

**DECLARATION OF KEVIN McNALLY REGARDING THE GEOGRAPHIC
LOCATION OF FEDERAL CASES, THE FREQUENCY OF AUTHORIZATIONS AND
DEATH SENTENCES AND THE RACE AND GENDER OF DEFENDANTS AND VICTIMS**

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.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. 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 perspective, and case-specific assistance invaluable.”

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. This declaration concerns: (1) the frequency with which the federal death penalty has been sought and imposed since 1988; (2) the race of the defendants as to whom a capital prosecution has been authorized; (3) the frequency with which the federal death penalty is authorized and imposed on a regional basis; and (4) the race and gender of victims.

I.

**FREQUENCY WITH WHICH THE FEDERAL DEATH PENALTY
IS SOUGHT AND IMPOSED**

5. The Project has collected information regarding all federal executions and all

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

potential and actual federal death penalty prosecutions initiated pursuant to 21 U.S.C. § 848(e) *et seq.*, enacted in 1988, and/or 18 U.S.C. §3591, *et seq.*, enacted in 1994.

6. Based on the Project's figures, as well as the reports published by the Department of Justice in September 2000 and June 2001, the "pool" of potential capital defendants in the federal system since 1988 totals 4,144. This figure is current as of October 10, 2018. This consists of, among others, 52 cases reviewed prior to the 1995 Death Penalty Protocols put into place by Attorney General Reno,² 682 reviewed by Ms. Reno after the Protocols went into effect (2000 DOJ Study), 639 reviewed by Attorney General Ashcroft (RCP total), 426 reviewed by Attorney General Gonzales (RCP total), 18 reviewed by Acting Attorney General Keisler (RCP total), 161 reviewed by Attorney General Mukasey (RCP total), 4 reviewed by Acting Attorney General Filip (RCP total), 1022 reviewed by Attorney General Holder (RCP total), 259 reviewed by Attorney General Lynch (RCP total), 6 reviewed by Acting Attorney General Boente (RCP total), 1 reviewed by Acting Attorney General Yates (RCP total) and 269 reviewed by Attorney General Sessions. There are also an additional

²Prior to the Protocols, which went into effect on January 27, 1995, the Attorney General only reviewed those cases in which a United States Attorney requested permission to seek the death penalty. Potential capital cases where the local determination was not to seek the death penalty were not reviewed by Main Justice. The change wrought by the Protocols was a requirement that *all* potential death-penalty cases, whether the United States Attorney wished to pursue the death penalty or not, be submitted to Main Justice for review and a final decision by the Attorney General. However, the United States Attorney remained free to enter into a plea agreement specifying a sentence other than death. Attorney General Ashcroft required Main Justice review of all such proposed plea agreements in 2001.

303 cases identified by United States Attorneys as potential capital cases that were never submitted for review (2001 DOJ Report).³ The Project has also identified additional cases reviewed by the various Attorneys General as well as others that were never submitted for review and/or charged as capital offenses even though there was justification for doing so. Of the total of 4,144 potential federal capital defendants, 305 are currently pending review by the Department of Justice, bringing the total defendants reviewed so far to 3,839.

7. From this group of 3,839 potential capital defendants, a total of 520 defendants have actually been authorized for capital prosecution. Thus, the Department of Justice has authorized capital prosecutions involving approximately 14% (520/3,839) of the defendants against whom the penalty could have been sought. To date, juries have returned 85 death verdicts as to 81 different defendants (four of those defendants were sentenced to death at both an original trial and then, after having their death sentence overturned on appeal, again at a resentencing retrial). Three defendants have been executed.⁴ Two defendants were granted clemency. There are 62 defendants presently on the federal death row under an active sentence of death. These cases are in various stages of review via direct appeal

³See the discussion of this figure at n. 10 of the June 2001 Supplemental Justice Department Study.

⁴Two federal executions took place in the year 2001 (Timothy McVeigh and Juan Garza) and one in the year 2003 (Louis Jones). Messrs. McVeigh and Jones were executed pursuant to the Federal Death Penalty Act of 1994. Mr. Garza was executed pursuant to the 1988 enactment, 21 U.S.C. § 848(e).

or post-conviction proceedings brought pursuant to 28 U.S.C. § 2255. There are 23 defendants presently pending or in trial who have been “authorized” by the Attorney General.

8. To date, juries have sentenced 152 defendants to a life sentence and 85 defendants to death. Judges have sentenced three defendants to life in prison.

II.

