

DECLARATION OF KEVIN McNALLY REGARDING JOINT AND SEPARATE TRIALS AND OUTCOMES IN MULTIPLE CAPITAL DEFENDANT FEDERAL DEATH PENALTY 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. Counsel for Efrain Rodriguez-Mendoza requested that I submit this declaration discussing the statistics on the outcomes motions to sever defendants in multi-defendant federal capital trials. Counsel for Mr. Rodriguez-Mendoza also has requested that I provide statistics on the outcomes of federal capital trials where more than one capital defendant was tried together. 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

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

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.”

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

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. In the prosecutions which have been tried in federal court with more than one capital defendant, district courts have granted separate trials or separate penalty hearings in a clear majority of cases.

5. Eighty prosecutions which have commenced trial have involved multiple capital defendants. Of the multi-capital defendant prosecutions (80), which have begun trial, some form of severance has been granted in 51 instances² (or 64%)

²1) *United States v. Alex Cooper and Darnell Davis* (N.D. IL No. 89-CR-580) (separate trials); 2) *United States v. Richard Tipton, et al.* (E.D. VA No. 3-92-CR-68) (one of four capital defendants severed); 3) *United States v. Reginald Brown, et al.* (E.D. MI No. 91-CR 81127) (separate trials); 4) *United States v. John Javilo McCullah, et al.* (E.D. OK No. 1:92-032-S) (separate penalty hearings and sequential jury deliberations before the same jury); 5) *United States v. Bruce Webster and Orlando Hall* (N.D. TX No. 4:94-CR-121-Y) (separate trials); 6) *United States v. Phouc Nguyen and Bountaem Chanthadara* (D. KS No. 94-CR 10129-01) (separate trials); 7) *United States v. Dennis Moore and Kevin Wyrick* (W.D. MO No. 94-00194-01-12-CR-W-9) (separate penalty hearings and sequential jury deliberations before the same jury); 8) *United States v. Everett Spivey and Richard Haworth* (D. NM No. 95-CR 491 LH) (separate trials granted to non-capital co-defendants); 9) *United States v. Jason de la Torea, et al.* (D. NM No. 95-CR 538-MV) (separate trials); 10) *United States v. Dean Beckford, et al.* (E.D. VA CR No. 3:95CR00087) (one capital defendant tried separately); 11) *United States v. Timothy McVeigh and Terry Nichols* (D. CO No. 96-CR-68-M) (separate trials); 12) *United States v. Jeffrey Williams Paul and Trinity Ingle* (W.D. AR No. 6:96CR60022) (separate trials); 13) *United States v. Quan Ray and Darrell Johnson* (N.D. IL No. 96

CR 379) (separate trials); 14) *United States v. Marvin Lee Holley and Charles Holland* (N.D. AL No. 96-B- CR 0208-NE) (separate trials); 15) *United States v. Anthony Jones and Jerry Williams* (D. MD. No. WMN-96-0458) (separate trials for capital and non-capital defendants); 16) *United States v. Norris G. Holder and Billie Jerome Allen* (E.D. MO 4:97-CR-0141-ERW(TCM) (separate trials); 17) *United States v. Chevy Kehoe and Daniel Lee* (D. AR No. LR-CR-97-243) (separate penalty hearings and sequential penalty deliberations before the same jury); 18) *United States v. Ricky Lee Brown, Barbara M. Brown and Janette A. Ables* (N.D. WV No. 1:98CR34) (separate trials); 19) *United States v. Cornelius Peoples and Xavier Lamar Lightfoot* (W.D. MO No. 98-00149-02-CR-W-6) (separate penalty hearings and sequential jury deliberations before the same jury); 20) *United States v. Sinisterra, et al.* (W.D. MO No. 98-00311-01/05-CR-W-2) (separate penalty hearings and sequential jury deliberations before the same jury); 21) *United States v. Willis Haynes and Dustin Higgs* (D. MD No. PJM-98-CR 0502) (separate trials); 22) *United States v. Mohamed Rashed Daoud Al-'Owhali and Khalfan K. Mohamed* (S.D. NY No. S6 98 CR 1023) (one non-capital co-defendant severed; separate penalty hearings and sequential jury deliberations before the same jury); 23) *United States v. Jamal Shakir, et al.* (M.D. TN No. 3:98-00038) (three separate trials); 24) *United States v. Daymon Smith and Kenneth Tatum* (E.D. TX No. 2:99 CR 5) (separate trials); 25) *United States v. Mariano Martinez* (C.D. CA No. 99-CR 83-(A)-DT) (separate trial for Martinez); 26) *United States v. Billy Lyon and Charles Stewart* (W.D. KY No. 4:99-CR-11-M) (three separate trials for two capital and one non-capital co-defendant); 27) *United States v. Julius Omar Robinson and L.J. Britt* (N.D. TX No. 00-CR-260-ALL) (separate trials); 28) *United States v. Samuel Ealy, et al.* (W.D. VA No. 00-CR-104-ALL) (separate trial granted for one of the three capital co-defendants); 29) *United States v. Dustin Honken and Angela Johnson* (N.D. IA No. 00 CR 3034 MWB) (separate trials); 30) *United States v. Elijah Bobby and Michael Williams* (S.D. NY No. 00-CR-1008) (separate penalty phase hearings); 31) *United States v. William and Rudy Sablan* (D. CO No. 00-CR-531) (separate trials); 32) *United States v. James Edward Frye and Billy D. Cooper* (S.D. MS No. 01-CR-8-ALL) (separate trials); 33) *United States v. Aaron Haynes and William Maxwell* (W.D. TN No. 01-CR-20247-ALL) (separate trials); 34) *United States v. Styles Taylor and Keoin Thomas* (N.D. IN No. 2:01 CR 073 JM) (separate penalty hearings and sequential jury deliberations before the same jury); 35) *United States v. Amesheo Cannon and Tyrese Hyles* (E.D. MO No. S1-1:01CR00073RWS) (separate trials); 36) *United States v. Michael Paul and Robert Norman Ostrander* (W.D. MI No. 01-CR-00218) (separate trials); 37) *United States v. Gilberto*

