FEDERAL DEFENDERS

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Christine A. Freeman
Executive Director

February 4, 2016

Honorable Kathleen Cardone
Chair, Committee to Review
The Criminal Justice Act Program
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Testimony of Christine A. Freeman, Executive Director
Middle District of Alabama Federal Defender Program, Inc.

Dear Judge Cardone:

Thank you for the opportunity to address the Committee and offer information for your important work. This statement covers four areas – a description of our office; issues of habeas practice; issues of quality of representation; and recommendations. I am aware that the Committee has different priorities at each public hearing. For ease in using this statement, I have included a Table of Contents.

Thank you for taking the time to review these comments. I look forward to speaking with you in Birmingham.

Sincerely,

Christine A. Freeman

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Table of Contents

A. Description of Our Office

1. Beginning of the Alabama Middle District's CDO

Our federal defender organization is a community defender organization ("CDO"). In 1993, then-Chief Judge Myron H. Thompson appointed a committee to consider the creation of a federal defender office. That committee created our non-profit corporation in 1994 and became the first board of directors. For a time, the Chief Judge made appointments to board vacancies. For the last several years, the board has filled vacancies on its own. We have a twelve-member board; all but two members are lawyers.

Dick Young was hired in April 1994 as the first Executive Director and the office opened for business in June 1995. I joined the office as Senior Litigator in July 1995 and became Executive Director in October 1999. When we first opened, our office had a staff of seven: four attorneys including the Executive Director and Research & Writing Attorney, one investigator, one administrative assistant, one receptionist/clerical support. Our office has been in four locations in Montgomery. In 2009 we moved into our present site, a building with rent less than $8/square foot.

In mid-2002, we took on some capital habeas cases at the request of Equal Justice Initiative ("EJI"). In FY 2003, we added a Capital Habeas Unit with state-wide responsibility for capital habeas cases in all three federal districts in Alabama.

2. Staff

At our highest employment, we had 36 staff members. We currently have a total of 33 staff: 14 attorneys, seven investigators, three paralegals, three administrative/IT staff, and six support staff. All attorneys, from both units, are scheduled for "duty day" rotation; this is important for both courtroom experience and exposure to our judges. Our support staff are assigned to assist staff from both the Trial Unit and the Capital Habeas Unit.

We have a diverse staff. One-third are men; half are white; half grew up outside Alabama; our ages span four decades; our individual political views and religious practices cover a broad range. Several of our attorneys had careers prior to law school, including high school and college teaching. Two attorneys speak Spanish. Two attorneys are under 30. Our investigators have post-college degrees: masters in social work, masters in counseling, a J.D., and computer forensic certification.

We commit to sending each staff member, including support staff, to training events every year. The trainings we've used include the excellent FDO-sponsored events and non-FDO providers such as Bryan Garner, NACDL, NLADA, Silicon Valley De-Bug, and others. Our support staff have attended training on office administration, communication, Excel, and Word. We also provide webinars throughout the year. Any staff member can request appropriate training.

3. The Middle District

Alabama has just over 4,800,000 residents. Only 23 percent have a bachelor's degree or higher education. Per capita annual income is just under $24,000 and the median annual household income is $43,511. Per the U.S. census, 19 percent of the state's population live in poverty.

Our district consists of the southeastern 23 counties of Alabama's 67 counties. Our district borders both Georgia and Florida. We have three divisions, with a courthouse in each: northern, eastern and southern. The Northern division contains fifty percent of the population of the district. Montgomery County alone, which is in the Northern division, contains twenty percent of the population of the entire district. Outside of the City of Montgomery, the Middle District is predominantly rural, without viable public transportation.

The total population of these 23 counties is slightly over one million. The district's population is 60 per cent white, 34 per cent African-American, and around five per cent Hispanic. Several of the counties in our district are among the poorest in Alabama. In the poorest of these, Macon County in the Northern Division, the per capita income is $17,000 per year and 32 percent of the population lives below the poverty line.

4. Trial Unit ("Traditional Unit") ("TU") Clients

While many of our clients charged with firearms offenses have prior criminal records, few of the rest of our clients have had any prior involvement with the federal court system. For a significant number of our clients, this is their first experience of any criminal charge.

Over the last five years, the people charged with federal crimes in this district have included from 55 to 48 percent African-Americans and from 22 to 15 percent Hispanic persons. Seventy to 80 percent of our clients are men. All are poor, most did not graduate from high school, many have substance abuse problems, and many suffer from mental illness. Those who work often have more than one job, but at minimum wage. For clients who must travel significant distances to court, the absence of statutory authorization for reimbursement for lodging or return trips is a problem, usually handled by contributions from our staff. We have housed traveling clients at the Salvation Army, the local halfway house, and other places, but these are not satisfactory solutions.

5. Trial Unit Caseload

The district's military bases, national park, federal prison, casino and state prisons all generate federal criminal prosecutions. Crimes charged in this district include a large number of tax fraud conspiracy cases, prosecuted by attorneys from DOJ's Tax Division. At one time, the Middle District had one of the highest number of tax prosecutions in the country. We have had several civil rights violations cases, including cross-burning and excessive force cases, prosecuted by attorneys from DOJ's Civil Rights Division. We have several child pornography and human trafficking cases.

