

Ad Hoc Committee to Review the Criminal Justice Act

Public Hearing # 1–Santa Fe, New Mexico

November 16-17, 2015

Transcript: Panel 2—Views from Federal Public Defenders

Judge Cardone: All right, we are going to start with our second panel today and this is views from the Federal Public Defenders. We have as our Committee members Chip Frensley; Ms. Katherian Roe; Dr. Robert Rucker; and the Honorable Reggie Walton; and our panel participants, Ms. Maureen Franco, the Federal Public Defender of the Western District of Texas; Ms. Virginia Grady, the Federal Public Defender from the District of Colorado and Wyoming; Jason Hawkins, from the, the Federal Public Defender from the Northern District of Texas; and Stephen McCue, the Federal Public Defender from the District of New Mexico. With that, um, we will start with opening statements and we will start with you, Ms. Franco.

Maureen Franco: Thank you your Honor and thank you, um, fellow, or Committee members. I appreciate the opportunity to be heard regarding this important issue. Um, I am the federal defender for the Western District of Texas. It is one of the largest defender organizations in the country covering 92,000 square miles. We are in two time zones, which is interesting especially when trying to organize conference calls with the various people in the offices, and we are one of the busiest districts both total case load, and average case load per attorney.

Fiscal year 2014, we opened 6785 cases and closed 7163 cases. In 2015 fiscal year, we opened 8275 cases and we closed 7388 cases. These are raw case numbers. In the entire district, um, if you exclude the petty offenses that are handled in the Del Rio Division known as Operation Streamline, which are petty immigration offenses, we handled, in 2014, we handled 45.54% of all criminal appointments and last year, we, um, handled 59.29% of all criminal appointments in our, in our district. Um, there are several issues that obviously the fourteen that the Committee has identified as being of importance, um, but due to time and peculiarity to our district, um, I wanted to address, um, a few of them.

One is the judicial involvement in the selection and compensation of federal defenders in the independence of the Federal Defender Organization. Um, I was selected by the director of the AO to participate as a steering committee member on the work measurement study initiated by the Judicial Resource Council. As a result of this extremely collaborative and comprehensive study, it was shown that the Western District of Texas lacked the necessary personnel to handle its case load. In fact, a formula generated by the office of personnel management recommended that our office receive an excess of an additional twenty-five full time equivalent employees. The twenty-five new positions our office was awarded, at this time, I cannot add any new attorneys. I have,

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um, I am circuit capped at fifty attorneys including myself. I have forty-nine on board right now. Um, I have reached out as well as, um, Margie Myers from the Southern District of Texas to this circuit to request, um, that they follow the work measurement formula that has passed all vetting from the judicial resource council through the executive committee, the budget committee, and um, in September, the judicial conference adopted it. And at this point in time, we have not received any news whatsoever whether or not the circuit will consider raising the cap. Um, I think based upon the, the large workload that we have historically had in the Western District of Texas and in the Fifth Circuit altogether that it seems incongruous that the circuit wouldn't immediately act to award us additional attorney positions. Uh so that our office could continue to handle the cases that we have appointed to and also, um, to address an issue which the court identified in its pervious panel discussion which is on the capital habeas cases, it has been extremely difficult, um, for when the cases arose in the Western District of Texas to find qualified counsel within the Western District to handle those cases. I believe that there is a strong need in the Fifth Circuit for if we don't call the Capital Habeas Unit, we just could get our cap raised so that we could add attorney positions within our office, then we could address that need that is, um, very, very evident within the Western District of Texas and certainly within the entire Fifth Circuit.

Um, another issue I think that is important is on the judicial involvement in the appointment and compensation and management of panel attorneys and investigators, experts in other services. Um, as obviously we are a border district and we carry a heavy immigration load, when appropriate, our attorneys and investigators pursue U.S. citizenship claims in defense to illegal reentry charges. Successful citizenship claims happen often enough in our district that no reentry case can be called routine anymore. Each must involve at least a preliminary inquiry into whether under a complex statutory scheme and often complex family histories, the defendant might be a citizen. This type, is this is the type of investigation and review possible for a court-appointed attorney who is not within the defender's office? Do they have the expertise to be able to make determinations to whether or not a derivative claim should and can be pursued? Will the judge in charge of the case appoint an investigator knowledgeable in this area which is highly specialized? Upon request of the court-appointed attorney, will the court pay for the time spent researching a possible derivative claim? The questions presented above and here, um, before the Committee are just a few of the areas of concern the commission should examine and study. It is important to note that we assist all non-U.S. citizens who could claim derivative citizenship regardless of what brought them into federal custody as we believe it is ancillary to our appointment. Do other court-appointed attorneys have the ability to do the same?

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We have a high percentage of Spanish-speaking defendants because many of our cases involve immigration and drug violations, a high pretrial detention rate. To see clients or interview witnesses, attorneys and investigators frequently must travel distances of up to 270 miles roundtrip. Court-appointed counsel has the same issue when appointed to a case within our district. The remote detention issue within our district complicates and exacerbates the issues of finding and retaining qualified court-appointed counsel to handle these cases and to get compensated for meeting the requirements of the Sixth Amendment. The remoteness and vastness of the Western District of Texas along with judicial involvement in the appointment, compensation, and management of panel attorneys similarly complicates the ability to recruit and retain qualified court-appointed counsel to serve on additional panels of eligible attorneys available for court appointments. For example, although many efforts have been made to establish a panel of attorneys in the Austin division available for court-appointed cases, no such formal panel exists within that division. The Alpine Pecos division and the Del Rio division are handicapped in efforts to recruit and retain qualified court-appointed counsel based upon the rural nature of these locales and the sheer lack of interested qualified attorneys to take on court-appointed work. The additional issue of Judicial involvement in assessing the need for the number and duration of remote jail client visits further exacerbates an effort to recruit and retain qualified court-appointed attorneys in these underserved areas. Um, I have already mentioned that the problems in the capital habeas cases.

The other issue that we have identified is, um, in our district is that it is very difficult in multi-defendant cases to find especially in certain divisions, qualified counsel to be appointed. Um, our office very often is conflicted out of the case because perhaps we represented a cooperator before or we can receive one of the cases and so the court has to go to the panel attorneys for, um, for this type of appointments. In our larger cities such as San Antonio and El Paso, they do have panel attorneys that panels that are broken down as far as complex or the A panel versus the B panel. But in Austin, for instance where we don't have the panel where we have to rely on the court has appointed in the past and trying to pull those people in, it is very difficult and I have mentioned the remoteness of the, um, of the Del Rio division and also the Pecos and Alpine division. For me, as the head of the NITOAD, which stands for the National IT Applications, Operations Applications, um, Division of, for the defender IT system, um, this, what has happened and what did happen with the consolidation of the IT has become especially troublesome and really needs to be addressed immediately. Um, it's, um, it's very difficult to try to at first to explain how this could have happened.

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Our IT system was separate from the AO's IT function. Um, defender services managed our IT. The NITOAD division had all their Western District of Texas employees. They work for me. I am the appointing authority. I am also the firing authority. Um, and when the AO decided to consolidate based for cost reasons, they decided they are going to take over our, our IT systems and instead of so they merged, they moved the defender services IT into the AO. This created a very difficult situation, if not an ethical situation. It was only with the intense involvement which we are very appreciative of the NACDL that issued an ethics opinion that, that set out, that it was, um, unethical for a defender office and defender employee and defender lawyer to be part of a system where our act, our data could be accessed by third parties, that we were able to enter into memorandum of understandings between the Defender Services Organization and the, um, national IT, um, the AO front. Um, that, I would say that all the, these memorandum of understanding, um, between the parties exist. Um, defenders continue to be concerned with the AO's access to client information and we should be concerned. Although management at the AO and within the technological department continue to make assurances that our confidential information will not be assessed, such reassurances are not comforting when the individuals in charge do not understand the reason for confidentiality.

For example, one AO IT manager at the highest, um, level explained that he had top secret clearance and thus, we defenders should not be concerned if he had access to our data. He did not understand that having access to our data when he is not a defender employee violates the duty of confidentiality owed to our clients. Another, um, AO IT manager wanted to access our protected case management system known as defender data in order to test applications within that protected realm, not realizing that allowing her through the firewall will jeopardize thousands of clients' confidential data and information.

So to sum up, I would say that, um, this need for the study is, is overdue that, um, sequestration brought this to the front burner. Um, it is a pressing concern and I, as I mentioned a few moments ago, the issue of the independence of our IT function is of extreme importance. Thank you.

Judge Cardone: All right. Um, if we could hear now from Ms. Grady?

Virginia Grady: Thank you. It's an honor to be here and, uh, it's great to have you all here to, um, asking these tough questions. Um, I'm going to pick up in my prepared comments from where the Committee left off with Ms. Otto and particularly the, the um, the, the, the subject of, um, independence, what that means now, today, as opposed to twenty years ago and also the, um, the subject of parity which, uh, has I think been, um, uh, discussed a little bit and I think we need to discuss more here. Um, since the inception of

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the Criminal Justice Act, Congress wrestled with the question of where the Administrative Offices of the United States Courts and the, uh, I'm sorry, of the Federal Defender Organization should be placed within our branches of government. It was essential to honor professional distance between appointed defense counsel and the court just as there is professional distance between prosecutors and the court. In fact, the initial placement of defender services within the judiciary was considered temporary. Until Congress could settle on a permanent placement, it cautioned that the need for a strong independent administrative leadership be the subject of continuing review until the time is right to take this next step. The Prado Committee was tasked with that review twenty-one years later. Since release of the committee's report, our community has worked diligently to perform our public defense function within the judicial branch while maintaining the same professional distance afforded privately, retained, or prosecution counsel. In recent years with the federal budgetary crisis affecting the judiciary at large, the defender community has faced the challenging task of responsibly performing the constitutionally mandated federal defense function with increasingly scarce resources. Now, we are working within a sophisticated funding formula following the great success of our co-operative work measurement study which recognized that federal indigent defense must be adequately funded. Drawing from this data-driven context, I hope that the review of this Committee will be able to focus more broadly on the characteristics of our individual practices, shared and unique, that drive our resource demands. So, I will turn to Colorado and Wyoming and our three immutable resource demands, geography, weather, and time.