RACE OF DEFENDANTS AUTHORIZED FOR FEDERAL CAPITAL PROSECUTIONS

9. The racial composition of the pool of 520 defendants whose cases were authorized for a federal capital prosecution is as follows: (A) African-American, 258 (49%); (B) Caucasian, 139 (27%); (C) Latino, 97 (19%); and (D), “other,” 26 (5%). These figures are current as of October 10, 2018.

III.

RACE AND GENDER OF VICTIMS

10. Since 2000, in a grossly disproportionate number of cases, juries have imposed the death penalty when the victim was a white female. As of October 10, 2018, white female victim cases constituted 37% (23 of 62) of federal death row but only 6% (193 of 3109)⁵ of the available pool of potential defendants since the year 2000. Moreover, 43%

⁵We have information as to the race and/or gender of the victim for 3029 defendants (out of 3109) since 2000.

(27 of 63) of all death sentences between 2000 and 2018 have involved white female victims. This is many times greater than one would expect given the pool of white female victim cases.

11. Attached as Exhibit A is a complete data set of all such authorized cases as of October 12, 2018.

12. Attached as Exhibit B is a 2016 declaration by an expert, Lauren Cohen Bell, Ph.D., which concludes that federal capital defendants accused of the murder of a white female are more than twice as likely than other federal capital defendants to be sentenced to death. Dr. Bell concludes that there is: “[A] robust correlation between the presence of a white female victim and the imposition of a death sentence.” [Exhibit B at 6]. Dr. Bell states that there is a “one-tenth of one percent, or one in one thousand” chance that the race and gender of the victim is not related to the capital sentencing outcome. [Exhibit B at 6]. Attached as Exhibit C is Dr. Bell’s curriculum vita. This opinion holds regardless of the race of the defendant.

IV.

REGIONAL VARIATIONS

13. Based on figures compiled by the Death Penalty Information Center (current as of October 12, 2018) the states which currently lead the nation in post-*Gregg* executions are Texas (555), Virginia (113), Oklahoma (112) and Florida (94). The states whose federal

districts have the most authorized federal death penalty prosecutions (including pending cases) are Virginia (57), New York (45), California (45), Texas (35), Missouri (29) and Maryland (26). Federal districts in the following states have had more than one federal death sentence returned by juries: Texas (16), Missouri (10), Virginia (8), Louisiana (4), North Carolina (4), South Carolina (3), Georgia (3), Oklahoma (3), Maryland (2), Pennsylvania (2), Arkansas (2), California (2), Florida (2), Illinois (2), Iowa (2), New York (2), Massachusetts (2) and West Virginia (2). Of the 85 federal death sentences imposed by juries since 1988, 55 (or 65%) have come from the traditional “death belt” states, the states that have historically executed the most people.

14. The United States Courts system has 94 districts. Of those, 22 districts (or 23%) have never had a case authorized for a federal death penalty prosecution.⁶ Attached as Exhibit D is a district by district breakdown of federal death penalty defendants.

15. There have been 10 federal death-penalty cases tried in the First Circuit involving a total of 12 defendants, as follows: 3 trials in the District of Massachusetts (3 defendants - 1 life sentence and 2 death sentences), 7 trials in the District of Puerto Rico (9 defendants - 2 acquittals and 7 life sentences). The First Circuit trials, involving 12 defendants, resulted

⁶1) M.D. Alabama; 2) S.D. California; 3) D. Delaware; 4) D. Guam; 5) M.D. Louisiana; 6) D. Maine; 7) D. Minnesota; 8) D. Montana; 9) D. Nebraska; 10) D. Nevada; 11) D. New Hampshire; 12) D. Northern Mariana Islands; 13) N.D. Oklahoma; 14) D. Oregon; 15) D. South Dakota; 16) D. Utah; 17) D. Virgin Islands; 18) E.D. Washington; 19) W.D. Washington; 20) E.D. Wisconsin; 21) W.D. Wisconsin and 22) D. Wyoming.

in 2 death sentences (or 17%).

16. In the Second Circuit there have been 22 federal death-penalty cases tried involving a total of 31 defendants, as follows: 4 trials in the District of Connecticut (4 defendants - 1 acquittal, 2 life sentences and 1 death sentence), 1 trial in the District of Vermont (1 defendant - 1 death sentence), 12 trials (1 trial was a retrial) in the Eastern District of New York (12 defendants - 11 life sentences and 1 death sentence), 2 trials in the Northern District of New York (5 defendants - 1 authorization withdrawn at trial and 4 life sentences) and 6 trials in the Southern District of New York (9 defendants - 1 guilty plea at trial, 1 acquittal and 7 life sentences). Only 1 death verdict has been returned.⁷ The Second Circuit trials involving 31 defendants resulted in 3 death sentences (or 10%). Two of these death sentences have been vacated in subsequent proceedings.⁸

