

DECLARATION OF MATTHEW RUBENSTEIN REGARDING APPOINTMENT OF COUNSEL PRIOR TO CHARGE OR INDICTMENT

1. I am a Capital Resource Counsel attorney in the federal public defender program and a member of the Federal Capital Trial Project. The Capital Resource Counsel and the Federal Death Penalty Resource Counsel (FDPRC) projects comprise the Federal Capital Trial Project (or “Trial Project”).¹ Established in early 1992, a core function of the Trial Project is to provide consultation, training, and assistance to counsel and courts to improve the quality of representation and the cost-effectiveness of defense services in federal capital prosecution cases.² I joined the Trial Project in 2010 as a Capital Resource Counsel attorney, was the Director of the Capital Resource Counsel (CRC) project from 2015 to 2025, and in 2025 transitioned back to a Capital Resource Counsel attorney position in the project. The Trial Project is funded and administered by the Defender Services Office of the Administrative Office of the United States Courts.

¹ The Trial Project assigns a CRC or FDPRC attorney to work with the defense team in every federal capital eligible case as a “resource counsel.” In their role as resource counsel, the CRC attorneys (full-time salaried federal defender staff) and FDPRC attorneys (part-time contractors) are not counsel of record; rather, they provide advice, assistance, and helpful information and resources to the defense team. In addition to their work as resource counsel, the CRC attorneys often serve as death-qualified “learned” counsel as part of their Project responsibilities; and the FDPRC attorneys are often appointed to serve as “learned” counsel as CJA counsel outside their role with the Project.

² The work of the Trial Project is described in a report prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (May 1998), at 28 – 30, http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf [Perma.cc archive: <https://perma.cc/SU25-GWMV>]. The Subcommittee report “urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project . . . , which has become essential to the delivery of high quality, cost-effective representation in death penalty cases” *Id.* at 50.

An update to the Report states: “Many judges and defense counsel spoke with appreciation and admiration about the work of Resource Counsel. Judges emphasized their assistance in recruiting and recommending counsel for appointments and their availability to consult on matters relating to the defense, including case budgeting. Defense counsel found their knowledge, national perspective, and case-specific assistance invaluable.” *Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases* (September 2010) at 63. <https://www.uscourts.gov/sites/default/files/fdpc2010.pdf> [Perma.cc archive: <https://perma.cc/LPH6-K8QB>].

2. My responsibilities in the Federal Capital Trial Project include the monitoring of all federal capital prosecutions throughout the United States to assist in the delivery of adequate defense services to indigent capital defendants in such cases. This effort includes overseeing the collection of data on the initiation and prosecution of federal capital cases.³

3. The appointment of learned counsel is required by statute. 18 U.S.C. § 3005. Learned counsel appointment is also required by the U.S. Judicial Conference. In 1998, the Judicial Conference adopted as federal judicial policy the recommendations of the Defender Services Subcommittee on Federal Death Penalty Cases (commonly referred to as the *Spencer Report*).⁴ The *Spencer Report* and the 2010 update⁵ to that Report provide compelling support for early appointment of learned counsel. (“The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought.” *Spencer Report 2010 Update*, Commentary at 93 (emphasis added).)

4. The *Model Plan for Implementation and Administration of the Criminal Justice Act*, section XIV, *Appointment of Counsel and Case Management in CJA Capital Cases*,⁶ which has been adopted by the U.S. Judicial Conference and thus constitutes federal judiciary policy,

³ In order to carry out the duties entrusted to me, I rely on the data gathered by Kevin McNally who served as Resource Counsel with FDPRC since the inception of the Trial Project in January 1992, served as the Director of FDPRC between 2007 and 2018, and continued overseeing the collection of data on the initiation and prosecution of federal capital cases until 2024 when I took over this responsibility. This information is gathered from a variety of sources including PACER case dockets and case filings, transcripts, the Administrative Office of the United States Courts, Department of Justice press releases, Federal Defender offices and CJA counsel, and information gathered by and received from Federal Capital Trial Project Resource Counsel. This information is regularly updated and checked for accuracy. The Project’s information regarding federal capital prosecutions has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.

⁴ https://www.uscourts.gov/sites/default/files/original_spencer_report.pdf (last accessed September 18, 2025); <https://perma.cc/SU25-GWMV>.

⁵ This comprehensive update of the Spencer Report in 2010, with revised commentary to the 1998 recommendations, was endorsed by the Defender Services Committee. The recommendations themselves, as adopted by the Judicial Conference in 1998, remain unchanged. <https://www.uscourts.gov/sites/default/files/fdpc2010.pdf> (last accessed September 18, 2025); <https://perma.cc/LPH6-K8QB>.