Illegal reentry cases in this district have more than doubled and are about one-fifth of our caseload. Supervision violation cases are one-fifth of our caseload. Drug trafficking and firearms cases have decreased in number, but now include charges of gang-related violence, and are now about one-fourth of our caseload. Tax fraud and benefits fraud cases are one-fourth of our caseload.

We are notified by the Clerk's office as soon as an arrest is made and the Initial Appearance scheduled. That was not done when our office first opened and the Probation office continues to resist contacting us before the pretrial release interview. However, now we almost always have an opportunity to meet with our clients prior to the Initial Appearance and we appear with them in court at the Initial Appearance. In many of our cases, particularly fraud charges, the client is notified in advance that she is the target of an investigation and, following completion of a financial affidavit, we request and receive appointment prior to indictment.

We currently have one small re-entry court for people on supervised release who are considered "high risk" of recidivism. The Probation office makes referrals to this court. We have had success in expanding the numbers of pretrial diversion grants in this district.

6. Our CJA Panel

Our CJA Plan calls for our office to handle 75 percent of the federal cases brought in this district, but in practice our office handles about 65 percent. Our Criminal Justice Act Panel is small, less than 40 lawyers. Almost all of them practice in one or two-lawyer offices. They have a range of experience from about five years to more than 30 years of law practice. The Panel is collegial, with each other and with this office. When our office has a conflict and a Panel member has agreed to accept appointment but is unable to attend the Initial Appearance, our office will cover the Initial Appearance – but not the Arraignment – for the Panel member, without a confidential discussion with the defendant. We manage the Panel, generally making appointments on a rotating basis, but we do not have a role in reviewing voucher payments.

We provide a range of services to the CJA Panel, including case-consultation, frequent emails with support and reference material, use of our library, and meeting space. Our office also provides at least 13 free CLE events, totaling eighteen hours of CLE, for the Panel each year, including one-hour Brown Bag lunch trainings and a six-hour all-day program every December. We also provide half-day refresher surveys. Instruction is given by both staff and outside speakers.

While voucher cutting is sometimes a concern, it currently seems to be minimal in this district and perhaps more a problem of communication with the initial reviewer in the Clerk's office. Panel members are reluctant to discuss voucher amounts with the judges, though I believe the judges are willing to have such discussion.

At one time, we received several complaints about voucher-cutting. We presented a seminar, with presentations by staff from the District and the Circuit clerks' offices. Voucher issues seemed

to improve after that. In part, we think the Circuit clerks clarified some voucher issues for the District clerks. Since then our office has received few complaints about CJA payments.

Appointment of experts for CJA Panel clients can be problematic. Because our organization has its own litigation budgets, we do not discuss use or cost of experts with the Court. We have been consulted by Panel members about possible experts and about difficulty in receiving approval. Sometimes the problem appears to be a need for more details to support the request; sometimes there seems to be a concern with the CJA budget that is inappropriate in making a case-specific decision. However, both the presumptive amount which Panel attorneys are permitted to spend without prior authorization ($800) and the expert cap ($2400) are too low.

In 2014, we revised the CJA Plan for this district. Each panel member is now required to obtain six hours of training on federal criminal practice, including two hours on federal sentencing, each year, and all Panel members are assigned to limited terms, at the end of which they must reapply to the Panel. We have an active Panel Selection Committee, which makes recommendations to the Court that are usually followed. The Committee consists of three of our staff members and four Panel members. We also have a mentoring program for people who are interested in the Panel but lack federal criminal trial experience.

The official data on Panel matters in this district and our office data on number of appointments often differs. It may be that the Court is making some appointments without notice to us, or other subjective decisions are impacting the data.

7. Community Involvement

We believe that one task of our office is to provide information to the community about the federal criminal justice system. Many of our staff serve on boards of local bar groups, community organizations, and schools. Staff members have provided "Street Law" instruction and assistance in moot courts and interview counseling at local schools, and have given talks to local community groups and to state prisoners nearing release. We provide internships and externships for students studying law, social work, criminal justice, paralegal certification, and a local public high school's pre-law program. We usually have several interns present in the office. We have also had several law graduates volunteer briefly with our office, including from China and Brazil.

Students can be helpful to our work, but they require orientation, instruction and close supervision. We believe the effort is worthwhile. Many of our former interns have become defender employees, including lawyers in other FDOs, investigators and social workers in public defender offices. The present coordinator of the high school pre-law program was an intern with us.

In addition, we are very conscious that we are operating in a state which does not have a public defender system and pays very poorly for indigent defense services. I am proud that the circuit judges in Montgomery County decided, finally, that they wanted a public defender office and

that they chose one of our attorneys, AFD Aylia McKee, to organize and head that office. We believe our office provided a practical demonstration of the benefits to the clients, the courts, and for justice, of having an institutional defender. In addition to Ms. McKee, several of the attorneys, investigators and social workers hired for that office had been summer interns, CJA Panel members, and volunteer counsel with our office.

B. Habeas Practice

1. Capital Habeas Unit ("CHU") Clients

Alabama currently has 187 people on Death Row, the largest per capita in the country. Death Row prisoners are located in three different facilities. The majority of the men are held at Holman Prison in Atmore, Alabama. Twenty-one of the men are held at Donaldson Prison in Bessemer, Alabama. The five women on Death Row are held at the women's prison, Tutwiler, in Wetumpka, Alabama. Holman is a 90-minute drive south of Montgomery; Donaldson is 90 minutes north; and Tutwiler is 30 minutes east.

