

Ad Hoc Committee to Review the Criminal Justice Act
Public Hearing #6—Philadelphia, Pennsylvania
April 11-13, 2016

Transcript: Panel 10—Views from Federal Defenders

Judge Cardone: I thank all of you for being here this afternoon. We're going to start from, with each of you giving us a very brief opening statement. We've gotten written submissions. The Committee has had an opportunity to review them. If you could make a brief opening statement, and then from there, we will go into the questioning.

We are on the last panel "Views from Federal Public Defenders." Let me introduce. We're going to start with Mr. Edson Bostic, our Federal Public Defender from the District of Delaware; Mr. Richard Coughlin, Federal Public Defender from the District of New Jersey; Mr. Michael Desautels?

Michael Desautels: Desautels, your Honor.

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Judge Cardone: Desautels, Federal Public Defender at the District of Vermont; Terence Ward, Federal Public Defender from the District of Connecticut; Deborah Williams, Federal Public Defender from the Southern District of Ohio; and Jim Wyda, Federal Public Defender from the District of Maryland. We'll start with you Mr. Bostic, if you could go ahead and make a brief opening statement.

Edson Bostic: Thank you, Judge Cardone, and I thank the entire Committee for giving me this opportunity to speak to you. I started my career as a volunteer lawyer to the Public Defender's Office in Broome County, New York, as I was studying to take the New York Bar many years ago. It was there that I found that I had to dedicate myself to criminal indigent defense.

I also went through and had a very diverse career including some time in a law firm, and also practicing as a solo practitioner and being a member of the CJA panel in the District of Pennsylvania. Then I spent about twenty years in the federal defender system as a crime supervisor initially . . .

Judge Cardone: Can I ask you to pull the microphone a little bit?

Edson Bostic: I'm sorry. Then, as a federal defender in the District of Delaware, and in my letter, I said that there needs to be something changed. Then I said, however, I've had the greatest experience, support and ability to get what I believe is necessary for a defender office to do in the District of Delaware. Good relations will fall to the stakeholders there. In Delaware, they have not been much concerned about cutting vouchers. Indeed, when CJA council asked for experts, there are ways we can get those approved very quickly and easily. They don't always ask for them as often as we'd like, but we

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don't have that tension.

Nonetheless, I have seen things and I've heard things around the country that make me believe that it is necessary that we have some things to change. In my submission to the Committee, I did not identify exactly what that change should be. That is because I have struggled mentally, we're trying to figure out where we should be, whether we should be totally independent from the judiciary or whether we should be in a land where DSO, I'm sorry, the Office of . . . ODS is generally what we used to say, be re-elevated and have more independence from the judiciary to help run the national defendant program. I continue to struggle.

I believe, however, that the best that can be accomplished at this time will be the enhanced ODS entity that many have discussed with you before, but I think they ought to be with the knowledge that there will be a transition period towards something even more independent and more stand-alone. Thank you.

Judge Cardone: Thank you. Mr. Coughlin.

Richard Coughlin: Thank you, your Honor. I want to start by thanking the Committee for the monumental and punishing schedule that you've maintained. I know you've been in Philadelphia for the last three days and have had hearings elsewhere around the country and really appreciate it.

I'm the Federal Defender in New Jersey. My office is actually right across the river in Camden. I started to notice that nobody came and visited, or expressed an interest in coming to Camden. My feelings are a little hurt about that, but I understand. I also live in Philadelphia, so I hope you've enjoyed your stay here and that you have been able to get out and see a little bit of the city.

I will keep my remarks brief. I've read a lot of the submissions. I've watched hearings online. I was here late yesterday. I came in to watch the last panel of the day. Basically, I have . . . some of it has caused me to reexamine some of my thoughts. I've learned a lot from what I've read and what I've heard.

With respect to the basic overall question, the global independence, I've come out basically the same place in my modified Stockholm syndrome position which is this restoration of Defender Services, restoration of the office and restoration of the Committee to its former status, along with other changes that would, I think, help correct a lot of the problems that have occurred in the last couple of years, some of which, I think, are due to the structure. I think they can be overcome with some modifications and with better communication.

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The system that we've got or had is not perfect, but I don't think that the remedy of complete independence is worth the risks associated with that model. I'll defer my further comments about specifics to any questions you might have.

Judge Cardone: Thank you.

Michael Desautels: Good afternoon. My name is Michael Desautels. I'm the Federal Defender in Vermont. I practiced also in the Northern District of New York for about eighteen years in a law firm but much of that time also on a CJA panel there. I also worked in a Federal Defender Office in Southern West Virginia for a few years.

I've taken a stance on positions about separateness and about the anecdotal information that CJA attorneys have talked about, about just conflicts in terms of presenting voucher request or request for investigators and experts in that to judges. That's been talked about really jointly and I think accurately, so I'm not going to address those here. Those are in written comments.

I just realized after hearing a lot of the testimony here and reading some of the submissions that this Committee, obviously, by taking all this time, putting all this energy and a part of the reason for doing that is that there's a huge audience out there that ultimately this Committee is going to address. I think the audience needs to know some really important points that I've seen sort of crystallized over times since the late 1980s when I started practicing.

One is that the type of case that we're talking about that gets assigned, either to a Federal Defender Office or to a CJA attorney, has increased in complexity just many times since I started getting cases in the 1980s. It was viable for me as a young attorney to get a case without training; without a training panel; without a mentoring panel.

Sure, I was smart enough to know to talk to a more senior lawyer. What do I do about this issue? The issues just weren't as complex as they are now with regard to categorical challenges. Do I have to go back and seek a vacate of a previous conviction in order to even to address the Guideline challenges in front of me now, the computer issues; the electronic surveillance; analogue drug cases. We have to bring in experts; witnesses like that. Those are examples of the complexity that's increased greatly.

I think that it's fair to say that the percentage of people who are charged with crimes, who are represented by CJA people, whether it's through the Criminal Justice Act, whether it's through the Federal Defender Offices or the panel attorneys, it has also increased in not only numbers but in the

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proportion of. I don't know that the public knows that so clearly.

Number three, I see across the country—certainly in Vermont, and I'm sure across the country from what I understand—a really high caliber of attorney on the Criminal Justice Act panels. Why would somebody be in a law firm in New York City as a partner and be clamoring to get on the panel? A part of this is because the work is interesting; but part of it is because people really want to be high-caliber attorneys, in a high-caliber practice, and that's where they do it. I don't know if the public knows that.

I think that to then translate, those are all, let's assume those are facts if they are, and therefore a rate increase, for instance, one remedy that this Committee is looking at obviously as a suggestion, that that translates into a necessary rate increase, that's a tough sell to the public. I get that. I think that's part of the overall job of reporting to Committee obviously, but I think that's just a really important point for the public to absolutely know.

When one of the panelists in the last session said, quote, "There's so much of what we do in this work that judges never see," I think that's absolutely true, but I think even more true is the fact that the public has no clue about that. I hope that the report that comes out of these committees were to take those factors into account. Thank you.

Judge Cardone: Thank you. Mr. Ward?

Terence Ward: Thank you for inviting me, your Honor. I'm the Federal Defender for Connecticut. I've been the Federal Defender since 2012. I've worked in the office from 1990 until 2012, and for eight years before that, I was on the panel. We have . . . we're a small office. There are seven AFPD's. We cover three seats of court plus a submarine base in Groton, Connecticut. We have a remote detention facility that's about four to five hours away.

I think that my office is actually an example of what an adequately, not lavishly, but adequately funded office can do. Building on what Mr. Ricco has said earlier, things that judges perhaps don't see that affect the administration of justice in the district in a positive way.

We have the ability to look at some systematic issues that panel lawyers on individual cases can't do and that the private are, due to just the lack of, and a client could pay for such things could do, and I'll give you an example. In 2006, after some months after *Sheppard* was decided, our office undertook the project of examining the regulatory history of every drug that has ever been regulated by the state of Connecticut, comparing it to the federal schedules, also comparing local Connecticut state court practices to federal practices with the result that we found that the Armed Career Criminal Act; § 851 notices.