⁶ <https://www.uscourts.gov/file/vol07a-ch02-appx2apdf> (last accessed September 18, 2025); <https://perma.cc/XU8D-LUKS>.

includes provisions addressing the process by which the Court may appoint counsel to an uncharged individual who is the subject of an investigation in a federal capital-eligible case:

B. General Applicability and Appointment of Counsel Requirements

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3. Qualified counsel must be appointed in capital cases at the earliest possible opportunity.

....

C. Appointment of Trial Counsel in Federal Death-Eligible Cases

1. General Requirements

....

b. To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal death-eligible case, the court may appoint capitally qualified counsel upon request . . .

5. In 2019, the U.S. Judicial Conference incorporated policies recommended by the Ad Hoc Committee to Review the Criminal Justice Act Program (Cardone Committee) and revised § 620.30 of the *Guide to Judiciary Policy, Volume 7 (Defender Services)*⁷ to include the language below:

§ 620.30 Procedures for Appointment of Counsel in Federal Death Penalty Cases

(a) Recommendations for Appointment of Qualified Counsel

(1) In appointing counsel in federal death penalty cases, 18 U.S.C. § 3005 (link is external) requires the court to consider the recommendation of the federal defender, or, if no such organization exists in the district, of the AO's Defender Services Office. Judges should consider and give due weight to the recommendations made by federal defenders and resource counsel and articulate reasons for not doing so.

6. Counsel was appointed, pre-complaint or pre-indictment, to represent individuals in the following cases that did not involve Federal Bureau of Prisons homicide investigations.⁸

⁷ <https://www.uscourts.gov/administration-policies/judiciary-policies/guidelines-administering-cja-and-related-statutes-18> (last accessed September 18, 2025); <https://perma.cc/AXA2-VJ9T>.

⁸ Counsel was appointed pre-charge in these non-Bureau of Prison homicide cases: *United States v. Christopher Andre Vialva* 6:99-CR-00070-ADA (W.D. Tex.); *United States v. Eric Rudolph* 2:00-CR-00422-CLS-TMP (N.D. Ala.); *United States v. Aaron Pike* 1:01-CR-00129-RJA-NKS (W.D.N.Y.); *United States v. Johnny Davis* 2:01-CR-00282-SSV (E.D. La.) (Judge Sarah Vance) [two learned counsel appointed at the capital rate]; *United States v. Kevin Fleming* 2:03-CR-00350-LRH-PAL (D. Nev.); *United States v. Fernando Delatorre* 1:03-CR-00090 (N.D. Ill.) (Judge Ruben Castillo) [two counsel appointed]; *United States v. Victor Wright* 1:04-CR-00966-ERK-VVP (E.D.N.Y.); *United States v. Gilbert Saldana* 2:04-CR-00415-PA (C.D. Cal.); *United States v. Lanny Benjamin Bodkins, Antoine Plunkett and Darel Keith Taylor* 4:04-CR-70083-

7. Counsel was appointed, pre-complaint or pre-indictment, to represent individuals in the following Federal Bureau of Prisons homicide investigations.⁹

GEC (W.D. Va.); *United States v. Joseph Duncan* 2:07-CR-00023-EJL (D. Idaho) [federal defender appointed]; *United States v. Frankie Roche* 3:08-CR-30014-MAP (D. Mass.); *United States v. Johnny Rounds* 1:10-CR-00239-WMS (W.D.N.Y.); *United States v. Jared Loughner* 4:11-CR-00187-LAB (D. Ariz.); *United States v. Ahmed Muse Salad* 2:11-CR-00034-RBS-DEM (E.D. Va.); *United States v. Hector Natal* 3:12-CR-000164-JBA (D. Conn.); *United States v. David Joseph Pedersen* 3:12-CR-00431-HA (D. Or.); *United States v. Shamerria Smith* 1:13-CR-00470-JHR (D.N.J.); *United States v. Dzhokhar Tsarnaev* 1:13-CR-10200-GAO (D. Mass.); *United States v. Jose Caldera* 4:14-CR-00278-MWB (M.D. Pa.); *United States v. Dylann Storm Roof* 2:15-CR-00472-RMG (D. Colo.); *United States v. James Cureton* 1:16-CR-00023-CBA (E.D.N.Y.); *United States v. James Matthew Bradley, Jr.* 5:17-CR-00649-DAE (W.D. Tex.); *United States v. Uriel Badillo* 2:19-CR-00154-TOR (E.D. Wash.); *United States v. John W. Black, III, Norman Bradford, April Braner, Jeffrey C. Smith, David Sanford, Jr. and Monroe Merrell* 3:20-CR-00046-GMG-RWT (N.D.W. Va.); *United States v. Jose Domingo Ordonez-Zometa* 8:20-CR-00229-PX (D. Md.); *United States v. Patrick Crusius* 3:20-CR-00380-DCG (W.D. Tex.); *United States v. Derick Brown* 2:20-CR-00243-LSC-SGC (N.D. Ala.). and *United States v. Darel King* 4:24-CR-20265-FKB-CI (E.D. Mich.). Counsel was appointed pre-charge in many other non-Bureau of Prison homicide cases that were investigated and never charged.