The district of Wyoming covers more than 97,000 square miles. It is served by two major interstate highways running both east, west, and north and south. I-80 the, uh, is a major national, uh, trucking thorough-through out there and during Wyoming winters, one of the country's most dangerous. We have one office in Wyoming. It is located in Cheyenne in the state's far southeastern corner. Thank you for putting up with my map. Our lawyers and our investigators spend many hours navigating the treacherous I-80. The United States District Court for the District of Wyoming set in Cheyenne, Casper, Mammoth, and Jackson. The Wyoming United States Attorney's Office is headquartered in Cheyenne and has branches in Casper, Mammoth, and Lander. But the criminal docket is largely limited to Casper and Cheyenne. We have three assistant federal public defenders assigned to our Wyoming branch. In fiscal 2014, five of our seven jury trials were held in Casper. Casper is a 179 miles one way from our Cheyenne office. With no office in Casper, our attorneys have always staged their litigation out of their hotel rooms.

There are no federally owned detention facilities in Wyoming and let me just say, none of the counties want us. Most of our clients are detained in

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the state of Nebraska, Scottsbluff County on the other, just on the other side of the border. Scottsbluff is about a two-hour drive from our Cheyenne office. The rest of our Wyoming detained clients are scattered in county jails across the state. I should add that none of these county jails with the exception of one want to have a contract with the United States Marshal Service.

The Wind River Indian Reservation occupies a 2.2 million-acre swath of land in the middle of the state. Two tribes, the Eastern Shoshone and the Northern Arapaho reside in Wind River. There are approximately 14,000 enrolled tribal members, tribal members most of whom live within the boundaries of the reservation. The crime rate on the Wind River Reservation has historically been five to seven times the national average. Many serious violent felonies arise there. These cases require on-site investigation by our attorneys and our investigator. Wind River is close to Lander where the United States Attorney has a branch office. Wind River is geographically isolated and it is truly cut off from access to justice. From our office in Cheyenne, it is 306 miles, a seven-hour drive. There is a courtroom in nearby Lander but we do not use it anymore because they can't manage having any one detained because all they have is a cage that will hold one person. Most of the Wind River cases are heard in Casper. So, the deplorable detention options in Wyoming really hurt the Native Americans the hardest. Most are either housed about an hour from the reservation in a county jail that restricts all of the federal inmates to twenty-three hours segregated lockdown or the alternative in Scottsbluff County in Nebraska. Wind River is a very poor community and many of its residents do not have the means to travel off of the reservation at all.

The CJA panel in Wyoming is very small. Most of the attorneys have very small practices and they reside in the Cheyenne area. All must deal with the same travel problems that the attorneys and investigator in my office face.

In Colorado, our resource demands are similarly driven by distance and geography. The district encompasses more than 100,000 square miles and supports the largest population of any judicial district in the Tenth Circuit. Federal lands comprise about one third of the state including four national parks, five national monuments, and twelve national forests. Colorado also has several military installations. Bureau of Prisons has a significant presence in the district of Colorado. The complex in Florence includes the country's highest security prison Super-max. It has a USP and FCI and a camp. The Florence complex is located in desolate country two and half hours southwest of Denver. Our clients who are charged with committing crimes in the Florence system now remain detained there during the life of the case. That means that we have to go there to see them. The only way to get to Florence is to drive the remote secondary highways. Client visits

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require advanced appointments that are frequently thwarted by long waits and last minute shutdowns within the prison complex and as you might imagine, the prison cases produce conflicts of interests and frequently require appointment of counsel and the same demands of the Criminal Justice Act panel attorneys. In recent years, the United States Attorney has had two assistants dedicated to prosecuting cases that occur in Florence. There is also an FCI, a camp, and a detention center just outside of Denver. All of our prison prosecutions are on the rise.

Colorado is also home to two Indian nations in the four corners region of the state. The Southern Ute tribe headquartered in Ignacio is an hour . . . um, a half-hour drive, southeast of Durango, southwestern corner of the state, and the neighbor, uh, neighboring Ute mountain, Ute Indian, uh, Ute mountain Ute Indian Tribe is about an hour drive west of Durango. Historically, all federal criminal cases arising in southwestern Colorado were transferred immediately to federal court in Denver along with any detained clients but in the last two years, the district has implemented an access to justice initiative to bring the court to the people on the western side of the state. So, every other month, the designated district judge holds a formal term of court in Durango and a formal term of court in the city of Grand Junction. The United States Attorney's Office has full-time assistants staffed in both locations. Prosecutions tied to these locations now largely remain there and as a result, the lawyers in my office are spending an unprecedented amount of time on the road.

The Rocky Mountains and the continental divides sit between our office in downtown Denver and these remote court programs. That may be stating the obvious to everyone here in this room but we have had visitors from Washington who had shown up with snippets of maps taken off of Google and have not recognized the topography between, um, the eastern half of the state and western half of the state, and that is important because the door-to-door drive from our office to Grand Junction is basically four hours, whether you go on a plane or whether you get in the car and drive there. It is longer if you try to drive to, Steamboat, I mean to Durango, but I don't like our lawyers to do that because it is a dangerous drive. Some clients designated to the Grand Junction docket are being held in Park County Jail which is two hours from Denver and about four hours in all high county roads from Grand Junction. Our locally detained clients are also scattered all about the Front Range in about six or seven different jails. Our office in Denver also maintains and established appellate section that takes cold-record appeals from all over the Tenth Circuit.

Our appellate practice is quite varied and complex. We work very closely with the members of the panel, um, in the Tenth Circuit particularly those who are, um, who reside locally. We also have, since 2009, had two appellate positions that are occupied by attorneys who have special

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expertise in capital habeas appeals. Since we began this practice, the attorneys who have occupied these positions have largely represented defendants from Oklahoma's death row. We do not have a CHU, and our work is limited to the appeal but as you know, death cases at any stage of the litigation are professionally taxing. The attorneys in our office have all contributed to training the Colorado and Wyoming panel attorneys through a program that I started fifteen years ago. Because I am not sure whether you are going to hear from panel attorneys from Colorado or Wyoming, I would like to speak specifically on their behalf.

Most of these people are solo practitioners. They have little or no staff. They answer their own phones. Some of them just rent air space. They keep their overhead low. They contract out for everything. Most don't have access to paralegals with expertise managing big discovery cases. We heard about e-discovery that the U.S. Attorney's Office is using where you download discovery from a cloud. A lot of the panel attorneys don't know what a cloud is. That is because they are doing everything themselves, not because they are technologically deficient. They do their own billing and when a solo practitioner must spend a day traveling to review discovery to see a client far away with a detained, who is detained, she leaves an empty office. I tell you this because when you hear as you have, testimony about voucher cutting from and rejected requests for investigators or experts, um, any other kind of outside help the panel attorneys may need, please understand that this is the landscape from which they work. They are very proud of their solo practices and they largely don't raise that flag when they are asking the court to fund outside expertise.

Panel attorneys are a critical component of our hybrid system and without them, the Criminal Justice Act would not reach all of the people it has intended to serve. Next week marks my 25th year as a federal public defender. Our organization has grown up since the days when I started. We have indeed become, as Judge Saris once wrote about ten or eleven years ago, the flagship of the Criminal Justice Act and we are now equipped with a formidable financial management tool to remain responsible stewards. The Committee's view of our future should be at least as long as our past. Your view of our future should be seen through the lens of preserving not only our financial parity, I am not really sure how we do that, but also our functional parity which I think is very important and something of an elephant in the room here. So to echo Judge Saris' words in 2004, our top priority must be to maintain the integrity of the Federal Defender Organization.

Judge Cardone: Thank you. Mr. Hawkins?

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Jason Hawkins: Good afternoon. I want to, uh, tell you it's an honor and privilege to be here before you and I want to thank you for the opportunity to lend my testimonies you examined the Criminal Justice Act. I began my career in public service, um, as a federal public defender in 1999. I was an assistant federal public defender in the Capital Habeas Unit at the District of Arizona. In 2001, I transferred my unit back to my home state of Texas and I've been in the Federal Public Defender's office from the Northern District of Texas since that time in various roles including as a trial attorney and an appellate attorney. Throughout these last seventeen years, I have experienced both the accelerating highs and the lows of the job. I've had the opportunity to argue before the Supreme Court of the United States. I have also had the traumatic experience of watching my client, Anthony Lee Chaney, be executed in the Arizona lethal injection chamber. I've dedicated my legal career to the fundamental principle announced in *Gideon* in that the citizen accused deserves equal access to justice under the law regardless of their financial circumstances. And since the initial passage of that Act in 1964, I generally believe the Act does accomplish its mission in providing the indigent charged with a crime in federal court with quality counsel through a robust mix of federal defenders and Criminal Justice Act panel of attorneys, members of the private bar. One could simply not exist without the other.

In recent years, however, I have questioned whether the Criminal Justice Act and its funding has kept up with the times. At its inception, only 30% of all federal defendants qualified for appointed counsel but today, that figure stands at 90%. Uh, the number of cases that counsel initially appointed to at the inception of, uh, of the act was approximately 10,000 cases and today that number stands between 210,000 and 230,000 annually. Within the Northern District of Texas, I have seen federal prosecutions increased dramatically over these last six years. Just six years ago using the waited caseload, um, metric, the new metric devised by the administration office of the courts, our caseload was at approximately 2400 waited cases. Today, it stands at approximately 3200 waited cases.

Through this period, I've been allowed minimal increases in my staff because that's, uh, now, decision controlled by the AO and whether or not those, uh, staff members are allowed to the attorneys is now tightly as, has always been tightly controlled by the Fifth Circuit. As the numbers have grown, um, with little growth in my staff, frankly we struggled to keep up. In 2013 when sequestration budget cuts hit, it nearly devastated my office. In my opinion, some of the policy makers when the AO made decisions that were designed to benefit the judicial plans at large of the defender services program and the clients that my office and the CJA panel lawyers represent. My office has only begun to recover from the five employees

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that I lost during that time of sequestration and the fifteen days of unpaid furloughs that were endured.

While I do not know what the future of the Criminal Justice Acts hold, I think that any serious review of the act must consider whether the defender services program should be independent of the Judicial branch. Thank you.

Judge Cardone: And finally, Mr. McCue.

Stephen McCue: Uh, thank you, Judge, and, I would also like to welcome you to New Mexico, um, where the sunshine's 320 days a year.

Judge Cardone: [LAUGHING]

Stephen McCue: All evidence to the contrary notwithstanding. Um, I will spare you the, uh, reading of my written testimony, although I commend it to you, if it's late at night and sleep evades you.

