

DECLARATION OF MATTHEW RUBENSTEIN
REGARDING JURY SELECTION PRACTICES

1. I am an attorney in the federal public defender program specializing in the defense of federal capital prosecutions¹ and I collaborate closely with the Federal Capital Trial Project.² I

¹ I have been representing capital defendants at trial since 1999, exclusively federal capital defendants since 2010, and have tried three capital cases through verdict, lead voir dire in another fifteen capital cases, personally assisted counsel during capital jury selection in eight capital trials, and assisted defense teams and prepared counsel for capital jury selection in six other federal cases. Twenty of these thirty-two cases were federal capital prosecutions. Since 2010 I have been a full-time staff attorney in the federal defender program representing federal capital defendants and assisting federal capital defense teams. In 2025 I joined the Office of the Federal Public Defender for the District of Maryland where I continue my work defending capital defendants in the District of Maryland and in other districts.

I have appeared as counsel in the following federal capital trials (*United States v. Robert Bowers*, No. 2:18-CR-00292 (W.D. Pa. 2023) (jury selection); *United States v. Brendt Christensen*, No. 2:17-CR-20037 (C.D. Ill. 2019) (jury selection); *United States v. Gary Sampson*, No. 01-10384-LTS (D. Mass. 2016) (jury selection); *United States v. Wesley Coonce*, No. 6:10-cr-03029-GAF (W.D. Mo. 2014) (trial); *United States v. Connell C. Williams*, No. 11-0298-F (W.D. Okla. 2013) (jury selection); and *United States v. Larry Lujan*, No. 05-924 RB (D.N.M. 2011) (jury selection)); personally assisted counsel during capital jury selection in the following trials (*United States v. Sayfullo Saipov*, No. 1:17-cr-00722-VSB (S.D.N.Y. 2023); *United States v. Jessie Con-Ui*, No. 3:13-cr-00123-ARC (M.D. Pa. 2017); *United States v. Naeem Williams*, No. 1:06-cr-00079-JMS-KSC (D. Haw. 2014); *United States v. John McCluskey*, No. 1:10-cr-02734-JCH (D.N.M. 2013); *United States v. Alexis Candelario-Santana*, No. 3:09-cr-00427-JAF-1 (D.P.R. 2013); *United States v. Kaboni Savage, et al.*, No. 2:04-cr-00269-MAK (E.D. Pa. 2012); *United States v. Brian Richardson*, No. 1:08-cr-139-CC (N.D. Ga. 2012); and *United States v. Anh The Duong*, No. 01-cr-20154-JF (N.D. Cal. 2010)); and assisted defense teams and prepared counsel for capital jury selection in the following cases (*United States v. John Pearl Smith, III*, No. 3:16-CR-00086-SLG-DMS (D. Alaska 2021) (de-auth and settled prior to trial); *United States v. Jarvis Wayne Madison*, No. 6:17-cr-00015-RBD (M.D. Fla. 2021) (entry of appearance pending when case de-auth and settled prior to trial); *United States v. Brandon Council*, No. 4:17-cr-00866-RBH (D.S.C. 2019); *United States v. Donald Fell*, No. 5:01-cr-00012-GWC (D. Vt. 2018) (appeared as counsel, de-auth and settled prior to trial); *United States v. David Hammer*, No. 4:96-CR-239-JHS (M.D. Pa. 2014) (entry of appearance pending when case proceeded as bench trial); and *United States v. Ritz Williams*, No. 4:08-cr-00070-YK (M.D. Pa. 2013) (entry of appearance pending when case de-auth and settled prior to trial)).

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.

joined the Trial Project in 2010 as a Capital Resource Counsel attorney and was the Director of the Capital Resource Counsel (CRC) project from 2015 to 2025. The Capital Resource Counsel and the Federal Death Penalty Resource Counsel (FDPRC) projects comprise the Federal Capital Trial Project (or “Trial Project”).³ 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. The Trial Project is funded and administered by the Defender Services Office of the Administrative Office of the United States Courts.

2. In my ongoing collaboration with the Federal Capital Trial Project, my responsibilities include reviewing all federal capital prosecutions throughout the United States and overseeing the collection of data on the initiation and prosecution of federal capital cases.⁴

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>].

³ 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.

⁴ 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.

A. Attorney Questioning

3. Since 2015⁵ there have been eleven (11) federal capital jury trials (involving twelve (12) defendants). Attorney questioning of potential jurors was allowed in nine (9) (82%) of these eleven (11) trials. If *United States v. Sayfullo Saipov*, No. 1:17-cr-00722-VSB (S.D.N.Y. 2023) is included because the court read verbatim the questions and follow-up questions that were prepared by the attorneys, questions prepared by the attorneys were utilized in ten (10) (91%) of the eleven (11) federal capital trials since 2015.⁶