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Career Offender notices things that depend upon prior state court convictions, meeting certain criteria to be qualifying federal predicates, that we found the Connecticut regulated drugs that were not on federal schedules, that Connecticut had practices where charging instruments did not specify the drug that people were pleading to; just sale of narcotics.

No one, by the way, in the seventeen years of the Guidelines and the mandatory minimums; no judge; no writer; no law professor; now lawyer had challenged whether a sale of narcotics conviction in the state of Connecticut could count as a federal predicate because it just seems so obvious that it could.

As a result of our work, I think that, if I have the numbers right, that since 2006, the government has only been able to make fewer than ten Armed Career Criminal Act cases stick against our office, that no § 851 notice has actually doubled in the mandatory minimum against the client of ours since 2008, that we've had, we've talked to panel how to do these challenges, that I heard Kathy Nester and Lisa Hay testify out in Portland about the back-end savings that our offices can generate; hundreds of years of incarceration that were not imposed as a result of work that we've done.

I don't go home at night thinking I've saved the BOP some costs or that I have saved the taxpayers some money. I go home thinking that I've saved . . . I go home thinking two things; that I have saved my clients years and years of unnecessary incarceration, and that I have let judges be judges. Many judges have thanked us for our work saying that they otherwise would have had to impose a sentence they thought was dramatically unfair.

What sequestration exposed though was how vulnerable we are, that the kind of work we did in that *Sheppard* challenge which, by the way, this was nights and weekends, and holidays for months, but we were, again, adequately funded, so that we could still maintain our caseload and make a challenge like this.

What sequestration did was took away one of our lawyers. It imposed furloughs on our offices. The kind of high-level that we were doing, all of a sudden, became a struggle just to cover three remote seats of court and a remote detention facility, and a submarine base that is an hour away.

I am, by that experience, I am in the camp of people who, I think, support DSO "plus." I'd like to turn back the clock a little bit prior to sequestration; elevate the director of the defendant services office back to a directorate; to have more of a voice in the budget to put the Defender Services Committee back in charge of taking care of developing our budgets.

I would just add one thing; that the reason I'm not for "big I" independence

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or for a greater degree of independence is that I've come from a state where we have a public defender commission for the state public defenders, where the governor appoints one member of the commission. The Speaker of the House appoints one or two. The President Pro Tempore in the Senate appoints one or two. The Chief Justice and the Supreme Court appoint them.

The experience, I think, is that that office is always understaffed and underfunded, that the Thomas Commission which was appointed by the Connecticut Supreme Court in 1990s found that the average state public defender handled 1900 cases per year. As juvenile lawyers who are special public defenders, when I was in private practice, I looked into doing that work. They were paid \$10 an hour.

I'm not . . . the other example is our state Legal Aid Society handles housing matters and other civil matters. The legislature came up with, at that time, what they thought was a brilliant idea to fund them with IOLTA funds, the Interest on Lawyers' Trust Accounts.

During the real estate boom in Connecticut, that was great. Legal Aid was flush. In the depression that's followed since, Legal Aid is struggling. When I go to the legislature to say, "This isn't adequate," it's like well, "That is too bad." I'm not for "big I" independence, but I'm happy to take your questions. Thank you.

Judge Cardone: Thank you, Ms. Williams?

Deborah Williams: Thank you, and thank you for inviting me. I think I'm the newest defender in the system. I've been in the Southern District of Ohio exactly one year this month. Before that, I spent twenty-seven years in the District of Arizona. Currently, I am the interim defender for the Northern District of Ohio, just keeping his chair warm while Colonel Newman wraps it up with the Marines and gets up to Ohio to start his new job.

I also had the honor of doing some panel training in the Virgin Islands a few years ago. I've had the ability to get to meet a lot of panel lawyers. I knew and worked around the panel lawyers a lot in Arizona. I am in the process of meeting and getting to know the panel in both districts in Ohio and met the panel in the Virgin Islands. I've heard from a lot of them over the years and more recently, and have heard of the problems they're dealing with and the common themes as you've been hearing over the past many months are vouchers; experts; jail issues; training.

I have very serious concerns on the issue of independence. I think it's critical that we have financial independence from the judiciary. I think that's one of the biggest problems that is facing the judges and the CJA Act; the CJA lawyers right now; that I've practiced in front of a lot of judges over

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the years; and I respect them greatly. I know they take their oaths very seriously. They do everything they can to avoid conflict and appearances of impropriety.

I think the current system that exists in a lot of districts where they are selecting the lawyers for the cases and they are being asked to review and approve or not approve the vouchers for the lawyers they pick for the cases they put them on, I think it puts the judges in a horrible position. It puts the lawyers in a horrible position. That system, in my opinion, should be changed.

As I said, I strongly support financial independence, and especially, after having had the experience this morning of listening to the folks who once worked in the AO in Defender Services, after hearing them testify, I think I have flip-flopped several times just in the past three days, but after hearing them I did one last flip-flop. I was so taken and so impressed by what I heard. I learned a lot this morning.

I believe we need independence. Please don't ask me what it should look like because, to be honest, I don't know. My deepest fear, because I love this system, it is my passion. I love what I do. In the political climate in which we live now and probably for the foreseeable future, the one thing I know I don't want is to wake up in the morning and be the next Planned Parenthood. That I think is my deepest fear as we continue to discuss independence. With that, again, I thank you for inviting me. I will do my best to answer any questions you might have.

Judge Cardone: Thank you. Mr. Wyda?

Jim Wyda: Hi. This is maybe one of those moments where everything has been said but not everyone has a chance to say it yet. No one can feel comfortable about an indigent defense system that's managed by the judges but for whom the cases are resolved. Count me amongst the votes for independence.

That wasn't my position when I was named the defender fifteen years ago. It's changed for a handful of reasons; but most of them I think you know already. The sequester experience was scarring for most of us. I will never forget having a meeting with my office staff and telling me that I was . . . I have been told to prepare to cut 33% of them. I didn't think our office would survive as an institution. I have been instructed to have that meeting with my staff.

When we were saved by a compromise, the savings nearly killed us. We lost 12% of our staff and still suffered a month's worth of furloughs. This sequester fallout for DSO and DSC you know about. I've also had the opportunity to work on many national committees which is sort of I guess

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enriched my perspective beyond Maryland.

Inevitably those meetings where Reuben is present and “Judge Chip” is frequently present; devolve into discussions about haves and have-nots within our system. What can we do about the immigration districts; the districts of immigration practices in Texas versus those in the Ninth Circuit in Arizona in terms of getting them staffing? The same thing and frequently in the same circuits, how can we properly fund CJA lawyers, CJA cases and the disparity between the circuits, districts and within districts.

Also locally; again, I think I’ve made it clear in my letter. I do feel lucky to be . . . in my district, you’ve met Judge Blake earlier. I feel lucky to have Chief Judge Blake in my district, supportive of our office and the CJA. I think we’re kidding ourselves to think that they’re still not a systemic problem that chills us from pushing back against even good judges.

I think most defenders . . . I will certainly admit that when I wrote my testimony, I thought about how it would be perceived by my judges in the District of Maryland and in the Fourth Circuit. I promise you that really good CJA lawyers are reluctant in my district to push back against decisions from our courts about their CJA budgets or their CJA vouchers being cut because judges wield an incredible amount of power. Not just in the decisions that you guys make in terms of litigation, in terms of appointments, but there’s all the indirect power where lawyers just don’t want to be held in the bad graces of the local bench. There is a great deal of reluctance to push back.

As others here have said today, I’m worried about the remedies. I’m uncomfortable with the alternatives, but I’ve come to believe that we have to have systemic change. Perhaps a thing that best captures my view on this is our lyrics from a rock song from, when Reuben and I were in law school together, there was the English group. The Clash had a song where the line was, “If I go, there will be trouble. If I stay, there will be double.” It feels that way . . .

Judge Goldberg: You know I’m going to ask you a lot of follow-up questions about that.

Jim Wyda: I’m pretty sure I heard that song blasting from Reuben’s sound system in our first-year dorm. Again, I assume I don’t have to explain the metaphor. I’m uncomfortable with where we might be going, if we have dramatic change, but I’m more uncomfortable with staying where we are. The current model seems to me isn’t fixable because of the conflict at its core.

