one that bears study and that may be something that the Committee wishes to recommend, but what people need to realize is that when a lawyer is paid this amount, a CJA lawyer it goes to her office, it goes to her upkeep, it goes to record keeping, it's not quote pure profit. It goes into everything that the Defenders have paid in their salary.

Dr. Rucker: Thank you.

Monica Foster: I agree with Mr. Sands that the rates should be raised to the maximum that Congress has authorized. I also would not be opposed to locality differences, I think that it is perhaps how you could make up some of it. I mean, if you were being paid say \$100 an hour in San Francisco, that is certainly not the same as \$100 an hour in some rural county in South Carolina. So I do think that there's some merit to locality increases, particularly for large cities where rates of overhead are so much higher, than in some of the more rural areas in this country.

Alex Reichert: Of course, when I talk about locality, you got to be careful. Williston, North Dakota was the most expensive . . . had higher rates of rent than New York or San Francisco, just two years ago. So you have to be careful when you do locality pay as well.

Jon Sands: What is staggering is the cost of experts and we are seeing those escalate quickly. For a time it sort of stabilized during the great recession, but now to get a good psychologist or neuro psych, you are spending several hundreds, \$400 or more all because they have more work than they can take and so they will go to who will pay them. The U.S. Attorney can afford to pay various experts and surprisingly we see the cost escalating with forensic accountants and those type of experts as well.

Dr. Rucker: Thank you Judge Cardone.

Judge Cardone: All right, how about here in the back?

Judge Fischer: I have nothing to add.

Judge Gerard: I have nothing to add.

Judge Cardone: Okay, Ms. Brenner

Arin Brenner: This question is primarily for Jon but anyone may weigh in, Jon I can't help it, I'm going to throw some T. S. Eliot back at you, he said, "For us there's

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only the trying, the rest is not our business,” and my question is if the Committee were to take that to heart, knowing what happened to the Prado Committee Report, you’re recommending that we recommend independence. Knowing that they may not be pragmatic or politically feasible would it be worthwhile for the committee to still make such recommendations? And why would that be helpful to Defenders say, for us to make a recommendation that we know may not be implemented in . . . anytime soon.

Jon Sands: Does the Committee want to end with a bang or with a whimper?

Judge Cardone: We just want to end!

Jon Sands: We could keep going with the hearings! It is a principle that the CJ Act had and it is a principle that the Prado commission are articulated, there is nothing wrong with a committee saying this, in a perfect world, would be the best possible model and to achieve it, we need to do these steps to get there. It’s one thing to recognize the difficulties, but that doesn’t mean you should shirk away from what is right. You can do a certain . . . you can do some core principles about what is needed . . . I don’t have a phone on, I really don’t.

Certain principles what is needed and say that over time, this is what we should strive to, but this is what we need immediately.

Daniel Scott: As I said in my written materials as well, don’t forget the small stuff! Because if the big doesn’t go through, the small stuff is what’s going to have the long term effect and there was a laundry list in Judge Prado’s report and we accomplished a lot of those things on that laundry list, even if the big thing didn’t get done. I’ll admit, I was one of the people who was opposed to the big thing.

Judge Cardone: Anybody else? All right, thank you very much, my goodness, we are right on time, or very close. I want to thank all of you for your appearance here today, I want to let all of you know that if you have any further thoughts, anything you would like to add please do so because I know sometimes these conversations stimulate some thoughts. I believe, it was Judge Prado, asked you but that goes for all of you, if you have any documentation that you can submit to us to sort of support some of the things we’ve talked about. We really welcome that because we’re all about facts, I mean it doesn’t do us any good to hypothesize without some facts to support it, so we would appreciate that. Once again, thank you for your time, we appreciate it.

Jon Sands: Thank you.

Alex Reichert: Thank you.

Daniel Scott: Thank you.

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Monica Foster: Thank you for your work.

Judge Cardone: I need to ask the Committee a question real quick and we take a break. I think we're going to start our last panel for today, it's originally scheduled to start at 3:00, we may be starting at 3:15 because we're waiting for one of the judges, but I will let you know in just a minute.