

February 15, 2016

MEMORANDUM

TO: Ad Hoc Committee to Review the Criminal Justice Act

FROM: Kevin McNally, Director, Federal Death Penalty Resource Counsel Project

SUBJECT: Comments Regarding the Criminal Justice Act and the Federal Death Penalty

Federal Death Penalty Resource Counsel Project

Established in early 1992 by the Administrative Office of the United States Courts, Defender Services Division (now Defender Services Office), the Federal Death Penalty Resource Counsel Project [FDPRC] is comprised of 10 part-time and 2 full-time veteran capital defense attorneys.¹ Created for the benefit of court-appointed

¹The 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. The work of the Federal Death Penalty Resource Counsel Project is described in a report prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (May, 1998) [hereinafter 1998 "Recommendations" or the "Spencer Report"] at 28-30.

www.uscourts.gov/file/originalspencerreportpdf. 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.

A 2010 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,

CJA panel attorneys, federal defenders and the judiciary, the Project serves as a national clearinghouse for information which might be helpful to defense counsel appointed in federal capital cases.

The Project monitors all federal death penalty cases and consults with counsel in areas ranging from the DOJ authorization process to developing budgets and mitigation and working with experts. Resource counsel responsibilities also include:

- Identification and recruitment of qualified defense counsel for possible appointment;
- Development of capital litigation training programs and materials to assist federal defenders and court-appointed private counsel;
- Responding to judicial inquiries concerning appointment of counsel, case budgeting and the defense function in federal capital cases;
- Responding to Congressional inquiries directed to the federal defender system relating to proposed capital punishment legislation; and
- Maintaining a liaison between the federal public defender system and responsible officials of the Department of Justice regarding the administration of federal death penalty statutes.

The Project produces a vast array of materials related to defending federal capital prosecutions, beginning with the authorization process, available on the Project's web site: www.capdefnet.org. The Project provides, for example, model pleadings on recurring issues such as defense funding, continuance, jury voir dire, discovery, government mental status exams, severance, penalty phase instructions,

including case budgeting. Defense counsel found their knowledge, national perspective, and case-specific assistance invaluable." *Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases (September 2010)*. <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx> [hereinafter "2010 Update"].

etc. These materials are made available at no cost to appointed counsel. Project attorneys also provide regular telephone and on-site consultation with assigned or appointed counsel in federal capital cases.²

The 1998 “Recommendations” and the 2010 Update state that “defense counsel should obtain the services of Federal Death Penalty Resource Counsel in order to obtain the benefit of model pleadings and other information that will save time, conserve resources and enhance representation.” www.uscourts.gov/file/originalspencerreportpdf and <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx> *Update* at 108. This Committee should echo this recommendation.³

FDPRC offers the following additional comments:

I. Disparities in Defense Funding

The Department of Justice currently reviews each potential federal capital case to determine which defendants should be “authorized” to face a federal death penalty trial. <http://www.justice.gov/usam/usam-9-10000-capital-crimes>. Prior to 1995, each United States Attorney was permitted to *not* seek the death penalty without Main Justice approval. The approval of the Attorney General was only required to seek the death penalty. This change has repeatedly been justified by the need for *national uniformity*. 2001 WL 21755916 (Cong. Testimony). See Little, R.,

²Originally, the Resource Counsel Project “was charged with responsibility for assisting in federal death penalty proceedings at all stages of litigation: trial, appeal and post-conviction. Those functions have now been distributed among three projects ...” 2010 *Update* at 100. FDPRC is the Trial Project, along with Capital Resource Counsel. Appellate litigation is handled by the Federal Capital Appellate Resource Counsel Project. Post-conviction litigation is coordinated by the Federal Capital Habeas Project.

³The Capital Case Section [CCS] of the Department of Justice currently has 15 full-time lawyer positions. CCS attorneys are counsel of record in nearly all federal capital trials and supplement counsel from the United States Attorney’s Office.

“Good Enough for Government Work? The Tension Between Uniformity and Differing Regional Values in Administering the Federal Death Penalty,” 14 *Fed.Sent.Reptr* 7 (2001).

