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Dear Judge Cardone and fellow Committee members:

My name is Rene Valladares. I am the Federal Public Defender for the District of Nevada. My office is headquartered in Las Vegas with one branch office in Reno. Together my offices handle approximately six hundred felony cases a year. The staff in my office is divided into three units: (1) a traditional trial unit (which every federal defender office has) comprised of skilled trial litigators; (2) a non-capital habeas corpus unit; and (3) a capital habeas corpus unit (or "CHU") which has a staff that specializes in representing individuals in capital habeas corpus proceedings and currently represents 48 death-sentenced individuals in Nevada, two in Arizona, and one in California.

In submitting my written comments before this committee, I have been asked to address the resources that are available at the national level that assist defense teams providing representation in all phases of death penalty cases. Then, I would like to discuss an undervalued resource within a federal defender office that is available to districts--the capital habeas unit. I will discuss what CHUs do, how they increase the quality of representation within a district, what special challenges they face, and how the quality of representation and judicial decision-making would benefit from having capital habeas units in districts that are currently underserved in providing capital habeas corpus representation. Finally, I urge this committee to strongly consider a fundamental issue of critical national importance--the need to re-examine the relationship between the judiciary and the CJA panel. The current system is rife with problems, is in dire need of reorganization, and should be the topic of further study. I will address each of these areas in turn.

I. National Resources

At the national level, there exists a variety of resource counsel projects available to attorneys providing death penalty representation at trial, on appeal, and in post-conviction, habeas corpus, and clemency proceedings. The projects were approved and are monitored by the Judicial Conference's Committee on Defender Services. Furthermore, each project is supervised by an expert panel of federal defenders who, themselves, specialize in capital representation.

The projects provide critical assistance by: consulting with lawyers and defense team members on case issues and strategies; providing assistance to judges seeking to appoint counsel, or who need assistance with capital-case budgets; developing and providing (in conjunction with the Defender Services Office) critical training for both federal defender offices and CJA panel practitioners; and maintaining websites that provide information on developing case law, sample pleadings and other resource material, and training information. The capital projects consist of attorneys and staff employed by federal defender offices and private practitioners with contracts to furnish assistance, which adds necessary flexibility in the delivery of their services. The particular project descriptions are briefly summarized below.

Federal Death Penalty Resource Counsel

The Federal Death Penalty Resource Counsel project (FDPRC) provides expert assistance in matters related to the defense function in federal capital prosecution cases to CJA panel attorneys, federal defenders, federal judges, the Defender Services Committee, and the Administrative Office of the United States Courts. FDPRC's principal responsibilities include monitoring federal death penalty cases; helping judges identify qualified defense counsel for federal capital prosecutions and advising courts about CJA issues and the defense function in federal death penalty cases; consulting with individual assigned counsel; researching and drafting model pleadings; maintaining a website containing federal capital trial materials; advising the Defender Services Office on issues related to the provision of defense services in federal capital trials; and conducting training programs on capital case defense issues. The FDPRC project is comprised entirely of private practitioners under contract with Defender Services' funding.

Capital Resource Counsel

The Capital Resource Counsel (CRC) is comprised of two full-time assistant federal defenders who provide the same services as FDPRC, but with the principal responsibility focusing on federal capital trial cases assigned to federal defender organizations (FDOs). A significant distinction between CRC and FDPRC is that one of CRC's duties is to serve as co-counsel with FDOs in a limited number of cases.

Federal Capital Appellate Resource Counsel

An assistant federal defender serves as the Federal Capital Appellate Resource Counsel, with the assistance of a research and writing specialist support position, to assist courts, FDO staff, and CJA panel attorneys in federal direct appeals of convictions and sentences of death. Appellate Resource Counsel focuses primarily on recruiting and recommending qualified appellate counsel to the courts; providing individualized case consultations, resource materials, and national training to attorneys appointed in federal capital appeals; monitoring all death-authorized trials, sentencings, and appeals; and engaging in direct representation in a number of federal capital appeal cases.

Federal Capital Habeas Corpus Project (§ 2255 Project)

The § 2255 Project provides necessary assistance in post-conviction litigation

of federal death sentences pursuant to 28 U.S.C. § 2255. The Project assists courts with identifying and recommending qualified federal capital habeas corpus counsel; providing individualized case consultation; planning and providing capital § 2255 training; monitoring all capital § 2255 cases (as well as capital cases on direct appeal); and providing direct representation in a limited number of cases. The members of the § 2255 Project are all employed by federal defender organizations.