Um, I would just like to hit a, a couple of high points. I mean, we share, um, we're an interesting district in that we share, um, problems, the problems of geography and distance, uh, with Colorado. We are the, the fifth largest state in the union. We have very small population. We have twenty-two Indian nations that are spread out, uh, throughout the northern portions of the state. We also, um, share a border with Mexico, so we have the same problems as Ms. Franco's office. We have an overwhelming, uh, immigration docket in the southern part of the state and, uh, even though we do a lot of reentry cases, there's nothing perfunctory about those cases. They are all individuals. They're all human beings. Um, they all need individual attention and individual investigation.

We have a fast track program down there so that the cases move quickly, um, which is I think very much to the credit of the court, they don't want to see people spending any more time in jail than they have to but it's tough on the lawyers. It's a lot of pressure on, on our lawyers and on the CJA panel down there, um, to move those cases quickly. Uh, we do about, state-wide, about 55% of the cases. I have those statistics here just for, uh, FY '15 which just finished at the end of September in, in Las Cruces and in Albuquerque. We, we, uh, took 55% of the appointments in each division of the court.

Uh, I just like to, to hit a couple of high points. I mean first of all, I think that the federal judiciary did assume of a fiduciary duty to look after the independence of the defense function. Um, when defender services was put into, um, the Administrative Office of the Court and, and they did that

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initially by setting up a structure, uh, separate appropriation for defender services and separate directorate, uh, within, um, the AO, uh, for the defender services matters. And with the, the budget Armageddon that we have all experienced in the last few years, I think there's been a scarcity mentality that has set in in the judiciary and I think a lot of those protections have been eroded.

And, um, you know, when the structure is changed as it has been for defender services, then, I think you are headed for trouble because, um, despite the, the best intentions of the judges who are currently at some of the committees, um, federal judges are a mixed bag. I mean, they are, they are, they come with a lot of different experiences. A lot of them, um, mostly have civil experience. Um, a lot of prosecutors end up on the federal bench and, um, there are some folks who are just not as committed to the independence of the defense function as, perhaps they, they should be. They see us as, uh, a competition for the budget. I mean, there's this notion a dime a defender get is a dime that judiciary doesn't get, and while I don't think technically that's true, uh, I think it's a, a, um, uh, a common sentiment, uh, in the judiciary.

Um, I think that the, the uh, the CJA panel and the CJA lawyers are really kind of the canary in the model and I think the fact that they have suffered problems with voucher cutting and with voucher review is a real warning sign that this must be heated by this Committee. Um, my own view is that the, the fact that judges are reviewing vouchers is really anachronistic. Uh back in the late 60s and early 70s when the CJA was established, there only wasn't anyone else to perform that function. Judges were already, um, setting fees and civil cases in some instances and so, um, that job fell to the judges but now, we have federal defenders. Federal defenders serve, I think ninety-one of the ninety-four districts nationally. Um, and we are as every study had shown, we're, we're fiscally well-managed, we're responsible managers, we're federal certifying officers and so, I think that, um, the task of reviewing vouchers should be taken from the judges, uh, and given to defenders. And I just like to say that it's not something I'm sure Maureen shares my concern about this, um, last year in FY '15, we had, uh, 2800 CJA appointments in this district. I already have a job, you know, I already have two jobs. I have a case load. I run an office. I work with our CJA panel. I don't really need to be reviewing 2800 vouchers, but I think we should. I think that, that, that function should be shifted, um, to federal defenders and that's all I have for my opening statement, thank you.

Judge Cardone: All right, we'll start with questioning and Dr. Rucker?

Dr. Rucker: Um, one of the things that struck me that, um, a lot of you talked about are resources and sort of scarcity of resources that you experienced with

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sequestration and, and a little bit of positive view because of the work measurement formula. Um, but I am struck that you don't have the resources now even though the work measurement, seems to say that you should have a lot more positions that you, than you currently have. Uh, should we take that away from the courts as well? Should we take the appointments of the federal defenders away from the courts? I would like to hear what all of you think about that. Do you have any adequate resources that you need to do on a lot of these things?

Maureen Franco: Uh, if could go first, uh, I think it should be taken away from the judiciary. I think that when, um, the work measurement was certainly crammed down our throats, um, we have always worked as a lean and mean machine I think nationally as a program and work measurements certainly buried that out. Um, but we, um, as being a steering committee member and joining in on it and it was, as I mentioned before, very collaborative and cooperative with, um, with Harvey Jones's office for personal management, it became very apparent that the Fifth Circuit is sorely lacking, um, in resources, um, from any of the other districts, um, throughout the country, uh, circuits throughout the country that we could compare ourselves too.

We are under, we are under-resourced, underfunded and it has been purposely done that way for what reason, I am not sure, maybe for historical reasons, um, but in any case, um, this has been fully vetted and has gone through every single committee you can think of. Everyone with that, any much debate, uh, agreed with that this funding formula was appropriate and that I should be getting more lawyers. And as I mentioned, um, in my statement and also my written letter, maybe, maybe the circuit will consider it in May. I am hoping that they will consider it in January but I think it is not likely. And, um, I think that it is, um, it highlights the problem with putting that much power in the circuit, um, that the work should, the personnel, the resources should go where the work is. Um, the Western District of Texas and the Southern District of Texas are two of the very busiest districts along with Arizona and in Reuben's District in Southern California. Um, and for us to be held back the way that we have been held back is, um, unacceptable and I think that, um, the circuit should be removed from that function.

Stephen McCue: I would like to say that we are in the land of milk and honey in the Tenth Circuit. I mean, we were very fortunate. Our Chief Judge is Judge Tymkovich who was involved in all of the studies and is aware and I don't anticipate any problems. We came out of the study plus fourteen and I don't anticipate problems but I think the fact that you're hearing that our neighbors to the south, in El Paso and another districts are having problems means that again, the structure needs to be addressed, uh, because it's implemented by individuals and, and they just happen to have,

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um, folks in charge down in the Fifth Circuit who have a very different view, um, of how things should be, should be running.

Jason Hawkins: I, I would just echo Maureen's comments. I mean, I, I think that she is correct. I think it needs to be taken away from them. Why, why the staffing is so different in the Fifth Circuit is something I, I do not understand. Um, when I compare ourselves with other circuits, we do very similar work, um, and yet the circuit, um, it has been difficult to get resources from the circuit. So, um, the AO put together this formula that, that says currently that I was supposed to get you know, one more employee with my current caseload as it, it stands this pat right now. Um, I should get eight more employees over the, over the next two years but certainly there have been initial indications from the circuit that it is going to take perhaps more of this formula to get those employees put in my office.

Virginia Grady: So as the newest appointee here, you, that is why I am going last to answer your question, but um, uh, I will echo what, um, Steve said about, uh, the Tenth Circuit being the land of milk and honey. We have a wonderful relationship with our circuit and we always have.

Um, I, I did want to, your question though, made me recall, um, something I read in preparing for today's testimony which I think, if I am recalling accurately, was the testimony by Attorney General Kennedy when the Act was originally presented to Congress in 1964. And at that time, he addressed, um, why was that the, um, maybe, maybe it was, maybe it was, it was later but why it was that the, um, the circuit, must have been in late 1970, why it was that the circuit would be appointing the, um, federal public defender as opposed to the district judges and the answer was because they, uh, the intent was to keep the district court judges from being too connected to what it was and having too much to, uh, prevent district court judges from considering themselves to have too much of a role in the management of the federal defender offices. I mean, we talk about each other, our, our district judges in terms of ownership, my chief judge and my defender, um, and I think that the notion at the time was to create a little bit more distance when the defender organization was, um, was created in 1970.

But um, you know, your other question was why are we staffed scarcely, why do we not have enough staff right now? And, um, for those of us were, who did benefit from the work measurement study, um, and our new funding formulas, the answer is it's taking time to staff up. Um, it is just taking time and what I don't know, I think everyone's situation is different. I can only speak for our situation, uh, but as we are trying to staff up, our demands are changing in our front yard and so all of the sudden, you know, in the last six or eight months, um, our lawyers are

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going all over the district in a way, in both districts in the way that they never have before. So, we're still chasing the concept of being fully staffed and I don't know if we're even going to get there in given what we have been given with the results of work measurement. But that's the nature of the beast is that we are a reactive, um, organization with a reactive business and the one part of this model that we can't do anything about are the numbers that come out of the U.S. Attorney's Offices. In some districts, those, like mine, those numbers are going up a little bit. In other districts, they are going down.

Judge Cardone: Can I follow up because there is a difference between appointing the actual Federal Public Defender and then the circuit having control over who you hire and how many people you hire. Um, so in follow-up to Dr. Rucker's question, any, any thoughts about those differences? In other words, each of you were appointed by your circuit, right? Um, do you see a problem with that, as opposed to the circuit managing how you run your office?

Stephen McCue: I just got reappointed for the fourth time, so I think it works great.

Panel: [LAUGHING]

Stephen McCue: Fifth time, fifth time actually. Um, I think that's, that's an interesting, uh, perhaps breaking point that you know, maybe it is appropriate for the judges, the circuit judges to pick the heads to the offices but beyond that, you know, we, we have, um, structure through defender services' office. I mean, they, we report everything about our budget to them monthly in terms of staffing and, and caseload and how things are going. And they are very much aware of what the trends are and so, I think they are perhaps in a much better position, um, than circuit judges who, um, you know, have plenty to do without delving that deeply into those kinds of, into that kind of nitty-gritty about what resources offices need.

Katherian Roe: I want to just follow up on Dr. Rucker's question and I am thinking specifically more Ms. Franco and Mr. Hawkins of the Fifth Circuit. For the past year and a half to two years, all the Federal Defender's and Community Defender Offices throughout the U.S. have been focused on the work measurement study and thousands and thousands of hours have gone into that study trying to perfect it to, to fit what we do but also having all of our staff work, um, to make sure that the data was correct. So, all of your staff obviously were involved in that for the last year and a half to two years and now, you get your numbers and work measurement studies says, for you Ms. Franco, that you have, you should get twenty-five additional employees, and for you Mr. Hawkins, another additional eight. Would you agree with what the number is or not? Um, the fact is

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that those metrics say that you're understaffed and have been understaffed for a very long time. And now, we have the circuit saying, well I don't even know if they say that may or may not be true. They say, okay everyone, the judiciary has agreed, all the committees have agreed with this, but we are not going to authorize that, at least right away, maybe in the future, maybe if you have the time, whatever it happens to be. My question to you is more about your people, your personnel. After having participated in all this, thinking that they are some in way independent as defenders, what has been the effect on them and what has been the effect on your clients?