17. In the Third Circuit there have been 13 federal death-penalty cases tried, involving a total of 18 defendants, as follows: 2 trials in New Jersey (2 defendants - one life sentence, the other committed suicide at trial), 6 trials in the Eastern District of Pennsylvania (10 defendants resulting in 1 authorization withdrawn at trial, 3 guilty pleas at trial, 1 acquittal, 4 life sentences and 1 death sentence), 4 trials in the Middle District of

⁷Ronell Wilson (ED NY) received a death sentence at his trial and at his resentencing after appeal. That death sentence was reduced to life in prison without release because he was found to be intellectually disabled.

⁸Donald Fell received a new trial in Vermont and entered into a plea agreement and was sentenced to life in prison without release.

Pennsylvania (5 defendants resulting in 1 authorization withdrawn at trial, 1 life sentence by the judge, 2 life sentences by the jury and 1 death sentence) and 2 trials in the Western District of Pennsylvania (2 defendants - 2 life sentences). The Third Circuit's trials involving 18 defendants resulted in 2 death sentences (or 11%).

18. In the Fourth Circuit there have been 47 federal death penalty cases tried, involving 71 defendants, as follows: 11 trials in the District of Maryland (13 defendants - 1 guilty plea at trial, 1 lesser included conviction, 8 life sentences by a jury and 1 life sentence by a judge and 2 death sentences), 4 trials in the District of South Carolina (4 defendants - 1 life sentence and 3 death sentences), 20 trials in the Eastern District of Virginia (35 defendants - 1 guilty plea at trial, 2 lesser included convictions, 2 acquittals, 22 life sentences by jury, 1 life sentence by judge and 7 death sentences), 2 trials in the Northern District of West Virginia (2 defendants - 1 guilty plea at trial and 1 dismissal after notice), 2 trials in the Southern District of West Virginia (1 trial resulting in 2 death sentences but a new trial was granted resulting in a guilty plea by one defendant and a life sentence from the jury for the other defendant), 5 trials in the Western District of North Carolina (5 defendants - 1 authorization withdrawn at trial, 1 life sentence and 3 death sentences) and 8 trials in the Western District of Virginia (10 defendants - 2 authorizations withdrawn at trial, 2 acquittals, 5 life sentences and 1 death sentence). The Fourth Circuit's trials involving 71 defendants resulted in 15 death sentences or (21%).

19. In the Fifth Circuit there have been 22 federal death penalty cases tried, involving 31 defendants, as follows: 5 trials in the Eastern District of Louisiana (5 defendants - but one defendant twice - so 6 outcomes) - 1 guilty plea at trial, 1 life sentence and 4 death sentences), 9 trials in the Eastern District of Texas (12 defendants - 5 life sentences and 7 death sentences), 5 trials in the Northern District of Texas (5 defendants - 1 life sentence and 4 death sentences), 2 trials in the Southern District of Mississippi (2 defendants - 2 life sentences), 3 trials in the Southern District of Texas (3 defendants - 1 life sentence and 2 death sentences), 1 trial in the Western District of Louisiana (1 defendant - 1 death sentence) and 2 trials in the Western District of Texas (3 defendants - 3 death sentences). The Fifth Circuit's trials involving 31 defendants resulted in 21 death sentences (or 68%).

20. There have been 16 federal death-penalty cases tried in the Sixth Circuit involving a total of 19 defendants, as follows: 3 trials in the Eastern District of Michigan (3 defendants - 1 guilty plea at trial and 2 life sentences), 1 trial in the Eastern District of Tennessee (1 defendant - 1 death sentence), 2 trials in the Middle District of Tennessee (2 defendants - 1 guilty plea at trial and 1 life sentence), 2 trials in the Northern District of Ohio (2 defendants - 2 life sentences), 3 trials in the Southern District of Ohio (3 defendants - 2 life sentences and 1 death sentence), 2 trials in the Western District of Kentucky (2 defendants - 2 life sentences), 3 trials in the Western District of Michigan (3 defendants - 2 life verdicts and 1 death verdict) and 2 trials in the Western District of Tennessee (3 defendants - 2

guilty pleas at trial and 1 life verdict). The Sixth Circuit's trials involving 19 defendants resulted in 3 death sentences (or 16%).

21. There have been 6 federal death-penalty cases tried in the Seventh Circuit, involving a total of 9 defendants, as follows: 5 trials in the Northern District of Illinois (5 defendants - 3 life sentences and 2 death sentences) and 3 trials in the Northern District of Indiana (4 defendants - 1 authorization withdrawn at trial, 2 life sentences and 1 death sentence). In the Seventh Circuit's trials involving 9 defendants, there have been 3 death verdicts (or 33%).