Habeas Assistance and Training Counsel

The National Habeas Assistance and Training Counsel Project (HAT) consists of expert practitioners under contract to provide training and assistance to attorneys representing state death-sentenced individuals in federal habeas corpus matters pursuant to 28 U.S.C. § 2254. The principal activities of HAT include case consultation, maintaining a website and providing resource materials, and training in federal capital habeas corpus litigation. HAT has advised and assisted federal defenders, panel attorneys, judges, the Defender Services Committee, and the Administrative Office of the United States Courts in matters relating to capital habeas corpus and clemency representation.

Regional Habeas Assistance and Training Counsel

The Defender Services Committee has also approved funding for contracts with Regional Habeas Assistance and Training Counsel (Regional HAT). While "national" HAT provides assistance on a national level, Regional HAT focuses on areas of the country where capital post-conviction counsel need particularized assistance. Regional HAT counsel are also private practitioners. The regions covered and the levels of funding set for each Regional HAT contract have been based upon several criteria, including the size of the death row population and the availability of alternative resources. Regional HAT has provided critical services to local appointed counsel in: Alabama and the 11th Circuit Court of Appeals; Missouri and the 8th Circuit Court of Appeals; and Texas, Mississippi, and the 5th Circuit Court of Appeals.

National Mitigation Coordinator

The U.S. Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510 (2003), significantly increased the demand in state and federal capital cases for mitigation experts--individuals possessing the requisite expertise to manage the development of a capital mitigation case, meaning, in short, the work-up of the societal, mental health, cognitive, medical, physical, and other unique factors that make a client who he is. The National Mitigation Coordinator, an FDO employee, provides assistance to FDOs, CJA counsel, and the courts by recommending qualified mitigation coordinators, consulting with and assisting defense teams, providing case-budgeting advice to courts, and assisting in national mitigation training.

II. Capital Habeas Units (CHU)

A CHU is a group of employees within a federal defender office that specializes in the representation of death-sentenced individuals in capital habeas corpus proceedings in federal

court. There are currently 18 Federal Defender Organizations that have CHUs. They exist in the Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits (three in Pennsylvania; two each in Tennessee, Ohio, and California; one each in Delaware, Arkansas, Nevada, Idaho, Arizona, Oklahoma, Georgia, Alabama; and the newest CHU, in the Northern District of Florida). CHU caseloads fall within a 4-to-6-cases-per-attorney standard. Committee on Defender Services, *Report on Death Penalty Representation,* September 19, 1995. In fact, CHUs provide the bulk of federal habeas corpus representation and litigation conducted nationwide in death penalty cases in 28 U.S.C. § 2254 and § 2255 proceedings.

It is important to note, when discussing the creation of CHUs that they are not separate entities or structures within a federal defender office. The term "CHU" simply refers to the dedication of staff and resources to work specifically on capital habeas corpus cases. A CHU is created in a district by (1) that district's circuit court of appeals' authorization of the necessary attorney positions within the FDO; and (2) approval of the necessary funding through the Defender Services Appropriation. A CHU's funding is approved and maintained separately from the funding for the office's traditional trial unit. CHUs obtain cases when the FDO is appointed by the district court in a capital habeas corpus proceeding. Occasionally, a court may prefer to appoint an FDO with a CHU from outside its district because, for example, the local FDO and panel do not have any or enough experienced attorneys to handle capital habeas corpus cases. In such instances, before the FDO could accept the appointment, it would need to comply with the out-of-district appointment protocol established and monitored by the Defender Services Office.

Capital habeas corpus law and practice are recognized as wide-ranging, complex, and constantly evolving. As the United States Supreme Court explained in McFarland v. Scott, 512 U.S. 849 (1994), the statutory 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.'" Id. at 855-56.

In order to navigate this "unique and complex" area of jurisprudence, CHUs employ attorneys, investigators, paralegals, and other administrative support personnel and train them in the art of capital representation. In turn, CHU staff members investigate, develop, and plead claims of constitutional error for their clients.

Adding to the complexity is the fact that the habeas remedy is both criminal and quasi-civil in nature as the practitioner re-litigates the client's underlying criminal case to determine what errors occurred at trial, and what prejudice flowed from those errors. CHU staff must not only become experts at conducting civil discovery, for example, but must also be able to delve into highly sensitive matters such as the client's family, social, mental health, and other medical history to develop the case in mitigation; reinvestigate the case from the trial level; absorb and synthesize reams of documents pertaining to the client's life history; and assemble and gain command of a court record that often spans years of prior litigation. To adequately plead their clients' claims, they must also become experts not only at the substantive areas of law that the

claims entail, but also other highly technical and often arcane areas of the practice, such as cause and prejudice to overcome procedural defaults, statutes of limitation, and tolling provisions.

CHUs can also be a great resource to panel lawyers who undertake death penalty habeas cases, as CHUs regularly monitor other cases in the system and provide training, materials, and other resources to fellow counsel.