I want to echo what other folks said. I’m blown away by the diligence and the hard work of this Committee. We know what the problem is. The Senate had in their legislative history when they created this; the awkwardness of

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this model. The Prado Committee commented the same way. Our community is looking to this Committee to do something about it.

Fairness and delivery of indigent defense services is too important not to fix. To create change, I fear that the change that we . . . I anticipate that what we're going to need to fix that is dramatic and systemic change. Thanks.

Judge Cardone: Thank you. All right. We're going to begin with the questioning. We'll start with you Mr. Frensley.

Chip Frensley: Thank you. Thank you all for being here. Thanks for everything that you do. When we talk about independence, a lot of what we hear is the fear of independence and the fear of what could happen. I'm wondering if . . . one thing we don't hear a lot about is sort of what do you perceive to be the benefit of independence in terms of how it affects the practice of law?

I'll just ask anybody on the Committee who wants to start or on the panel who wants to take that one and say what you would perceive to be the benefit of independence? That's however you perceive independence to be; inside, outside or whatever it may be. Jim?

Edson Bostic: Let me just state this real . . . Oh, I'm sorry.

Chip Frensley: No, go ahead.

Edson Bostic: Briefly that I think in my letter I said I have that good, both in my district and in the circuit. I believe the CJA lawyers do also. Yet, I still hear that lawyers are all unwilling to file that request for an expert, especially if they end up not using the expert for the purpose of this crime, and that the conflict is real and exists.

It exists where perhaps a member of my office may need to file a recusal motion and determining how best to file that, for example, not that any judge would have ever in the past complained about any motion or any litigation that we've had, but you still go through the thought process. I believe that something different is needed. I don't know what independence should look like. As I said, I do believe that some kind of transition is necessary as we determine exactly what independence should look like.

Chip Frensley: I'm not necessarily asking the question about what do you think the structure of independence should be but I want to know what you think the benefit of independence would be?

Richard Coughlin: I think having some confidence that the office is going to be funded year to year and that within whatever the structure is that you've got a meaningful

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voice in what that funding is going to be. You have an opportunity to participate in that formulation that, as it relates to bigger or substantive questions about whether it's sentencing or criminal law in general that you, that there's a mechanism to weigh in on those issues and be able to . . . demeaningly participate in that process as well, and to do so without fear of repercussions.

Mr. Bostic just mentioned being concerned about motions to recuse. I don't . . . some of the issues that have been identified, like concerned about that, if I was in private practice, regardless of whether I was representing a client who was paying me or not, I think you're always going to tread likely in those sort of areas and you want to maintain those relationships.

I'm not sure that those and a few instances that in my, like I said, eighteen years, nineteen years as the defender where a line was crossed. In my view, it would have happened . . . it wasn't the structure that gave a judge the permission to do something that I don't think they should have done. It was just a judge with a particular reason for doing it based on some other relationship.

It didn't . . . I think sometimes there's a confusion between the two. We tend to think of ourselves as being under fire because the judges, in either as a federal defender or as a concern about the judge affecting the board, being able to weigh in. That doesn't seem . . . to me that's not the issue and it sometimes confuses things. I think to be able to participate in substantive law change and issues and funding is what I'm looking for in independence.

Chip Frensky: Let me impact the question a little bit because maybe it was too broadly asked. I'll ask you Terry because you've talked about your experiences having been a panel lawyer. One version of independence may be that panel lawyers no longer have to go to the judge who appoints them in the case to ask for expert services, and instead, they go to someone who is maybe a supervisory attorney, or an administrator, or something like that who has a background in the practice, okay? How, if at all, do you believe that that would affect the performance of their work?

Terence Ward: I think that . . . I've advocated in the letter I wrote for case budgeting attorneys to be spread to the district courts as well. I think that lawyers would be more inclined, I think, to ask for or to work with a case budgeting attorney to explore the use of experts than they would to ask a district judge who's presiding on the case. Can I have this expert, let's say, a psych expert?

Then, you've got the report and don't submit it. I think everyone realizes the report was bad. I think there'd be more freedom to, as I said, to explore the use of experts if the judiciary were not involved in, or at least the judge who

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is presiding on the case, should not be involved in that.

Chip Frensley: You would think that's a positive, right?

Terence Ward: That's right.

Chip Frensley: Jim, let me ask you, because you have experience on a national level dealing with issues, that judiciary has a part of it that liaisons with Congress and takes policy positions on some things. There are issues that come before Congress all the time that would affect our clients and affect our program, but our interest as defenders may not be the same as the interest of the judiciary. You can see the conflict as far as deciding whether a position is going to be taken.

If there was independence to the standpoint that the defense function was able to articulate a position and advocate for a position in Congress, that judiciary may not do so, how, if at all, would you see that form of independence benefiting the defense function?

Jim Wyda: Again, in an ideal world, and again, I've realized that's a difficult gap, but I think that's what our community would most want. DOJ certainly has it. We would like to have the ability to have that impact. Clemency work is an example of where we were denied the opportunity to do work that we thought would make a big difference for our clients and we're denied that opportunity. We would probably want to advocate for a legislative remedy for matters like that. Can I take a minute to address your broader question that you've mentioned at the beginning?

Chip Frensley: Yeah, certainly.

Jim Wyda: What motivates me and I think what probably motivates all of us as we're trying to sort this through, the reason why I would love independence is I think it would make a difference for our clients. I think you've heard the evidence over and over again in terms of through the defenders in Texas who drew the contrast between how they're funded versus the District of Arizona is funded. You've talked about the chart with the use of experts by CJA attorneys. My district, I think, is doing well compared to its peers. I think we're in a little bit over 20%. That's not very good; the fact that 80% of the CJA attorneys, the CJA representations in our district don't have an investigator; yet an expert.

I would hope that we'd be able to improve this system, so that we can raise that bar. Again, the question that I think Reuben raised at the end of the last session, one of the ways I evaluate my lawyers is if you're not using experts, there's a problem. There's either a lack of energy there, a lack of creativity or a systemic problem in my office that, in all of your cases,

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you're not using an investigator or an expert. That means you're just taking what the government gives you. That's not what we do.

Chip Frensley: Thank you. One suggestion that we've heard as an alternative is to move the functions of panel administration and voucher review, expert approval, that sort of thing, into the defender's office. That could take several forms. It could either be the defender or defender employee, or it could be a panel administrator, or somebody who is somewhat walled off, if you will. I was just wondering if any of you have thoughts or perspectives about that in terms of, number one, its feasibility and, number two, its impact on the functions of the defense?

Terence Ward: Here would be my fear. It's that if we had to go through another sequestration that I want . . . I have a small office and everyone is sort of a jack of all trades. I need every one of those people. If sequestration came and we had a panel administrator or whatever you want to title the person, we didn't actually do any work for our clients but it was strictly for the panel. If I had to have a cut, I'm sure that they would not let me cut the panel administrator. I'd be cutting a lawyer or a paralegal or an investigator that's worked for my clients. I don't want to be in that position.

Chip Frensley: Sure. What if that position were sort of separately funded or a different appropriation from the defender; your office appropriation but just housed in your office and receive whatever support or osmosis or whatever it may be in the office?

Terence Ward: I would just be afraid that even if it started out that way, that if a new sequestration came, that the roles would change. They would say, "No, you have to cut X number of dollars from your budget, and we're not going to separate out people, but you can't lose that person." I'd just be afraid that it would morph over time and that it would end up hurting my clients.

Chip Frensley: Anybody else have any thoughts from that issue?

Deborah Williams: Yesterday, a woman spoke . . . was she from AJ's office? The panel administrator?

Committee Members: Western District of Washington . . .

Deborah Williams: Okay. Over the past year, I've heard several other defenders talk about having panel administrators in their office, even people who are doing the voucher reviews and how they have walled them off and made sure they have complete independence even from the defender to allay the fears of conflict.

In Arizona, we administered the panel but that was one piece we could

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never really wrap our minds around, if we don't do the voucher review; don't want to do the voucher review because of the inherent conflict. It sounds like, and I know you've heard from defenders who have done that, there are ways to do it.

