

**TESTIMONY OF MARK E. OLIVE  
REGARDING CAPITAL FEDERAL HABEAS ASSISTANCE AND TRAINING**

To the Committee to Review the Criminal Justice Act Program  
Hearing in Birmingham, Alabama, February 18, 2016

Chair, Judge Kathleen Cardone, and Members of the Committee, thank you for your invitation to assist in your task of reviewing the Criminal Justice Act. My testimony is directed to the provision of appointed counsel in federal habeas corpus proceedings for state death-sentenced inmates, an area of the practice (and teaching) of law in which I have been involved for almost forty years. I address a program of the Administrative Office of the United States Courts (AO) called the Habeas Assistance and Training Counsel (HAT), and how it assists in determining the need for, and fulfilling the Criminal Justice Act (CJA) promise of, quality counsel nation-wide in capital federal habeas corpus proceedings.

**HABEAS ASSISTANCE AND TRAINING COUNSEL**

The Supreme Court has emphasized “the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1315-1316 (2012). In general, “if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.” *Trevino v. Thaler*, 133 S.Ct. 1911, 1916-17 (2013).

Section 3599(a)(2) of Title 18 of the United States Code requires the appointment of counsel for indigent individuals under state court sentences of death who seek federal habeas corpus relief pursuant to § 2254 of Title 28. These capital habeas corpus matters are, both substantively and procedurally, among the most complex proceedings brought in federal courts. They are intellectually demanding, time-consuming, and costly. “Congress’ provision of a right to counsel... reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of ‘the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.’ An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial, because ‘[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.’” *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994)(citations omitted).

Representation in capital § 2254 habeas corpus cases is provided by appointment of Federal Defender Offices in some circuits, but, in others, is primarily provided by appointment of private attorneys. Many of these counsel lack capital habeas experience and must spend substantial time becoming familiar with the intricacies of habeas corpus and death penalty law.

In order to ensure that effective representation in capital habeas corpus cases is provided in the most cost-effective manner possible, the AO has created HAT via consulting contracts

with experienced capital habeas corpus practitioners who: provide, on a part-time and limited basis, consulting, training, and related services to appointed counsel in these cases; and who also consult with the judiciary and AO. HAT consulting contracts are reviewed and approved by the Defender Services Committee (DSO). There is a National HAT and four Regional HATs. My testimony describes these HATs and their important contributions under the CJA.

## **NATIONAL HAT**

National HAT provides assistance to the AO, and to counsel involved in federal capital habeas corpus litigation. The attorneys assisted by HAT include those in Capital Habeas Units (CHUs) within federal defender offices, appointed private counsel, pro bono private counsel, counsel in state defender offices who provide federal representation, and counsel in non-profit organizations. National HAT assistance is through direct consultation with counsel, but also through training programs, databases, and a website with habeas-related materials, case summaries, and model pleadings. National HAT also consults with DSO through one-on-one dialogue, and by participating in committees and other advisory groups.

National HAT performs the following functions:

- Assists the federal courts in recruitment of qualified, competent capital habeas corpus counsel;
- Advises the judiciary on policy and procedure relating to federal capital habeas corpus representation in particular regions on a national basis;
- Assists and cooperates with the Regional HATs;
- Assists individual federal defender organizations with supervisory and resource allocation issues that arise in connection with their representation of petitioners in capital habeas corpus cases, particularly in circumstances where the federal defender lacks capital habeas corpus experience and expertise;
- Assists appointed attorneys providing, or being recruited to provide, appointed representation to petitioners in capital habeas corpus cases in Federal court;
- Assists federal defender organizations and CJA panel attorneys providing representation in state clemency proceedings;
- Coordinates research on common issues in capital habeas corpus cases; maintains a “brief bank” to avoid duplication of effort by counsel;
- Develops, implements, and participates in authorized national, regional, and local capital habeas corpus training programs for individuals providing § 2254 and clemency

representational services under CJA;

- Provides material and content for an Internet site dedicated to providing assistance to counsel and others involved with capital habeas corpus cases;
- Drafts and distributes capital § 2254 habeas corpus training materials, manuals, and other resources (e.g., sample federal pleadings such as petitions for a writ of habeas corpus and motions for appointment of counsel, stay of execution, evidentiary hearing, certificate of appealability, and discovery);
- Monitors: (a) capital § 2254 habeas corpus cases entering the federal courts; (b) habeas corpus legal developments, including preparation of legal and resource impact analyses; and (c) on both a state-by-state and national basis, the need for appointed counsel in capital § 2254 habeas corpus cases;
- Promotes the exchange of information and ideas on how to best facilitate the appointment of counsel in capital §2254 habeas corpus cases;
- Responds to legislative inquiries concerning federal capital § 2254 habeas corpus issues; and
- Provides expert assistance to the United States Judicial Conference Committee on Defender Services and the AO, as well as to judicial councils and other judiciary entities.