What makes a good CHU are sufficient resources and dedicated, qualified staff members who can present the full picture not just of the client's case, but of his life. This requires that the staff function well together--morale needs to be kept high, and the staff experience and expertise must be maintained. Yet, this is easier said than done. Not only in Nevada, but across the United States, there is a shortage of individuals who are qualified to do this work (or who could be qualified with sufficient training) and who desire a steady diet of death penalty habeas corpus cases as a career. When a staff member leaves a unit, he or she is very difficult to replace for these reasons, and lag times of many months or years are not uncommon while suitable replacements are found, if they can be found at all. As a result, competition for qualified staff among CHUs is keen.

Other challenges abound. The high-stakes nature of the work inevitably takes its toll on the practitioner. Death is the ultimate punishment, and working under an execution warrant is the most stressful kind of litigation that exists. The cases are extremely resource-intensive relative to manpower and experts, which can lead to conflict as teams grapple with these needs in resource-scarce environments. Even without an immediate execution looming, the pressure of continual deadlines, coupled with the gravity of the ultimate potential outcome, can lead to great distress among staff. If an execution does occur, the trauma is felt throughout the office, particularly by those closest to the case. In our individual offices and at national seminars, we make sure to train staff members on the effects of the secondary trauma they can absorb due to the unique pressures of the work. When necessary, we provide grief, substance abuse, and other counseling.

Finally, the client population served by CHU staff members consists of some of the most damaged individuals in society. It is not uncommon for a client on death row to have grown up in poverty and to suffer from brain-damage, mental illness, intellectual disability, emotional, physical, or sexual abuse (or all three), and drug and/or alcohol abuse or dependence <u>all at the same time</u>. Each of these factors is additive, meaning that each works synergistically to make the existence of every other problem worse. Institutional safety nets upon which society relies have often failed the client throughout his life. Building rapport with, let alone gaining the trust of, such a client is an extremely slow, painstaking process—if it ever happens at all. This can be challenging for the lawyers and other staff as well.

Despite all these challenges, however, CHUs are highly effective at producing a consistently high quality of work. In developing and identifying constitutional errors, they play a crucial role in maintaining public confidence in the accuracy of the criminal justice system. CHUs could and should be brought to other areas of great need.

<u>The Need for CHUs in Underserved Areas, Like Texas, Is Great</u>.

The state of capital representation in Texas, the most execution-friendly jurisdiction in the country, is extremely problematic. Texas leads the nation with the highest number of executions in the modern era—well over five hundred. Its death row at present includes 269 individuals, third in line after California and Florida. There is a dearth of qualified counsel to handle the cases. Counsel who are appointed operate under presumptive fee caps that surely chase away otherwise qualified practitioners. Often, those lawyers who are willing to take the cases are appointed regularly despite demonstrated ineffectiveness, such as failing to file petitions within the statute of limitations. None of the four federal defender offices in Texas accept capital habeas corpus case appointments as they currently have no dedicated funds or staff to do so. On occasion, a few FDOs with CHUs from outside Texas have been appointed by Texas judges to provide representation in capital habeas corpus cases; however, this option has not been without its obstacles. As will be more fully addressed by others on the panel, Texas would be well-served by establishing a CHU in one or more of its four federal defender offices. For my part, I would pledge the assistance of my office in whatever capacity is deemed most helpful both in starting such a unit and in helping it to thrive.

In examining the viability of a CHU in Texas, it is instructive to look at the approval of the newest CHU in the Northern District of Florida in 2014. Just as in Texas, there simply existed in Florida--until very recently--a lack of political will to create a CHU. Until 2014, the 11th Circuit had never had a CHU in a Federal Public Defender Organization. The only two CHUs in the 11th Circuit, in the FDOs in Georgia-Northern and Alabama-Middle, were part of Community Defender Organizations.

In Lugo v. Secretary, Florida Department of Corrections, 750 F.3d 1198 (11th Cir. 2014), Chief Judge Edward Carnes addressed the many instances wherein counsel in Florida cases missed the filing deadlines in federal capital habeas corpus proceedings, and suggested that establishing a CHU there would be a viable remedy. Chief Judge Carnes wrote: "Perhaps a better method of combatting the problem of missed AEDPA deadlines among Florida death-row inmates is to establish a capital habeas unit (CHU) in one or more of Florida's three federal districts, which could track capital cases in that state to ensure that the claims of death-row inmates are timely presented in both state and federal court." Judge Carnes went on to opine that "it is no coincidence" that such a problem does not exist in Georgia, which has had a CHU in the Northern District since 1996. Id. at 1215. "[E]stablishing a CHU," he wrote, "would have several benefits. Not only could it provide direct representation to capital inmates in some federal habeas proceedings, thus minimizing the need for court-appointed counsel, but it could also provide critical assistance and training to private registry counsel who handle state capital cases in Florida's collateral proceedings. A CHU could also monitor and track cases in Florida to help prevent AEDPA's one-year limitations period from lapsing before a federal habeas petition has been filed." Id.

