

**DECLARATION OF KEVIN McNALLY REGARDING LESS THAN DEATH PENALTY SENTENCING AFTER FEDERAL CAPITAL SENTENCING TRIALS**

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. [www.uscourts.gov/dpenalty/1COVER.htm](http://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

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. Since the reinstatement of the death penalty with the passage of the Anti-Drug Abuse Act of 1988, 21 U.S.C. §848(e)-(t), followed by the Federal Death Penalty Act of 1994, U.S.C. §3591 *et seq.*, federal juries have rejected government requests for the death penalty after a penalty trial for 154 defendants. Federal

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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."

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

judges have rejected death sentences in three additional cases after waivers of jury sentencing.

5. Of these 157 non-death sentenced capital defendants, 156 have been sentenced to life imprisonment without the possibility of release, and one to a lesser sentence.

6. The only convicted capital defendant to receive a less-than-life sentence did so after the jury rejected the government's threshold intent allegation, and thus found him ineligible for the death penalty. *United States v. Villarreal*, 963 F.2d 730 (5<sup>th</sup> Cir. 1992). In *Villarreal*, the government sought the death penalty after 21 U.S.C. §848(e) against two brothers, Baldemar and Reynaldo Villarreal, for the drug-related murder of a state police constable. After a joint sentencing hearing, the jury concluded that neither defendant was legally death-eligible. As to Baldemar, the jury found the "intent" factor of 21 U.S.C. §848(n)(1)(A) (that he "intentionally killed" the officer) was proven beyond a reasonable doubt, but further found that the government had failed to establish either of the two "second-tier" statutory aggravating factors ("substantial planning" and "especially heinous"). *United States v. Baldemar Villarreal*, Special Findings at 1-2 (E.D. Tex. July 11, 1991). Accordingly, under the §848 statutory scheme, the jury was

unable to consider the imposition of the death penalty, and the trial judge sentenced Baldemar to life imprisonment. *Villarreal, supra*; Trial Transcript at 2119. As to Reynaldo, however, the jury found that the government failed to establish the threshold “intent” aggravating factor of §848(n)(1)(A). *United States v. Reynaldo Sambrano Villarreal*, Special Findings at 1 (E.D. TX July 11, 1991). In light of the agreement of the parties that the Court was free to sentence within the 20-to-life range, and departing from any applicable Guideline under U.S.S.G. §5K.2, the trial judge imposed a sentence of 40 years. *Villarreal, supra*, Trial Transcript at 2125.

6. With the single exception described above, which involved a death-ineligible defendant, every defendant to have received a sentence other than death following a capital sentencing hearing and verdict in a post-*Gregg* federal capital case has been sentenced to life without the possibility of release.

I declare under the 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 this 24<sup>th</sup> day of June, 2022.

/s/ Kevin McNally  
Kevin McNally