The following detail regarding National HAT's work is presented with respect to training and assistance to the AO and the Courts.

## **I. NATIONAL TRAINING**

### **A. National HAT core programs conducted annually**

#### **1. HAT Annual National Federal Habeas Corpus Seminar**

This annual seminar focuses on developments in habeas corpus procedure and other matters related to capital habeas representation and is held after the end of the Supreme Court's term. Usually about two hundred attorneys attend from around the country. Numerous plenary sessions and smaller workshops cover all aspects of federal habeas corpus practice, including information on how best to develop and present specific claims, ethical considerations, investigative techniques, and emerging issues. In addition to HAT counsel, the faculty includes university-based researchers, capital litigators, mitigation specialists, and mental health experts. Breakout sessions include a beginners' track on federal habeas corpus basics as well as advanced workshops on specialized problems.

## 2. The National Seminar on the Development and Integration of Mitigation Evidence

This seminar has been held annually since the Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), which recognized the need for thorough mitigation investigation and acknowledged the critical importance of the non-lawyer who had compiled the mitigation in this successful federal habeas corpus case. Approximately one hundred and sixty persons from around the country attend this conference which addresses various mental health developments, changes in the evolving litigation landscape, and empirical research. In addition to HAT counsel, the faculty is comprised of university-based researchers as well as capital litigators, mitigation specialists, and mental health experts. Breakout sessions include a beginners' track on mitigation basics as well as advanced workshops on specialized problems.

## 3. Anthony G. Amsterdam Supreme Court Advocacy Institute

This seminar was designed by NYU Law School Professor Anthony Amsterdam to improve the quality of strategic planning and advocacy on behalf of death-sentenced inmates in the United States Supreme Court and in the process of obtaining or avoiding Supreme Court review. The program combines lectures with case-planning sessions based on hypothetical cases developed by HAT. In addition to HAT counsel, the faculty consists of experienced Supreme Court practitioners. Registration is limited to forty-eight attendees.

## 4. The Habeas Institute Skills Seminar

This hands-on seminar was created by HAT, with assistance from the National Institute for Trial Advocacy. It teaches the skills needed to develop and present a case in federal habeas corpus proceedings. Through lectures and small group exercises on interviewing, witness examination, and oral argument, lawyers new to the work begin the process of understanding the intricacies of capital habeas corpus litigation. In addition to HAT counsel, the faculty includes other capital litigators. Registration is limited to forty-eight attendees.

## 5. The Persuasion Institute

This program addresses persuasive legal writing and argument. The faculty includes both capital litigators and professional writers and experts on narrative, with lectures on various aspects of narrative construction and story telling, along with small group discussions of articles, stories and legal briefs. In small groups participants brainstorm about how to construct a compelling narrative from a case hypothetical. At the conclusion of the program, the faculty and attendees discuss writing samples provided by the attendees before the seminar in light of what they have learned in the course of the seminar. Registration is limited to thirty-five attendees.

## 6. Mitigation Skills Seminar

This program, created by National Mitigation Coordinator, Russell Stetler and HAT, teaches attendees how to develop mitigation evidence through lectures and hands-on exercises in small groups with attendees interviewing witnesses and receiving immediate feedback from faculty members. The attendees also learn how to transform witness interviews into declarations and their final products are critiqued by the faculty. In addition to HAT counsel, the faculty is comprised of capital litigators, mitigation specialists, and mental health experts. Registration is limited to thirty-six attendees.

#### B. Other seminars as needed

National HAT also conducts seminars on new matters as needed by the community. For example, HAT monitors developments concerning the regulations promulgated by the Department of Justice for the certification of states seeking the benefits of Chapter 154 of Title 28 of the U.S. Code. Simply stated, under Chapter 154 if a state provides competent counsel and necessary resources in state post-conviction proceedings, then that state is eligible to receive procedural and other benefits in federal habeas corpus proceedings. HAT has held several seminars, in consultation with the AO, and consulted at length with representatives from the various states about certifications under Chapter 154 and the certification process. Another example of seminars we conduct based upon special need or requests is our national seminar on Forensic Science in the Courtroom. A third example is, after the United States Supreme Court ruled that the Eighth Amendment precludes the execution of mentally retarded/intellectually disabled individuals, HAT conducted several seminars in different parts of the country on how to litigate claims of mental retardation/intellectual disability under the then-new decision.

