FEDERAL CAPITAL HABEAS PROJECT

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Dear Judge Cardone and Esteemed Committee Members:

Thank you for the opportunity to testify before the Ad Hoc Committee to Review the Criminal Justice Act Program.

I am the Director of the Federal Capital Habeas (or "§ 2255") Project. The § 2255 Project was created in 2006 by the Defender Services Committee of the Judicial Conference in conjunction with the Office of Defender Services of the Administrative Office of the United States Courts in order to address the needs of the growing population on federal death row. We were established to assist federal courts with the appointment of counsel in capital post-conviction proceedings pursuant to 28 U.S.C. § 2255 and to ensure that all individuals sentenced to death in federal court who have completed their direct appeals receive post-conviction representation consistent with the highest standards of the legal profession.

There are currently sixty people under federal sentence of death.[1] The § 2255 Project monitors developments in all federal death row cases, and works towards the goal of ensuring that each federally death-sentenced prisoner has a full and fair opportunity to challenge in post-conviction proceedings the constitutionality of his conviction and sentence. To that end, we identify and recruit qualified counsel for all cases entering post-conviction proceedings across the country; consult closely with counsel from initial appointment through clemency on all issues relevant to the litigation; offer the only trainings designed specifically for lawyers representing federal clients in capital habeas proceedings; and advise courts on appointment of counsel, case budgeting and related matters. We are the only organization that serves these functions for federal prisoners under sentence of death. We also represent several clients directly.

In other words, we have both a bird's-eye, and an up-close, view of the unique challenges facing counsel who represent death-sentenced federal prisoners. That broad perspective informs my testimony today. I believe I can say without fear of contradiction that I and the members of our Project are the nation's experts in the realm of federal capital post-conviction defense.[2] I

[1] In 2006, when the Project was created, there were 42 individuals under federal death sentence, many of whom had already entered § 2255 proceedings. We spent several years following our inception working to shore up cases that had not been adequately litigated, providing much-needed and long overdue assistance and training to the attorneys who had been appointed in those cases and on occasion replacing counsel with properly qualified attorneys; at the same time, as the number of federal death sentences continued to increase, we identified, recruited and recommended counsel for appointment in cases entering § 2255 proceedings, and provided guidance to those defense teams as necessary.

[2] I have been representing death-sentenced prisoners for over 25 years, first in federal and state courts in various southern states, and then primarily in Alabama. I spent many years litigating Alabama post-conviction cases at the Alabama Capital Representation Resource Center and then the Equal Justice Initiative; I also served as a special advisor to the Administrative Office of the U.S. Courts on improving capital habeas representation in a variety of

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hope our experiences over the last decade in this area can be of some use to this Committee in fulfilling its mission, and I am grateful for the opportunity to share them.

I will address my testimony today to one of the main issues this Committee is reviewing: ensuring the provision of adequate counsel for the defense. In our work with courts, counsel and clients, we have determined that the main obstacle to a fair and equitable process for capital § 2255 litigants is the failure to provide them with qualified lawyers who have access to adequate resources. Without sufficient expertise, or necessary investigative or expert help, even the best-intentioned attorneys will not be able to properly investigate, plead and establish constitutional or statutory violations in the one post-conviction proceeding to which their clients are entitled. Our focus on this one population and area of the law nationwide has yielded several important lessons. First, federal capital habeas cases are much larger than those arising from state convictions. This is due primarily to the type of cases prosecuted, the magnitude of the record, and the geographical scope involved. Second, the statute of limitations has a singular effect in § 2255s on the need for counsel to be appointed promptly and given the ability to do all that is required within that first year to ensure no claims are lost. Third, prisoners without counsel familiar with the law, or without expert help to establish constitutional error, frequently miss key claims or lack the evidentiary support to prove them. Finally, as we deal with cases throughout the country, we have observed a system of providing counsel and resources that is haphazard and uneven. This is so even though each of these prisoners is convicted and sentenced under federal law and all are facing the same adversary. The failure to provide appropriate counsel harms the prisoner's chance of establishing a right to relief. We believe it also denies the federal system a claim to fairness or accuracy in its administration of the death penalty.

I begin with an explanation of the features of federal capital post-conviction litigation that differentiate it from other capital cases. I then address the two most significant problems with existing mechanisms under the current system: appointment of qualified counsel and adequate funding.

Overview of Capital § 2255 Cases

Section 2255 largely serves the function of the writ of habeas corpus for those incarcerated for federal crimes, and is rooted in the time-honored principle that every prisoner must have the right to challenge the legality of the Government's actions in prosecuting him and restricting his liberty.[3] Motions filed pursuant to § 2255 provide prisoners under federal sentence of death with their sole opportunity to litigate claims that the Government failed to prosecute them according to constitutionally prescribed rules, or that the jurors who convicted and sentenced them harbored biases that interfered with their ability to be fair, or that their trial lawyers neglected to undertake the work necessary to defend them properly against capital charges or to persuade a jury that they did not deserve a sentence of death.