Fifty percent of the residents of Death Row are African-American and 48 percent are white. Sixty percent were prosecuted in counties in the Northern District, 25 percent in Middle District counties, and 15 percent in the Southern District.

One-third of Death Row residents were prosecuted in just three counties. Jefferson County, in the Northern District, has a total population of 660,793 and sent 32 men to Death Row. Houston County, in the Middle District, has a total population of 104,193 and sent 15 men and two women to Death Row. Mobile County, in the Southern District, has a total population of 415,123 and sent 11 men and one woman to Death Row.

About half of our clients were prosecuted in the Northern District. Half are African-American. Most never finished high school. Many have a history of substance abuse, mental illness, and/or violent family backgrounds. Some have organic brain damage.

2. Capital Habeas Unit Caseload

In the 14 years that we have represented Alabama Death Row prisoners, four of our clients have been executed (one was a "volunteer"); four of our clients have died from "natural" causes (if you discount the quality of Alabama Department of Corrections medical care); and seven have been primarily represented by other counsel and are not included in our open case count. At present, we have 29 open federal habeas clients. Three of our cases are on appeal to the Eleventh Circuit, and 11 are in district courts with §2254 petitions pending. Five have pending challenges to lethal injection in the Middle District. Ten of our cases are out of court entirely.

In 2004, our board of directors authorized the creation of the Alabama Post-Conviction

Relief Project, Incorporated, a second non-profit organization. The Project was created to recruit and support volunteer lawyers to represent Death Row prisoners in state post-conviction proceedings, so that these prisoners' federal constitutional issues would be preserved and viable when we represented them in federal court. The first president of the board of the Project was John Carroll, former Chief U.S. Magistrate Judge of the Middle District and then Dean of Cumberland Law School. We receive an annual grant from the Southern Poverty Law Center to support this work, supplement that with additional fund-raising, and maintain a separate bank account and separate accounting for the Project. Our annual CDO audit also reviews the Project accounts and procedures. The Project currently has 16 clients. At least ten former clients of the Project have become federal Capital Habeas Unit clients. One Project client recently won a new trial in state post-conviction and one former-Project client recently won relief in federal district court, leading the State to agree to resentence him to life without parole.

3. Capital Habeas Unit Staff

Our Capital Habeas Unit presently has one supervising attorney, six additional assistant federal defenders, one research and writing attorney, four investigators, and three paralegals. Three support staff are assigned to this budget; as noted above, all support staff have split assignments with the Trial Unit and Capital Habeas Unit. Clients' case teams consist of two attorneys, one investigator, one paralegal, the lead attorney's legal assistant, and other staff as needed.

While the Defender Services Organization ("DSO") has followed the American Bar Association's standard of limiting first chair responsibilities to four to six CHU cases per attorney, this standard does not address the additional responsibilities our attorneys have as second chairs and as support for Project cases. Those responsibilities expand the attorneys' caseload beyond "four to six." Second chair responsibilities are substantial – they must review all pleadings, write portions of pleadings, and be fully prepared to lead the case in the absence or reassignment of the first chair.

4. Habeas Practice

Habeas practitioners must be specialists – knowledgeable about state practice, state procedure and state law, criminal advocacy and forensic sciences, the federal law in their jurisdiction, conflicting practice in other jurisdictions, and current Supreme Court issues. Each capital habeas case presents multiple, complex, case-specific issues. These clients are best represented by full-time specialists, with the flexibility and resources necessary to address all aspects of these cases.

Particularly regarding Capital Habeas Units, past DSO decisions have had an impact on office case management. For example, some years ago, without discussion with the Defenders, the timekeeping and data collection system was changed so that any Trial Unit case handled by a Capital Habeas Unit attorney was not included in the office's Trial Unit case count. The requirement of separate budgets for TUs and CHUs potentially creates disparate resources for the two units.

Allowing FDOs full flexibility in management of our cases and staff will not lead to financial extravagance. Review of financial decision-making already exists through the layered system of office supervisors and office administrators, monthly financial and case reporting to DSO, our required annual audit, and the quadrennial assessment process.

As you are aware, any issue not sufficiently raised in state court post-conviction proceedings may not be raised in federal court. And any state court decision on a state procedural rule is held to be binding on any federal court reviewing the state death penalty case. Thus, state habeas procedure and practice have a major impact on federal habeas practice in each jurisdiction. While the Defender Services Organization can plan to fund and support federal defender Trial Units based on basic uniformity among all federal courts, that uniformity does not exist in federal habeas practice.

Some states, such as Kentucky, have state-wide public defender systems that handle both direct appeals and post-conviction. Others, such as Tennessee, have separate state-wide state post-conviction programs, which guarantee counsel in post-conviction. Some states, such as Oklahoma, require that direct appeal and post-conviction litigation proceed simultaneously. Some states provide lengthy evidentiary hearings in state post-conviction, leading to large transcripts and records and extensive development of the factual record. Others have a highly restrictive standard for what can be litigated in post-conviction, resulting in few and very limited evidentiary hearings. And some, like Alabama, have no system in place at all – no state-funded defender system, no state-funded training, no state-funded capital resource center to monitor and litigate capital cases, no state-funded resource for pro bono lawyers and post-conviction counsel.