Maureen Franco: It is a good question. Um, everyone participated fully in the work measurement and understood the importance of it and everyone in the office kept time from someone who answered the phone to myself, everyone kept time for that period, um, and um, all of us are invested in trying to staff up our office to recoup the losses from sequestration because we lost a lot of people, um, took early retirement. I think I added it up at one point in time in a hundred years, um, cumulative of, of legal experience, federal criminal defense walked out the door as a result of sequestration. It is very difficult to come back from that. So, we are all committed to, to participating in this and to try to staff back up again. And, um, I can hire, um, LRW's, the legal research in writing positions but they can't go to court. So, that, um, doesn't help my trial attorneys very much when they have to go visit clients at remote jails, um, and when they are in El Paso, for instance, when there are nine different courts that they could be in one day. Um, so it is very demoralizing in a lot of ways that we participated fully. We got a steady app that showed that we were understaffed, that we've done a Herculean job for the last forty years that our office has been in existence and then to basically have a big, um, brick wall thrown up against us. To try to get through that is very difficult, um, but I'm hopeful that if we just keep chipping away, um, in getting the data to the circuit that they will relinquish some of their resistance to give us the additional staffing.

Jason Hawkins: Again, I am just going to what she said. I do think demoralizing is the appropriate word. Uh, you know, the study was very transparent. Um, it came out and it showed us. It compared us to other offices around the country. Um, it showed us what the actual case numbers were and so, uh, my attorneys and staff saw that and, and asked me for an explanation. And I said I, I don't really have an explanation. That's just how the Fifth Circuit has really controlled us. Um, but my hope is, um, as much as Maureen's says, we get this information up to the Fifth Circuit, um, and with that, and with the help of our local district judges frankly, um, that that will aid us in, in chipping away and, and, and show what the impact of how they controlled us, you know, for the past twenty years, what impact that has actually had on us, and the ability for us to represent our clients.

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Judge Walton: You may not want to answer this question and I would understand why but is the attitude that exists that is limiting your ability to staff your offices the product of legitimate fiscal concern, indifference, or something sinister?

Jason Hawkins: I am not really, I, I don't know, your Honor. That's a difficult, very difficult question for me to answer. Um, I, I will say, you know, um, for, for the first time in the last decade, uh, last year, I made a request to the, to the chief judge of the, new chief judge of the Fifth Circuit, um, to add attorneys to my office and that, that request was approved and so, like I said, my hope is now that with this new data that has come out with the work measurement study, um, that that gets into the judges on the Fifth Circuit's head and that it will have a better impact for us.

Maureen Franco: But, um, you don't mind me adding this to Jason is that when Jason was able to get the four positions, um, basically the rest of us were told don't come with your hat in your hand, um, and that it was not, even though his numbers showed that his caseload had grown tremendously over the, from his last request which was what, ten years prior to that?

Jason Hawkins: Yes.

Maureen Franco: That, um, it was not a pro forma decision, that it was a very contested and heated discussion regarding whether or not those four lawyers, um, would be, um, justified in his office. Now, that decision was made, um, around sequestration. It was pre-work measurement, um, and pre-approval of the work measurement formulas, so perhaps, um, that edification will improve the rest of us with our hats in our hand, um, to get, um, positions approved by the circuit but as far as, I don't know, I don't think it is, it's a nefarious reason for it. I think that, um, I heard a quote earlier today about you know, part of it should be your pro bono, um, responsibility to do this type of work and, um, it sounded somewhat familiar to what I've heard, so I wonder if that came out of a Fifth circuit opinion. But, um, yeah I think that there is that, the, the thinking out there too is that, um, perhaps, um, the bar should be doing more of these cases and not our office, I don't really know.

Judge Walton: I don't know if the data exists but do you know if data does exist that shows a correlation between lack of resources and wrongful convictions and say, you know, districts where you don't have what you need as compared to districts where they do get adequate resources?

Maureen Franco: I'm sure there are studies like that probably on the state level. I am not aware of that on the federal level but I know on the state level that they have done those types of studies to show that, um, when the public

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defenders are overtasked, overworked that the wrongful conviction rate is quite a bit higher than in the areas where, where it is not.

Judge Cardone: How about the concept of dockets declining? I mean, you are so much subject to dockets going up and down, do you hear or do you have a concern that they are going to say, well, Ms. Franco and Mr. Hawkins, what is the concern? You know our case, these caseloads in the circuit are going down.

Maureen Franco: Well, that's an interesting point because when I was preparing my letter to the circuit to ask for new positions, I noticed that my two predecessors talked about, really we should be asking for X but we are only asking for Y because our, you know, we're subject to the whim of the immigration docket. Um, but as Jenny said, we're, we're constantly playing catch-up, so even if we caught up to the docket as it stood right now, we would still be understaffed when you compare us to other dockets. I mean to other, uh, districts throughout the country and certainly to other circuits throughout the country. So, um, and yes, they are declining but the cases are becoming much more difficult. They are becoming much more selective on what cases they bring, and it's, um, it's requiring much more involvement, um, in attorney time and investigator time and expert times. I mean, just driving up here, I got probably four or five requests for experts in various cases throughout the district. Um, and so are, the nature of our cases are changing and, and as we all talked about, a § 1326 case is not a simple § 1326 case from a derivative citizenship issue which is very time-insensitive to a crime of violence issue which can be, you know, maddening to try to figure that out and to litigate it, and to present it properly to the court. So, even if the number goes down, it just, the work has not gone down. I can assure you that we're more busy now than we have been.

Judge Walton: Do any of you call for absolute autonomy from the judiciary and if you do, do you share the concerns that some had expressed that you may not fair as well with absolute autonomy as compared to what you fair now?

Stephen McCue: Just to expand my response, Judge, I think, I, I don't think we have unanimity in the defender community on that issue on the independence issue. Um, I, I think even on this panel, we don't have unanimity. Um, there, there has been, there has been talk in the defender community that if we were independent, we might end up being the next planned parenthood, you know, that we are really one scandal or one horrible case away from, from being defunded.

That said, um, we did pretty well during sequestration by going to the Hill ourselves and, um, asking for the funding that we needed because we felt that the judiciary wasn't taking our part and wasn't representing us well

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and, um, Congress both in the House and the Senate was very receptive, um, and I think they appreciate it, the function that we have and, uh, the fact that the Sixth Amendment requires it and that their constituents, um, appreciate having good representation.

So, I, I think it's, it's, uh, I mean personally, I don't, I don't see how we could really be independent. You know, we have a finite structure of government. There is the judiciary, the executive, and I, I don't, I don't really see how that would work. I don't see a clear path to that. I mean other people, I think have, um, thought it through more, more completely than I have. But I think, to me, I think that the structure, um, reinvigorating and reinforcing the structure that we have within the judiciary, um, would go a long way towards, uh, updating the system. They only have a system that is fifty years old and the realities of the criminal justice system in this country have changed in the last fifty years and we were dealing with a statute that's fifty years old and so, I think that's, that's where we need to start.

Judge Cardone: Well, how about the structure more like the Sentencing Commission?

Stephen McCue: I think, I think that would be a, a good step in the right direction. I mean, people have said that the Sentencing Commission or the Federal Judicial Center, you know, are both really sort of independent entities within the judiciary and I think that's, you know, that would be a step in the right direction.

Judge Walton: But it's suffering, I mean, positions aren't being filled and there are a lot of oppositions to the Sentencing Commission on Capitol Hill . . .

Stephen McCue: Like us.

Judge Walton: By some who don't like some of their more recent policies, so . . .

Stephen McCue: They like us better.

Panel: [LAUGHING]

Stephen McCue: At least this week. [LAUGHING] That could all change and that's, and I think that's what holds back a lot of defenders. I'm saying we should just get help.

Maureen Franco: I think with that, we need to have some more independence. I don't know if we mean complete independence, um, but certainly with my, um, my role as being head of NITOAD and this, um, the AO taking over our IT system without a second thought about it, without any, um, concern for the attorney-client privilege information and confidentiality, um, was very

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troubling, um, and it required a lot of pushback and like I mentioned before, only because, thank you Chip, the NACDL, um, issued an ethics opinion which based, backed up what we were saying. Um, I think we need a national office so the defender services office, we need somebody like them, but I am not so sure it belongs in the AO would be my, would need to structure something that works outside the AO.

Judge Walton: Theoretically where?

Maureen Franco: That's a, I'm like Steve, I cannot envision. I know it has to be out there and, and that we could, uh, all of us working together to come up with something but it's just the AO through sequestration and then with this, the reorganization they did, even when I think it is, um, you know I know it was the, um, the executive committee I think that took away the um, the uh, jurisdictional issue for the Defender Services Committee. A lot of these things have happened. You just scratch your head and, and say, why, and the ability to do that seems very inappropriate. But, um, we, I am worried about us becoming the next Planned Parenthood but the system that we have right now is not functional.

Judge Walton: Or the legal services.

Maureen Franco: Right.

Virginia Grady: You know, if I, if I could just chime in here on this, um, subject. I think it is premature for a lot of us to weigh in on that ultimate question but I also, um, expect that when the Committee is done with the tour and talking to all the defenders and the panel attorneys and judges that you have a better idea of where lines should be drawn in the sand. Uh, and we certainly have a couple of top, you know, lines in the sands on our list that should be drawn such as, um, uh, IT but, um, I think that there is, there may be other, you know, areas. Maybe that the, what the Committee decides after, um, its review is something that no one has thought of before, but that is the whole purpose of having all of these conversations and we would like to be as much engaged in that, all of the defenders I am sure, as possible so that those of us who are, don't have an answer to that ultimate question, um, are also um, becoming better educated about how to resolve these tough problems that have, I think come out of, um, frankly all these national conversation about money.

Judge Walton: When you expressed your concerns about functional parity, and I don't want to pitch you against your, um, U.S. Attorney but his perspective at least here in New Mexico is that, there is not a disparity as far as resources are concerned between prosecutors . . . U.S. Attorney's Office and the defenders. Do you take exception with that?

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Stephen McCue: Yeah, that is crazy talk.