I think that is a very feasible alternative, assuming there was a way to get that position into an office, because I have "work measurements", spinning around in my brain right now, so it would have to be a position that would somehow get funded and come to us from the outside, so it's not to be subject to work measurement and future sequestration.

Chip Frensley: I'm not sure who has case budgeting attorneys in their circuits, but the case budgeting attorneys are funded through the appropriation of Defender Services, yet they're court employees, and since a model like that might be something that would be an option, I'm curious though, do you think that the placement of that individual, and let's just set aside Terry's concerns about funding right now.

Let's assume . . . do you think that the placement of that individual in the Defender's Office would give that individual more legitimacy and credibility than the placement of that individual within the clerk's office or do you think it matters? For anybody who wants to comment.

Deborah Williams: My main, somewhat knee-jerk reaction is that it might give some more credibility being within the defender's office. At the same time, it might make some people question, "How can you be avoiding conflict if you've got a codefendant with me and we have a twenty-person case?" I don't know.

In Arizona, many years ago, they brought in, the court brought in a lawyer to do voucher review and set up a system, and I honestly don't know if he's still there, but at least for a period of time, I heard from the panel lawyers that it did create some relief, but that was quite a long time ago.

Edson Bostic: I think that . . . oh, sorry, go ahead, Richard.

Richard Coughlin: I think that the current system is awful. I think having it in my office would be less awful for, because there are risks, I think, associated with it in terms of appearance and conflict. I'm in New Jersey and I would be concerned about suddenly being invited to all sorts of beach houses, golf clubs and showered with gifts and . . .

Chip Frensley: Concrete shoes?

Richard Coughlin: Yeah. Then, you have to . . . it's got to be checked for a wire and so forth, so if it gets complicated. It would be . . . look, if it took the judges out of the

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business of reviewing a request for experts and investigators and so forth, I would take that on. I think that I would take it on because I think it would help the system. I think it would help the clients immeasurably.

I'm in a district where vouchers aren't cut. Expert services; I look at the numbers. I'm not quite sure that they match, but the clerk's office tells me, but whatever. We've done a lot of training on using experts and getting people to use experts, and within the last couple of years. The amount of money spent for CJA experts in New Jersey was one-half of the total for the circuit in 2014 and/or two-thirds in 2014 and one-half last year.

Even with that, I know that they don't ask for investigators as frequently as they'd like to because they don't want to go through the paperwork. They don't want to reveal what exactly they're doing. They're uncomfortable with making a sort of more general request when they don't, when they can't list the witnesses that they'd want interviewed but they'd still like an investigator or someone to go through and work with the client with them and don't want to explain that to the court.

All of that, not being able to do that, hurts clients, and it makes the practice much more difficult than it should be. I think, preferably, it would be something independent along the lines of a case budgeting attorney, but if you put them in my office, we'd work out something.

Chip Frensley: Thank you.

Judge Cardone: All right. Dr. Rucker.

Dr. Rucker: I may be beating a dead horse here, but can I follow up on that? I'm really concerned about the lack of use of experts. Mr. Coughlin, you just talked about that and not wanting to do the paperwork. What kind of reason is that?

Richard Coughlin: What I mean is in the marginal situations. I talked to a panel lawyer and they called me about case budgeting and about . . . he had some questions. He was talking to the case budgeting attorney in the Third Circuit, Renee Edelman who has been tremendous and been a tremendous addition and a huge help.

I asked him about expert usage; when it is he wouldn't ask for an investigator. It was basically what I just described. If he's got witnesses who have to be interviewed, he'll ask for an investigator and we'll get it. If he had a child pornography case recently that went to trial, he didn't get an investigator.

Dr. Rucker: He didn't get it because he did not ask or the judge denied it?

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Richard Coughlin: He didn't ask. He didn't ask because he didn't have any witnesses who had to be interviewed. The discovery, he felt he would have liked to. What he would have liked to have had an investigator do were a paralegal and, in retrospect, he probably should have asked for a paralegal.

It would be somebody who could review the evidence with him, review the case with the client, and maybe would have seen things that he didn't see. It's more of an amorphous, less task-oriented request that he felt might not be honored. He did get a psychologist. He had a psychiatric workup done. He didn't feel like writing a justification, and \$2500 dollars wouldn't be enough. He'd need more than that. It just . . . it became . . . he felt it was optional; so he didn't. It wasn't necessary. He couldn't describe it as necessary. It would have been good to have.

Dr. Rucker: This makes me think about a number of things. One is the quality of the representation. It makes me wonder about training issues. It's something that Chip has been talking about, Mr. Frensley has been talking about, "Judge Frensley," just the overall use of experts.

Ms. Williams, you mentioned that in your written testimony as well. What we've seen across the country is that the rate of use of experts is incredibly low. If you were doing your staff, you would, I think, and what we've been told repeatedly is have, always have an investigator and a paralegal probably assigned to every case, and yet we don't see that with the panel of attorneys. It really makes me wonder about the quality of representation being provided by the panel when they're not doing this. Is it a training issue? Is it a culture issue? Ms. Williams, do you want to speak to that?

Deborah Williams: Yes, if I may, my panel rep in the southern district went to the gathering, the CJA rep gathering in San Francisco. When he came back, he sent out emails to the panel, talking about some of the things he have been hearing; some of the themes; and also that he had learned that the panel lawyers in my district are well below the national average in use of experts. I can't tell you the percentage but they're well below.

I asked him, "What are your thoughts? Why is this going on?" Because I'm sure there are many reasons. He said, among other reasons, there is a general fear of spending money because there is a concern that the judges, a concern by the lawyers that the judges see them as competing, if you will, for the same pot of money.

Judge Goldberg: I'm sorry to interrupt. Mr. Coughlin and Mr. Bostic, I think, just said, if I heard them right, that in their districts, at least the judges are totally supportive. How does that fit?

Deborah Williams: I think this concern in particular comes from probably not anything that a

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judge is saying outright but a feeling, a perception that is arising when judges make critical comments on requests that are made, and the lawyers start to really key into that and become sensitized to it, or when a judge questions the reason for an expert or the amount requested, there is a self-policing that starts to kick in, and there is a fear of reprisals.

Well the judge said the last time I asked for, let's just say an investigator, I got the impression they thought I was asking for too much or that I wasn't asking too often so now I have another case and maybe I shouldn't ask again because maybe the judge thinks I'm spending too much money. It's, I think perhaps in part of self-fulfilling prophecy but there are repeated themes . . .

Judge Goldberg: We spend a lot of different information from around the country but just within this room I've just pointed at two federal defenders who said their judges are completely supportive. Mr. Skipper testified up and down, judges in the eastern district are completely supportive. Where is this . . . ? We've heard a lot of people say their judges are completely supportive of investigators.

Reuben Cahn: Let me ask a question to try to unpack that because I think this is . . . let's turn to Rich and you talked about a specific case and you said that this person would have liked an investigator, thought it would have helped them in their representation but didn't request it. There's got to be some disincentive because, of course, if there weren't any there'd be so. What'd the disincentive to that attorney to ask for the investigator?

Richard Coughlin: The disincentive is the immediate just filing the papers there is also regardless of the culture of being supportive there is a concern about being judged about what you're asking for, and are you asking for too much, and I think some of that is because of the structure. Some of it is continued fallout from sequestration, general atmospheres in the country about how public money is spent, being concerned that you're going to be identified as somebody who is wasting government money or spending it, not being as thrifty and creative as maybe you should be. It's that . . . in part that general atmosphere that we live in a time when people don't want to fund education, they want to fund infrastructure, they don't want to fund research and development. To have a stand-alone Federal Defender Organization going to Congress and having Congress, members of Congress vote up or down on that specific budget as opposed to a budget that voting on a judiciary budget leads me to . . .

Judge Goldberg: Mr. Coughlin, we can read your testimony, your submission. We make sure it's yours. "Perhaps most importantly, I am not aware of any instances where someone from my office or the CJA panel has ever hesitated to raise an issue or make a colorful argument on behalf of a client because they were

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afraid there may be negative consequences for the office or in the case of panel attorneys their membership on the panel.”