One might expect a similar national uniformity on the defense side. But, there is not. The 2010 Update to the 1998 Recommendations by the Subcommittee on Federal Death Penalty Cases analyzed both high cost and lowest cost trials. *Update* at 41-45. The Update found a geographic variable:

In capital cases, brought under federal law and under the supervision of federal judges, one might expect a consistent level of defense resources regardless of the state in which a case is tried. Considering as well that the Department of Justice has increasingly “nationalized” federal death penalty prosecutions over the past decade ... yet the data for the period encompassed by this study, 1998-2004, demonstrates significant geographic variation in the distribution of defense resources ... Federal capital trials brought in the four highest cost states expended six times greater defense resources than trials conducted in the four lowest cost states.

Update at 50-51.

The link between defense resources and outcome is critical to understand.

There was a strong association between a lower cost defense representation and an increased likelihood of a death sentence at trial ... For trial cases in which defense spending was among the lowest one-third of all trial cases, the rate of death sentencing was 44%. For trial cases in which defense resources were in the remaining two-thirds of costs, the likelihood of a death sentence was 19%. Thus, the lowest costs cases were more than twice as likely to yield sentences of death.

* * * *

61 percent (8 of 13) of the federal defendants tried in states with low cost trial defense received a death sentence, whereas only 19 percent

(8 of 42) of the federal defendants tried in other states were sentenced to death.

2010 *Update* at x and 54-55; emphasis added.

This Committee should study this unaddressed phenomenon of “steep regional differences in defense resources.” *Update* at 52. There has not been an examination of CJA funding in federal capital cases in over a decade.⁴ There is much reason to believe that this disparity, so crucial to who lives and who dies, continues today.⁵ The 2010 *Update* “findings strongly suggest that more research is needed and that the topic merits additional consideration by the judiciary.” *Update* at 56. This Committee should recommend an examination of disparities in defense funding between individual cases and between regions or Circuits and how it interrelates with the quality of representation.

Putting aside the issue of disparity, this Committee should recommend a study of defense costs in federal capital cases. There have been 20 trials involving 25 defendants since the 2010 Spencer Report *Update*. There have been an additional 14 cases involving 16 defendants in “authorized” federal capital cases since the 2010

⁴The 2010 *Update* studied data from 1998 to 2004.

⁵For example, in *United States v. Snarr*, 704 F.3d 368, 403-06 (5th Cir. 2013), the District Court approved a budget of \$187,000 for experts and investigators, finding that it was reasonably necessary for an adequate defense. The Chief Judge of the Circuit reduced this budget to \$65,000. After a hearing, the District Court approved an additional \$65,000 in funding, of which the Chief Judge approved only \$20,000.

By way of comparison, in response to a request from the *Honolulu Star-Advertiser*, the District Court ordered the release of CJA documents in *United States v. Naeem Williams* (D. HI No. 1:06-CR-00079-DAE). “Taxpayers Foot \$4.3 M Defense Bill for GI’s Trial.” The *Honolulu Star-Advertiser* (July 2, 2014). “More than \$1.4 Million went to pay for defense expert witnesses, paralegals, investigators, overhead and other miscellaneous expenses ...”

Update that have been concluded through a negotiated settlement or otherwise. There is much to study.⁶

II. Appointment of Counsel

A. Appointment of learned counsel with “distinguished prior experience.”

18 U.S.C. §3005 states that the District Court “shall promptly, upon the defendant’s request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases.” Learned counsel should have “distinguished prior experience in the trial, appeal or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty” litigation so as to “assure high quality representation.” *United States v. Miranda*, 148 F.Supp.2d 292, 294 (S.D. NY 2001). See the 1998 Judicial Conference Recommendations, the Spencer Report, *supra.*, at 18.

As the 2010 Update stated: “The first responsibility of the Court in a federal death penalty case is to appoint experienced, well-trained and dedicated defense counsel who will provide high quality legal representation.” *Update* at 91. The Spencer Report recommendation 1(b) “contemplates *excellence*, not simply prior experience ...” *Update* at 94.⁷

The Update found that “there is a negative, or inverse, relationship between the attorneys hours on a case and their client’s risk of being sentenced to death; the more hours dedicated to a case, the lower the risk of a death sentence.” Further, the Update found:

⁶The defense costs of such cases has most certainly increased. For one factor, the hourly rate for counsel was \$125 per hour in cases studied in the 2010 Update (1998-2004). It is currently \$181 per hour.

