

**DECLARATION OF KEVIN McNALLY REGARDING APPOINTMENT OF COUNSEL  
PRIOR TO CHARGE OR INDICTMENT**

1. I currently serve with the Federal Death Penalty Resource Counsel Project, assisting court-appointed and defender attorneys charged with the defense of capital cases in the federal courts. I have served as Resource Counsel since the inception of the Resource Counsel Project (RCP) in January, 1992. I was the Director of the Project between 2007 and 2018. The Project is funded and administered under the Criminal Justice Act by the Defender Services Office of the Administrative Office of the United States Courts.

2. My responsibilities as federal resource counsel include the monitoring of all federal capital prosecutions throughout the United States in order to assist in the delivery of adequate defense services to indigent capital defendants in such cases. This effort includes the collection of data on the initiation and prosecution of federal capital cases.<sup>1</sup>

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<sup>1</sup>The work of the Federal Death Penalty Resource Counsel 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](http://www.uscourts.gov/sites/default/files/original_spencer_report.pdf). 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

3. In order to carry out the duties entrusted to me, I maintain a comprehensive list of federal death penalty prosecutions and information about these cases. I accomplish this by internet news searches, by reviewing dockets and by downloading and obtaining indictments, pleadings of substance, notices of intent to seek or not seek the death penalty, and by telephonic or in-person interviews with defense counsel or consultation with chambers. This information is regularly updated and is checked for accuracy by consulting with defense counsel. 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. There is considerable precedent for appointment of "learned counsel," pursuant to 18 U.S.C. § 3005, in a potential federal death penalty cases, before a complaint or an indictment is filed. This has occurred, for example, in potential capital prosecutions where the defendant is already in custody in state or federal jurisdiction and is being investigated for a federal capital crime or where a decision

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perspective, and case-specific assistance invaluable."

<http://www.uscourts.gov/services-forms/defender-services/publications/update-cost-and-quality-defense-representation-federal>

has not officially been made to bring a federal capital charge, but a federal capital indictment is possible.

5. I am aware of the following cases involving Bureau of Prisons [BOP] homicide investigations, where counsel was appointed, pre-complaint or pre-indictment: *United States v. Anthony Battle* (N.D. GA CR No. 1:95 CR 528); *United States v. David Paul Hammer* (M.D. PA CR No. 4-96-CR-239); *United States v. Marek Kowalski and Peter Georgacarakos* (M.D. PA CR No. 98-014-MW-01); *United States v. Michael O'Driscoll* (M.D. PA CR No. 4:CR-01-277); *United States v. Carlos David Caro* (W.D. VA CR No. 06 CR 00001); *United States v. Tommy Meeks* (M.D. PA CR No. 4:07-CR-00196); *United States v. Antoine Giles* (N.D. WV 2:07-MJ-00001-JSK); *United States v. Joseph Cabrera Sablan and James Leon Guerrero* (E.D. CA No. 08 CR 00259); *United States v. Patrick Andrews and Kevin Bellinger* (N.D. WV No. 1:08-MJ-00010-JSK); *United States v. John Javilo McCullah* (M.D. FL 09); *United States v. Michael Thompson, Scott Patrick, Thomas Malloy, Darrell Johnson, Ronald Dick and Joseph Casey* (M.D. FL 09); *United States v. Andy Sisson* (D. CO 2009); *United States v. Darryl Milburne and Dwuane Gravely* (E.D. KY No. 7:09-CR-00013-GFVT); *United States v. Carlos Gomez* (M.D. PA 2010); *United States v. Dominic Stewart and James Duckett* (D. CO No. 1:10-CR-00129-REB); *United States v. Silvestre Rivera and Richard*

*Santiago* (D. CO No. 1:10-CR-00164-LTB); *United States v. Wesley Paul Coonce, Jr. and Charles Michael Hall* (W.D. MO No. 10-03029-01/02-CR-S-GAF); *United States v. Ulysses Jones* (W.D. MO 6:10-CR-03090-DGK); *United States v. Edgar Nelson Pitts* (C.D. CA 2011); *United States v. Shaun Steven Folts* (S.D. IL No. 11-MC-42-DRH); *United States v. Allen Hurley* (M.D. PA No. 3:11-CR-360); *United States v. Gary Watland* (D. CO No. 1:11-CR-00038-JLK); *United States v. Willie Edgar Bush* (W.D. VA No. 2:11-CR-00015-JPJ); *United States v. Frederick Ashley* (C.D. CA 2012); *United States v. Samuel Stone* (E.D. CA 1:12-CR-00072-AWI-DLB); *United States v. Phillip William Astor* (C.D. CA No. 2:12-CR-00103-VAP); *United States v. Thomas Trayvon* (M.D. PA 2013); *United States v. Dana Mattingly* (D. AZ No. 2013); *United States v. Boyd Higgenbotham* (M.D. FL No. 5:13-CR-00004-ACC); *United States v. John Travis Millner* (E.D. KY No. 7:13-CR-15-ART); *United States v. Daniel Ray Casto* (C.D. CA 2014); *United States v. Milton Huff* (C.D. CA 2014); *United States v. Andrew Rogers* (S.D. IN 2014); *United States v. David Paul Hammer and Morgan Wayne Siler* (D. AZ 2015) and *United States v. Adam Wright* (E.D. MI No. 2:19-CR-20498-PDB-MKM).<sup>2</sup>