and was being considered in another when the jury acquitted the three defendants.³ In four multi-capital defendant prosecutions, no pre-trial motion was filed by the capital defendants in three cases⁴ or was opposed by one

Caraballo and Martin Aguilar (E.D. NY No. 01-CR-1367) (separate trials); 38) *United States v. Keon Moses, et al.* (D. MD CR No. 02-CR-410-ALL) (one capital defendant tried separately); 39) *United States v. Wilfredo Perez and Fausto Gonzales* (D. CT No. 02-CR-7-ALL) (separate trials); 40) *United States v. Branden Basham and Chadrick Fulks* (D. SC No. 02-CR-992-ALL) (separate trials); 41) *United States v. Lorenzo Catalan-Roman and Hernaldo Medina Villegas* (D. PR No. 3:02-CR-117-ALL) (separate penalty hearings before the same jury); 42) *United States v. Iouri Mikhel, et al.* (C.D. CA No. 02-220 (A)-NM) (one capital defendant tried separately); 43) *United States v. Barry Byron Mills, et al.* (C.D. CA CR No. 02-00938-GHK) (capital defendants severed in three groups); 44) *United States v. Richard James and Ronald Mallay* (E.D. NY No. 02-773) (separate trials); 45) *United States v. Gary Eye and Steven Sandstrom* (W.D. MO No. 4:05-CR-00344-ODS) (separate penalty hearings and sequential jury deliberations before the same jury); 46) *United States v. Antonio Argueta* (D. MD No. 8:05 CR 00393-DKC) (separate trials); 47) *United States v. Timothy O'Reilly* (E.D. MI No. 05-80025) (separate trials); 48) *United States v. Azibo and Azikiwe Aquart* (D. CT 3:06-CR-160 (PCD)) (separate trials) and 49) *United States v. Kaboni Savage and Steven Northington* (E.D. PA No. 2:07-CR-00550-RBS) (separate penalty hearings and sequential jury deliberations before the same jury). In two cases, severance was denied prior to trial but granted after a new trial was ordered: 50) *United States v. Len Davis and Paul Hardy* (E.D. LA CR No. 94-381) and 51) *United States v. George Lecco and Valeri Friend* (S.D. WV CR No. 2:05-00107).

³*United States v. Edward Alexander Mack, et al.* (S.D. FL No. 93-252-CR-UUB).

⁴*United States v. Jean Claude Oscar, et al.* (E.D. VA No. 93-CR-131) (no motion filed); *United States v. Shaheem and Raheem Johnson* (E.D. VA No. 97-00314-A) (involved two brothers who wanted to be tried together) and *United States v. Peter Jordan and Lorenzo Gordon* (E.D. VA CR No. 04-CR-58) (no motion filed).

defendant⁵ in a fourth and fifth case. In four cases, a pretrial guilty plea by one of two capital defendants mooted the issue.⁶ In another case, all three capital defendants entered guilty pleas during jury selection.⁷ Severance was denied in fourteen other multi-capital defendant prosecutions or 18 % (14 of 80 cases).⁸ In two other cases, severance was granted from one or more non-capital

⁵*United States v. Tyrone Walker and Walter Diaz* (N.D. NY No. 94-CR-328) and *United States v. Wesley Paul Coonce and Charles Michael Hall* (W.D. MO No. 10-CR-03029-01/02-CR-S-GAF).