Thus, efforts to predict appropriate staffing or appropriate funding are very difficult, if not impossible, on a national level. The guidelines DSO had in place prior to RAND and the Work Management Study reflected this problem. The "case weighting" system was based on criteria that were applicable to some regions' habeas practice – but not to others'. For example, the assumption was that a large state post-conviction transcript and record would require more work from federal habeas counsel in reviewing and preparing the case for federal habeas. Thus, cases with larger records receive extra "weight" and count for more than a single case. But in jurisdictions with capital murder trials that are only a couple days long, where state habeas petitions are dismissed without a hearing, CHU staff must spend hundreds of hours in substantial investigation – to fully identify issues and create an adequate record for federal habeas.

5. Alabama Habeas Practice

Alabama's death penalty system is unique. It permits judges to "override" the jury's sentence. Almost a fourth of the people on Alabama's Death Row received their death sentences from judges overriding juries' recommendations of life. It is not yet clear what impact *Hurst v. Florida* will have on Alabama's Death Row prisoners whose cases are in post-conviction litigation. While Florida and Delaware, which are also jury override states, have apparently stayed executions or imposition of the death penalty while the ramifications of the case are litigated, Alabama executed

one of our clients shortly after the opinion was issued.

The State of Alabama does not have a public defender system, at any level. For years, only one judicial circuit had a public defender office – other circuits used contract lawyers or case-by-case appointments. The single public defender office did not handle appeals or post-conviction matters. The only statutory criteria in Alabama for appointment to a capital case is five years of bar membership – with any type of law practice.

Until 1999, state law limited payment for appointed counsel to $20 per hour for out-of-court work, $40 per hour for in-court work, and capped the total fee for all cases at $1000. In 1999, Alabama raised the hourly rates to $40/$60 and removed the cap for capital cases. In 2011, the hourly rate was raised to a flat rate of $70 per hour. But over one-third of the people now on Alabama's Death Row were convicted before 1999, and were represented by appointed counsel whose compensation was limited to $1000. And even the current hourly reimbursement rate is well below what attorneys in this region charge retained clients.

Compensation for an appointed state direct appeal, including of a capital case, is currently limited to $2500. This may be a contributing factor to some of the very poor quality of direct appeal work by appointed counsel in capital cases. One of our clients' appointed appellate lawyer raised only a few issues and devoted the majority of the brief to an attack on the method of execution, plagiarizing from the dissent in *Baze v. Kentucky*, without even changing "Kentucky" to "Alabama." Another appointed lawyer filed an 11-page brief citing only one case. A third typed up the client's handwritten notes and submitted them virtually without change. Often appointed appellate counsel first file a motion for new trial. Despite case law advising that a claim of ineffective assistance of counsel is best raised in post-conviction litigation, some appellate counsel raise that issue in the motion for new trial or on direct appeal – without investigation or factual development of this claim.

Compensation for appointed state post-conviction counsel was not raised in either 1999 or 2011. It was and is capped at $1500, although this maximum may be waived by the appropriate appellate court and the director of indigent defense for good cause shown. Alabama has no system for guaranteeing appointment of post-conviction counsel. A prisoner must have filed a post-conviction pleading in state court in order to request appointed counsel in a post-conviction matter. Then the court appoints counsel only "if it appears to the court that the indigent defendant is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the indigent defendant." The court has no time limit for ruling on appointment of counsel. One of our CHU clients did not receive appointment of state post-conviction counsel for more than six months after filing a request and then only after a partial dismissal of his case.

State law permits reimbursement for expert or litigation expenses up to $300 without prior approval of the court, in both trial and post-conviction proceedings. Any amounts over $300 must be approved in advance. For an indigent defendant to be entitled to expert assistance at public

expense, she must show "with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense." When seeking funds for experts, a defendant is not entitled to an expert of her own choosing, but may be limited to an expert selected by the court. Reimbursement for expert expenses and other litigation costs is generally not available until the case is concluded – which may be years after the initial appointment. Several of our Project clients had evidentiary hearings completed without any ruling by the circuit court on their motions for expert funds.

With no state system in place to track and guarantee appointment of post-conviction counsel, Alabama Death Row prisoners have relied on volunteer habeas counsel recruited by the privately-funded ABA Death Penalty Project and Equal Justice Initiative ("EJI"). Volunteers from out-of-state firms have been essential to providing representation to death-sentenced prisoners in Alabama, and have in fact won relief for quite a few. But both the ABA and EJI have struggled to recruit sufficient numbers of lawyers with adequate time to prepare and file post-conviction cases. As a result, prisoners have had to file "skeleton" petitions and request appointment of counsel, just to preserve their time for seeking relief. When state courts have prevailed on local lawyers to accept these appointments, it seems to be without regard to needed expertise and resources.

Thus, counsel handling state habeas litigation for Death Row prisoners are often unfamiliar with Alabama's procedural requirements. In many cases, these counsel have failed to do investigation, been content with 20-minute hearings, missed deadlines, failed to file appeals, abandoned a case before petitioning for relief from the Alabama Supreme Court, or otherwise failed to preserve and properly litigate trial errors. One of our clients was not informed of the denial of his appeal by the Alabama Court of Criminal Appeals until after the time limit for filing his federal habeas had passed. Another client's lawyer filed his state post-conviction appeal in the wrong court, leading to an untimely appeal. Still another client was never told that his lawyer had failed to pay the filing fee or file an *in forma pauperis* application, leading to a later federal court finding that his state petition had not been "properly filed" and so had not tolled the federal statute of limitations. And another client's appointed state post-conviction counsel thoroughly cross-examined trial counsel on their failure to conduct investigation – but failed to introduce evidence of what helpful information was available, and then applied the criminal appellate time limits instead of the civil appellate time limits, leading to an untimely filing.