Richard Coughlin: Right and making a colorful argument a, they legal, raising a legal issue, a challenge to a judge’s ruling, whatever it is, yes. I think that’s true. I stand by that. Is there this cloud over the process? Yeah. I think there is. I think even in the best of districts there’s a cloud. I think I said that in my written testimony that there, that this is . . . that is a systemic problem that should be addressed.

Terence Ward: If I could just add here. I went to Quinnipiac Law School this fall because I thought well maybe the reason people aren’t using paralegals is in little Connecticut that there aren’t this big crowd of paralegals out there waiting for work and maybe lawyers don’t know where to find them. I went to Quinnipiac and said, “Would you supply law students or recent graduates, especially in a tough job market and pitch to them this would be a great opportunity for your graduates and law students to connect themselves with criminal defense firms and would you train people to be paralegals?” I notified the panel that I had Quinnipiac standing by with law students ready, willing and able. I’ve had no request for a paralegal. I don’t understand it.

Edson Bostic: If I may. Last year in Maryland I led a breakout talking about the use of experts with a number of DSO and there were many CJA representatives there from around the country and on the defenders and the discussions centered upon, from the CJA representative concerns, fear, fear of asking and fear of not getting time and time again and keep pushing the envelope and fear whether they’ll remain on the panel and that’s what the report is. While I have it good in my district and all of my CJA the panel members were saying, “We ask for it, we get it.” On this report on what was said from people around the country.

Judge Cardone: Can I . . .

Michael Desautels: I’ll report hearing the same thing. Another exact comment the way that Terry Ward explained it, literally people have told me if I get an expert psychiatrist and then the report doesn’t get offered in court or to the judge in pretrial then I’m concerned that the clear take on that was that the report was worthless or at least it wasn’t favorable to the client and then that maybe reflects on the attorney for having gotten or sought an expert that wasn’t worth the consult in the first place or works to the clients disadvantage. It demonstrates that there really is not a mental health problem there that wanted to be advanced and so I hear the exact same types of things.

Judge Cardone: Can I just ask or say, I hear everyone here say, “If we ask for it we get it.”

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What's happening is they're not asking for it. We've tried to discover is it a training issue. From what I hear from here and I think generally it's not a training issue, it is that they're not asking. If you ask for it and you get it and only one person ask and they get it well, of course, they're asking and they're getting but that doesn't tell us . . . we've seen 3% use of experts. We've seen 5% use of experts and so if 5 out of a 100 cases are getting asked for then, of course, they're getting it but it should be 65% so it's a 65% or a 100% where they're asking for as in your offices, would they all get it? Is that what you're all saying? If every CJA attorney that you know in every single case like you have the opportunity to do in your offices ask for experts, are you telling us that the judges would approve that? Is that what you're all saying when you say if they ask for it they get it?

Richard Coughlin: I don't think so.

Judge Cardone: Why do you not think so?

Richard Coughlin: I think that at some point there would be pushback because it's different and it costs money and the judges would be concerned about the appearance of a CJA budget run wild in the District of New Jersey. How it would play out exactly, where the line would be? I don't know but I think if you, if that occurred it would, there'd be pushback.

Reuben Cahn: Let me ask a question to those of you who say in my district if my attorneys, my CJA panel attorneys ask for it they get it which is what you're really saying if they ask for it when they're absolutely sure they're going to get it because being turned down has some negative consequences. Is that's what being said here?

Edson Bostic: That's not what I'm saying. At this point from what I've seen and what I've been told from my panel members where they ask they ordinarily get the appointment of the investigator or the paralegal or what have you and in some cases even a co-counsel or on complex fraud case. That's my experience but as I report to you from what I learned in terms of talking to other CJA representatives from around the country and other defenders as well, that's not happening in their districts. I see rather every CJA panel member ask for expert on every case whether it be sentencing, litigation or otherwise and they'll get it, I do not know.

Deborah Williams: I don't want to speak, if I may from my past experience. All it takes is one maybe two times for a panel lawyer to be told no and then it's review time and a judge says, "Oh that person always wants ABC or D." Then all of a sudden that person is no longer on the panel. That sends a very loud message and it runs wild through the panel and you can bet that request for assistance will drop off immediately because the message is very clear.

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Terence Ward: I think we need to distinguish between experts, paralegals, and investigators. I think in my district it's really been encourage. Jerry Tritz, the case budgeting attorney for the Second Circuit came and addressed the panel at my request and talked about how he views paralegals as a wise use of money that instead of listening to a 100 hours of wiretaps for an attorney at \$125 or \$127 or whatever it is an hour, their paralegal could listen under guidance with we're looking for this kind of terms or whatever at \$25 an hour. He's encouraged it. I think that if any CJA lawyer in my district ask for a paralegal it would be granted. I think of they ask for a psych expert in every case it probably wouldn't be granted.

Jim Wyda: Can I just weigh in for a second? I love your focus on this issue because I think this, how you resolve this issue would unpack the culture issue. My view is the culture is that the system has someone created a culture within the CJA attorneys not to go for it and it's a fundamental flaw with our model. It's certainly my position in my testimony. My testimony is today. There's an anxiety about going for it. There's an anxiety about being rejected. There's anxiety about being high maintenance and that you're either going to get less appointments or get kicked off the panel. Again, I would be, Judge Goldberg, somebody who would say that my court is supportive but I will also tell you that attorneys in my CJA good, really good CJA attorneys, strong CJA attorneys are reluctant to complain about decisions made against their interest in a context of a voucher or in a context of a budget and I believe it compromises the quality of the litigation. I believe it's, on occasion, unfair to the individual attorney in terms of their compensation.

Again, I've had that conversation within the past week with a woman CJA attorney that I admire a great deal and my court does. She had to make a decision about whether she was going to complain about it. She wanted confirmation from me that it was wrong. I gave her that. I suggested that she complain about it and I don't think she will because she doesn't, even with her stature, I don't think she wants to be deemed high maintenance or a squeaky wheel to be complaining about a judge or a CJA administrator.

Judge Goldberg: I'm not quibbling with any of you that that's not a very thoughtful plausible theory but and I interrupted Dr. Rucker so I'll take it back to him which his point was, I think he was trying to say to you, okay, the system as you've explained it, it's inherently setup so it creates the situation where people aren't asking but I think what Dr. Rucker is asking you is, is there another reason? Is it maybe the CJA lawyers aren't doing their jobs? Could that be part of it as opposed to this inherent system, evil system where judges have to approve vouchers? Is that possible?

Jim Wyda: Related to that, again, I would suggest that it's all systemic problem. I think there are probably instances in which there's lawyers who weren't used to

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working with experts and maybe just aren't trained that way, aren't . . . that's still a systemic problem. We don't have the right people on the panel. I guess the other observation I'll make and certainly, probably I will talk to my new attorneys about,, for the most part we pick our battles as defense lawyers and, again, my sense is that the CJA lawyers are not picking the battle to fight over getting an investigator or getting an expert in many of our districts.

Again, I think my district is at the higher end of the numbers and I will stay say it's a disappointing number that compromises the quality of justice in my district and the integrity of the system.

Deborah Williams: I don't necessarily agree in this, I've heard this come up quite a bit today that it's a training issue because across several districts now I see many cases where let's say there's a multi-defendant case and the CJA, a CJA lawyers and the defender is able to get in on the case and stay in, the CJA lawyers are happy to have us why, because we bring resources that they can use. They know that, they welcome it and in my experience I've seen, they know how to use them. I don't think it's a training issue. I agree with everybody that we're talking about a culture issue that has grown over time.

Judge Cardone: Back to work.

Dr. Rucker: I have more questions but let me just ask one. Let me go to Mr. Wyda. In your written testimony and it's sort of related what we're talking about here and it's a cultural thing as well I think. You're talk about self-cutting and we've heard that before by attorneys and I see some of you nodding their head, yes. How prevalent is this?