Panel: [LAUGHING]

Stephen McCue: That's, you know, they have so many resources. I mean, and you know, and um, I mean they, they have suffered, I mean, in fairness, and Damon, you know, Mr. Martinez is a wonderful U.S. Attorney who does a great job. Um, they have lost a lot of folks, uh, and they have trouble replacing them. They have lost a lot of folks through retirement and people who moved to other districts, um, and the caseload in New Mexico is, is crushing. I mean, it's, you know, we have the Indian country, we have the border, and so they, they do need more resources. But you know, he, I think he is thinking of his office and not so much of the FBI, the DEA, the ATF, you know, the ICE all the, you know, all the, the support that they have. So, I mean you know, in, in terms of, um, you know one to one, I mean their office is much larger than ours. They have like sixty-five lawyers, we have thirty-one. You know, and some of those are in the Civil Division and some of those have special functions like national security, which we don't, doesn't really come back on us much in terms of caseload. But I think overall, the Department of Justice, I don't think anyone even knows what their budget is. If you try to find it, it is all, you know, it is, it is sort of classified or, or spread out over so many different, um, different places, um, that, you know, it is difficult to quantify but on a local level, um, you know, um, I, I think they are, they are okay. I mean maybe he thought you guys give him some more.

Panel: [LAUGHING]

Stephen McCue: Positions and he brought that up.

Panel: [LAUGHING]

Dr. Rucker: Let me, if I may follow, I'm sorry.

Judge Cardone: Go ahead Dr. Rucker.

Dr. Rucker: I just want to follow up on Judge Walton's point, not just with the federal defenders but especially with the panel attorneys. What about the resources for them? I mean it seems to me that they don't have the resources that, that you have nor DOJ. Would you care to comment on that?

Stephen McCue: Yeah, they are at a distinct disadvantage.

Jason Hawkins: I agree with that. There is, yeah, they, um, unfortunately, um, you know when I need a case investigated, I don't have to go ask for one

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[LAUGHING]. I got ten investigators and paralegals in my office. When I have got a huge white collar fraud case, I got an investigator that is accountant and is certified fraud examiner. I just hand her the case. Um, yeah, there is, there is simply no comparison really in the resources available to our office versus the CJA panel attorneys.

Um, you know, a telling example, one of the things that I, I, Mr. Martinez had testified to earlier when he was talking about the, the process of e-discovery. Um, this is a new ongoing phenomenon especially in Dallas Division. Um, the U.S. Attorney's Office is producing cases that lead to multiple terabytes of discovery and they are handling it to solo practitioners and saying, "here you go." And they simply can't handle that type of case. Um, we're working on a solution to that um, ah, and trying to find and to create a, a, special server that will help it with that process to make that putting more equal, um, that you know a process that will allow my office to be appointed as a discovery coordinator, um, and we will be able to house and host discovery with the CJA panel attorneys on those cases, but yeah, I, I, agree with Steve unfortunately they are distinct, disadvantage when it comes to us, with the disadvantage when it comes to U.S. Attorney's Office.

Judge Cardone: How, how about getting experts, um, and I, I would particularly talk to you, Ms. Grady and you, Ms. Franco, um I know that in cases that I have, where I think they need it an expert, they're not asking for it or after trying to ask for them, they can't get people to fly in from Houston or Dallas or whatever. It is such a cost and so it's hard to get them, hard to get them to come up for the cases um, and I, and so I would like to hear your um, opinions about the use of experts particularly about the CJA attorneys.

Maureen Franco: I think it's extremely difficult for them and if the court is regulating how um, how much the expert can charge or what they can pay for as far as flying in, um, because if we don't have any local talent then one of the, the Del Rio Division, the El Paso Division, they have to go out of town to get. It is very costly and I can tell you that firsthand from having approved the, our vouchers, but the, uh, attorney request, so the expert request from the attorneys is very um, very costly and I, honestly don't know how they do it. Um, because I think that even though the court would recognize that they needed an expert, one they'd have to know to ask for it that the court would grant it, and the court's answer are going to be tied as to how much money it can pay because of the caps that are in place. So it's extremely difficult um, that is a benefit that as a defender office that we have over um, court appointed lawyers in this type of cases.

Virginia Grady: It parts to get shocked, it also um, part the mechanics of, um, the difference in the mechanics of asking for an investigator or an expert. Let's say they need a psychiatrist and you're a panel attorney. If it is an

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attorney in my office, the attorney writes a memo to me or my first assistant explaining why they want the psychiatrist, what to cases is about, maybe we have some questions, and then we approve it, we find the psychiatrist, the expert, they usually got somebody in mind and maybe we negotiate the fee a little bit. Imagine the attorney, the panel attorney trying to do that, um, with a court that is more interested than the court should be about why the panel attorney needs that expert and maybe from my perspective, we are hiring the expert to see what makes the person tick, you know or to rule out what makes the person tick, you know, to identify or rule out something that might be an important mitigating um, factor and sometimes, it's not there. Well, that stays with us in the office. The panel attorney is in the difficult position of having to basically show its hand to the court um, with the request with the CJA 21 and you know, I mean, some, some, sometimes, we just don't know. We're not psychiatrists so we don't know what exactly is wrong with our client but somethings going on and they want to know. Why you can't explain that in your CJA 21 to the, to the court, so it's difficult and I think that, that the dynamic discourages some panel attorneys from making a request in the first place and in other situations, they make the request but they don't make the case because they don't, they are limited in how much information that they want to disclose to the court, uh, to support the, the funds and they get, they get turned down, they don't go back and maybe those are some of the cases where you, Judge Cardone see, you wonder well, you know why didn't I see an expert on that case? Maybe it's because the panel attorney couldn't like articulate what would, what's the good reason, because sometimes, we can't. Because unlike I know I hate to admit it, but we're I'm not an expert in all things. Uh, even though sometimes, I pretend to be. And you know, but that's, that's the process, not just the artificial weirdness of being a panel attorney and having to ask for an expert in the case when frankly, you shouldn't be disclosed in the kind of information in the first place.

Judge Walton: And based upon what you all said, there are still several districts that don't have more federal defenders and you know some say well, one fit doesn't you know apply to every situation, should we be recommending that uh all districts have federal defenders?

Virginia Grady: Yes, or community defender.

Maureen Franco: Yeah.

Jason Hawkins: Yeah, one of the others, absolutely.

Virginia Grady: I can't think of a good reason not to, should be a hybrid system everywhere.

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Jason Hawkins: Yeah, yeah, along with CJA panel attorney representation, sure absolutely.

Katherian Roe: I have a question, this is a follow-up on the experts issue and when I was looking at the national study or the national statistics about experts with CJA cases, I couldn't help but notice that in the Fifth Circuit, there are only uh, 3% of the cases, of CJA cases, had experts. And the average, the average payment if you will, per attorney on those expert cases, for the expert, is ninety dollars, which I am not, I am not really sure what you can do with ninety dollars. But I guess it averages it out for the all the people who did not have their experts [LAUGHING]. Exactly. The question I have is whether or not you have actually heard from some of the folks on your CJA panel that this is an issue and as a result, they just don't even bring the request or whether they have had a number of request that have been denied or whether they are intimidated about it because they have been told before, don't come in here with the silly request for experts well, in that case does not needed an investigator um, I am just trying to get an idea as to how we could possibly be so incredibly low and then to have only ninety dollars as expert fees because that that does not even buy you maybe an hour and half for an investigator. Have any of you any ideas, or any thoughts about that?

Jason Hawkins: I mean from my perspective, I think you have highlighted all the problems just anecdotally, I mean up to those, those, types of complaints uh from the CJA panel lawyers. I mean I, I looked at the statistics for 2014 and there were 704 CJA representations and only thirty-two of those cases were experts used and that is extraordinarily troubling to me. Um, uh, I mean frankly my lawyers couldn't get by without the investigators, my ability to hire psychologist or psychiatrist to do this, to help on these cases. Um, uh, I, you know part of it is I wonder whether it is uh, training, and not knowing the proper way to maybe ask for this. Um, I don't think in the past we may have emphasized that enough um, and especially after seeing these statistics, I mean we are, we are going back to the drawing board or to starting at square one and part of our uh, presentation extending to the CJA panel, this is exactly how you get this done um, and people that, that have done that before. But, I mean, I can certainly I've heard antidotal stories of judges just saying no, just, don't bring me this request. Do you want an investigator? Why can't you investigate it yourself?

Maureen Franco: I concur with Jason on what you, you have said also to um, Ms. Roe, about and anecdotally, it is the court who will refuse it, that they are afraid to ask, they don't want to not get the next appointment because they ask for you know experts in this case or investigators in that case. But I also agree that perhaps we haven't done a great job of educating our panel. That we take it as you know, brushing your hair in the morning or something, something natural that we would just do. And um, that you get

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an investigator, that you get an expert involved in the case. And um, I think that I agree with Jason that this year when we do our planning I will make sure that we, we address that issue and talk about it out front openly. Say, why aren't you asking for a deal, is it you know lack of knowledge and not knowing how to do it, is it a lack of investigators that are available to do it, that could very well be in the case that there is a lack a people locally that can do it, and so then there is the hesitancy of going outside of your, your division to get the expert. But um, I mean I, I, I think that we probably should takes some of the blame for that is, that we have not done a good job of educating our panels that, that, that is available to them.

Chip Frenshley:

Well I mean, you know on that point, because um, um, I will ask the question but I did want to comment about that because you know it is not just necessarily exclusively a training issue in terms of they don't know how to do it, but it is also a cultural issue and it is about changing a culture of representation. And you all comment from a culture were that is the way we do things and you know, it is well known that most panel lawyers are small solo or small firm practitioners where it is not the culture to go hire an expert because, number one your client does not have the money to go do it, and number two if you are working on the states system, you won't get the funding period, it is not even an option that is available. So I wouldn't just you know I wouldn't just solely I accepted it as a failure of training by defenders but, but it is also something about the training, part of the training needs to be to change that culture. Um, it may be self-evident but Steve, why don't you make the case for why you think that your model of moving from the anachronistic system of judges being the ones handling vouchers to the defender office, uh, as being the way to go?

