

**DECLARATION OF KEVIN McNALLY REGARDING INSTRUCTIONS ON THE “BEYOND A REASONABLE DOUBT” STANDARD AS APPLIED TO THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN FEDERAL CAPITAL TRIALS.**

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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 in January, 1992. The Project is funded and administered under the Criminal Justice Act by the Office of Defender Services 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 quality, cost-

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, opinions, rulings, instructions 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. Various federal district courts have instructed juries to apply the "beyond a reasonable doubt standard" to weighing aggravating and mitigating circumstances

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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 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>

in the penalty deliberations in federal capital trials. Some of these cases are:<sup>2</sup> *United States v. Sampson*, 335 F. Supp.2d 166, 239, n. 42 (D. Mass. 2004) (court charged: "However you personally define sufficiency, the prosecution must convince you beyond a reasonable doubt that the aggravating factor or factors sufficiently outweigh the mitigating factors to make death the appropriate penalty in this case."); *United States v. Gilbert*, Docket #93-30044-MAP (D. MA) (court charged: "you shall then consider whether you are unanimously persuaded beyond a reasonable doubt that the aggravating factor or factors proved sufficiently outweigh the mitigating factor or factors proved."); *United States v. Azibo Aquart*, Docket #3:06-cr-00160-JBA (D. Conn.), ECF #930 (Final Sentencing Instructions) at 7, 33 (court charged: "the weighing process asks whether you are unanimously persuaded, beyond a reasonable doubt, that the aggravating factors sufficiently outweigh any mitigating factors ..."); *United States v. Hans*, Docket #6:05-CR-01227-HMH (D. SC), ECF #312 (Verdict Form) at 9 (verdict form states: "We, the jury, as to Eric Preston Hans, unanimously find beyond a reasonable doubt that the aggravator factor or factors provided in this case outweigh the mitigating factor or factors so as to justify a

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<sup>2</sup>The Court's final instructions are available upon request from Kevin McNally, 513 Capitol Avenue, Frankfort, Kentucky 40601; 502.227.2142, fax 502.227.4669; [kmcnally@dcr.net](mailto:kmcnally@dcr.net).

sentence of death."); *United States v. Garrett*, Docket #4:99-CR-00133-WTM-ALL (S.D. GA), ECF # 570 (Final Sentencing Instructions), at 21 (court charged: "once you have decided upon the aggravating and mitigating factors present in this case, the law requires you to evaluate these factors to decide whether you are unanimously persuaded beyond a reasonable doubt that the aggravating factors provided so outweigh any mitigating factors that justice cannot be served absent a sentence of death."); *United States v. Lentz*, Docket #01-CR-50 (E.D. VA) (court instructed: "once you have decided upon the aggravating and mitigating factors present, the law requires you to evaluate these factors to decide whether you are unanimously persuaded beyond a reasonable doubt that the aggravating factors proved so outweigh any mitigating factors that justice cannot be served absent a sentence of death."); *United States v. Mayhew*, Docket #2:03-cr-00165-ALM (S.D. OH) (Final Sentencing Instructions), at 9 (court charged: "in order for you to decide that John Mayhew should be sentenced to death, you must reach a unanimous decision that the government has proven, beyond a reasonable doubt, that death is the appropriate sentence. This means that each of you must be individually convinced, beyond a reasonable doubt, that death is the appropriate sentence before it is possible to sentence Mr. Mayhew to death."); *United States v. Henderson*, Docket

#2:06-CR-00039 (S.D. OH), ECF # 160-16 (Trial Transcript of 6/27/2007), at 70-71 (court charged: "the government must meet its burden of proof beyond a reasonable doubt in every aspect of the sentencing phase...Similarly, the government must prove beyond a reasonable doubt that the aggravating factors sufficiently outweigh the mitigating factors."); *United States v. Kadamovas and Mikhel* Docket # 02-220(A)-NM, (C.D. CA), ECF # 1540 (Final Sentencing Instructions), at 18 (court charged: "the government, at all times, has the burden of proving beyond a reasonable doubt that the appropriate sentence for each defendant is in fact the death penalty. Specifically, that means that the government must prove beyond a reasonable doubt: ... (4) that all the aggravating factors found to exist sufficiently outweigh the mitigating factors found to exist so as to make a sentence of death appropriate."); *United States v. Fell*, Docket #2:01-CR-12-01 (D. VT), ECF # 197 (Final Sentencing Instructions), at 3 (court charged: "the government, at all times and as to each of the capital counts, has the burden of proving beyond a reasonable doubt that the appropriate sentence for Donald Fell is in fact the death penalty."); *United States v. Phillips*, Docket #07-549 (E.D. PA), ECF # 696 (Trial Transcript of 4/26/10 at 165): ("This weighing process asks whether the government has persuaded each and every one of you beyond a reasonable doubt that the aggravating factor or factors