22. In the Eighth Circuit there have been 21 federal death penalty cases tried, involving 32 defendants, as follows: 1 trial in North Dakota (1 defendant - 1 death sentence), 3 trials in the Eastern District of Arkansas (4 defendants - 1 guilty plea at trial, 2 life sentences and 1 death sentence), 4 trials in the Eastern District of Missouri (5 defendants - 2 life sentences and 3 death sentences), 2 trials in the Northern District of Iowa (2 defendants - 2 death sentences), 2 trials in the Western District of Arkansas (2 defendants - 1 life sentence and 1 death sentence), 13 trials in the Western District of Missouri (18 defendants - 1 authorization withdrawn at trial, 10 life sentences and 7 death sentences). The Eighth Circuit's 32 defendants who went to trial resulted in 15 death sentences (or 47%).

23. There have been 11 federal death-penalty cases tried in the Ninth Circuit involving a total of 22 defendants, as follows: 7 trials in the Central District of California (15 defendants - 3 authorizations withdrawn at trial, 2 guilty pleas at trial, 2 acquittals, 6 life sentences and 2 death sentences), 1 trial in the District of Arizona (1 defendant - 1 death sentence), 1 trial in the District of Hawaii (1 defendant - 1 life sentence), 1 trial in the District of Idaho (1 defendant - 1 death sentence), 1 trial in the Eastern District of California (1 defendant - 1 guilty plea at trial), 3 trials in the Northern District of California (3 defendants - 1 guilty plea at trial and 2 life sentences). There were 4 death verdicts returned in the Ninth Circuit in trials involving 22 defendants (or 18%).

24. In the Tenth Circuit there have been 13 federal death penalty cases tried, involving 18 defendants, as follows: 4 trials in the District of Colorado (4 defendants - 3 life sentences and 1 death sentence), 4 trials in the District of Kansas (4 defendants - 1 authorization withdrawn at trial, 2 life sentences and 1 death sentence), 4 trials in the District of New Mexico (4 defendants - 2 guilty pleas at trial and 2 life sentences), 4 trials in the Eastern District of Oklahoma (5 defendants - 2 life sentences and 3 death sentences) and 1 trial in the Western District of Oklahoma (1 defendant - 1 guilty plea at trial). The Tenth Circuit's trials involving 18 defendants resulted in 5 death sentences (or 28%).

25. In the Eleventh Circuit there have been 17 federal death penalty cases tried, involving 20 defendants, as follows: 2 trials in the Middle District of Florida (2 defendants -

2 life sentences), 1 trial in the Middle District of Georgia (1 defendant - life sentence), 3 trials in the Northern District of Alabama (3 defendants - 1 guilty plea at trial, 1 life sentence and 1 death sentence), 3 trials in the Northern District of Georgia (3 defendants - 1 life sentence and 2 death sentences), 1 trial in the Southern District of Alabama (1 defendant - 1 life sentence), 5 trials in the Southern District of Florida (8 defendants - 3 acquittals, 3 life sentences and 2 death sentences) and 2 trials in the Southern District of Georgia (2 defendants - 1 life sentence and 1 death sentence). The Eleventh Circuit's trials involving 20 defendants resulted in 6 death sentences (or 30%).

28. In the D.C. Circuit there have been 3 federal death penalty cases tried, involving 4 defendants, resulting in 4 life sentences, or 0% death sentences.

29. I also have information on the number of authorized federal death penalty cases, since 1988, by the state in which each such prosecution was brought. According to the Project's records, the following compilation accurately sets forth the particular state in which each of the 520 federal death penalty cases authorized since 1988 was prosecuted:

Alabama (6), Alaska (3), Arizona (6), Arkansas (7), California (46), Colorado (8), Connecticut (5), DC (17), Florida (16), Georgia (9), Hawaii (2), Idaho (1), Illinois (14), Indiana (8), Iowa (4), Kansas (7), Kentucky (5), Louisiana (14), Maryland (26), Massachusetts (5), Michigan (22), Mississippi (3), Missouri (29), New Jersey (4), New Mexico (10), New York (45), North Carolina (10), North Dakota (2), Ohio (6), Oklahoma (6), Pennsylvania (23), Puerto Rico (25), Rhode Island (1), South Carolina (5), Tennessee (15), Texas (35), Vermont (3), Virginia (57), West Virginia (10).

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 16th day of October, 2018.

/s/ Kevin McNally
Kevin McNally