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jurisdictions. Our Project staff includes attorneys with considerable expertise in capital post-conviction litigation as well as experience in trial and policy work.

[3] Section 2255 is technically a further challenge in an inmate's criminal case: the statute was enacted primarily to reallocate federal post-conviction litigation to the more convenient forum of the sentencing court rather than the district court where the inmate was housed. Despite its status as a motion, Congress intended § 2255 to "afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis v. United States, 417 U.S. 334, 343 (1974).

While the principles that form the foundation of § 2255 date back centuries, in practice capital § 2255 litigation is a relatively new field. The first post-*Furman* federal death penalty statute was enacted only in 1988[4]; most of the prisoners under federal sentence of death today were convicted pursuant to the 1994[5] statute expanding the number of federal offenses eligible for capital prosecution. Singular aspects of capital § 2255 litigation set these cases apart from the better-known capital habeas cases, governed by 28 U.S.C. § 2254, that originate in state court proceedings.

For example, unlike in capital § 2254 cases--where the main post-conviction process ideally occurs in state court, and the federal habeas case is shaped in large part by that state process--the § 2255 litigant has only one forum, and one opportunity, to develop and present extra-record facts in support of his § 2255 motion. The § 2255 district court is thus both the first and last place where a capital § 2255 movant can develop facts necessary to support his or her constitutional claims. While both § 2254 and § 2255 motions have a one-year statute of limitations, the statute in § 2254 litigation is tolled throughout the pendency of state collateral proceedings, where the post-conviction investigation and constitutional challenges occur. For § 2255 litigants, there is no such tolling: all claims must be investigated, researched and raised within the year following the denial of *certiorari* review on the direct appeal. The virtually immutable deadline for filing means that, as soon as that one-year time period begins to run:

- A defense team must be identified, recommended and appointed;
- Counsel must learn the existing record, which in federal cases is extensive;
- The team must meet and develop a rapport with the client;
- Counsel must begin to assess avenues for investigation;
- Counsel must determine preliminary funding needs;
- Appropriate expert and investigative resources must be secured;
- Records not collected by trial counsel must be obtained and reviewed;
- A thorough fact investigation must be undertaken;
- A thorough mitigation investigation must be undertaken;
- Post-conviction claims must be identified;
- Counsel must prepare and litigate necessary pleadings; and
- A § 2255 motion with all applicable claims and sufficient factual support must be filed.

The ability to accomplish these and other tasks presumes a working knowledge of capital and habeas law and practice. Moreover, unlike at trial, it is the prisoner and not the prosecution who has the burden of proof in post-conviction. Absent adequate investigative and expert resources, the § 2255 movant will not be able to establish the necessary facts in support of the motion or withstand a Government motion to dismiss. Because amendment rules are restrictive

[4] The death penalty under 21 U.S.C.S. § 848(e)(1)(A)-(B) was enacted as part of the Anti-Drug Abuse Act of 1988 and became effective on November 18, 1988. *See* Pub. L. 100-690, Nov. 18, 1988, 102 Stat. 4181.
[5] The Federal Death Penalty Act of 1994 was enacted as Title VI of the Violent Crime Control and Law Enforcement Act of 1994 and became effective on September 13, 1994. *See* Pub. L. 103-322, Title VI, Sections 60001-26, Sept. 13, 1994, 108 Stat. 1959 (codified at 18 U.S.C.S. 3591-3598).

and also dependent on the statute of limitations, for the most part any claims one fails to assert or support during that first year are lost forever.

The need for appointment of counsel at the earliest possible moment,[6] and the need to provide counsel with financial resources early enough in that year to conduct their investigation, is therefore critical. We know from our oversight function and from direct experience that it is very difficult for federal practitioners to complete the amount of work necessary to submit a comprehensive § 2255 motion before the statute of limitations expires. And because § 2255 counsel come to the case without prior involvement or knowledge of the facts, the task of identifying all budgetary needs at the outset is a virtual impossibility.