⁶*United States v. Robert Williams and Marvin Damon* (E.D. VA No. 3:95CR45); *United States v. Cornell Winfrei McClure and Rufus Jerry Millegan* (D. MD No. 01-CR-367-ALL); *United States v. Thomas Smith and Israel Ward* (W.D. MO No. 3:02 CR 05025) and *United States v. Daryl Henderson and Charod Becton* (S.D. NY No. 1:02-CR-00451-MBM-ALL).

⁷*United States v. Raul Robledo, et al.* (C.D. CA No. 05 CR 578).

⁸1) *United States v. LaFawn Bobbitt & Rashi Jones* (E.D. VA No. 97 CR 129); 2) *United States v. Christopher Vialva and Brandon Bernard* (W.D. TX No. W99CR070); 4) *United States v. Kevin Gray*, 2001 WL 1344859 (D. DC); 5) *United States v. Lavin Matthews, Christopher McMillian and Tebiah Tucker* (N.D. NY No. 00-CR-269-ALL); 6) *United States v. Alan Quinones and Diego Rodriguez* (S.D. NY No. 00 CR 0761 (JSR)); 7) *United States v. Andre Cooper, et al.* (E.D. PA CR No. 01-CR-512); 8) *United States v. Shawn Arnette Breeden and Michael Anthony Carpenter* (W.D. VA No. 03-CR-13-ALL); 9) *United States v. Oscar Grande and Ishmael Cisneros* (E.D. VA No. 04-CR-283-ALL); 10) *United States v. Lanny Benjamin Bodkins and Antoine Plunkett* (W.D. VA No. 4:04-CR-70083-JLK-ALL); 11) *United States v. Ricardo Sanchez and Danny Troya* (S.D. FL 06-80171-CR-HURLEY/VITUNAC(s)(s)); 12) *United States v. Melvin Gilbert and James Dinkins* (D. MD No. 1:06-CR-00309-JFM); 13) *United States v. Mark Snarr and Edgar Garcia* (E.D. TX No. 1:09-CR-00015-MAC-KFG All) and 14) *United States v. Christopher*

defendants.⁹ The final two joint capital defendant trials involved two brothers and identical evidence.¹⁰

6. In those trials involving more than one capital defendant, juries have reached the same verdict on punishment - either life or death - for all defendants in nearly every case (89%). In 32 trials the penalty verdict was the same.¹¹ In only

Cramer and Ricky Allen Fackrel (E.D.TX No. 1:16-CR-00026-MAC-ZJH).

⁹*United States v. Wilfredo Martinez-Acosta, Victor Rodriguez and Carlos Ivan Llera-Plaza* (E.D. PA No. 98-CR-362) and *United States v. Hector Acosta Martinez and Joel Rivera Alejandro* (D. PR CR No. 99-044 (SEC)).

¹⁰*United States v. Antonio and Robert Carpenter* (W.D. TN No. 99-20155) and *United States v. Reynaldo and Baldemar Villarreal* (E.D. TX No. 9:91-CR-4).

¹¹1) *United States v. Reynaldo and Baldemar Villarreal* (E.D. TX No. 9:91-CR-4) (two life sentences); 2) *United States v. Richard Tipton, et al.* (E.D. VA No. 3-92-CR-68) (three death sentences); 3) *United States v. Jean Claude Oscar, et al.* (E.D. VA No. 93-CR-131) (three life sentences); 4) *United States v. Len Davis and Paul Hardy* (E.D. LA No. 94-CR-381) (two death sentences); 5) *United States v. Anthony Walker and Walter Diaz* (N.D. NY No. 94-CR-328) (two life sentences); 6) *United States v. Dean Anthony Beckford, et al.* (E.D. VA No. 3:95-CR-00087) (four life sentences); 7) *United States v. LaFawn Bobbitt & Rashi Jones* (E.D. VA No. 97 CR 129) (two life sentences); 8) *United States v. Shaheem and Raheem Johnson* (E.D. VA No. 97-00314-A) (two life sentences); 9) *United States v. Cornelius Peoples and Xavier Lamar Lightfoot* (W.D. MO No. 98-00149-02-CR-W-6) (two life sentences); 10) *United States v. Mohamed Rashed Daoud Al-'Owhali and Khalfan K. Mohamed* (S.D. NY No. S6 98 CR 1023) (two life sentences); 11) *United States v. Christopher Vialva and Brandon Bernard* (W.D. TX No. W99CR070) (two death sentences); 12) *United States v. Alan Quinones and Diego Rodriguez* (S.D. NY No. 00 CR 0761 (JSR)) (two life sentences); 13) *United States v. Michael Williams and Elijan Bobby Williams* (S.D. NY No. 00-CR-1008) (two life sentences); 14) *United States v. Matthews, McMillian and Tucker* (N.D. NY No. 00-CR-269-ALL) (three life