As with any court, the time-frame of post-conviction litigation is uncertain. A case may take years to litigate in Alabama state courts – or the case may be dismissed without a hearing. One of our Project cases was dismissed one month after it was filed in the state circuit court. Post-conviction counsel then spent eight years litigating the denial of a hearing, returning to the circuit court twice, but with only limited remands.

Although hearsay is permitted at state sentencing proceedings, the Alabama Attorney General's office has taken the position that hearsay is not admissible in state post-conviction proceedings, and circuit courts have agreed. This has made state post-conviction litigation an

expensive minefield for volunteer counsel. A number of circuit courts have refused to admit affidavits, have refused to permit witnesses to testify to the contents of records they have reviewed, and have struck expert testimony as insufficiently supported by the record.

Even well-intentioned volunteer counsel have difficulty handling habeas cases in Alabama. Some assume that this is simply the work of a "super appeal," reviewing records and crafting legal arguments. It is not. Ineffective assistance of counsel, mental and physical illness, intellectual disability, *Brady* violations, juror misconduct, junk science and inexpert experts -- each of these are complex issues that require substantial time, travel and resources, and obstinate advocacy. Some volunteer or appointed counsel underestimate the time and expense that will be required. While some of the larger firms approach their Death Row clients as they would private clients, and pour resources into their case, other firms have been unwilling to continue to fund all expenses or to tolerate repeated absences for investigation in Alabama. And local appointed counsel simply have not provided funding or time out of their own pockets, away from their own practices.

All of these factors led our board to believe our clients will only receive a full, fair and adequate hearing, with full development of all the factual and legal issues, if we assisted in guaranteeing adequate counsel in state post-conviction and worked closely with those counsel, through the creation of our separately-funded Project.

These concerns have to be present in other Capital Habeas Units. Tying federal habeas practice to avoidable mistakes in state post-conviction limits our effectiveness and deprives many clients of a fair consideration of important constitutional issues on the merits.

Just as a federal Trial Unit attorney would be deficient if she failed to coordinate representation and resolution of a client's federal case with a client's state lawyer on a pending state case, CHU counsel must also insure that state post-conviction proceedings do not create obstacles to fair proceedings in federal habeas.

6. Impact of the Work Management Study on Habeas Practice

I was a member of the Defender Steering Committee for the Work Management Study ("WMS"). I received all information generated during the study, fully participated in the Steering Committee, and was very aware of the discussion and development of likely WMS standards for Capital Habeas Units ("CHUs"). I supported the WMS overall as one way of demonstrating and describing our work, primarily of Trial Units, to AO staff and judicial committees.

At the time of the WMS, our CHU had seven AFDs and three R&W attorneys and 3.99 federal cases per AFD. In addition, we had a staff ratio of 2:1 -- two non-AFDs per AFD. And, apparently because a concrete number was needed, the "four to six" ABA standard morphed under the WMS into "4.8" clients per attorney. The WMS ultimately resulted in a budget cut for our CHU, eliminating two staff positions and reducing our CHU funding substantially.

I was not initially concerned with this impact, in part because we were told we would have a two-year period to make a "soft landing;" I was confident our caseload would increase; and we often return funds to DSO at the end of each fiscal year.

For unrelated reasons (spouse change in employment and new family member) one AFD and one R&W attorney left our CHU soon after the WMS was completed. And our workload increased almost immediately – we were asked to take five cases that had been handled by other counsel to conclusion and were now out of federal habeas court. We added some of those cases to our lethal injection docket and began to assess what clemency or other litigation could be brought on behalf of our new clients. Because we had not represented these clients before, our investigation had to begin from scratch and under tight time frames.

But when I requested permission to fill the two attorney vacancies, I was told that I would not be permitted to do so until I had a two-year period of adequate caseload to demonstrate the need for the hiring. This ignored the reality of habeas practice – unlike trial unit work, these cases generally don't "go away" or turn over quickly. If we have five more cases today, we are highly likely to still have those cases in two or more years, unless a client is executed. The fact that we had returned a substantial amount of budgeted funds to DSO – more than enough to pay for two more attorneys for several years – was also considered irrelevant. I asked if I could hire an attorney temporarily, for a year and a day, but this request was also denied.

This policy gives us an impossible choice – take on additional cases without adequate staff, or take no additional cases and guarantee that we will not be permitted to add staff. This seems an unnecessary fiscal control - as noted above, review of financial decision-making already exists through office supervisors, office administrators, monthly reports, the annual audit, and assessment.

To limit our work in this way also seems counter to the spirit of the Criminal Justice Act and the statutory provisions for counsel in federal habeas. The benefit of federal defender capital habeas units has been well established and recognized by the courts.

Many cases illustrate the fallacy of this two-year "wait and see" approach to hiring for Capital Habeas Units. Here is one.

7. Mr. "Smith"

Shortly after the discovery of the beaten body of a young woman in her apartment outside Birmingham, an older adolescent I will call "Tom Smith" and his friend were caught driving the victim's car, with some of the victim's possessions in the car. Other possessions had been pawned, in Mr. Smith's own name. At the age of 19 years, "Tom Smith" was charged with three counts of capital murder, in the course of a burglary, rape, and robbery.