In less than two years since the Lugo opinion, the CHU established in the Northern District of Florida is achieving its mission. In terms of direct representation, the CHU has investigated, researched, prepared, and presented to the courts meaningful submissions on behalf of its clients. In its first merits appeal to the 11th Circuit, the CHU persuaded the Court of Appeals that a ruling in its client's favor was appropriate. Hardwick v. Fla. Department of

Corrections, 803 F. 3d. 541 (2015). A number of CHU clients have had no contact with any attorney in years before the CHU became involved. In terms of day-to-day operations, the CHU monitors and maintains contact with court-appointed state counsel to ensure that filing dates are not missed so that federal review rights will be protected. CHU staff have consulted with more than 50 appointed and state agency lawyers on various aspects of capital defense, including several group consultations conducted for lawyers with similar issues or litigation circumstances. Given the unique needs of death warrant litigation, CHU staff are consulting with other agencies and counsel in every Florida death warrant case. They have sought to assist the judges in their district by filing motions suggesting step-by-step litigation procedures, including developing a method of practice based upon specific litigation schedules. Finally, they have provided formal and informal training to other lawyers and private investigators, including a series of CLE-credit training seminars presented on a periodic basis and covering various aspects of capital defense. There is no reason why similar efforts could not be undertaken, and why similar results could not be achieved in Texas.

III. Judicial Involvement with the Panel

Finally, I would like to highlight for this committee an issue that is of critical importance all across the country and which concerns the extent of the courts' involvement with the CJA panel. The court appoints counsel in criminal and habeas corpus cases; and in every case, by law, the court "fix[es] the compensation and reimbursement to be paid to the attorney...." 18 U.S. C. 3006A (d)(5). What is problematic, however, is the extent of judicial involvement in selecting and retaining panel members and in the willingness of too many courts to cut vouchers as a matter of course.

It is my opinion that there is simply too much involvement with the court's selecting members to serve on the CJA panel in a district; cutting vouchers without explanation or even, in some districts, across the board; and allowing members to remain on the CJA panel when their services prove to be sub-par. These problems are serious and, in my view, require further study; but, there are steps this panel could and should take now to recommend more input from actual practitioners, and less from courts, to correct them.

The issues of selection and deselection of panel members can be taken together. As a rule it is the practitioners in a district, and not the judges, who know the effort it takes to mount a vigorous defense on behalf of a client in a given case; and it is the practitioners, and not the judges, who know who best among them can provide the most effective representation. In my view, the practitioners' opinions on these matters should be given far greater deference than they receive in the majority of districts. Judges may have the best intentions, but for the most part, simply have not walked among the members of the defense bar, let alone spent their entire careers representing poor people charged with crimes in our society. By the same token, practitioners are the best ones to assess when a fellow practitioner's performance fails to meet the standard of care. For this reason, I would urge this committee to recommend as a best practice in each district a system in which criminal lawyers determine inclusion in, and exclusion from, the panel.

While not so much an issue in my home district, the problem of voucher cutting is acute in much of the country. Here again, this is a problem because non-practitioners (judges) are conducting the voucher review themselves, and do not have a sense of what is required to litigate a criminal case from a defense perspective. As a result, judges are more likely to espouse the view that cases with similar charges should command similar fees among counsel, for example, not anticipating that each case is different (even among co-defendants) and that each will call for its own amount of research, investigation, expert consultation, and development of mitigation evidence to adequately represent that client. The cutting of vouchers as a matter of course also chills the draw of quality lawyers to the panel, particularly in the most serious cases in which we need them most, and in districts where the number of attorneys with criminal experience is limited. I would urge this committee to adopt a solution to this problem by recommending that the defender, or some other panel of practitioners, conduct a preliminary review of the vouchers for reasonableness before they go on to the judges for review and signature. Once "approved" by the federal defender or reviewing panel, the voucher amount should not be reduced absent good cause. This is a process that works very well in certain districts and it appears that all are well-served by this reasonableness review being conducted by practitioners. It is my understanding that judges in those districts not only feel the system benefits from the procedure, but welcome being relieved of the volume, time-sensitive nature, and burdensome legwork of reviewing vouchers. Were this practice to become the norm, I believe we would see more qualified practitioners being willing to take CJA cases.

Thank you for allowing me to share my concerns with this panel. Should I be able to be of further assistance, please do not hesitate to call upon me.

Sincerely,

Rene Valladares
Federal Public Defender