⁹ Counsel was appointed pre-charge in these Bureau of Prison homicide cases: *United States v. Anthony Battle*, 1:95-CR-00528-ODE-RHD (N.D. Ga.); *United States v. David Paul Hammer* 4:96-CR-00239-JHS (M.D. Pa.); *United States v. Michael O'Driscoll* 4:01-CR-00277-MM (M.D. Pa.); *United States v. Marek Kowalski and Peter Georgacarakos* 4:02-CR-00034-JFM (M.D. Pa.); *United States v. Carlos David Caro* 1:06-CR-00001-JPJ (W.D. Va.); *United States v. Tommy Meeks* 4:07-CR-00196-JEJ (M.D. Pa.); *United States v. Joseph Cabrera Sablan and James Leon Guerrero* 1:08-CR-00259-OWW (E.D. Cal.); *United States v. Darryl Milburne and Dwuane Gravely* 7:09-CR-00013-GFVT (E.D. Ky.); *United States v. Dominic Stewart and James Duckett* 1:10-CR-00129-REB (D. Colo.); *United States v. Silvestre Rivera and Richard Santiago* 1:10-CR-00164-LTB (D. Colo.); *United States v. Wesley Paul Coonce, Jr. and Charles Michael Hall* 6:10-CR-03029-GAF (W.D. Mo.); *United States v. Ulysses Jones* 6:10-CR-03090-DGK (W.D. Mo.); *United States v. Antoine Giles* 1:11-CR-00051-IMK-JSK (N.D.W. Va.); *United States v. Allen Hurley* 3:11-CR-00360-RDM (M.D. Pa.); *United States v. Gary Watland* 1:11-CR-00038-JLK (D. Colo.); *United States v. Willie Edgar Bush* 2:11-CR-00015-JPJ (W.D. Va.); *United States v. Samuel Stone* 1:12-CR-00072-AWI-DLB (E.D. Cal.); *United States v. Phillip William Astor* 2:12-CR-00103-VAP (C.D. Cal.); *United States v. Patrick Andrews and Kevin Bellingier* 1:12-CR-00010-JSK (N.D.W. Va.); *United States v. Shaun Steven Folts* 4:12-CR-40015-JPG (S.D. Ill.); *United States v. Boyd Higgenbotham* 5:13-CR-00004-ACC (M.D. Fla.); *United States v. John Travis Millner* 7:13-CR-00015-ART (E.D. Ky.); *United States v. Dana Mattingly* 4:16-CR-00102-JAS-DTF (D. Ariz.); *United States v. Andrew Rogers* 2:16-CR-00018-WTL-CMM (S.D. Ind.); *United States v. Steven McCoy* 1:18-CR-00046-MAC-KFG (E.D. Tex.); *United States v. Adam Wright* 2:19-CR-20498-PDB-MKM (E.D. Mich.); *United States v. Samuel Silva* 2:20-CR-00017-JPJ-PMS (W.D. Va.); *United States v. Eleke Davis* 1:22-CR-00016-RMR (D. Colo.); *United States v. David Lee Bishop* 5:22-CR-00079-JA-PRL (M.D. Fla.); *United States v. Lawrence Taylor* 2:22-CR-00006-JRS-DLP (S.D. Ind.); *United States v. Daniel Ray*

I declare under penalty of perjury under the laws of the United States of America, 28 U.S.C. §1746, that the foregoing is true and correct. Executed September 18, 2025.

/s/ Matthew Rubenstein

Matthew Rubenstein

Casto 5:22-CR-00182-GW (C.D. Cal.); *United States v. David Paul Hammer and Morgan Wayne Siler* 4:23-CR-01300-SHR-MAA (D. Ariz.); *United States v. Rodney Hamrick* 2:23-CR-00015-JPH-CMM (S.D. Ind.); *United States v. Gerald Rubalcaba* 6:23-MJ-6050-HAI (E.D. Ky.); *United States v. Joshua Mebane* 2:24-CR-00018-JRS-CMM (S.D. Ind.); *United States v. Milton Huff and Samuel Mertz* 5:24-CR-00074-JGB (C.D. Cal.) and *United States v. Ishmael Petty* 1:25-CR-00123-DDD-1 (D. Colo.). Counsel was appointed pre-charge in many other Bureau of Prison homicide cases that were investigated and never charged.