⁷Four lawyers, one from Missouri and three from Texas, are responsible for seven clients sentenced to death and continue to be appointed despite credible claims of ineffective performance.

Defendants in low cost cases were much less likely to have been represented by attorneys viewed as having “distinguished prior experience” in capital litigation, as recommended in the Spencer Report, than were defendants in other cases.⁸ Further, judges in the low cost cases were significantly less likely to have followed the recommendations of the Federal Defender organization or the Administrative Office in appointing counsel than were judges in other cases.

Update at 48.

There were 42 death penalty trials while Attorney General Holder was in office. In nearly half of these trials, counsel from out-of-district was appointed as “learned counsel.” There have been 13 death sentences after these 42 trials. Only three of these thirteen trials resulting in a death sentence involved CJA counsel appointed from outside the district. Only three death sentences involved the appointment of a third attorney. Three of these thirteen death row inmates were represented by attorneys who did not have “distinguished” prior experience or who were not recommended by the Federal Public Defender or where the recommendation of the Federal Public Defender was not accepted.⁹

This Committee should investigate the quality of representation in federal capital cases and any link between the nature of the appointment, how many lawyers were appointed, whether any recommendation was solicited or followed and whether geography should be a determinative factor in the appointment of “learned counsel.”

⁸Judicial Conference policy calls for appointed counsel in a federal death penalty case to have “distinguished prior experience” in capital litigation. *See* Spencer Report, Recommendation 1(b) (Qualifications of Counsel), and Guide to Judiciary Policy, Vol. 7, Defender Services § 620.30(e).

⁹18 U.S.C. § 3005 states: “In assigning counsel under this section, the Court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, the Administrative Office of the United States Courts.”

As of last September, there were 11 “authorized” federal death penalty cases pending trial. In eight of those cases out-of-district learned counsel were appointed.¹⁰ In seven of the eleven cases, third counsel was appointed. Appointment of out-of-district counsel and/or third counsel has become the national standard of practice.

Courts should appoint counsel with “distinguished prior experience” ... even if meeting the standard requires appointing counsel from outside the district in which a matter arises. Appointing such qualified defense counsel generally produces cost efficiencies, including a higher likelihood of a non-trial disposition ... The cost of travel and other expenses associated with bringing counsel from another jurisdiction can be minimized with careful planning by counsel and the Court.

2010 *Update* at 94.¹¹

This Committee should recommend the appointment of “learned counsel” with distinguished prior experience in the defense of capital trials, including, where appropriate, the appointment of third counsel and/or counsel from outside the district.

B. “Learned counsel” recommendations not accepted.

This Committee should study how often and why the Court does not follow the recommendation of the Federal Public Defender or the Administrative Office of the United States Courts.

¹⁰Of the three cases where out-of-district learned counsel have not been appointed, two are from Texas and one from Missouri.

¹¹“In the institutional defender context, when it is helpful and desirable, attorney resources can be shared between Defender offices, pursuant to an established protocol.” *Update* at 95. This Committee should consider whether increased funding should be provided for this type of loaning protocol.

As the 2010 Update stated: “[T]he Federal Defender and Resource Counsel are likely to have access to information that the Court lacks. That information includes factors relating to the defendant or to counsel who are candidates for appointment.¹² Consideration of these factors is essential to establishing a defense team that functions effectively.” 2010 *Update* at 99. Experience teaches that diverse defense teams (race, ethnic background, gender, age, etc.) communicate better and produce more successful results. This Committee should study the link between diversity and result.

C. Pre-Charge appointment of counsel.

In a number of cases, particularly in Federal Bureau of Prison homicide cases, suspects are held for years prior to a murder charge being brought. In most of these cases, counsel is appointed prior to indictment upon motion or upon the issuance of a “target” letter from the United States Attorneys Office. However, in a small minority of these potential capital prosecutions, Courts have not appointed counsel where the government declines to issue a “target” letter. In some of these cases, the eventual capital defendant can languish for years without being charged and without an attorney.