A prime recent example of National HAT developing training when the need is identified or brought to HAT is the Perspectives on Race and Ethnic Bias Seminar held last year. HAT co-sponsored the seminar with Cornell Law School and Federal Defenders, with the NAACP Legal Defense Fund hosting the event. Speakers included both social psychologists and attorneys who addressed a variety of race and ethnicity-related topics, including implicit bias and possible methods for exposing and overcoming such bias in cases and in offices. After lectures, attendees participated in small group discussions of the lectures and their personal experiences with race-related issues in their practices. In light of how well-received the seminar was, HAT plans to repeat the seminar this fiscal year.

## **II. ASSISTANCE TO THE ADMINISTRATIVE OFFICE AND THE COURTS**

#### A. Identifying under-served states

Part of National HAT's responsibility is to identify states in which additional habeas corpus resources are needed and to consult with the AO about ways, if any, to enhance assistance to these regions. Texas, Alabama, Missouri, and Mississippi are such states, and there are presently Regional HATs in each of these states. A report on each of these states is presented below.

Another way to provide resources in under-served states is to establish a CHU in a Federal Defender Office to monitor cases, provide training, and provide direct representation in federal capital habeas corpus proceedings. National HAT has experience in assisting the AO with establishing such offices. There are now several states where problematic representation could be addressed by the establishment of a CHU.

Such an office was recently established in the Northern District of Florida as the result of that bench's concern about the quality of representation being provided in capital habeas corpus cases. The Chief Judge of the District, with the assistance of HAT and the AO, undertook a substantial study of the inadequate representation in federal habeas corpus cases and then projected the caseload and necessary personnel for a proposed CHU. The proposal was vetted in the United States Court of Appeals for the Eleventh Circuit, and the Circuit and the Committee approved the proposal. That office is now operational in Tallahassee, Florida,

## B. Policy

HAT discusses policy issues with DSO as needed. For example, HAT assisted DSO and the federal judiciary by consulting about CHUs in Florida and now in other states. HAT works with the AO's Death Penalty Working Group on long-range planning for training and representation in habeas cases. HAT also has participated in training programs for the AO such as a two day trainer for capital case-budgeting attorneys sponsored by DSO at their offices. In addition, HAT participates in conference calls with the Capital Habeas Discussion Group comprised of habeas attorneys in CHU offices nationwide and attends an annual meeting with attorneys from the CHUs.

## REGIONAL HATS

There are four Regional HATS—in Texas, Alabama, Missouri, and Mississippi—states identified by the AO as “under-served” states.

## TEXAS

Texas has one of the larger death rows in the country and one of the largest federal court death penalty dockets. Texas also has the highest number of executions each year. Currently there are 251 Texas death row prisoners, approximately 150 of whom have federal habeas corpus cases pending in federal court. An additional 50 have completed their federal appeals and are eligible for execution.<sup>1</sup>

The biggest problem facing Texas HAT is the large number of cases and the poor quality of lawyering provided by appointed federal counsel. Only a limited number of lawyers provide quality representation in capital cases and a large number of capital habeas petitioners need

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<sup>1</sup>Mandy Welch, Esq., a Texas HAT attorney, provided the information presented here about Texas.

counsel. As a result, the courts often appoint lawyers who have little or no capital habeas experience or have such large caseloads that they are unable to give the cases the attention they require. The consequences of such appointments can be seen, for example, in the 10 cases where appointed habeas corpus counsel missed the federal statute of limitations. Indeed, one lawyer alone was responsible for missing the limitations deadline in three separate cases.

To address these and other problems, Texas HAT expends significant efforts to recruit qualified counsel. Because most experienced and high quality habeas counsel in Texas already have full caseloads, the best qualified attorneys are often unavailable to take additional cases. As a result much of the recruitment effort is aimed at large law firms within and outside of Texas and CHUs in federal defender offices outside of Texas.