Stephen McCue:

For one, I think that experts is, is a good place to start with that, I mean, like all the other defenders here, I review expert requests every week if not every day from our lawyers, from everything from a window tint expert and a highway stop case to, uh, uh, a neuropsychologist. And, um, you know, we, we see it every day, um, we think it's, it's good practice. We think it's part of their practice and I think that, um, uh, uh, I think, it would be much less, uh, discouraged, you know, either tacitly or, or, you know, unintentionally, um, or, or, intentionally, uh, by defenders who were performing their role who are in, you know, saying, you know, look if, it this was, uh, a defender case, you know, we'd be talking to this expert or that expert. And we already do that informally, you know, because people call and say, you know, I mean, we, we have open lines of communication and you know, you hear it every day in the office, you know, just you know, there's a panel lawyer on line four. Someone just picks up and talks, you know, instead of they call their friends in the office and say, you know, we got this kind of issue, who do you like, um, who would you hire? Um, and so, um, you know, I, I think moving that to the next level where, where we have control, um, over, over the purse strings,

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I think we make it happen more often. And it, and it doesn't happen, not for me to, it is sort of a scandal in federal system that the numbers, they are always low. They have been low ever since, you know since I know that they have, they have been look at, in terms of the experts.

Chip Frenley: Do, do you think that there could be uh, a cost containment argument, uh, or component of moving that function to defenders involvement in, in experts for panel attorneys? Either in terms of being able to know what is out there, know what rates are, or, or some other means perhaps?

Stephen McCue: You know, uh, I think it would help, I mean, I think initially there may be more expenditures for experts more people or using them but honestly, um, you know, uh, as, Judge Armijo was saying, Chief Judge Armijo, you know, she is on our panel committee and, and we're talking about, you know, this lawyer is up for reappointment and she'll say, you know he comes in and he has experts and he, you know, or she has, you know done this work and, and, you know, they, they really appreciate someone who goes out and does the work. So, you know, uh, uh, I think that there is kind of a disconnect there that the judges like to see that, but for some reason, people are too intimidated. I mean, I, I just think that, um, it's, it's a job that we're already doing for our own lawyers, um, and I think, you know, all the studies have shown that we do it well. We do it efficiently. We do it, um, with cost containment in, in mind. I mean that's been, uh, the montra of it's, you know, come out, or come to us from defender services for years now that you have to be responsible with the, with the public's money, uh, and I think, I think we're in a good position to do it, let's say we're already doing it, you know, we may need a little more help to do it for, uh, the 130 lawyers on our panel, uh, in addition to the, you know, the 30 in our office but I think it would, it would improve the quality of practice and the quality of representation, and that's, I think everyone's goal in this endeavor.

Chip Frenley: And to the broader questions of, of voucher review, uh, why do you think that, housing that function within the defender office, um, would be a better approach than number one, the current system, and number two, the possibility of someplace else like the clerks' office?

Stephen McCue: Well, uh, again, because we are doing the work. I mean, you know the people who are defenders have been selected by the circuit, uh, or appointed by a Board of Directors and they are experienced people. They, they know what it takes to defend the case. I mean, we've been doing it for decades. And uh, you know, I think, you know we have a more open line of communication with the panel about, you know, why did this, why is this voucher so high or why is this so low, or why did this happen or why did this not happen, what was the problem with this case. And I think, um, that, uh, uh, I just think it would work better and because, yeah,

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I think, you know, we do that work every day. Um, and, and you know, we know the panel lawyers and we have codefendants with them, you know, we see them in court. When there's a big docket, um, you know we talk to them about their cases and what's going on and so, um, you know, uh, uh, I think, a lot of the, the good things about the judges doing it in such that they know the case, they you know they sent to a trial or, or hearing or whatever, um, those that benefit transfers pretty easily to the defenders you know especially if we're involved all along in terms of the budget and or experts or just you know, help on the hearings. We do move courts for people, we do, you know, we give briefs. We share, you know, motions and substitute things like that all the time, so there is already a lot of involvement and a lot of crossover with the panel.

Chip Frensley: I know that is not a unanimously held position within the defender community. Is there anybody else on the panel who disagrees with Steve's view and if so, could make the counterpoint to why it is not a good idea to have that function within the defender's office?

Maureen Franco: Steve is looking at me. He kind of ratted me out.

Stephen McCue: [LAUGHING]

Maureen Franco: You know, I have to say when I became the first assistant, um, when I became a first assistant, Henry Bemporad was the defender, um, my first um, big defender conference that I went to with him, I said we should be doing this, we should take that from the court, we should review the vouchers, we should, you know, help with that. He is like, you are crazy, you know, with the workload that we have, and he is like, go to it, go see if you can figure that out and of course then, he just gave me a bunch of other work to do, so I never got around to it. But I mean, I think that ideally, it should be in our office. It is just I, I would, you know, we need help. It can't be done under the current system and, um, we would just need to have a lot more. The staff that the work measurement gave me is just barely to keep us going where we are right now but philosophically, I am right with Steve. I mean, I think that our offices should be doing it. Um, our compadres are doing it throughout the country, um, swear by it and think it is the best way to do it and I think that I am convinced that it is the best way to do it.

Virginia Grady: We do not manage the panel, Chip as you know, but um, but there is a lot to be said for a long-term plan to have defender organizations manage their panels. There is a lot of, um, offices I think who might agree with us on the, um, purpose of panel management, um, the cost, cost-saving component of panel management and there is one. Um, but maybe they don't have either the funds, it is not built into their formulas, how is it counted, or they don't have the space to do it and frankly, to, to manage a

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panel and based upon my conversations with my colleagues who do manage the panel, it takes more than one person to do it. And a lot of the courts only have one person assigned and that person isn't an attorney and doesn't have the, the background or experience to appreciate the paperwork that is coming in. So, you know, but I could just add one thing to what Steve was saying and I am in full agreement with what he said, you know, just the example of um, of retaining an expert to work on a case. Sometimes that is, that can be beneficial way, a truncated process. You know, we, maybe you want to bring the expert in to identify whether or not there is an issue for the expert to then investigate, but we do not know whether that issue is even there. So, we, we retain the expert to first identify whether the issue that we are thinking about exists and whether the expert should go forward. That's a small price tag. Then, having identified, yes that issue does seem to be there, perhaps your client does in fact have, uh, um, delusional disorder and what I have seen suggests yes it is there, we go forward with a separate contract. I can't, I don't think that is happening in the context of panel attorneys where there, it is just not invited by the way the system is set up, um, where they can actually bring the expert in, investigate whether the question should be pursued, and then having perhaps reached a positive response then going, hiring the expert to then pursue and develop the question, so, or the answer to the question. So those are things that we do on a regular basis as defenders as the cost-saving, um, component to our daily practice that just isn't worked into the model to the extent that there is one for panel attorneys that we would do if the panel, if we had panel administrators in the offices.

Chip Frenslley: Does anybody perceive um, there to be a conflict in that role or I have often heard that is a concern for some defenders who don't believe it is appropriate to, uh, to exercise that function. Does anybody share that position or maybe . . .

Stephen McCue: I am sure there, there are going to be some cases where it is a problem. I mean, I think um, current system you know has some issues that way. Um, a defender should do it like, like Susan Otto was saying. I think that, that there, there are ways to insulate that person in that position, um, so that there isn't, there isn't any kind of compromising though, um, duties of confidentiality and the other problems that would come up in that scenario. Um, I mean I think it's manageable. I mean, it is, you know, it is something that has to be thought about.

Judge Walton: I think I probably know what your response is going to be but as you know, there has been a push by the Justice Department and some in Congress for federal courts to create reentry courts and uh, they are extremely labor-intensive and the responsibility in those courts unfamiliar with, as far as defense services are concerned, they have to take over representation of defendants even if they were hired, represented by

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someone else for the reentry court program. If your chief judge decided that he or she wanted to create a reentry court, would you have the resources to staff the court?

Maureen Franco: Well, we have a reentry court in the El Paso division so, and I staff it and I have, um, three other assistants, uh, that assist me with it, um, so we do have a reentry court, so I could do one. That's about it, though. I mean, it would require, because they are extremely labor-intensive that's why I had other assistants. I was trying to do it myself but it became clear that it required a lot of work and so, um, I got volunteers to help me with it but personally and philosophically, I think reentry courts are, um, and I have seen the proof is in the pudding, and I see that it works. Um, if you do it right, um, that I think there, it is worth the investment but it, it is very labor-intensive to do.

Jason Hawkins: We also have a reentry court in Dallas also that is started by Magistrate Judge Irma Ramirez, and we staff it with one of our attorneys who will go over, um, on a monthly basis, um, to help out with those cases. Um, I would agree that, you know, I been in there and watched it several times. Um, I think it has transformed the lives of some of the people that are in there, um, and has, recidivism and so, I, I think it's definitely worth the effort on the part of the Judiciary, to introduce more of those types of courts into the federal, in the federal system.

Judge Cardone: I have a, a question. Um, Mr. Martinez when he was here was talking about, um, the way his office functions and you guys were all talking about parity and, um, as a result of Mr. Frensley's question talking about, you know, some sort of overseeing of the CJA panel, um, what if we came up and then talking about independence, what if we came up with some formula, uh, or some system that essentially gave your each federal public defenders selected by your circuit, um, and with the help of the DSO, each of you were given a budget like Mr. Martinez is given to oversee defense in your district and that would include overseeing the CJA panel, overseeing, um, your FPD office, um, making sure that experts were available across the board for everybody. How, how do you see that functioning, um, where you, you are given a choke of money just like Mr. Martinez to make things fair. Um, you know, and then with the help of DSO and, and you know, formulas and things that help you figure out how to spend that money, is that something that might work? Any thoughts?

Stephen McCue: Um, I have never thought about that. I mean, I, I think that, that's happening on a macro level. I mean, you know, defender services has, um, they have a pretty tight rein on CJA panel payments. Back during sequestration, they could tell us, um, you know, what they were spending per day on vouchers. So, I mean, I, I think the expertise is there. You know, it, it probably could work out. I, I think part of what Mr. Martinez

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was talking about was I think, um, they would like to have more input, um, on who gets to stay on the panel and um, you know, in theory, I don't, you know, I guess in theory I have a problem with it in, in you know, having U.S. Attorney have some say over who gets to be on the panel. In practice, I think it, it would work in our district with the personalities we have now, um, because I get calls from assistant U.S. Attorneys, um, you know, fairly regularly saying like, hey, you know, what is up with this lawyer, why are they not returning my calls, they are not doing anything for these clients, you know, they are letting this, this offer lapse when it's, you know, it's really in the client's best interest. I mean, you know, I, I think that they would, they would not say this guy's a pain in our side and so, we don't want him on the panel. That would be more like, hey this person's really not doing their job and I don't feel good about, um, winning the case when, when they are just laying down.

Judge Cardone: Well, I'm talking about is you managing it.

Stephen McCue: Right.

Judge Cardone: In other words, as FPD, if you are getting those calls anyway, why shouldn't you sort of over, be overseeing that whole system in your district?