Jim Wyda: That's wholly widespread in my district. Again, I think any survey, honest survey from our CJA lawyers is either has to do with delays in payment coming from the circuit when you go through that process, which is easier to take whatever the number might be, \$8000, \$9000 and go for \$12,000 but I think there is anxiety about review from the circuit, more so than from our district court where we have a good . . . again, despite what I think is my honesty about some of the challenges it's a good district with a CJA panel administrator and a decent bench . . . beyond a decent bench . . . but it's widespread in my district.

Dr. Rucker: The others would you like to comment on that. How widespread is it?

Terence Ward: I really don't know. I don't have a district where there's a lot of voucher cutting so I don't know if that's because our panel lawyers self-cut. We almost always exceed the cap. We have a remote detention facility that for lawyers just a single visit to a client for an hour and a half is more than \$800. To see a client ten times during the course of the case is going to push

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over the cap. I don't know how prevalent it is. I'm not sure other than serving a panel there would be a way to know.

Dr. Rucker: Ok, I have used my time . . .

Judge Cardone: All right. Reuben, any questions?

Reuben Cahn: Yeah. I'm going to start with you Jim . . .

Judge Cardone: Microphone.

Reuben Cahn: Let me start with you Jim and I hope to . . .

Jim Wyda: Does it have to do with our music taste in the . . .

Reuben Cahn: No. I'm not going to go anywhere that easy. I'm going to put you on the spot a little bit because one of the things we've been hearing a lot about maybe this is an unfair characterization but I'll say timid panel lawyers who were not asking for the resources they need and maybe not fighting some of the battles they ought to fight but in your position as the head of the Capital Trial Expert Panel you had a number of situations with what we've kindly referred to as problem districts with defenders who are not willing to fight to certain fights and not willing to do certain things. Sometimes just recommending appointment of not very good lawyers in capital cases sometimes in their own handling of capital cases not fighting those fight. Could you describe a little bit of you've seen over the ten plus years you've been head of Capital Trial Expert Panel with regards to defenders in those circumstances? We're not asking you to name names but . . .

Jim Wyda: No. There won't be names and again probably with the, in the context of the CJA lawyers but again with the defenders I think people are doing the best they can within their cultures, their hamstrung by the cultures in their district but there is . . . again, the conversations that I alluded to about the haves and the have nots usually comes up in the context of our capital work. I think the Spencer Report bears this out . . . that the disparity between funding between districts in certain regions in this nation versus the funding given in other districts is incredibly dramatic.

Again, I think the Spencer Report makes the case or at least the supplement of the Spencer Report makes the case that it's making a difference in outcomes and again it seems to me it's the core of what I've describe as a fundamental flaw in the system is that we've got a totally deregulated system that turns on individual judges appreciation of the defense function so if you're litigating a capital case in one region of the country, you can end up with a wildly differently funded defense and if you're in my district or in this district or in New York as you heard earlier and again, some of it

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may have to do with the cost of living in this districts but the funding of the mitigation case, the funding of the investigation case is dramatically different, frequently depending on geography and the most often circuit.

Reuben Cahn: Let me, and this would be for those . . . for those of you who are suggesting that what you'd like to see is kind of . . .

Judge Cardone: Microphone.

Reuben Cahn what you'd like to see is DSO plus a return to the Halcyon Days of your, when DSO was ODS and when the DSC had control of the defender program. I want to catalogue a few of the problems we've heard about interference by district judges with defender management of their office, conversions of a CDO to an FPDO, circuit limitations on attorney hires by defender offices, panel voucher cuts which would result in limiting the scope of the representation of the panel lawyers, what we've just been talking about the lack of, the refusal to support or to fund experts be it investigators or other more, what we would more normally term expert.

Circuit judges having budgets in capital cases and improve by the district court judges and finally what you heard this morning from Steve Asin, Dick Wolff and Bob Burke about the institutional conflicts that have limited what the Defender Services Committee and asking for the budgets it believed were needed to support the Defender Services program. What additional structural changes or mechanisms would you put in place to try and address all this problems which have existed prior sequestration, existed prior to the jurisdiction stripping of DSC, existed prior to the work measurement study? What for those of you want DSO plus, what would you do to address to those problems? Terry, let's start with you.

Terence Ward: I would say having sort of grown up in the system for all this years that prior to sequestration I think defenders were generally pretty happy with their offices and the ability they had to manage them. I'm not saying it was a perfect system by any means but . . . I don't know if there's, we've been talking about training meaning . . .

Reuben Cahn: Does this sound like a system they should have been pretty happy with? I mean I just described a system before this things happen.

Terence Ward: I'm not sure that that was uniform across the country . . .

Reuben Cahn: I'm not saying . . . what if happened in 20% of the offices, is that a system we should accept as tolerable?

Terence Ward: Well, we've been talking about training a lot maybe judges should be trained to more appreciate the defense function. I'm not sure the system

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needs to be thrown out to fix the problems in 20% of the offices. I don't know. What I would say is that I was a lot happier prior to sequestration than since and it seems like some of those things that have happened have really happened since 2012.

Reuben Cahn: In the medical community if 20% surgeries went awry and patient's lives were upended and damaged I think the medical community we consider that a systemic problem. We're dealing with people's lives why isn't 20% a failure that's intolerable?

Terence Ward: It is and I think there are things that could be changed. Perhaps in the statute the circuit setting with the number of lawyers and not letting basically the defender decide how many . . . if you have a pot of money, how to spend that money. That could be changed, I think the use of case budgeting attorneys and perhaps taking expert approval away from the judges but the alternative of "big I" independence as I said before I don't think if you look at my state system that that's worked better than what we had before. I think it's much worse.

Richard Coughlin: For the number of years before sequestration at defender conferences and when I was on performance measurement working group. We were told, and this occurred sort of serially that Congress and the budget people in the AO saw a program that was out of control and they were concerned about the ballooning budget and why are these budgets going up so fast and there was request for data and statistics and defenders didn't want to give the data, didn't want to give those statistics and at a history of relying on stories of about what, why we need this money because of what we do and so forth.

There's a real reluctance to allow any data to be released. At one point, the head of the IT section in the defenders services office did a study of that. I want to say it was in the late 90s, early 2000s. He was asked to provide numbers and he suggested this and I also show that we were 2000 FTEs short of what we should be funded at and so that was dismissed and then we did RAND as an effort to provide data and a reason for what and where the costs were going up and explaining that the cases were changing and so forth in the discovery. It was suggested or the impression that we got was, well they must have to pulled their wool over RAND's eyes and convince them that they really need all this money and all this staffing.

Then we went to the heart of this and work measurement studies going to show exactly what's going on and for the most part, for some offices not so much, for other offices probably not much change. For others should have more people. It occurred to me that throughout all that time the defenders never had a seat at the table and maybe it was that other agencies going to Congress were providing data and statistics and that's what the appropriators were used to see and we were getting, instead we're getting it

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on the end from a budget office within the AO that our perception in maybe a slightly paranoid state was out to get us and out to do us harm.

Now, maybe it wasn't all good will and good natured but it seems to me that we should have . . . if we've been involved and had membership on the Defender Services Committee had access to the budget office, had access to Congress, that maybe things would have been different, maybe not but . . .

Reuben Cahn: You're starting to sound like a proponent of independence.

Richard Coughlin: No. What I'm suggesting is that we stopped being treated as if we're court services and that we have a real stake in this and that we should be a part of . . . we should have membership in these bodies. One of the other sort . . . that's occurred to me, that there were questions yesterday about . . . what could we do as a trial, as a model or whatever to test this out and maybe you have a standalone either within the judiciary or a corporation and the lines of PDS that is a national defender office in terms of policy and lobbying on criminal justice issues. Maybe that's the vehicle for an ex-officio member of the sentencing commission and it was a corporation. It's by . . . like PDS, it . . .

The board would consist of federal defenders and other stakeholders. Maybe it would do take on training. Maybe it would take on supreme court advocacy or any number of functions but as I . . . but would not implicate the overall defender budget because that would still be separate. Some congressmen who's just had a bad, a terrorism case in their district who's all that happens to be on the Appropriations Committee isn't in a position where there if they choose or want to make a, want to grandstand or make an issue about the millions of dollars that were spent on the defense in that case.