Capital § 2255 practitioners face additional challenges with regard to time and resources:

> *Geographic Diversity:* Most capital § 2255 cases involve locations scattered across the country. In a large number of federal cases, the mitigation investigation takes place in a state different from the one in which the offense occurred. In cases involving prison killings, witnesses are likely to be federal prisoners who have either since been released or moved to other federal facilities located around the country. A number of the federal cases involve foreign nationals whose life histories must be thoroughly investigated in their home countries.
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> *Size of the Record:* The paper (or electronic) record in many capital § 2255 cases is much larger than in cases arising from state death sentences. This is so for a number of reasons. Pretrial motions practice and jury voir dire are often far more extensive in federal capital cases than in state capital prosecutions. Federal capital charges often follow an earlier state law enforcement investigation into the same offense which must be examined in the § 2255 proceeding; sometimes there has been a full state trial as well. This review cannot begin until the statute-of-limitations clock begins to run and is often very time consuming.
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> *Location of the Client:* Almost all federally death-sentenced men are housed at USP Terre Haute, Indiana. Two are incarcerated at the supermax prison in Florence, Colorado. The one woman currently under federal death sentence is housed at FMC Carswell in Fort Worth, Texas. Federal death row prisoners are, therefore, usually far from the jurisdiction of the crime and far from their lawyers as well, another factor affecting expenditures of time and money.
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> *Centralization of the Prosecution and Resources the Government Can Bring to Bear:* In most capital § 2255 cases, the trial prosecutors remain involved in the litigation in post-conviction and thus bring a familiarity with the case and the witnesses to the Government's § 2255 team. By contrast, ethical

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[6] Because the statute begins to run the moment *certiorari* is denied, we have recruited counsel prior to the denial date and usually have an appointment motion filed in advance of that date. Most courts will appoint counsel conditional upon the denial so that the prisoner loses no time on the statute of limitations. As noted below, some courts refuse to consider the motion until the statute begins to run, necessarily shortening the time available for preparation.

> considerations require that defense lawyers not litigate post-conviction cases that they tried themselves, as they are in no position to examine their own effectiveness; they thus must begin from scratch to accomplish all the tasks listed above. Many times Department of Justice lawyers in Washington assist local U.S. Attorneys and appear alongside them in the proceedings and assist with drafting pleadings. In addition, federal prosecutors have a rich array of resources naturally at their disposal with which to defend the conviction and death sentence. Federal prosecutors can turn to the FBI, which has field offices around the country, to conduct any necessary inquiries, and can rely on the FBI's national databases, in-house experts, and its own extensive (but, as DOJ has itself acknowledged, often faulty) forensic laboratories. Given all of these factors, post-conviction counsel for the defense must try to ensure that they have the resources sufficient to properly review and challenge Government evidence.

It cannot be stressed enough that, because there is so much to accomplish in a capital § 2255 case during the one-year statute of limitations period, attorneys with the requisite habeas expertise must be appointed as close as possible to the date the period begins to run, and must have access to adequate resources early on and throughout the initial filing year, to conduct a thorough investigation, hire necessary experts, and identify, develop and present all possible claims.

Unfortunately, the system currently in place often fails to meet these obligations.

<u>Problems with Appointment of Counsel in Capital § 2255 Cases</u>

We believe some of the most pressing problems for the Committee to consider concern the appointment of counsel in capital § 2255 cases. Most troubling are the failures of some appointing courts to recognize what constitutes, and then to appoint, qualified federal capital habeas counsel, especially if in-district qualified counsel is conflicted from the case or otherwise unavailable; or to make appointments of counsel at the earliest possible moment a case enters post-conviction proceedings.

Timely appointment of qualified counsel. As I indicated above, because there is so much to accomplish during the one-year statute of limitations in federal capital cases, it is critical to appoint counsel who is familiar with capital post-conviction and understands what is involved in asserting, investigating and supporting the types of claims that can be raised in a capital § 2255 motion. All issues asserted in a § 2255 must rely on facts outside the trial record.[7] Because of this, most claimed errors are raised within the context of the defense attorney's performance: ineffective assistance of counsel, certain claims of prosecutorial misconduct, and at times, juror misconduct, form the mainstay of a federal collateral attack. Sentencing issues frequently involve psychological or intellectual impairment, so capital counsel usually will need to have some familiarity with these subjects or early access to experts who do. Counsel must understand how to raise these claims in the context of both guilt/innocence and sentencing, and must

[7] By contrast, § 2254 counsel can litigate claims raised on direct appeal in the state court forum. These claims are not available in § 2255.

understand how challenging a federal conviction and sentence differs procedurally from challenging a state conviction and sentence. There is no time for counsel to learn on the job.

My staff and I spend considerable time seeking recommendations for, identifying, and recruiting teams who have the requisite expertise and ability to hit the ground running for cases entering capital § 2255 proceedings. Because these cases can occur in any district in the country, we work with the local bar whenever the need for counsel arises.[8] Keenly aware of the importance of cost containment, we look whenever possible for lawyers who can cost-effectively meet the specific needs of the particular case: sometimes in terms of geography (finding counsel close to where mitigation interviews are likely to occur, for example), sometimes in terms of expertise (Bureau of Prisons homicides have particular investigative and discovery needs; if it is clear a client is mentally ill, we may seek out counsel familiar with litigating mental health issues in post-conviction). These decisions help keep the number of defense team hours spent traveling or researching to a minimum. Because the Government's post-conviction practice tends to be somewhat similar across jurisdictions, because post-conviction often focuses on sentencing issues rather than guilt, and because, outside of an evidentiary hearing, little time is spent in the courthouse itself, the value of having counsel local to the jurisdiction of the offense is often outweighed by other considerations. In our effort to convey to the courts the rationale for our recommendations for appointment of counsel, we have often engaged the aid of members of the local bar or local federal defender offices.