Kevin McNally personally assisted appointed counsel in voir dire in the following federal capital trials: *United States v. Richard Tipton, et al.*, No. 3:92-CR-00068-JRS (E.D. Va.); *United States v. John Javilo McCullah*, No. 6:92-CR-00032-RAW (E.D. Okla.); *United States v. Michael Murray*, No. 1:92-CR-00200-SHR (M.D. Pa.); *United States v. Jean Claude Oscar, et al.*, No. 2:93-CR-00131-HCM (E.D. Va.); *United States v. Stacey Culbert*, No. 2:92-CR-81127-AC (E.D. Mich.); *United States v. Louis Jones*, No. 6:95-CR-00015-C (N.D. Tex.); *United States v. Orlando Hall*, No. 4:94-CR-00121-Y (N.D. Tex.); *United States v. Bruce Webster*, No. 4:94-CR-00121-Y (N.D. Tex.) and *United States v. Len Davis*, No. 2:94-CR-00381-ILRL-MBN (E.D. La.). Kevin McNally observed portions of the jury selections in other cases: *United States v. Thomas Pitera*, No. 1:90-CR-00424-RJD (E.D.N.Y.) and *United States v. Dennis B. Moore*, No. 4:94-CR-00194-DW (W.D. Mo.). Kevin McNally selected federal capital trial juries as counsel of record: *United States v. Quinones and Rodriguez*, No. 1:00-CR-00761-JSR (S.D.N.Y.) and *United States v. Valerie Friend*, No. 2:05-CR-00107 (S.D.W. Va.). Kevin McNally assisted in preparing defense counsel for jury selection in other cases: *United States v. Jason De la Torre*, No. 1:95-CR-00538-MV (D.N.M.); *United States v. Timothy McVeigh*, No. 5:95-CR-00110-RPM (W.D. Okla.) (Alley) on change of venue to No. 1:96-CR-00068-RPM (D. Colo.) (Matsch); *United States v. Theodore Kaczynski*, No. 2:96-CR-00259-GEB-GGH (E.D. Cal.) and *United States v. Angela Johnson*, No. 3:01-CR-03046-MWB-LTS (N.D. Iowa).

⁵ Trial from 2015 to the present best reflect modern capital defense trial practice following key developments in the law and professional standards. In particular, defense representation in capital cases evolved significantly in the wake of *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), the American Bar Association's 2003 revisions to the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003), and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008), which collectively updated and expanded the norms of capital defense practice and clarified the essential elements of effective representation in capital cases.

⁶ If we expand the review to all trials since the reinstatement of the federal death penalty (and include the data analyzed by Kevin McNally up through 2015), attorney questioning of prospective jurors was allowed in 192 of the 237 trials (81%).

B. Jury Questionnaires

4. Jury questionnaires were used in every one of the eleven (11) (100%) federal capital trials since 2015.⁷ These special juror questionnaires, which include questions beyond those found in standard questionnaires, have been used to facilitate efficient follow up questioning by the parties and Court to explore and discover potential bias and ensure that the prospective jurors who serve are able to give meaningful consideration to both life imprisonment without release and the death penalty, give meaningful consideration and effect to all categories of mitigation evidence, and are constitutionally qualified to serve.

C. Individual and Sequestered Voir Dire

5. Individual, sequestered (away from other potential jurors) voir dire was used in ten (10) (91%) of the eleven (11) federal capital trial since 2015.⁸

⁷ If we expand the review to all trials since the reinstatement of the federal death penalty (and include the data analyzed by Kevin McNally up through 2015), the district court ordered or approved a special juror questionnaire in 223 of the 237 trials (94%).

⁸ If we expand the review to all trials since the reinstatement of the federal death penalty (and include the data analyzed by Kevin McNally up through 2015), the district court ordered individual, sequestered (away from other potential jurors) voir dire for at least portions of jury selection in 208 of the 237 trials (88%).

D. Length of Jury Selection

6. In the eleven (11) federal capital cases tried since 2015, jury selection averaged 15.5 days.⁹ In the three federal capital trials during this period involving hate crimes or domestic terrorism in which the defendant did not proceed *pro se*, the average number of days of juror questioning was twenty-seven (27) days.¹⁰

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 February 4, 2026.

/s/ Matthew Rubenstein
Matthew Rubenstein

⁹ This data relied on a review of the dockets and transcripts of these eleven (11) trials.

¹⁰ Four (4) of the eleven (11) trials involved hate crimes (*United States v. Robert Bowers*, No. 2:18-cr-00292-RJC (W.D. Pa. 2023) (eleven (11) homicide victims; eighteen (18) days of individual juror questioning), *United States v. Dylann Roof*, No. 2:15-cr-00472-RM G (D.S.C. 2016) (nine (9) homicide victims; defendant proceeded *pro se* and trial involved four (4) days of individual juror questioning)) or domestic terrorism (*United States v. Sayfullo Saipov*, No. 1:17-cr-00722-VSB (S.D.N.Y. 2023) (eight (8) homicide victims; thirty-nine (39) days of individual juror questioning), *United States v. Dzhokhar Tsarnaev*, No. 1:13-cr-10200-G AO (D. Mass. 2015) (four (4) homicide victims; twenty-four (24) days of individual juror questioning)).