The State's theory at trial was that only Mr. Smith had committed the rape and murder of

the victim, and that the friend had been unaware of those crimes. The friend was allowed to plead guilty to a time-served sentence for theft of a credit card. At trial, the State presented expert testimony on DNA evidence and fingerprint evidence found at the scene. Each expert testified that the evidence was "a match" to Mr. Smith. The State argued its experts' opinions definitively established only Mr. Smith's "semen was in [the victim's] vagina," only "his bloody thumb print was on that doorknob," and only "his palm print was on her ankle." Mr. Smith's lawyers presented no experts, relied on inept cross-examination, and ultimately conceded to the jury that "forensic experts who are all good … have come in here and told you the truth. . . . We don't know exactly what happened . . . . that's why we say it's not just him that did it." After two hours deliberation, the jury convicted Mr. Smith of all counts of capital murder.

At the penalty phase, the State recalled one of its experts and again argued that all evidence showed only Mr. Smith was responsible for this murder: ". . . the scientific facts are irrefutable and they don't lie." Defense counsel again presented no experts, but called Mr. Smith's mother to testify to his age. Her testimony fills less than three pages of the trial transcript. The jury voted 11 to 1 for a death sentence. At the later, separate hearing before the trial judge, the judge noted "absent the forensic evidence relating to [the friend], it is apparent to me that [Smith] was a major participant." The judge imposed the death penalty.

At the hearing on the motion for new trial, new appointed counsel called trial counsel to testify as to their failure to retain forensic experts. Mr. Smith's lead counsel said doing that would have been pointless. On appeal, new counsel argued the forensic evidence was insufficient and improper – but without any support in the record for this challenge.

In state post-conviction, Mr. Smith was represented by a volunteer lawyer whose firm did not provide financial support. The volunteer counsel paid for the expenses of the litigation himself. He hired a mental health expert, but no others, and the new mitigation evidence he presented consisted of lengthier family testimony on Mr. Smith's lack of a prior criminal record, his good behavior as a child, and Mr. Smith's alcoholism at the time of the offense. The volunteer lawyer did not represent Mr. Smith in federal post-conviction litigation. Once the 2254 pleading was filed, the federal judge appointed a local attorney to represent Mr. Smith. This attorney did not hire experts and presented no additional mitigation evidence.

This past June, our office was asked to represent Mr. Smith in his clemency application. We consulted multiple experts and conducted an in-depth family investigation. We obtained an affidavit from an expert in molecular biology, forensic biology and DNA. After reviewing the State's expert's notes and testing, our expert concluded "some of the methods applied to the biological evidence in this case, particularly with respect to interpretation of DNA profiles and statistical calculations, have been expressly rejected by the scientific community." She found the State's expert "failed to include relevant data and information that would undermine confidence in the reliability of his results, misrepresented the data that he did discuss, and used irrelevant data to support his conclusions." She identified *eight* unsound methodological and reporting practices,

including inaccurate statistical calculations, and she noted that in reality, the laboratory documents showed a mixture of DNA types from the "male" fraction of the vaginal swabs, some of which did not "match" Mr. Smith's "very degraded" sample. She concluded the State expert failed to develop any clear "match" between vaginal swabs and Mr. Smith's sample.

The State's fingerprint expert at trial was also their lead investigator in this homicide investigation. He found the victim's body, searched the crime scene, and developed investigative leads. We obtained an affidavit from a professor in criminal investigation and technology who has authored a book on fingerprinting and criminal identification, and has spoken widely regarding fingerprinting, scientific evidence, science and the law, and validity of fingerprint evidence. Our expert concluded the State's expert should not have testified that Mr. Smith's fingerprints were a "'match." He noted that both at the time of Mr. Smith's trial and today, fingerprint examiners are incapable of individualizing fingerprints to that degree. He also found that "[t]here are at least two points on which one might question whether his approach was consistent with what is today called ACE-V. The first is that his description of his approach to analyzing latent prints . . . describes only 'comparison,' not 'analysis.' The Analysis phase is crucial because it typically involves interpreting the features of the latent print by itself. If the latent print is initially analyzed in a side-by-side comparison with the known print of the suspect, the potential for bias is increased. It would be more likely that the examiner might improperly utilize the known print of the suspect as a guide to the interpretation of the latent print."

Because – at all stages of his litigation – Mr. Smith' counsel consulted no forensic experts and called none to testify, they were unable to challenge the prosecution's case and failed to show that the state's experts had testified inaccurately and had not met professional standards. They had no evidentiary support for their penalty phase argument that Mr. Smith was not solely responsible.

His counsel similarly missed Mr. Smith's mitigation evidence. As it turns out, multiple members of three generations of Mr. Smith's family have been extreme, dysfunctional alcoholics, and Mr. Smith himself started drinking to unconsciousness when he was just 12 years old. His home life provided some motivation for this. He never knew his father and his mother left him behind, frequently, when she married and moved with one of her many husbands. By the age of 18, he was homeless and "couch surfed" with friends and other relatives, until he arrived at Death Row. No sentencer or reviewing court ever heard this information about Mr. Smith.

We presented our evidence in a clemency application, filed a lethal injection challenge on Mr. Smith's behalf, and sought relief in the Alabama Supreme Court under *Hurst v. Florida*. But Mr. Smith was executed in January.