The defender budget would still be separate. You would get some of what you're looking for from independence in terms of access to Congress on legal issues, access to Sentencing Commission and so forth. You would also avoid what I see a specter of a defender general, somebody who is . . . look, no office is perfect. We should do more sort of introspective looking. You would avoid that top-down, "this is how things are going to be," which is something that I'm concerned about in some of this other models that have been suggested. That's what I thought.

Judge Cardone: Reuben?

Reuben Cahn: Take it away, Judge Goldberg.

Judge Goldberg: Dr. Rucker, I have one question and then you can have my next question if you want. Actually, I have two questions.

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Judge Cardone: Maybe three?

Reuben Cahn: Just one more question.

Judge Goldberg: Just one more . . . famous lawyer . . . just one more question. It's late. My mind was wondering a little bit. I was sitting here thinking. I was looking at my good friend Leigh Skipper in the back, head defender in Philadelphia, six defenders here, my new good friend, Reuben Cahn, sitting next to me, my other new good friend, Katherian Roe. You're sitting in front of a sign that says Edward Prado. That's not Judge Prado?

Surrounded by fellow defenders, I'm a former AUSA, you know what I was thinking, I was thinking thank God, I'm not going to call a cooperating witness to testify right now. This would not go well with all these defense talent here. Here's my one question. If, and it's a hypothetical question. Judges get to ask hypothetical questions and so the Committee members so I have the double luxury of asking a hypothetical question. You have to accept the facts even if you think they are little ridiculous.

Supposed we could effectuate change in the following way; we would take all of the decisions regarding resources away from the judges. There'll be an independent entity that would approve all the resources that, and I should be more precise, for CJA lawyers so investigators, paralegals, experts, DNA experts, that kind of thing, vouchers, all of that, judges don't do it. Someone independent from judges does it. We would elevate, my hypothetical changed, we would elevate the DSO back to where they were. I don't understand the organizational chart, how they were demoted but I get that they were demoted in some way, make them a directorate again and make sure that they had access to budget discussions and were at that table.

We could get money for substantial training for both defender offices and CJA lawyers. Under that hypothetical, would anyone of you still advocate for independence?

Deborah Williams: Would you repeat the last card after would any of you have . . .

Judge Goldberg: Would any of you still advocate for independence and by that, I mean taking all the defender services and everything to do with public defenders and CJA lawyers and create a separate entity outside of the umbrella of the judiciary?

Deborah Williams: Before I came this morning and listened to Dick Wolff and Steve Asin and Bob Burke, I would have been with that hypothetical 100% and I think it's what many of us consider the DSO plus model so to speak but after listening to them and learning from what they had to say looking backwards, I'm not

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so sure that I wouldn't still vote for complete independence.

Judge Goldberg: What? Why?

Deborah Williams: Because after listening to them, I feel that I now have heard more of the back story of what things looked like in the AO and in ODS, as it used to be known, what was really going on behind the scenes as opposed to what it looked like from where I sat and in all those years, I was an assistant at various levels, not a defender. Like I said at the very beginning, don't ask me what I would . . . what form I would propose because I'm not sure what it should look like.

Judge Goldberg: It frustrates me a little bit because you're the experts. We want to hear . . . you can't say there's problems but don't offers solutions.

Deborah Williams: I know . . .

Judge Goldberg:

This is why you guys are here. You're the experts in this field.

Jim Wyda: I'd like to interrupt. If I understood your hypothetical correctly, I'm assuming that the circuits still control the number of assistance, the circuits still appoint the defenders and so I'm still for independence. If I'm understanding your hypothetical in the . . .

Judge Goldberg: You are . . .

Jim Wyda: the basis for your hypothetical is that somehow, we can't totally trust judges to use their judgment in the CJA context because maybe they don't understand the defense function. I appreciate it enough to make the decisions . . .

Judge Goldberg: Judges are out of that function in my hypothetical.

Jim Wyda: I understand . . . the reason why we're doing that is because somehow, we don't think they have the expertise. Why would we have them control the defender offices, the appointment of the defender that . . .

Judge Goldberg: If I add it to my hypothetical, then all the offices should be Community Defenders then what?

Jim Wyda: Again, if they still control the number of assistance going to that office because again, I watched the testimony . . .

Reuben Cahn: They have no say as to how many lawyers I have.

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Katherian Roe: But, now, you have no insurance, right?

Deborah Williams: Oh, well, there's that . . .

Michael Desautels: Judge your hypothetical that the . . .

Katherian Roe: Or retirement.

Michael Desautels: that the director has something to . . . the new director reports to the administrative office head but the defender budgets are within judiciary budget, right? That's your hypothetical, yeah?

Judge Goldberg: Yes.

Michael Desautels: I'd still vote for independence just because I think there's an inherent tension conflict that's always going to be there because of that fact. What would the model look like? You got to look like something like the admittedly defunct legal services corporation. That'd be some kind of corporation that Congress wouldn't be able to just derail or defund and I understand that's the bottom line. Judiciary sort of position that we're here to help you and we can get the budget through, when you can't, you're on your own. I understand that. That's really clear but in my hypothetical, it would be a standalone.

Judge Goldberg: All the things offered in my hypothetical, we go to Congress for your funding but still you want out.

Michael Desautels: Yes, because there's an . . . it's not because I've had bad experiences with judges it's because I think there's an inherent conflict with that that has been explained with testimony by other people.

Jim Wyda: Judge, again, I consider myself pretty strong for independence, I'm not . . . I'd probably wanted to deliberate a little bit over this. There may be so much benefit from that hypothetical that I might be willing to sacrifice. I'm now channeling my inner Donald Trump. I want to make a deal but . . .

Judge Goldberg: Don't obsess over too much because I don't have that much authority . . .

Jim Wyda: I like the way you're thinking and making a lot of progress. I agree with Mike that there's an . . . in the ideal world, you would be of the advocate for your own budget that was at least one of the consequences of the sequester was that we felt poorly represented on the one of the hill, what led to sort of the way that the devastation in our office and our programs was we don't think we were well advocated for but again . . .

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Judge Cardone: What if you had like a pass-through budget? In other words, I don't believe that the budgeting office at the AOs has anything to do with, for example, Sentencing Commission budget or FJC budget so what if you had some power to make up your own budget and it went up with the judiciary's budget but it didn't necessarily get touched by the judiciary.

Jim Wyda: That . . . I mean to the solution's question, that's one of the solutions that seems appealing. I would also suggest, I think it was in my testimony and others as well that the public defender service in D.C. are much more modest budget but seems to . . . that is a very effective well-funded defense organization that has the independence that I think we would so desire. I know there are other models out there, again, I think there are models out there that could work. One last comment, again, I think I've alluded to this already these meetings that "Judge Chip" and Reuben I been in and it goes into Terry's response that, the discussion with Reuben over the 20%, I would one of my primary motivations for independence is we're national system of justice.

We can't tolerate a different standard of justice in Texas and in Missouri than you get in Connecticut and New Jersey and Delaware and I hope that this Committee will make a strong statement.

Judge Goldberg: I think that's a great point what you just said.

Jim Wyda: Even a blind squirrel finds an acorn occasionally . . . [laughter]

Edson Bostic: If I may, if we could get all those things and insure a seat at the table for a defender representative, it would make my struggle a whole lot easier but also I think that then we would have to at some point, finite point, in the future look at what we have having gone all these benefits to see if they work well and if it has made a difference that we would meet those changes that we had made . . .

Judge Goldberg: Judge Cardone, I cede my time to Dr. Rucker.

Judge Cardone: Does anybody back there have any questions?

Judge Walton: Yeah. I don't doubt that there is a legitimate fear of reprisal or retribution if lawyers feel that if they make a request for certain services and if those results don't come back to the court—i.e., a psychiatrist exam—that the judge would assume that the report was negative, and therefore somehow use that against the client. That may occur, but what I find very frustrating is that while these scenarios are given to us as to why panel lawyers are not making the request, we have very few concrete actual situations presented to us showing that that occurred so is it based upon actual concern as a result of things that have actually taken place or is it a paranoia based upon

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supposition?