four trials was the penalty verdict different for the defendants.¹² In four other

sentences); 15) *United States v. Kevin Gray and Rodney Moore* (D. DC CR No. 1:00CR00157) (two life sentences); 16) *United States v. Jamain Williams and Andre Cooper* (E.D. PA No. 01-CR-512) (two life sentences); 17) *United States v. Iouri Mikhel and Jurijus Kadamovas* (C.D. CA No. 02-CR-220 (A)-NM) (two death sentences); 18) *United States v. Lorenzo Catalan Roman and Hernaldo Medina Villegas* (D. PR No. 3:02-CR-117-ALL) (two life sentences); 19) *United States v. Barry Byron Mills and Tyler Davis Bingham* (C.D. CA No. 02-00938-GHK) (two life sentences); 20) *United States v. Wayne Bridgewater and Henry Michael Houston* (C.D. CA No. 02-00938-GHK) (two life sentences); 21) *United States v. Richard James and Ronald Mallay* (E.D. NY CR No. 02-778 (S-1) (SJ)) (two life sentences); 22) *United States v. Keon Moses and Michael Lafayette Taylor* (D. MD No. 02-CR-410) (two life sentences); 23) *United States v. Shawn Arnette Breeden and Michael Anthony Carpenter* (W.D. VA No. 03-CR-13-ALL) (two life sentences); 24) *United States v. Peter Jordan and Lorenzo Gordan* (E.D. VA No. 04-CR-58) (two life sentences); 25) *United States v. Oscar Grande and Ishmael Cisneros* (E.D. VA No. 04-CR-283-ALL) (two life sentences); 26) *United States v. Gary Eye and Steven Sandstrom* (W.D. MO No. 4:05-CR-00344-ODS) (two life sentences); 27) *United States v. George Lecco and Valeri Friend* (S.D. WV CR No. 2:05-00107) (two death sentences); 28) *United States v. Ricardo Sanchez and Danny Troya* (S.D. FL 06-80171-CR-HURLEY/VITUNAC(s)(s)) (two death sentences); 29) *United States v. Melvin Gilbert and James Dinkins* (D. MD No. 1:06-CR-00309-JFM) (two life sentences); 30) *United States v. Mark Snarr and Edgar Garcia* (E.D. TX 1:09-CR-00015-MAC-KFG All) (two death sentences); 31) *United States v. Wesley Paul Coonce and Charles Michael Hall* (W.D. MO No. 10-CR-03029-01/02-CR-S-GAF) (two death sentences) and 32) *United States v. Christopher Cramer and Ricky Allen Fackrel* (E.D. TX No. 1:16-CR-00026-MAC-ZJH) (two death sentences).

¹²1) *United States v. James Norwood Hutching, Ramon Medina Molina and John Javilo McCullah* (E.D. OK No. 1:92-CR-032-S) (two life sentences and one death sentence); 2) *United States v. Chevy Kehoe and Daniel Lee* (D. AR No. LR-CR-97-243) (one life sentence, one death sentence); 3) *United States v. German Sinisterra, Arboleda Ortiz and Plutarco Tello* (W.D. MO No. 98-00311-01/05-CR-W-2) (two death sentences and one life sentence) and 4) *United States v. Kaboni Savage and Steven Northington* (E.D. PA No. 2:07-CR-00550-RBS) (one death sentence and one life sentence).

cases, the jury acquitted all defendants.¹³

7. The information detailed herein is maintained in the ordinary course of business of the Federal Death Penalty Resource Counsel Project, and is accurate to the best of my knowledge, ability and belief.

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 4th day of September, 2018.

/s/ Kevin McNally

Kevin McNally

Federal Death Penalty Resource Counsel

¹³*United States v. Edward Alexander Mack, Chedrick Crummie and Kevin Denard Rozier* (S.D. FL No. 93-252-CR-UUB); *United States v. Ricky Lee Brown, Barbara M. Brown and Janette A. Ables* (N.D. WV No. 1:98CR34; *United States v. Hector Acosta-Martinez and Joel Rivera Alejandro* (D. PR No. 99-CR-044 (SEC)) and *United States v. Samuel Ealy and Walter Church* (W.D. VA No. 00-CR-104-ALL).