

DECLARATION OF G.BEN COHEN REGARDING
FEDERAL DEATH PENALTY CASES
INVOLVING ALLEGATIONS OF FUTURE DANGEROUS

1. I currently serve as a Resource Counsel with the Federal Death Penalty Resource Counsel Project, which assists court-appointed and defender attorneys responsible for the defense of capital cases in the federal courts. Established in 1992 by the Administrative Office of the United States Courts, Defender Services Division, now the Defender Services Office, the Project serves as a national clearinghouse for information concerning federal capital cases. 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. The responsibilities of 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.¹

¹ 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 25. 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

3. In the course of regularly conducted activities, the Project maintains a comprehensive database of federal death penalty prosecutions and information about these cases. The database is maintained by reviewing dockets, obtaining indictments, pleadings of substance, notices of intent to seek or not seek the death penalty, reviewing public records, and by regularly conducted email, telephonic or in-person interviews between Resource Counsel and defense counsel, and consultation with clerk's offices and judge's chambers. This information is regularly updated and is checked for accuracy.

4. The Project's information regarding federal capital prosecutions has been relied upon by the Administrative Office of the United States Courts and the Federal Judicial Center. Declarations based upon the data collected by the Project has been accepted, cited to and relied upon in numerous opinions and judgments.²

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 36. 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." See <https://www.uscourts.gov/sites/default/files/fdpc2010.pdf>. 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 76.

² See e.g. *United States v. Fell*, 224 F. Supp. 3d 327, 340 (D. Vt. 2016) ("The most striking evidence of arbitrary application of the death sentence provided by Mr. McNally was his review of all cases

The data collected by the Project has also been relied upon as basis for analysis in law review journals, training manuals, and other published material.³ Resource Counsel collect comprehensive, accurate data concerning various practices that have emerged since the federal courts resumed trying capital cases in 1990. This collection of data includes maintaining information concerning district-level practices.

5. The data below reflects the information concerning allegations of future dangerousness. To date, the Attorney General has authorized federal capital

like the present case in which there were multiple victims"); *United States v. George*, No. 17-201, 2018 U.S. Dist. LEXIS 216649 (E.D. La. Dec. 27, 2018) (citing Federal Death Penalty Resource Counsel declaration for factual finding that "15 months is below the average time between notice and trial in federal capital cases weighs in favor of a finding of reasonableness."); *United States v. Williams*, No. H-03-221-11, 2004 U.S. Dist. LEXIS 33412, at *16-17 (S.D. Tex. Dec. 29, 2004) (relying upon "facts in the Declaration" reflecting statistics concerning to find that the defendant "met his burden under Armstrong that similarly situated defendants of a different race were not being charged with the death penalty and that the Defendant had presented "some evidence" of discriminatory intent. *United States v. Bass*, 536 U.S. 862, 863, 122 S. Ct. 2389, 153 L. Ed. 2d 769 (2002)."); *United States v. Ayala Lopez*, 319 F. Supp. 2d 236, 240 (D.P.R. 2004) (citing declaration of Kevin McNally as basis for holding "we find compelling what other federal district courts have done when faced with the "ever-present risk of prejudice" of joint trials.").

³ See e.g. Rory Little, *The Federal Death Penalty: History And Some Thoughts About The Department Of Justice's Role*, 26 Fordham Urb. L.J. 347 (1999); Lieutenant Commander Stephen C. Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, 2010 Army Law. 5 (2010); Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DePaul L. Rev. 1615 (2004); G. Ben Cohen, Rob Smith, *The Geography of the Federal Death Penalty*, 85 Wash. L. Rev. 425 (2010); Rory Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt and the Specter of Timothy McVeigh*, 53 DePaul L. Rev. 1591 (2004).

prosecution against 538 defendants. Of these, 374 defendants have faced an allegation of a non-statutory aggravating circumstance of future dangerousness. The government did not allege the aggravating circumstance against another 139 defendants. Information concerning whether future danger was alleged as to the remaining 25 of 538 defendants has not been located.

6. Of the known instances in which aggravating factors were alleged, our data reveals that the Department of Justice has alleged future danger against 374 of 513 defendants (73%).

7. The Project also collects data on the race of defendants in federal death eligible cases. Of the 538 authorized cases, 262 (49%) of the defendants are Black, 148 (28%) of the defendants are white, 99 (18%) are Hispanic and 29 (5%) are other minorities. Over the course of the operation of the federal death penalty, future dangerousness has been alleged against Hispanic defendants at a higher rate than against Black, white or other minority defendants.

8. There has been an allegation of future dangerousness against 80 of the 99 (81%) Hispanic defendants authorized for the federal death penalty. An allegation of future dangerousness has only been made in 294 of the other 439 (67%) cases.

**Allegations of Future Dangerousness in Authorized Cases
By Race of Defendant**

	Authorized	Allegation of Future Dangerousness	Percentage
Black	262	175	67%
Hispanic	99	80	81%
White	148	102	69%
Other	29	17	59%
Total	513	374	73%
Total Non-Hispanic	439	294	67%

9. There is a disproportionately high percentage of future dangerousness allegations against Hispanic defendants. This discrepancy between allegations of future dangerousness against Hispanic defendants versus all other defendants has grown in recent years. An allegation of future dangerousness has been made against 95% of the Hispanic defendants authorized in the decade and a half since the departure of Attorney General Gonzalez in September 2007.

**Allegations of Future Dangerousness in Authorized Cases
By Race of Defendant Post Attorney General Gonzalez**

	Authorized	Allegation of Future Dangerousness	Percentage
Black	46	20	43%
Hispanic	21	20	95%
White	31	20	65%
Other	10	6	60%
Total	108	66	61%
Total Non-Hispanic	87	46	53%

10. The above information regarding federal capital cases was collected in the regular course of the business of the Federal Death Penalty Resource Counsel Project, as part of tracking ongoing federal capital cases.

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 28th day of January, 2021.

/s/ G. BEN COHEN

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