

**DECLARATION OF KEVIN McNALLY REGARDING DEFENSE
EXPERT TESTIMONY IN THE PENALTY PHASE ABOUT GENERAL AND
INDIVIDUALIZED VIOLENCE RISK ASSESSMENT AND CLASSIFICATION AND
CUSTODY OPTIONS WITHIN THE BUREAU OF PRISONS**

1. I currently serve as the Director of 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. 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.¹

¹The 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. www.uscourts.gov/dpenalty/1COVER.htm. 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. A recent update to the Report stated: “Many judges and defense counsel spoke with appreciation and

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, orders and opinions by the District Court and by telephonic or in-person interviews with defense counsel or consultation with chambers. 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. The Supreme Court has specifically held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing. *Jurek v. Texas*, 428 U.S. 262, 275 (1976) ("any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of

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."

<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>

determining what punishment to impose). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

5. Various capital sentencing schemes focus the sentencer's attention on the potential danger the defendant may pose to others in the future. Even when the relevant capital punishment law does not explicitly designate "future danger" as an "aggravating circumstance," I know from three plus decades of experience that this issue ("future danger") plays a central role in individual capital sentencing decisions - be they made by a prosecutor, a jury, a judge, or, in the case of clemency, by a chief executive. Interviews by social scientists of actual capital trial jurors demonstrates that the potential "future danger" of the defendant is a critical sentencing factor in the life or death vote which must be cast. Stephen P. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?," 98 *Colum. L. Rev.* 1538 at 1555 tbl. 2, 1559 tbl. 4 (1998) (presenting findings based on the Capital Jury Project data from South Carolina that brutality of crime, defendant's future dangerousness, and defendant's absence of remorse are among factors jurors consider most aggravating).

6. Although “future danger” was not designated by Congress as an “aggravating circumstance,” after January 1, 1995,² future dangerousness has been alleged as a non-statutory aggravating circumstance in 75% (351 of 468) of federal capital cases.³

7. Mark Cunningham, Ph.D., is a leading expert in violence risk assessment. Dr. Cunningham has compiled a large body of information demonstrating the truth about how murderers act in prison, whether they kill again, and whether they commit violent acts while confined. He is the first author of a scholarly paper summarizing conceptualizations, research data, and practical applications of risk assessment in a capital context. See Cunningham, M.D. & Reidy, T.J. (1998), “Integrating base rate data in violence risk assessments at capital sentencing.” *Behavioral Sciences & the Law*, 16, 71-95. He is the first author of a peer reviewed scholarly paper addressing common errors in capital sentencing violence risk

²The United States Attorneys’ Manual, Title 9, §9-10.000 (January 27, 1995)) was amended at that time suggesting to local federal prosecutors that “future danger” be alleged in federal capital cases.

³There have been 493 defendants authorized for a federal capital prosecution. We have collected the notices of intent to seek the death penalty for 468 of those 493 defendants (351 had future danger alleged, 117 did not have future danger alleged). Of the remaining 25 defendants, 19 notices were sealed. The remaining 6 are not available on PACER).

assessment. See Cunningham, M.D. & Reidy, T.J. (1999), "Don't confuse me with the facts: Common errors in violence risk assessment at capital sentencing." *Criminal Justice and Behavior*, 26, 1, 20-43.

8. Dr. Cunningham has synthesized available statistical data regarding the possible future danger of convicted murderers, including studying statistics regarding violence within the federal prison system. Dr. Cunningham uses the statistical data provided by the Department of Justice itself (from the Bureau of Prisons) and demonstrates convincingly that "prison works" to neutralize violent individuals, despite public misconceptions to the contrary.⁴

9. Dr. Cunningham's approach using actuarial methods focuses the sentencer's attention on objective risk analysis and not the fear mongering favored by some prosecutors. He explains to jurors that such methods are commonly used by the insurance industry, for example. This effort, to objectively quantify the risk an individual may pose for committing violence in the future, has met with success. Jurors realize that they themselves utilize base rates in making probability judgments in their own lives. Dr. Cunningham's approach makes sense to them. I have observed

⁴Dr. Cunningham's work in federal capital cases has led him, pursuant to orders by district courts, to inspect various BOP facilities, including the high-tech Administrative Segregation, ADX, so-called "Supermax" in Florence, Colorado.

his testimony and it is comprehensible to both jurors and judges. It is also persuasive. He and his colleague, Thomas Reidy, are widely credited with helping to obtain life sentences in very serious federal capital cases.⁵