In order to recruit large, *pro bono* firms, Texas HAT identifies and gathers information about cases that will be entering federal court in order to ensure the firms will have sufficient time to obtain approval to take the case and thereafter to become familiar with the record and develop the claims before the statutory deadline for filing the federal habeas petition. After the cases are identified and prioritized in the order of anticipated decisions, case memos are prepared based upon the proceedings in state court. The memos have been extremely helpful in the recruitment efforts and the initial consulting work with both recruited and appointed counsel. During the last half of FY 2015, Texas HAT successfully recruited counsel in eight (8) cases.

After appointment of counsel, Texas HAT provides consulting assistance to: attorneys recruited by Texas HAT; appointed CJA counsel who have provided conscientious representation in the past and accept an offer for assistance; and attorneys who have demonstrated an interest in Texas HAT's assistance and are likely to benefit from that assistance. Texas HAT already is or becomes familiar with the case and offers assistance spotting issues, identifying appropriate experts, providing sample pleadings and briefs, reviewing drafts of pleadings and briefs and in other areas where consultation is needed or requested. The cases Texas HAT consults on are regularly monitored in an effort to identify issues and problems in a timely manner. In addition to maintaining a brief and pleadings bank, Texas HAT periodically prepares litigation memos on topics relevant to a large number of cases. Texas HAT also participates in National HAT seminars.

## **ALABAMA**

Despite having the largest death row per capita in the country, Alabama does not provide post-conviction counsel at the conclusion of the direct appeal process, does not fund an agency to make sure that inmates are able to file timely habeas petitions, and does not notify inmates about when or how to file petitions themselves. As the Supreme Court has observed, Alabama is “[n]early alone among the States” in “not guarantee[ing] representation to indigent capital defendants in postconviction proceedings.” *Maples v. Thomas*, 132 S. Ct. 912, 918 (2012). Alabama death row inmates are therefore at risk of having no or limited state post-conviction review as well as having their federal statute of limitations expire, thereby forfeiting their right to

challenge their convictions and sentences in federal court.<sup>2</sup>

There currently are 13 death row inmates who need counsel in Alabama, and that number will likely grow by the end of the year. Alabama HAT actively recruits lawyers to provide federal representation for every case and without that effort many death row prisoners in Alabama would miss filing deadlines and would be executed without any federal habeas corpus review.

Out of the nearly 200 people on death row in the state, over 120 of the cases are currently in the state and/or federal post-conviction stages of litigation. Lawyers with no previous experience in capital litigation are representing most of them. Because of the absence of a state-wide public defender system in Alabama, Alabama HAT is the primary contact person for every recruited lawyer working on death penalty cases in habeas proceedings in the state. The type of assistance varies with each case depending on its procedural posture, and the needs of counsel, and ranges from reviewing pleadings and discussing federal habeas litigation strategies to explaining habeas law.

There will likely be an increase in the number of execution dates that are scheduled in Alabama within the next year. While there is ongoing litigation that has delayed the setting of execution dates the past couple of years, there will be multiple execution dates scheduled when that litigation is resolved. It is anticipated that resolution could come as early as the middle of this year, which will increase the need for consulting assistance given that clemency representation is left to federal habeas counsel in Alabama.

## MISSOURI

The Missouri HAT was created to recruit, train, and assist CJA counsel representing death-sentenced prisoners in federal habeas corpus proceedings. While the state is virtually always represented by skilled specialists in death penalty and habeas corpus law, § 2254 petitioners in Missouri are represented by CJA counsel, almost none of whom share their adversary's skill and experience.

The obstacles facing Missouri prisoners and their CJA lawyers are especially daunting in light of the chronic underfunding of the Missouri Public Defender System (MSPD), which represents all indigent death row prisoners at trial, on direct appeal, and in state post-conviction proceedings. The Missouri Supreme Court has commented that the "statewide public defender system . . . had the capacity [in fiscal year 2009] to spend only 7.7 hours per case, including trial, appellate and capital cases." *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d

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<sup>2</sup>Randy Susskind, Esq, an Alabama HAT attorney, provided the information presented here about Alabama.



870, 873 (Mo. 2009) (en banc).<sup>3</sup>

The pace of executions in Missouri has been challenging for CJA counsel. They provide representation in clemency proceedings because the MSPD does not. During fiscal years 2014 and 2015, a total of 18 death row prisoners were executed. There are five more prisoners on death row who either have an execution warrant pending or who are eligible for an execution warrant. Numerous other cases will soon complete the federal habeas process and those prisoners will also be eligible for an execution warrant. The number of attorneys available to provide representation in these cases is small and their caseload large.