The lawyers who represented Mr. Smith before our office were, presumably, good and well-intentioned people. But they were not knowledgeable about criminal forensics, mitigation, or state or federal habeas. The lawyers in our office are great and hard-working -- and, because of their full-time devotion to this field -- knowledgeable about criminal forensics, mitigation, and state and

federal habeas. They are the experts required for this litigation. To rely on an alternative, volunteer source of lawyering simply rolls the dice again for Death Row clients who already have been unlucky at trial and in life.

Had our office had more staff, we could have reached out to Mr. Smith's counsel and offered advice and support early in his post-conviction litigation. But neither the WMS, case weights, nor any other model for funding Capital Habeas Units incorporates this function.

C. Quality of Representation

1. What We Do

The phrases usually used to describe Federal Defender organizations tend to flatter: "flagship," "gold standard," or, somewhat retro, "Cadillac." But what do these terms describe? The law schools and pedigree of our lawyers? Their writing abilities? Their knowledge of current law? Their preparation for court? The Sentencing Commission believes over 95 per cent of our cases resolve without a trial and with a conviction. Most lay people would not view this as success.

I think it is important to assess the quality of our representation, and the impact any changes in structure or support would have on it, with a more ground-level understanding of what we do. If possible, *we save peoples' lives*. If that's not possible, *we minimize damage done to their lives.*

2. Mr. "Jones"

In March 2012, a young man I will call "Mr. Jones" ran from a city police officer at a motel in Montgomery. When he was caught, it was determined that he had thrown a gun and a bag of marijuana and that he still had a bottle of crack cocaine. Mr. Jones was arrested by local police. A state lab report measured the drugs as eight grams of marijuana and eight grams of crack cocaine. Mr. Jones was charged with violating his state probation for three, six-year-old armed robbery convictions and he was sent to state prison for two years.

After Mr. Jones was sent to state prison, he was indicted in federal court and charged with possession with intent to distribute crack cocaine, possession of a firearm in furtherance of drug trafficking, possession of marijuana, and possession of a firearm and ammunition as a convicted felon. Because of the robbery convictions, he was eligible to be sentenced as an armed career criminal. If convicted, he faced at least a mandatory minimum sentence of 15 years for possession of the firearm and ammunition, followed by a mandatory consecutive minimum sentence of five years for use of the firearm in furtherance of drug trafficking.

Our office was appointed to represent Mr. Jones. Communication was difficult. He was extremely paranoid. Our investigator learned that Mr. Jones had been physically abused by his alcoholic mother; he had repeated the first grade and been placed in special education classes; and he

dropped out of school in eighth grade. We learned from his grandmother that Mr. Jones had tried to hang himself when he was eight years old and he had set the house on fire. We learned he had been shot in the head when he was fifteen years old and had witnessed his own brother's murder. The armed robberies were committed shortly after these events, when he was sixteen.

Despite his young age, Mr. Jones had been sentenced for the robberies as an adult. He had received a "reverse split" sentence of 20 years, requiring him to serve a full five years in adult prison and then begin probation. While in state prison, he twice tried to commit suicide by hanging. He was hospitalized both times. The second suicide attempt likely resulted in brain injury. A magnetic resonance image (MRI) confirmed a lacunar infarct of the right midbrain and he thereafter suffered weakness/numbness to the left side of his body, mild left side facial paralysis, and slurred speech.

Mental health professionals in the state prison system diagnosed him, at various times, with: Schizophrenia; Bipolar Disorder; Mood Disorder NOS; Cognitive Disorder NOS; Severe Cognitive Deficits; Posttraumatic Stress Disorder; Depression; Attention Deficit/Hyperactivity Disorder; Adjustment Disorder With Mixed Disturbance of Emotions and Conduct; Insomnia; Psychomotor Retardation; Ineffective Coping Skills; Borderline Intellectual Functioning; Personality Change Due to Head Injury; and Antisocial Personality Traits. But when he returned to state court five years later for a hearing on his probation, according to a notation on one of the state court docket sheets, he was "Not a candidate for Mental Health Court because of charge, per Mental Health Court."

After Mr. Jones came into federal custody, we hired a psychologist to examine him. That psychologist determined that Mr. Jones was psychotic and incompetent to stand trial and that he needed to be transferred for in-patient treatment as soon as possible. We filed a motion to find Mr. Jones not competent to stand trial and for hospitalization. The court ordered Mr. Jones to be evaluated by the Bureau of Prisons and he was sent to FMC Lexington. The Bureau of Prisons examiner concluded he was malingering, albeit suffering from a cognitive disorder and depression, and that he was competent. The examiner observed "[d]iscarding the firearm and marijuana would suggest that [Mr. Jones] knew he could face consequences for possessing those items."

On Mr. Jones' return to Montgomery, months later, we engaged a second psychologist to examine him. This psychologist concluded that Mr. Jones had both paranoid schizophrenia and intellectual disability, and that he was then suffering from stress-induced psychosis and was incompetent to stand trial. Following a contested hearing, the court concluded that Mr. Jones was not competent to stand trial and directed the Bureau of Prisons to assess possible restoration of competency. This time, Mr. Jones was sent to FMC Butner. The examiner at Butner concluded that Mr. Jones was incompetent to stand trial and not restorable to competence. Mr. Jones was returned to Montgomery. After another contested hearing, the court ordered Mr. Jones to be returned to the Bureau of Prisons for assessment as to dangerousness. In a third evaluation of Mr. Jones, the examiner at Butner concluded that Mr. Jones did not pose a substantial risk of danger to others. Mr. Jones was again returned to Montgomery. After additional hearings addressing conditions of release, Mr. Jones was released from custody in December 2014, twenty-two and a half

months after he was first arrested on the federal indictment.