10. Expert testimony, by Dr. Cunningham and others, addressing the general topic of future danger has been admitted in many federal capital trials. Such expert testimony takes one of three forms: 1) general testimony regarding the risk of future

⁵See *United States v. Anthony Ayeni Jones* (D. MD CR No. WMN-96-0458); *United States v. Dean Anthony Beckford* (E.D. Va. No. 3:96 CR 66); *United States v. Quan Ray* (N.D. IL CR No. 96 CR 379); *United States v. Marvin Charles Holley* (N.D. AL CR No. 96-B-0208-NE); *United States v. Trinity Edward Ingle* (W.D. AR No. 6:96CR60022); *United States v. Shaheem and Raheem Johnson* (E.D. VA CR No. 97-00314-A); *United States v. LaFawn Bobbitt* (E.D. VA CR No. 97 CR 129); *United States v. John Bass* (E.D. MI CR No. 97-80235); *United States v. Khalfan Khamis Mohamed* (S.D. NY No. S6 98 CR 1023); *United States v. Jamal Shakir* (M.D. TN No. 3:98-00038); *United States v. Daymon Smith* (E.D. TX CR No. 2:99 CR 5); *United States v. Coleman Johnson* (W.D. VA CR No. 3:00CR00026); *United States v. Michael Williams* (S.D. NY No. 00-CR-1008); *United States v. Jamain Williams and Andre Cooper* (E.D. PA No. 01-CR-512); *United States v. Martin Aguilar* (E.D. NY No. 01-CR-1367); *United States v. Styles Taylor* (N.D. IN CR No. 2:01 CR 073 JM); *United States v. Richard James and Ronald Mallay* (E.D. NY CR No. 02-778 (S-1) (SJ)); *United States v. Shawn Arnette Breeden* (W.D. VA No. 03-CR-13); *United States v. Demetrius R. Hargrove* (D. KS No. 2:03-CR-20192-CMDJW); *United States v. Vertis Clay* (E.D. AR No. 4:04-CR-00035 WRW); *United States v. Kenneth McGriff* (E.D. NY CR No. 04-966 (ERK) (VVP)); *United States v. Larry Lujan* (D. NM No. 05-924); *United States v. James McTier* (E.D. NY CR No. 05-401); *United States v. Vincent Basciano* (E.D. NY No. 05-CR-0060 (S-3) (NGG)); *United States v. Jelani Solomon* (W.D. PA No. 2:05-CR-00385-TFM); *United States v. Ellis Mosher* (E.D. TX No. 1:06-CR-00101-TH); *United States v. Maurice Phillips* (E.D. PA No. 2:07-CR-00549-JCJ) and *United States v. Brian Richardson* (N.D. GA No. 1:08-CR-39).

violence by convicted murderers; and/or 2) individualized testimony regarding the risk of future violence by the defendant on trial; and/or 3) classification and custody options available to the Bureau of Prisons, including Supermax confinement at Administrative Maximum in Florence, Colorado, known as ADX.⁶