found to exist, one, outweigh the mitigating factors found to exist and, if they do, two, whether they sufficiently outweigh the mitigating factors to justify a sentence of death on the particular capital count you are considering."); *United States v. Pitera*, Docket # 90-0424 (E.D. NY) (Trial Transcript of 7/1/92), at 284 (court charged: "Once you have decided upon the aggravating and mitigating factors present in this case, the law requires you to evaluate these factor to decide whether you are unanimously persuaded beyond a reasonable doubt that the aggravating factors proved so outweigh any mitigating factors that justice cannot be served absent a sentence of death."); *United States v. Mohamed et al.*, Docket #S6 98-CR-1023 (S.D. NY) (Final Sentencing Instructions), at 26 (court charged: "This weighing process asks whether you are unanimously persuaded, beyond a reasonable doubt, that the aggravating factors sufficiently outweigh any mitigating factors."); *United States v. Aguilar and Caraballo*, Docket # 01-CR-1378 (E.D. NY), ECF #523 (Final Sentencing Instructions), at 3-4 (court charged at separate trials: "the government has the burden of proving beyond a reasonable doubt that the appropriate sentence for [the defendant] is in fact the death penalty. Specifically that means that the government must prove...all of the following beyond a reasonable doubt: ...(4) that all of the aggravating factors found to exist sufficiently outweigh the mitigating factors as to

make a sentence of death appropriate."); *United States v. Dixon*, Docket #01-CR-389 (E.D. NY), ECF #157 (Final Sentencing Instructions), at 3-4 (court charged: the government has the burden of proving beyond a reasonable doubt that the appropriate sentence for Emile Dixon is in fact the death penalty. Specifically, that means that the government must prove...all of the following beyond a reasonable doubt: ... (3) that all the aggravating factors found to exist so far outweigh the mitigating factors so as to make a sentence of death appropriate ."); *United States v. Williams, et al.*, Docket #00-CR-1008 (NRB) (S.D. NY) (Final Sentencing Instructions), at 14 (court charged: "This weighing process asks whether you are unanimously persuaded, beyond a reasonable doubt, that the aggravating factors sufficiently outweigh any mitigating factors."); *United States v. Barnes*, Docket # 7:04-CR-00186 (S.D. NY) (Final Sentencing Instructions) at 38-39 (court charged: "Remember that all twelve jurors must agree beyond a reasonable doubt that death is in fact the appropriate sentence, but that no juror is ever required by the law to impose a death sentence."); *United States v. Quinones and Rodriguez*, Docket # 00 CR 00761 (JSR) (S.D. NY) (Final Sentencing Instructions) at 9 (court charged: "On the contrary, you may not impose the death penalty unless every last one of you is convinced, beyond a reasonable doubt, that life imprisonment without release is not

sufficient and that death must be imposed. Anything short of that requires a penalty of life imprisonment without release."); *United States v. McGriff*, Docket # 04-966 (ERK) (VVP) (E.D. NY) (Final Sentencing Instructions), at 2 (court charged: "the government has the burden of proving beyond a reasonable doubt that the appropriate sentence for the defendant is, in fact, the death penalty.").

Additionally, some courts instruct the jury generally on the government's burden of proof. Some of these cases are: *United States v. Honken and Johnson*, Docket # 01-3047-MWB (N.D. IA), ECF # 524 (Final Sentencing Instructions), at 12 (court charged: "the prosecution has the burden of proving beyond a reasonable doubt the 'aggravating factors' and all the other requirements for imposition of the death sentence."); *United States v. Baskerville*, Docket #03-836 (JAP) (D. NJ), ECF # 239 (Trial Transcript, 5/10/2007) at 6727-6728 (court charged: "the prosecution has the burden of proving the aggravating factors and all requirements for imposition of the death penalty beyond a reasonable doubt."); *United States v. Miner*, Docket # 99-215 (W.D. PA) (Final Sentencing Instructions) at 5 (court charged: "The burden of proving that Joseph P. Miner should be sentenced to death rests at all times with the government. The government must satisfy its burden beyond a reasonable doubt."); *United States v. Mikos*, Docket # 02-CR-137-1 (N.D. IL), ECF # 380 (Final

Sentencing Instructions), at 4 (court charged: "as I have just instructed you, the government must meet its burden of proof beyond a reasonable doubt as to everything that it must prove."; *United States v. Catalan-Roman and Medina-Villegas*, Docket #3:02-CR-00117-PG (D. PR), ECF # 512 (Final Sentencing Instructions) at 7 (court charged: "As I have instructed you, the government must meet it's burden of proof beyond a reasonable doubt."); *United States v. Taylor and Moses*, Docket #02-CR-410 (D. MD) (Final Sentencing Instructions), at 4 (court charged: "the government has the burden of proof beyond a reasonable doubt."); *United States v. Taylor*, Docket #2:01-CR-073 JM (N.D. IN), ECF # 914 (Final Sentencing Instructions), at 9 (court charged: "[T]he government must meet its burden of proof beyond a reasonable doubt.").

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 9<sup>th</sup> day of January, 2012.

/s/ Kevin McNally  
Kevin McNally  
Federal Death Penalty Resource Counsel