At various times, three different investigators from our office have interacted with Mr. Jones. Two with masters in social work made assessments and resource referrals. One served as surrogate grandfather and "sounding board" for Mr. Jones. Since his release, the court has held additional status hearings to monitor Mr. Jones' performance. For a time, Mr. Jones moved back and forth between his mother's and grandmother's homes, but each time with the permission of his probation officer. With assistance from our office, Mr. Jones has obtained disability benefits. His federal probation officer has arranged for a case manager from the local mental health office to provide transportation and supervision for Mr. Jones. He has maintained his medication. During a neighborhood problem, not started by Mr. Jones, he called both his probation officer and our office, to consult as to what actions he should take. Later, he called his probation officer again and said this was the first year of his life in which he had not been in trouble. Recently, he married and visited our office with his wife. Our staff helped him successfully apply for Section 8 housing.. And Mr. Jones has started a part-time job at a nearby carwash. Mr. Jones' future prognosis is guarded at best, but he now has a chance at a productive life, a chance that the twenty-year prison sentence would have prevented.

Our representation of Mr. Jones was informed and enhanced by interaction between the Capital Habeas and Trial Units. The first chair on his case formerly worked in our CHU, and says that his CHU experience makes him a better trial lawyer. He approaches clients more holistically, and investigates and presents mitigation more thoroughly and effectively, based on insight gained representing clients on Alabama's death row. And these insights are now shared by our entire staff.

My federal defender and CJA colleagues in other jurisdictions have similar experiences and accomplish similar results for their clients. Federal defender offices have been able to achieve these results because we have the flexibility to apply necessary staff, resources and experts on behalf of our clients. Given the risks faced by our clients, the frequently inadequate attention given to their problems before involvement with our offices, and the range of possible results, this approach must be supported.

3. Resource Counsel

We have used CapDef resource counsel in our single direct-death case and confer with HAT counsel. Both sources have been extremely helpful to us.

Much of the success in sentencing that federal defender offices have achieved over the last several years has been due in no small way to the work of the Sentencing Resource Counsel. They have sent a constant stream of information to our offices, helped formulate innovative litigation strategies, and made sure defenders across the country had equal access to the most current information relevant to our sentencing cases.

But the limitation to sentencing advocacy is too narrow. Although DSO presents excellent training on all aspects of federal criminal practice, we need full-time resource counsel on other aspects of our practice, including mental health, supervision, and collateral consequences of conviction.

In addition, we should have independent defender policy and legislative advisors, who are free to work on development of national policies and legislation that benefit our clients. At present, we don't have much of a place at the tables talking about criminal justice reform. And DSO's involvement in policy matters is limited to positions taken by the Judiciary and Administrative Office – positions that are not always consistent with the interests of our clients. Failure to take advantage of our skills and energy on these topics is a disservice to our clients and our communities. Our insights are important and we are, in so many areas, our clients' only advocates.

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Christine A. Freeman received her J.D. from the University of Pennsylvania Law School and her B.A. from the University of Michigan. Prior to joining the Federal Defender's office in Montgomery, she was an assistant federal defender with the Federal Public Defender for the Middle District of Tennessee. She has also been in private practice and served on the CJA Panel in Nashville, Tennessee; employed as an assistant county public defender for Davidson County, Tennessee; a staff attorney in prison and post-conviction litigation for the Southern Center for Human Rights in Atlanta, Georgia; and a staff attorney and branch office director in eastern Kentucky with the Appalachian Research and Defense Fund of Kentucky. She is a former president of the Alabama Criminal Defense Lawyers Association, the Montgomery chapter of the American Inns of Court, and the Montgomery chapter of the Federal Bar Association. She is board president of the Alabama affiliate of the American Civil Liberties Union. Since working in Alabama, she has served on the standing federal defender committees DSAG, DAWG, PMWG, and on BAP and the WMS.

D. Recommendations

There should be statutory authorization for reimbursement for lodging and round-trips to and from court, for financially-eligible defendants.

The judiciary should not be ruling on defense expenses and vouchers and there should be a formal appeal process for challenging CJA voucher cuts.

The presumptive amounts which CJA Panel attorneys can spend for experts should be raised.

Case weight standards for Capital Habeas Units should recognize and "count" both first-chair and second-chair responsibilities of attorneys.

Capital Habeas Units should be the primary provider of 2254 representation in each federal district, so that full-time specialists handle these cases.

Judicial management of habeas litigation should end, whether in the form of rigid standards

for costs, control of office staffing and budgets, control of case budgeting, or limitations on use of experts.

Every Capital Habeas Unit must be permitted to take steps to guarantee appropriate litigation and exhaustion in state post-conviction proceedings.

Federal Defenders should be able to add staff when their caseload meets WMS criteria.

Capital Habeas Units should be tasked with, and staffed for, assisting all counsel handling capital habeas cases within their district.

Federal Defender offices should be encouraged, funded, and staffed to provide holistic advocacy for our clients.

The types of Resource Counsel should be expanded and a Defender Policy and Legislation Initiative should be created, staffed and permitted to fully advocate for criminal justice reforms on behalf of our clients.