⁶See, e.g., *United States v. Ronald Eugene Mathis* (M.D. FL CR No. 91-301-CR-T (17)(A) (Kovachevich); *United States v. Michael Murray* (M.D. PA CR No. 92-200) (Rambo); *United States v. Ramon Medina Molina* (E.D. OK CR No. 1:92-032-S) (Seay); *United States v. Jean Claude Oscar* (E.D. VA CR No. 93-CR-131) (Morgan); *United States v. Bruce Webster* (N.D. TX CR No. 4:94-CR-121-Y) - 1 (Means); *United States v. Paul Hardy* (E.D. LA CR No. 94-381) (Berrigan); *United States v. Bountaem Chanthadara* (D. KS CR No. 94-10129-01) (Belot); *United States v. Louis Jones* (N.D. TX CR No. 6-95 CR 0015-C) (Lubbock Division) (Cummings); *United States v. Everett Spivey* (D. NM CR No. 95-491 LH) (Hansen); *United States v. Dean Anthony Beckford* (E.D. VA CR No. 3:95CR00087) (Payne); *United States v. Anthony Battle* (N.D. GA No. 1:95 CR 528) (Evans); *United States v. Darryl Alamont Johnson and Quan Ray* (N.D. IL CR No. 96 CR 379) (Conlon); *United States v. Marvin Charles Holley* (N.D. AL CR No. 96-B-0208-NE) (Blackburn); *United States v. Trinity Edward Ingle* (W.D. AR CR No. 6:96CR60022-001) (Hendren); *United States v. David Paul Hammer* (M.D. PA No. 4-96-CR-239) (Muir) (at both trials); *United States v. Anthony Jones* (D. MD. No. WMN-96-0458) (Nickerson); *United States v. Aquila Barnette* (W.D. NC CR No. 3:97CR23-P) (Potter); *United States v. Billie Jerome Allen and Norris Holder* (E.D. MO No. 4:97 CR 0141 ERW (TCM)) (Webber); *United States v. Howard L. Smith, Jr.* (E.D. VA CR No. 97-341-A) (Ellis); *United States v. LaFawan Bobbitt* (E.D. VA CR No. 97 CR 129) (Williams); *United States v. Raheem and Shaheem Johnson* (E.D. VA CR No. 97-00314-A) (Bryan); *United States v. John Bass* (E.D. MI CR No. 97-80235) (Tarnow); *United States v. Dan Lee* (D. AR CR No. LR-CR-97-243) (Eisele); *United States v. Richard Lee Tuck Chong* (D. HI CR No. 98-00416 ACK) (Kay); *United States v. Khalfan Khamis Mohamed* (S.D. NY No. S6 98 CR 1023) (Duffy); *United States v. James A. Finley* (W.D. NC CR No. 498CR243) (Thornburg); *United States v. Jamal Shakir* (M.D. TN No. 3:98-00038) (Nixon); *United States v. Carl Derick Cooper* (D. DC CR No. 99-0266 (Green)); *United States v. Marvin Gabrion* (W.D. MI No. 1:99-CR-76) (Bell); *United States v. Christopher Vialva* (W.D. TX CR No. W99CR070) (Smith); *United States v. Daymon Smith* (E.D. TX

CR No. 2:99 CR 5) (Heartfield); *United States v. Coleman Johnson* (W.D. VA CR No. 3:00CR00026) (Moon); *United States v. Michael Williams* (S.D. NY No. 00-CR-1008) (Buchwald); *United States v. Julias Omar Robinson* (N.D. TX No. 00-CR-260) (Means); *United States v. Rudy Sablan* (D. CO No. 00-CR-531) (Daniel); *United States v. Rodney Moore* (D. DC No. 1:00CR00157) (Lamberth); *United States v. Jamain Williams and Andre Cooper* (E.D. PA No. 01-CR-512) (Joyner); *United States v. Styles Taylor* (N.D. IN CR No. 2:01 CR 073 JM) (Sharp); *United States v. Zacarias Moussaoui* (E.D. VA No. 01-CR-455) (Brinkema); *United States v. Gary Sampson* (D. MA No. 01-CR-10384) (Wolf); *United States v. Sherman Lamont Fields* (W.D. TX No. 01-CR-164) (Smith); *United States v. Donald Fell* (D. VT 2:01-CR-12-01) (Sessions); *United States v. Martin Aguilar* (E.D. NY No. 01-CR-1367) (Dearie); *United States v. Jurijus Kadamovas* (C.D. CA CR No. 02-220 (A)-NM) (Manella); *United States v. William Emmett LeCroy* (N.D. GA No. 02-CR-38) (O'Kelley); *United States v. Richard James and Ronald Mallay* (E.D. NY CR No. 02-778 (S-1) (SJ)) (Johnson); *United States v. Luis Gonzales-Lauzan* (S.D. FL No. 02-CR-20572) (Cohn); *United States v. Branden Basham and Chadrick Fulks* (D. SC No. 02-CR-992) (Anderson); *United States v. Wilfredo Perez* (D. CT No. 02-CR-7) (Arterton); *United States v. Demetrius R. Hargrove* (D. KS No. 2:03-CR-20192-CMDJW) (Murguia); *United States v. Shawn Arnette Breeden* (W.D. VA No. 03-CR-13) (Wilson); *United States v. Shannon Wayne Agofsky* (E.D. TX 1:03-CR 173) (Heartfield); *United States v. Kenneth McGriff* (E.D. NY CR No. 04-966 (ERK) (VVP)) (Korman); *United States v. Ronell Wilson* (E.D. NY No. 1:04-CR-01016-NGG) (Garaufis) (both trial and retrial); *United States v. Rejon Taylor* (E.D. TN No. 1:04-CR-00160-1) (Collier); *United States v. Vertis Clay* (E.D. AR No. 4:04-CR-00035 WRW) (Wilson); *United States v. James McTier* (E.D. NY CR No. 05-401) (Glasser); *United States v. Valerie Friend* (S.D. WV CR No. 2:05-00107) (Copenhaver); *United States v. Jelani Solomon* (W.D. PA No. 2:05-CR-00385-TFM) (McVerry); *United States v. Larry Lujan* (D. NM No. 05-924) (Brack); *United States v. Timothy O'Reilly* (E.D. MI No. 05-80025) (Roberts); *United States v. Antonio Argueta* (D. MD No. 8:05 CR 00393-DKC) (Chasanow); *United States v. Vincent Basciano* (E.D. NY No. 05-CR-0060 (S-3) (NGG)) (Garaufis); *United States v. Carlos David Caro* (W.D. VA No. 06 CR 00001) (Jones); *United States v. David Lee Jackson* (E.D. TX No. 1:06-CR-51) (Crone); *United States v. Ellis Mosher* (E.D. TX No. 1:06-CR-00101-TH) (Heartfield); *United States v. Azibo Aquart* (D. CT 3:06CR160 (PCD)) (Dorsey); *United States v. Naeem Williams* (D. HI No. 1:06-CR-00079-DAE) (Ezra); *United States v. James Dinkins and Melvin Gilbert* (D. MD No. 1:06-CR-00309-