The governing statute calls for capably qualified counsel to be appointed “promptly,” 18 U.S.C. §3005. [Spencer Report] Recommendation 1(b) endorses appointment of specially qualified counsel “at the outset” of a case, which in some cases may mean prior to the formal filing of a charging document.

Update at 93.

This Committee should recommend that such individuals be assigned or appointed counsel upon such time as they become a suspect in a homicide.

¹²“Case-specific consultation is ... required by Judicial Conference policy (see Guide, §§620.30(a) and (b), explaining the 18 U.S.C. §3005 consultation requirement and suggesting that in developing a recommendation, consideration be given to the ‘facts and circumstances of the case.’)” 2010 *Update* at 99-100.

III. Compensation

During the time period studied by the 2010 Update, the hourly rate for capital cases was \$125.00 per hour. It is currently \$183.00 per hour. The Update recommended that “[t]he rate ... should be reviewed at least every three years to ensure that it remains sufficient in light of inflation and other factors. (18 U.S.C. §3006A(d)(1) and 18 U.S.C. §3599(g)(1)).” *Update* at 97. This Committee should recommend regular review of the adequacy of compensation paid in death penalty cases.

A. Presumptive Fee Caps

The 2010 Update referred to one Circuit’s policy, titled “Special Procedures for Reviewing Attorney Compensation in Death Penalty Cases.” This policy “considers attorney compensation in excess of \$100,000 at the district court level to be ‘presumptively excessive’ ...” *Update* at 55.

This Committee should recommend against the use of presumptive fee limitations. The Fourth Circuit recently considered such a policy but did not implement it.

B. Presumptive Expert Rates

Given the resources available to the Department of Justice, this Committee should recommend against the use of presumptive rates for investigators and experts. Presumptive rates create an unlevel playing field, handcuff the defense and ignore the unique circumstances of individual cases and geographic location. The government is able to retain any expert of its choice, notwithstanding higher than normal hourly rates. Government expert Park Dietz has been paid as much as \$600.00 an hour.¹³

¹³“In 2006, Kitsap County Prosecutor’s Office retained Dietz at a rate of \$600 an hour for the trial against Wayne Hower, an auto mechanic who shot and killed convenience store owner Al Kono in Port Orchard.”

<http://www.portorchardindependent.com/news/95534824.html#>. Dietz has

C. Voucher Cuts

This Committee should investigate fee reductions in federal capital cases and recommend against arbitrary fee reductions. See “Lawyers Cry Pay-Cut Ruling in Capital Case,” the *Roanoke Times* (December 12, 2004).

IV. THE DEPARTMENT OF JUSTICE

The Department of Justice has created a review process prior to the decision of the Attorney General regarding whether to seek the death penalty. This involves a defense investigation and preparation which culminates in a written submission as to why the death penalty should not be sought. In addition, there are in-person meetings with the United States Attorneys Office and often with the Attorney General’s Capital Case Review Committee at Main Justice.

In April of 2014, the Department of Justice revised its death penalty authorization protocols to create a “fast-track” review procedure applicable to many cases, requiring pre-indictment submission to Main Justice and allowing for early decisions whether or not to seek the death penalty.

http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm

I am implementing several changes to expand, simplify and speed up the process for expedited decision(s) ... cases where typically the death penalty is not sought. ... These cases - which now all must be submitted pre-indictment, absent extenuating circumstance - will qualify for expedited decision.

Attorney General Holder Memorandum Regarding Revisions to the Death Penalty Protocol (April 7, 2014).

This protocol, if followed, would result in substantial savings to the Defender Services program. However, based on data collected by the Trial Project, compliance

charged as much as \$800.00 an hour.

http://www.snapnetwork.org/bishop_finn_pays_tons_to_discredited_expert

with this “fast-track” requirement has been inconsistent. This Committee should urge the Department of Justice to enforce the “fast-track” decision-making protocol.