Stephen McCue: It's a big jump. I mean, that would, that would, like I said, I already have a job.

Judge Cardone: Well, but, but, with, with more staff . . .

Stephen McCue: Yeah.

Judge Cardone: With a budgeting attorney, I mean, is there are way that you think it could happen as I . . .

Stephen McCue: I think it could and I think it does happen in some of the smaller districts. Um, I, I think in the district of, um, Colombia AJ, uh . . .

Judge Walton: AJ Kramer.

Stephen McCue: Kramer, you know, does that, you know, um, pretty much in, in New Orleans, I think that, um, the defender there, uh, has serves that function pretty much already. I mean, not, we don't, we don't have fiscal control because the, the payments go through defender services but, um, you know, I mean, I think those are the people to ask and I don't know how it would work on a scale, um, like we have in, in the border. Um, you know, it's the, the numbers are just staggering. I mean South Texas, they have 25,000 cases a year just in the defender office. So, I mean the, the scale

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would be daunting in those kinds of situation but it does happen, uh, on a smaller scale so, there certainly is a precedent for that.

Judge Cardone: Anybody else?

Jason Hawkins: I, I'm going to get out of the, the scale thing intimidates me frankly. Um, I, I don't know what kind of staff that would necessarily take to get something like that done and so that would require a great deal of thought and you would have to look at the numbers of, you know, something like that with our current caseload as high as it is.

Maureen Franco: I mean, I, I think it makes sense to do it that way. It's just, um, the logistics, trying to figure those out but it does seem to be a solution to this problem.

Virginia Grady: Like short term for some of us, it can be done, longer term for others but yes, I mean, as a basic concept, I think it could be done. It's, you're basically building a little office within an office to manage the panel.

Judge Cardone: Um, I wanted to ask in the circuit, uh, and particularly in the Fifth Circuit, um, a question about the CHU, there isn't one. I know that in the Western District, I think we have four death penalty cases that we just got, um, with no attorneys really available to, uh, appoint, to represent and so, um, Ms. Franco and, and for you, Mr. Hawkins, if you have any input on this, how do you feel about these capital habeas cases and how do you assist your judges in finding counsel?

Maureen Franco: It was a, uh, a real, um, disheartening experience to be involved, um, with you and the other judges trying to find counsel for, um, these death cases. Um, the fact that we don't have the capital unit in Texas, um, is devastating. That there are lawyers out there who can do this work and are able to do this work but they are overworked because Texas likes to execute people, so they are busy working on that. Uh, on the cases, the current cases that they have after the *Martinez* decision, the person who represented them in state court should not be representing them in the federal proceeding. Um, and so that's, when I heard that earlier today, that is of concern because there should be a new, uh, set of eyes or a couple of pairs of eyes that are put on those cases and, um, I think that I, I don't understand what the hesitancy is. I don't understand the entire history as to why we cannot even say the word CHU in, in Texas but before the circuit but, um, Jason was offering to, to house one. Um all the defenders in Texas agreed that, um, we'd send our cases there that Jason could manage that office and we were shot down, um, by the circuit at a very low level but, um, we were basically the lowest at that. We would have better chance of performing social security than getting a, a capital Habeas unit in Texas. Um, so, you know, the alternate approach is what

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Virginia is doing which is hiring people in our office that could do that work but with the caseload as it is right now, unless I get that cap up, I can't do that. But ideally, that's what I would like to do is to add, um, a couple of attorneys. I recently hired a mitigation specialist. I'm putting my big toe in the water to try to at least to get ready to do this type of cases, but it might be that's what we are going to have to do if we are able to raise our caps that we should perhaps consider, um, recognizing that this is a need in the state of Texas. That it's not going to be changed institutionally and so each defender needs to take on that responsibility.

Judge Walton: Was any explanation given as to why the circuit took that position in light of the fact that Texas executes more people than anybody?

Maureen Grady: No sir.

Jason Hawkins: No, your Honor.

Katherian Roe: I have a question about the panel after that moment of silence [LAUGHING]. I have a question. Before the, um, CJA, over fifty years ago, judges routinely picked out someone in the courtroom, you there, sir, you look like a fine lawyer, why don't you represent this man? Oh you're a real-estate lawyer? Oh well that's not a problem, in, in federal criminal cases and we all know that. And there came a time when that became disfavored and the courts decided that it was not the best representation to bring someone in who knew nothing about federal criminal defense and assign them to someone who is looking at twenty or thirty years in prison.

I'm wondering, I, um, Mr. Hawkins when I read your, uh, your statement for today, I was very surprised to see that in the District of Texas and I'm wondering if it, it is also true of any other districts that there were six divisions in the Northern District in which there is something called a non-voluntary panel in that if you are lawyer and you're breathing and walking, that you can do federal criminal cases or someone can get a fifteen year mandatory minimum just because you didn't understand the difference between what a predicate offense was for ACCA and what it wasn't. Can you tell me about that and why you think that exists and also for the other folks on the panel whether or not that's an issue in your district?

Jason Hawkins: Well, you know, why it exists, I mean it generally, um, exists in, in divisions where there is a fairly low lawyer population. I mean, we have some counties in Texas where there are more cattle's than there are people, so it is difficult in finding you know, uh, lawyers to do the cases and so, uh, do, do I think it's proper? No. Um, you know, when, when a lawyer is appointed on those cases, I mean, they frequently coordinate with us, absolutely. Um, as a matter of fact, you know, we're, we're

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currently shepherding through a case where the lawyer, in Amarillo, only practices tax law and no real experience in doing these types of cases. It is unfortunate but there is just, there's just not a large panel in Amarillo in order to get that done if at all. So, um, you know, I think it's just, just been the historical practice and, um, the judges that have been on the bench in frankly a very long time. And there, um, you know, and it's certainly been broached before, um, uh, by, you know, my predecessors, certainly, um, and it just hasn't moved the needle at all, um, and I, I think it's just, it's just always been that way, and so that's the way it always should be.

Judge Cardone: Do they have a CJA plan?

Jason Hawkins: Um, yes, there is a CJA plan for the Northern District of Texas.

Judge Cardone: No, but does, do the, and, are they following that plan now?

Jason Hawkins: Um, your Honor, um, our, recently the AO came down and did the study of our CJA plan and the quality of representation, um, within the Northern District of Texas. Um, they were very, um, highly praised. My particular office, they were, um, very critical of how the CJA plan is run, um, out, you know, in some of these divisions, um, and so there has been a movement, um, by myself, uh, along with our district clerk and our chief district judge to see if we can find a way to revise that plan, um, but that's just in its beginning stages.

Judge Cardone: Is there any sense if somebody is not following the plan and what can be done? I mean, why have a plan if nobody is following?

Jason Hawkins: I, uh, that, that's a difficult question to answer, your Honor. I mean, I, um, I, I would say that each, you know, federal judge, um, has its own views on how the panel should be run, and the chief district judge certainly doesn't have the ability to necessarily to control the other, the other district judges in this matter in my experience, what I've noticed.

Stephen McCue: I've never heard of anything like that. I mean, we certainly don't have that in New Mexico. I mean, although, the, some of our senior judges talk fondly of the days when they would be summoned and to seat in the jury box as young associates and they would assigned a case pro bono, but I don't think anyone thinks that's a good idea. We have a great panel. We are proud of our panel. We have some amazing lawyers on the panel. I would be more than happy to have them represent me or any member of my family, and I think, you know, that's the way it should be.

Maureen Franco: We have that problem in the Austin division which I alluded to earlier. Um, our office gets the majority of cases anywhere between 85% to 90%

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of the cases but, um, one would think that there's plenty of qualified lawyers in, in Austin, Texas who could do criminal defense work, um, but they have, um, at this point, even though, um, several defenders, um, well my two predecessors attempted to get Austin to develop a plan or a adopt the plan, they have not um, and still have not, and so for us to do training um, I have to rely in the clerk's office to let me know who had um, filed the voucher within the last year or eighteen months to years and then we e-mail those people so that they can come in for some training. So, I have no idea who a lot of them are um, but it is not from the lack of trying, it's from my end also from John Convery who is the rep. for the western District, and the Fifth Circuit rep. in Austin trying to get them to adopt the plan instead of the panel, but they have to this point have refused to do.

Jeffrey Frensley: What's the reluctance?

Maureen Franco: I think it's partly the idea of picking someone out of audience to uh, represent the client or picking up the phone and calling somebody um to do it but what Jason is saying, it happens with us too if a lawyer who has never done, there's only a civil lawyer who has never done criminal work, the first thing they do is they call the branch chief in Austin and, and our office will help walk that person through the case. It becomes very problematic though, if we have a codefendant because then we can't offer that assistance because of the privilege in confidentiality issues.

Judge Cardone: So you are saying that, the court's decision not to develop the plan?

Maureen Franco: Apparently.

Judge Cardone: A follow-up plan.

Katherian Roe: Follow-up plan.

Maureen Franco: Right. Because we have a district plan. So even if you follow the district plan, but they don't have a divisional plan.

Katherian Roe: But attorneys are still willing to do the work if they're called by the judge.

Maureen Franco: Well only 10% of them because we, um, to the Austin division credit to those judges there, they are giving the majority of the cases to us but that does not promote the idea of having robust hybrid system which is what we need and so we need to have more than just the defenders office representing um, individuals who are charged in that division.

Katherian Roe: Is there any, I'm sorry, is there any reason believe that, that the Austin attorneys don't want to be on the panel because of, because of voucher cut issues or lack of independence or, or any of those issues.