11. Evidentiary challenges by the government to such expert testimony have been infrequent. Challenges have been largely overruled. In *United States v. Gabrion*, 648 F.3d 307, 353 (6 Cir. th 2011), *vacated on rehearing en banc* the Court noted "Cunningham was allowed to testify as to the different security levels for inmates, as well as the monitoring of inmate communications, confinement, and visitation for those inmates considered dangerous." *See also Robinson v. United States*, 2008 WL 49068272*6-7 ("Dr. Mark Cunningham testified ... regarding risk assessment of future dangerousness ... the government called another witness, Peter M. Carlson, who provided further description of the various security levels in prison.").

12. Expert testimony, as described above, has been admitted by district courts in cases where there is no allegation made by the government of the non-statutory

JFM) (Motz); *United States v. Maurice Phillips* (E.D. PA No. 2:07-CR-00549-JCJ) (Joyner); *United States v. Kaboni Savage* (E.D. PA No. 2:07-CR-00550-RBS) (Surrick); *United States v. Brian Richardson* (N.D. GA No. 1:08-CR-39) (Cooper); *United States v. Alejandro Enrique Umana* (W.D. NC No. 3:08-CR-134-RJC) (Conrad); *United States v. Joseph Ebron* (E.D. TX 1:07-CR-142) (Clark); *United States v. Edgar B. Garcia* (E.D. TX 1:09-CR-00015-MAC-KFG All) (Crone); *United States v. Alexis Candelario-Santana* (D. PR No. 3:09-CR-00427-JAF) (Fuste); *United States v. Wesley Paul Coonce, Jr.* (W.D. MO No. 10-03029-01/02-CR-S-GAF) (Fenner); *United States v. John Charles McCluskey* (D. NM No. 1:10-CR-02734) (Herrera) and *United States v. Xavier Jiminez-Bencevi* (D. PR No. 3:12-CR-00221-JAF) (Fuste).

aggravating circumstance of future danger.⁷

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 25th day of September, 2014.

/s/ Kevin McNally
Kevin McNally

⁷See *United States v. Carl Haskell* (W.D. MO No. 00-CR-395); *United States v. Aaron Haynes* (W.D. TN No. 01-CR-20247); *United States v. Donald Fell* (D. VT 2:01-CR-12-01); *United States v. Zacarias Moussaoui* (E.D. VA No. 01-CR-455); *United States v. Michael Lafayette Taylor and Keon Moses* (D. MD No. 02-CR-410); *United States v. Wilfredo Perez* (D. CT No. 02-CR-7); *United States v. Meier Jason Brown* (S.D. GA No. 403-01); *United States v. Antonio Argueta* (D. MD No. 8:05 CR 00393-DKC); *United States v. Darryl Lawrence* (S.D. OH No. 2:05-CR-00011-GLF); *United States v. Valerie Friend and George Lecco* (S.D. WV CR No. 2:05-00107); *United States v. Azibo Aquart* (D. CT 3:06CR160 (PCD)); *United States v. James Dinkins and Melvin Gilbert* (D. MD No. 1:06-CR-00309-JFM); *United States v. Thomas Galan* (N.D. OH No. 3:06-CR-00730); *United States v. Naeem Williams* (D. HI No. 1:06-CR-00079-DAE) and *United States v. David Runyon* (E.D. VA No. 4:08-CR-16).