Deborah Williams: Judge, if I may. My new district in fact both the districts in Ohio, I know that they do not have a voucher cutting problem but speaking from my past where there was a growing huge voucher cutting problem, experts have now and are now refusing to work with panel lawyers because they've had . . . the experts themselves have had their bills cut and so they don't trust that the panel lawyers will be able to get them paid whereas if they work for defender offices, they know they're always going to get paid. There, the lawyers, the panels . . . excuse me. The panel lawyers have experienced tremendous voucher cuts, some of the very top layer of the panels over the years have dropped off because they just couldn't tolerate not just working for and I've had lawyers tell me I can no longer work for free or pay the court to let me take the case. I can't do it anymore. Just have seen tremendously good lawyers drop off for that reason.

Judge Walton: We need those testimonials. That would be very helpful to us in making our case that there are systemic problems that need to be addressed but it's kind of . . . I think it's going to be very difficult for us to convince the powers to be that there is in fact a legitimate problem that needs to be addressed if we don't have that documented evidence.

Deborah Williams: Unfortunately, Judge, I suspect you won't hear those testimonials because if somebody is pulling back on what they need for representation because of the fear of what's happening to people around them or even to themselves in the past they're not going to be variant client to come forward and make the bold statement that you need to hear.

Judge Cardone: All right . . . it's all yours . . .

Judge Fischer: Don't look at me. I'm not saving it . . .

Judge Cardone: He's got a list . . .

Dr. Rucker: No, I don't have a list . . .

Reuben Cahn: Reggie and I are going to jump in, as soon as you . . .

Dr. Rucker: I'm going to change totally. I kind of hesitate to do that but one of the things we're supposed to be looking at is diversity and we have not had a lot of testimony about diversity so I'd like to hear you talk a little bit about the diversity within your office but also especially the panel because we don't have data on the panel at all so can you talk a little a bit about are you satisfied with the diversity in your office or on your panels? Mr. Wyda, let's start with you.

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Jim Wyda: I don't think anyone . . . I'm not sure too many defenders would say they're satisfied and I'm not sure we should be satisfied with the diversity in our offices. I will say we are making progress. I think there's . . . where we push hard and I think I'm proud of the fact that our communities pushed hard. You can go to what we call the "baby defender conference," the new Assistant conference we see a great deal of diversity there. I'm proud of my office. I think where . . . my assistants were over 6% women. I think 35% people with color, 20% African-American compared to the U.S. attorney's office in my district, wildly more diverse.

I think the panel in my district, I know my judges are committed in trying and there's an ongoing conversation about it. We have a longer way to go there I think sometimes because their panel is fueled by alums from our two offices and you're not going to get much diversity from the alums of the U.S. Attorney's Office in my district.

Dr. Rucker: Ms. Williams.

Deborah Williams: In my prior office we had over time John Sands, has built a phenomenally diverse office and continues to do so in every possible meaning of the word diverse. The panel is . . . there's a very large panel in Phoenix and a very large in Tucson because of the demographics of the state in part. I would say that the panel in Tucson might be a bit more diverse than the panel in Phoenix but the panel is not as diverse as the defender office. In Southern Ohio, it is not as diverse as I am used to but I will say that I'm working on it. I'm very committed to it because that's what I raised in basically.

It is in progress. The panel does not seem to be particularly diverse. I do know that the panel underwent a reduction and size a couple of years before I arrived and I have told that the panel lost some diversity at that time but I agree with Jim. It is something that none of us are fully happy with but it is a work in progress and it's something we're all very committed to and it's a struggle every step of the way.

Dr. Rucker: Mr. Ward.

Terence Ward: Three of my seven AFPDs are women. There's one African-American male. All of my three paralegals were women and one investigator is a woman. I'm frustrated in trying to attract minority candidates to the panel, we have had a fair amount of success in the district increasing the participation of women on the panel but that's still again a work in progress. I'm not satisfied. Still working.

Michael Desautels: I would say work in progress also in the district of Vermont.

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Judge Cardone: Come a bit closer.

Michael Desautels: I would say it's a work in progress as well. It's not a very diverse state in general frankly so that's part of the problem.

Richard Coughlin: When I became the defender, there were . . . I don't remember what the . . . how many women attorneys that were . . . there were no minority attorney in the office and there's not a lot of turnover. I guess there's still six attorney who are still there from when I started. There are now twenty lawyers in the office, thirteen are white, seven minority. That's assistant defenders. There's ten men, ten women. We have five research and writing attorneys. One is a minority. They are all women. We have six investigators and five paralegals. Four are men. Seven are women. The five are minorities and so it's gotten a lot better than when I started and over time, hopefully, we'll continue to improve.

Honestly, I'm proud of what we've been able to accomplish in that time and I think that it has helped us in court. I think it's helped our clients. I think it's helped us attract minorities in women to the panel. The panel is still very much a work in progress so much so that . . . again more with minorities than women but both still I've been working with our CJA management committee. I'm a member of that to revise our training program and model it after what seems to had some success in the Southern District of New York and we're hoping to start taking applications for that.

By September, the board of judges have to approve the final version of that and it will state explicitly that it's open to everyone but the object is to increase minority representation on the panel and it will be modeled as I said to Southern District program which mirrors that the "buddy" suggestion that was one of the members of the last panel made and already reaching out to minority bar associations, getting into some of the judges, have identified a couple of candidates and hopefully with time that will change.

One of the other . . . I'll leave it at that.

Edson Bostic: Diversity has always been important to me and we have nine . . .

Judge Cardone: Can I ask you a little closer?

Edson Bostic: I'm sorry. Diversity has always been important to me. We have nine attorneys, AFPDs including myself as the defender. Six out of nine are women. Three are African American including myself, two being women and one is a supervisor. We have two research writing attorneys. They happened to be both women. One is Middle Eastern descent. We have the Hispanic . . . in the office, we used to have a Hispanic AFPD but he left to go into private practice.

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With respect to the panel, we struggle and we talked about this on the panel, the committee for the CJA panel in my district. We're always trying to recruit minorities to the panel both women and people of color. We have undertaken mentoring program but again, we still struggle to fill the void there. We do have a small panel twenty-three. We do have one African American male. We used to have two, one retired due to an illness. We do have several Hispanics that we particularly recruited from other districts to participate on the panel. I think we have great strides and we continue to believe that such strides are important not only in my office but across the entire program.

Judge Fischer: Kathy, I do have one quick question. There's a statute that provides that the U.S. Marshal service will provide transportation one way for people . . . has that post problems for any of you because either get them here but you can't get them home or vice versa. Somebody gets them there but they can't get them back to you.

Deborah Williams: Yes.

Michael Desautels: Yes.

Terence Ward: Yes.

Richard Coughlin: Definitely.

Judge Fischer: How do you deal with that? Do you use that out of your coffee, pay for that of your coffee fund or put them up yourselves or just say they're on their own?

Michael Desautels: We have taken that of a fund and taken up a collection. Have done that many, many times. Done it for a couple of years at which time the U.S. Probation Office announced that there was a fund that they had there that it never come to my attention before to do that. Second Chance Act money was what I was told and then that didn't seem to last for a while. It dried up because they were using it for other internal probation things to legitimate obviously. Seriously, I had to question that . . .

Reuben Cahn: It's just amusing that you have to note that.

Michael Desautels: Well, I didn't want to be casting aspersions by the way I said that. It's a problem. Every now and then I'll see an order from another district on a Rule 5 case where judge in a another district has allowed for two-way transportation that I always think that's kind of cool but I don't see any

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precedence statute for that.

Female: Thank you.

Judge Cardone: Anybody else? On behalf of the Committee, thank you very much. It is very late in the afternoon so we do appreciate you guys being here. I want to tell all of you if there is something that you think I've . . . I know . . . I think it was Judge Goldberg who said you need to figure out a way to solve all of our problems so if you do, please, if you have any great thoughts, if you think of something that you wish you would have said or anything that stimulate a further thought, please feel free to get it to us. You can either send us in writing or communicate with our staff. On behalf of the entire Committee, thank you and thank you for your time.

Group: Thank you.