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- Maureen Franco: Possibly?
- Katherian Roe: I' m sorry, Mr. Hawkins.
- Jason Hawkins: Oh no, and I was going to say it has been my experience especially in the smaller division when the federal judge calls, you are not going to say no.
- Judge Cardone: Does that work?
- Jason Hawkins: [LAUGHING].
- Judge Cardone: All right um, you mentioned Ms. Grady that you said we all have lines in the sand. I would like each of you to tell us what your line or lines in the sand are, we will start with you Mr. McCue. For us, for us as a Committee, what are your major lines in the sand?
- Stephen McCue: Um, you know I, I think increasing or decreasing the independence of our office, I mean being able uh, to decide who gets the cases within our office um, how we staffed them, how we fund them within our office and I mean to me that is, that is a line that um, I draw in the sand with the district court, I mean I, you know we don't let them pick lawyers um, we don't let, let them you know basically tell us how to do things in terms of funding our cases. So I would say that, that, that sort of hard line that we have drawn and you know and, and we could move that to protecting the panel um, that I think, that, that would be something, that I would be all for, um, I, I think like I said before, the panel is really, the canary in the coal mine because they are the independent contractors, they are solo um, they don't have the strength and numbers that we do and so I think um, you know there are the ones who suffered the most when there is scarcity mentality you know, brought in the judiciary.
- Judge Cardone: Ms. Franco?
- Maureen Franco: For me um, it is the independence of our um, IT function um, it is just become critically apparent to me that if we don't get this solved quickly and affirmatively and definitively then every defender office, I would recommend that they um, get they're own server and they work their own e-mail system or defender data system, they're own statistical um, recording because there is a third party that has access to our information. It completely destroys the attorney client privilege and make us all susceptible to being grieved upon by our clients because we have to get all former clients, all present clients to agree to that breach, the potential breach so um, to restore that independence in our IT function, I think is for me is a very hard line in the sand and that we really need for that to happen.

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The other is to set the demotion of the defender services within the AO that needs to be reversed. She, whoever in the position obviously I'm saying she, because Cait Clarke is in that position, but she should be moved out at the program services and restore to the director position that she had before to show that we are not just providing or simply providing services to the courts to the judges, is that we represent clients, real individuals that have been charged with crimes and so we are not like probation in pretrial in the clerk's office. We are different and so I think she needs to be restored. That position needs to be restored but for me those are the two hard lines in the sand that I've drawn.

Judge Cardone: Ms. Grady.

Virginia Grady: I guess. We are duet. Let me add that, um, having a memorandum of understanding on the subject of, uh, AO access to our case management data is not sufficient, you know. We don't pass that around and require people to eat it, read it in the lunchroom. People don't understand that. They don't understand why we have one. Frankly, it is no substitute for what ought to be physical separation of our data management which what private attorneys would have, or have it. I can't imagine being a private attorney being told by the way we're just gonna hook you up, don't worry about it. Here is memorandum of understanding to make up for that hook up. They got some real problems and it really undermines, uh, confidence and the integrity of our, of our case management. Uh, and the other, and I agree. Put the DSO back where it was and see where we go with that. That is a simple a solution. Maybe it was made, I don't know, under the stress of the financial times. But, I think it was bad idea and we need to put back where it was.

Jason Hawkins: Building on that, at a bare minimum, with the demotion of the Defender Services Program with the structure of the AOs absolutely is unacceptable to me. Um, and the fact that we don't have a seat at the table in requesting appropriations for our office, uh, it is, it became readily apparent during sequestration that we can do just as good of a job or better that policy maker within the AO did and that crucial time. Uh, I think the policy decisions are being made within the administrative office by people that never stepped foot in a courtroom or never defended a federal criminal case. And so, the office needs to do restored to allow us to have a seat at the table.

Chip Frensley: One of the concerns in the community of panel of attorneys is the issue of unwarranted and arbitrary voucher cutting. And I am just curious because one of things that readily apparent is that there is just a complete absence of data to support or show the prevalence of that condition, and I am wondering what you know about that if anything in your districts?

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- Virginia Grady: Well in Colorado we only give you anecdotal evidence because we don't have access to the data. But if we did, we would be taking about it. I can tell you that it happens. It seems to anecdotally be happening more than it used to. Sometimes it goes in waves um but largely, it's happening, not just at the tail end of the case with the voucher but also at the front end with the request on the CJA 21s.
- Jason Hawkins: And it is my understanding and I may have misunderstood this but the eVouchering program was supposed to identify those cases initially at least, where the judges were cutting the vouchers and that has since been disabled.
- Judge Walton: Is this just across the board or you are talking about specific judges? I mean, it is universal?
- Virginia Grady: No, it is not universal.
- Stephen McCue: It's the same in New Mexico. I mean there are, I mean I had a lot of lawyers who call me up and say, you know what, I've been in the panel for twenty years and I've never had a voucher cut and all of the sudden I am getting these cuts and there's no, I mean the only explanation is, that is too much money for that kind of case. It is not that they didn't do the work, it's not that work was not reasonable. It's just too much money, and so I've heard that more in the last few years than I ever heard it previously. So it's a problem, that's all I can tell you. I think, I mean there is supposed to be the ability to see the voucher as submitted any voucher and the voucher as paid and so I think that, you know I don't if that's, if that's been disabled. It is hard to track. The, the CJA lawyers had a real disadvantage. I mean they don't want to complain. They view it as throwing good money after that, you know, they're not going to get paid for the time they spent uh, meeting with the judge about, the cut that was made. We encouraged them to do that. Some lawyers do it. Um, I think it's a good thing. I think they should all do it. Um, but you know they worry about where the next case is coming from and they worry about uh, say just you know, throwing good money after that so they don't pursue.
- Judge Walton: Again, is that with some specific judges or universal?
- Stephen McCue: Um, uh, it's specific judges. Some more than others.
- Robert Rucker: Is it coming from the presiding judge or court of appeals? Both?
- Stephen McCue: It's the individual judges, the individual district judges.

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Katherian Roe: Is that everyone's uh, thought that it is more district court judge than court of appeals in your districts?

Maureen Franco: Well, I think there is cutting being done out there too?

Jason Hawkins: Yes. Yeah, definitely with regard with the capital habeas cases of you know [inaudible] absolutely.

Virginia Grady: Right.

Katherian Roe: Do any of you have the ability to ascertain when bill, when vouchers are cut?

Stephen McCue: No.

Maureen Franco: No.

Virginia Grady: No.

Jason Hawkins: No.

Katherian Roe: And so none of you then obviously notify your judges for them to know that there was a judge from your district, I think, I'm not sure it's yours Mr. McCue and I can't remember, but one of your districts was saying that they never knew when vouchers were cut. It was your [points to the panel] district actually, and the question was why, why wouldn't they, but it's because you don't even know. The federal defender never gets notified.

Stephen McCue: No.

Katherian Roe: The reason I asked that question is because in districts where the federal defender manages the panel, the federal defender knows every voucher that's cut and then sends a letter to the district court judge also saying that the vouchers has been cut, those cut at the circuit, that's why I was asking.

Virginia Grady: Yeah I don't think they know in our district.

Katherian Roe: Do you have any feelings or thoughts about whether or not there are, there's a practice in your district that the panel attorneys voluntarily cut their own vouchers in order to prevent the, the, the vouchers from getting cut again?

Virginia Grady: Absolutely.

Stephen McCue: Absolutely. Yeah, they do. I mean, I think a lot, I mean what I always encourage people to do is to list the hours, but you know, reduce the claim

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so the judge knows that there was a lot more time put in to this, than they're billing the court for, but yeah, I know people do that.

Katherian Roe: It was interesting um, the comments of the judge that was on the first panel when he kept saying that he had no problems. He had never had any problems with voucher cuts. From your district, Ms. Franco and I think that issue became clear, or the reason he never had any problem became clear, because all lawyers were getting their vouchers under the statutory maximum number.

Maureen Franco: Um-hum.

Katherian Roe: So that couldn't be a coincidence.

Maureen Franco: Right. One would think not.

Chip Frensley: Yeah, uh, I don't mean that leave the, uh the experts, I know we've, we haven't talked about in a minute in a while but with respect to um, compensation for expert services, are other than the statutory caps that exist, are you aware of any artificially created caps on expert services that are happening in your districts or circuits? As far as you know, the court is saying you know, this is the cap no matter what, you're never going to spend more money than this on any experts.

Stephen McCue: There, there's a CJA manual at the clerk's office publishes that has presumptive rates. Um, and but I, I don't, I never heard of them saying you know, that that's you know, that's it, we're not going to go over there. I think if you have a good reason, um, and you know, they could show that there is good quality work being done and that that's something the clerk's office puts out, the judges aren't bound by it.

Maureen Franco: I would agree with that that there is a chart that has a presumptive or separate mental health, I think that excluded for it but there is a presumptive rate um, but um but we made it clear in I think the year or two ago when we had a CJA training in El Paso division that maybe you participated Judge Cardone, I don't remember, but where we told the panel that as a presumptive rate that if you have to find the expert that requires more that you could ask the court for it, um, for more than just what the presumptive rate was, but um, you know I think it's judge-specific and also the practitioner who they find that to do the work for them.

Judge Cardone: Do you have question Reuben?

Reuben Cahn: Yeah, I actually I had a question I'd like to if Jason could, could explain something to me. I understand you have a currently, normally asking to

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talk about publicly available information but § 2255 in your office involving a federal capital prosecution in Texas in which the initial budget, barely small budget approved by the district court judge was as I understand, slashed by the circuit court that became an issue of contention. Would you able to tell us what the publicly available facts on that are, or are there any?

Jason Hawkins: Uh, I mean no. I mean I think that's still, my understanding is that's still under review, I'm not as familiar with that, that particular case.

Judge Walton: Have you or Maureen, heard of that happening again in any other cases? Federal capital cases in this circuit.

Maureen Franco: Yes. [LAUGHING].

Judge Cardone: We take anonymous comments. [LAUGHING] All right, like were getting close to the end, am I, is there anything um, let's start with you Mr. McCue. Anything that you would like to add that we have overlooked or that you think is important for us.

Stephen McCue: No. I've said my piece. Thank you.

Judge Cardone: Maureen?

Maureen Franco: No, your Honor, thank you.

Jason Hawkins: If I could just go back to the one thing on the Capital Habeas Unit your Honor, um, I think it is important to try to get some type of, you know, if not a unit, some type of lawyers who are familiar with that work, established somewhere inside the state of Texas. And frankly, I don't think that can come from me. I don't think it can come from Maureen, I think that charge has got to be led by the district judges and the magistrate judges that are having difficulty uh, uh in finding lawyers, to do these cases. And I think if your voices are mildly heard in the Fifth Circuit, that that's going to have much greater impact, than if it's just me, asking for it to be established.

Judge Cardone: Well on behalf of Committee, we want thank you again, um, all for being here. Um, yeah, as you know, we are going to be resuming tomorrow morning early. We would invite all of you to be here to continue to hear and listen and again, we take, I've said this before, we have cjastudy.fd.org for all of you in the audience, for people that want to follow up. If you have any thoughts, any great epiphanies on how we can go forward, please do no hesitate because we are trying to get this many ideas and to, to really put as much work and effort into this as we can. So,

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as you can see, we would appreciate any comments and thank you all for being here. Thank you.