6. I am aware of the following cases where counsel was appointed, pre-complaint or pre-indictment. These cases do not involve Bureau of Prisons [BOP]

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<sup>2</sup>The order appointing counsel is attached.

homicide investigations: *United States v. Christopher Andre Vialva* (W.D. TX CR No W99CR070); *United States v. Aaron Pike* (W.D. NY CR No. 01-CR-129-ALL); *United States v. Johnny Davis* (E.D. LA CR No. 01-CR-282-ALL) (Judge Sarah Vance) [two learned counsel appointed at the capital rate]; *United States v. Kevin Fleming* (D. NV CR No. CR-S-03-0350-LRH-LRL); *United States v. Victor Wright* (E.D. NY CR No. 04-966 (ERK) (VVP)); *United States v. Gilbert Saldana* (C.D. CA CR No. 04-CR-415-ALL); *United States v. Lanny Benjamin Bodkins, Antoine Plunkett and Darel Keith Taylor* (W.D. VA CR No. 4:04-CR-70083-JLK-ALL); *United States v. Eric Rudolph* (N.D. AL CR No. 00-CR-422-ALL); *United States v. Fernando Delatorre* (N.D. IL CR No. 03 CR 090) (Judge Ruben Castillo) [two counsel appointed]; *United States v. Joseph Duncan* (D. ID CR No. 07-23) [federal defender appointed]; *United States v. Hector Natal* (D. CT No. 3:11-CR-00109-JBA); *United States v. Johnny Rounds* (W.D. NY No. 1:10-CR-00239-WMS); *United States v. Ahmed Muse Salad* (E.D. VA No. 2:11-CR-34); *United States v. Shamerria Smith* (D. NJ No. 1:13-CR-00470-JHR); *United States v. Jared Loughner* (D. AZ No. 11-CR-0187-TUC-LAB); *United States v. David Joseph Pedersen* (D. OR No. 3:12-CR-00431-HA); *United States v. Dzhokhar Tsarnaev* (D. MA No. 1:13-MJ-02106-MBB-1); *United States v. Nestor Pagan* (D. CT 2014); *United States v. Jose Caldera* (M.D. PA No. 4:14-CR-00278-MWB); *United States v. James Cureton* (E.D. NY No.

1:15-MJ-00747-LIB); *United States v. Jason Purham* (S.D. IA); *United States v. James Matthew Bradley, Jr.* (W.D. TX No. 5:17-CR-00649-DAE); *United States v. Patrick Crusius* (W.D. TX 2019) and *United States v. Uriel Badillo* (E.D. WA No. 1:19-MJ-20004-MKD-1).

7. In at least three cases, federal counsel has been appointed although no federal charges were ever filed: *United States v. Jo El Butler* (S.D. NY - not charged); *United States v. Frankie Roche* (D. MA - not charged) and *United States v. Michael White* (D. KS - not charged in BOP homicide).

8. From the Commentary to Recommendation 1(b) of the Spencer Report, p 93: The governing statute calls for capially qualified counsel to be appointed “promptly,” 18 U.S.C. § 3005. Recommendation 1(b) endorses appointment of specially qualified counsel “at the outset” of a case, which in some cases may mean prior to the formal filing of a charging document. Courts should not wait to see whether the government will seek capital prosecution before appointing appropriately qualified counsel and granting them the resources necessary for a preliminary investigation. The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought. Virtually all aspects of the defense of a federal death penalty case, beginning

with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase. Early appointment of "learned counsel" is also necessitated by the formal authorization process adopted by the Department of Justice to guide the Attorney General's decision-making regarding whether to seek imposition of a death sentence once a death-eligible offense has been indicted. Integral to the authorization process are presentations to the local United States Attorney's Office and Justice Department officials of the factors which would militate against a death sentence. See United States Attorney's Manual § 9-10.000. A mitigation investigation therefore must be undertaken at the commencement of the representation. Delay in appointment of learned counsel risks missing this important opportunity to avoid the high cost of a capital prosecution. Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the local U.S. Attorney and with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds. And, since the local prosecutor's recommendation nearly always prevails with the Attorney General, the opportunity to persuade the U.S. Attorney not to request capital authorization is extremely important.