Missouri HAT helps CJA counsel in federal habeas corpus cases carry their burden in multiple ways: (1) case-related assistance and advice to counsel; (2) case tracking and support materials, including a bi-monthly newsletter on recent legal developments; and (3) local training and participation in National HAT's trainings.

1. Case assistance and consultation. Missouri HAT has established contact with private practitioners who regularly call for advice and assistance in their cases. Assistance includes helping lawyers find qualified mitigation specialists and mental health experts, and providing direct assistance with legal pleadings.

2. Capital Case Support Materials and case tracking. Missouri HAT has identified every person under sentence of death in Missouri and other jurisdictions in the Eighth Circuit and regularly reports developments in those cases that may be of interest to CJA counsel. Missouri HAT maintains the Death Penalty Litigation Clinic web site through which newsletters and other research resources are shared with CJA counsel.

3. Training. Missouri HAT produces and presents local training and participates in national training. In FY 2014, '15 & '16, Missouri HAT hosted National HAT's Mitigation Skills Workshop at UMKC Law School in Kansas City. Missouri HAT regularly assists with the other seminars presented by National HAT.

In spite of Missouri HAT's availability, the monthly pace of executions since November, 2013, has taken a heavy toll on CJA counsel. Missouri HAT is working with National HAT and with representatives from the AO to explore whether the establishment of a CHU would be a more effective and efficient way to meet the needs of Missouri prisoners under sentence of death.

## **MISSISSIPPI**

There are 23 death-sentenced prisoners in Mississippi with cases pending in federal court or in post-certiorari proceedings, including clemency. Mississippi HAT monitors capital cases in

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<sup>3</sup>Professor Sean O'Brien, HAT counsel for Missouri, provided the information presented here about Missouri.

all stages of proceedings and recruits and consults with counsel for federal habeas corpus proceedings. There are few lawyers with extensive experience in federal habeas corpus litigation or who are familiar with the specialized law pertaining to the death penalty or complex mental health issues, such as intellectual disability or competence to be executed.<sup>4</sup>

Although there is a state office of capital post-conviction counsel, those attorneys cannot provide representation in federal court. New attorneys for federal proceedings must be located to determine, inter alia, whether initial state post-conviction counsel were ineffective. Due to substantial problems with the state post-conviction office and the overall inexperience of attorneys in that office, there have often been grounds for challenging the performance of prior state post-conviction counsel. See *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) (recognizing ineffective assistance by state post-conviction counsel can provide cause in federal habeas proceedings to overcome an otherwise procedurally defaulted claim of ineffective assistance by trial counsel.).

Mississippi HAT attempts to find qualified federal habeas counsel in Mississippi and recruits lawyers to join a list of eligible attorneys maintained by the federal district courts. The ABA Death Penalty Representation Project assists in locating additional qualified counsel from private law firms to represent death-sentenced inmates. In addition, efforts are made to contact qualified, out-of-state counsel who are willing to accept appointment in Mississippi and work closely with in-state attorneys who lack federal habeas corpus experience. Mississippi HAT assists potential counsel by drafting motions to be appointed and gathering the record of prior proceedings.

Mississippi HAT also consults with appointed counsel handling federal habeas corpus proceedings. Many attorneys appointed for federal habeas corpus cases have little or no experience with death penalty litigation or the highly complicated and ever changing federal habeas corpus law. Appointed counsel frequently require assistance about technical procedural issues, identifying the claims that are cognizable in federal proceedings, and developing facts in support of constitutional claims. Mississippi HAT meets with appointed counsel and provides sample pleadings, training materials, and memoranda regarding recent legal developments. Mississippi HAT reviews pleadings, discusses litigation strategies, addresses ways to challenge procedural impediments, answers questions about local practice, and explains federal habeas corpus law. Mississippi HAT updates appointed counsel on developments in the district courts of Mississippi, as well as the Fifth Circuit and United States Supreme Court, and assists counsel in gathering materials necessary to the representation. Mississippi HAT also participates in HAT's national programs.

## CONCLUSION

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<sup>4</sup>David Voisin, Esq, HAT counsel for Mississippi, provided the information presented here about Mississippi.

In the above ways, National HAT and Regional HAT assist CJA attorneys and the courts in capital habeas corpus proceedings in an effort to ensure high quality and cost-effective representation.