I declare under the penalty of perjury under the laws of the United States of American, 28 U.S.C. §1746, that the foregoing is true and correct. Executed this 6<sup>th</sup> day of March 2020.

/s/ Kevin McNally  
Kevin McNally



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

No. 19-50194

Plaintiff,

vs.

Magistrate Judge R. Steven Whalen

ADAM WRIGHT,

Defendant.

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**ORDER OF APPOINTMENT OF SECOND COUNSEL**

Counsel has been appointed to represent Adam Wright pre-indictment under the Criminal Justice Act. He has exposure to being charge with an offense for which an authorized punishment is death.

Where a defendant has been indicted in a death-eligible case, he or she is entitled to the appointment of two attorneys, at least one of whom is “learned in the law applicable to capital cases.” 18 U.S.C. § 3005. The statute does not mandate the appointment of learned counsel pre-indictment, nor does the Sixth Amendment require that a defendant be provided with counsel in pre-indictment plea negotiations. *See United States v. Moody*, 206 F.3d 609 (6<sup>th</sup> Cir. 2000), citing *United States v. Gouveia*, 467 U.S. 180 (1984)(establishing a bright line rule that the Sixth Amendment right to counsel does not attach until the initiation of adversary judicial proceedings).

However, while neither the statute nor the Constitution *requires* the appointment of counsel before the initiation of formal charges, the Court nevertheless retains the discretion to appoint counsel pre-indictment in appropriate cases, in the interests of justice. Indeed, this district's decision to do so in numerous non-capital cases has been uncontroversial, and CJA counsel has been appointed in this case.

Given the complexities of capital cases, including the formal authorization process adopted by the Department of Justice and the necessary presentation to the Justice Department and to the local United States Attorney of factors that would militate against a death sentence, pre-indictment appointment of learned counsel to assist in, for example, preliminary mitigation investigation, would be of immense benefit to not only the defendant but to the government and the Court. In a declaration submitted to this Court, Kevin McNally, director of the Federal Death Penalty Resource Counsel Project, frames the issue this way:

“Delay in appointment of learned counsel risks missing this important opportunity to avoid the high cost of a capital prosecution. since an erly decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the local U.S. Attorney and with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds. And, since the local prosecutor's recommendation nearly always prevails with the Attorney general, the opportunity to persuade the U.S. Attorney not to request capital autorization is extremely important.”

Although in *Moody*, the Sixth Circuit declined to *require* the pre-indictment appointment of counsel based on Supreme Court precedent, the Court felt constrained to

add that “logic, justice, and fundamental fairness favor” the position that counsel should be appointed before formal charges are brought. 206 F.3d at 615. And in his concurring opinion in *Moody*, 206 F.3d at 618, Judge Wiseman stated:

“The criminal justice system has and is changing so that defendants now face critical stages of their prosecutions prior to indictment. The Sixth Amendment’s underlying purpose is to protect defendants in critical stages of their prosecution. Thus, the Sixth Amendment should guarantee the right to counsel during preindictment plea negotiations. Precedent, however, prevents me from endorsing this position which logic demands.”

If, as the Sixth Circuit has thus recognized, the pre-indictment appointment of counsel in a non-capital case serves important interests, then similar appointment of learned counsel in a potential capital case is all the more important. And again, while the Sixth Amendment, the Criminal Justice Act, and 18 U.S.C. § 3005 establish when and when not counsel *must* be appointed, nothing in those provisions, or in the case law interpreting those provisions, circumscribes or restrains the Court’s discretion to appoint counsel in an appropriate case in the interests of justice.

I will therefore appoint second, learned counsel to represent Mr. Wright pre-indictment. Attorney Kathleen M. Corell has been represented to this Court by the Federal Defender Office of Detroit to possess the learning and experience required by 18 U.S.C. § 3005.

Accordingly, IT IS ORDERED that attorney Kathleen M. Correll, Correll & Associates, PO Box 13351, Portland, OR 97213, telephone number 503-284-7837, be appointed to represent Adam Wright in this case, at the hourly rate of \$188.00 per hour. *See* Vol. 7, Chapter 6, Guide to Judiciary Policies and Procedures, § 630.10.10.

s/ R. Steven Whalen  
R. STEVEN WHALEN  
UNITED STATES MAGISTRATE JUDGE

Dated: February 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was sent to parties of record on February 11, 2019, electronically and/or by U.S. mail.

s/Carolyn M. Ciesla  
Case Manager to the  
Honorable R. Steven Whalen