Nevertheless, district courts are under no obligation to accept our counsel recommendations; although most have, there have been some who have rejected a qualified, cost-effective team in favor of local under-qualified counsel or a *pro bono* law firm.[9] Unfortunately, the learning curve is simply too great and the statute of limitations too short for even the most talented, but unschooled, attorneys to get up to speed without seriously jeopardizing the client's ability to raise his claims effectively. Over the years, we have seen attorneys, including those from top tier law firms, miss critical issues that experienced capital habeas attorneys would have raised. We have also seen well-intentioned local CJA practitioners overwhelmed by the amount of time and depth of resources necessary to investigate and litigate these cases.[10]

[8] The Project's legal staff is located in and familiar with various different circuits. My work in numerous state and federal jurisdictions, our legal connections throughout the country, and our network of colleagues through the federal public defender system all help educate us about the capital defense bar in a given district.

[9] Law firms can be a terrific source of assistance on these cases, and we continue to seek their involvement. However, where the firm has no counsel with capital or habeas experience, putting them on a huge case with a statute of limitations running may be counterproductive. We are also finding more reluctance on the part of firms to take on *pro bono* cases that require a significant expenditure of funds and attorney time.

[10] Often a CJA lawyer may be considered an experienced "capital practitioner" by a federal district court judge based on the lawyer's number of appointments in state capital cases. However, quantity does not always imply quality and it can be very difficult for a federal district court judge to discern whether a particular lawyer has the ability or time to provide effective representation. For example, in Harris County, Texas, a Houston Chronicle review of court files found that almost one-third of capital lawyers in the county exceeded the caseload limits recommended by the National Legal Aid and Defender Association. These lawyers were appointed to as many as 10 capital cases and up to 360 other felonies at the same time. Lise Olsen, "Attorneys Overworked in Harris County Death-row Cases," Houston Chronicle, May 25, 2009. Moreover, the number of cases handled by an attorney may not speak at all to her competence. Newspaper articles have documented attorneys who have tried scores of cases but consistently lost; one such lawyer's efforts resulted in 20 clients on state death row. Adam Liptak, "A Lawyer

Here are a few examples:

- In one case, a district court rejected our recommendation to appoint a federal defender office that would have brought with it salaried attorneys, in-house investigative services, and funding already appropriated for the hiring of experts, as well as capital § 2255 expertise. The court instead elected to appoint two local solo practitioners who had virtually no capital habeas experience. The attorneys spent the first several months attempting to obtain a basic understanding of capital § 2255 litigation during a critical period in which, among other important tasks, a social history investigation of their mentally ill client and the circumstances of the offense should have been undertaken with assistance from investigators and mental health experts. It was not until six months into the statute of limitations period that the local attorneys were able to finally persuade the district court to appoint a federal defender office to assist them, because the complexities and investigative needs of the case were simply too great for the two CJA-appointed lawyers to handle. At that point, the attorneys from the federal defender office had to learn the voluminous record and then, essentially from scratch, deploy their resources and utilize their expertise for the impossible task of conducting a full investigation; hiring mental health and other experts; developing concrete factual support for all the cognizable constitutional violations they could identify; and, with initial counsel, writing and producing a § 2255 motion in less than half the time provided under the statute of limitations.

- A district court refused to appoint an available federal defender office[11] in capital § 2255 proceedings in a case in which the prisoner has a strong claim, completely missed at trial, that he is intellectually disabled and

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Known Best for Losing Capital Cases," N.Y. Times, May 17, 2010.This is not a unique phenomenon but rather is a trait shared by some local CJA lawyers who continue to be appointed to federal death penalty cases.

[11] Our recommendation to appoint a federal defender office in this case and other capital § 2255 cases is based on experience and is also reflected in studies of the federal death penalty system that conclude these institutions provide a cost-effective approach to representation. As the update to the "Spencer Report" to the United States Judicial Conference Committee of Defender Services acknowledged, in encouraging courts to consider appointing federal defender offices:

> There are particular benefits to the appointment of well-resourced offices in capital 2255 proceedings, which require digesting and briefing large amounts of legal and factual material and conducting a thorough investigation within a very compressed timetable. Post-conviction representation makes demands that can be efficiently met by institutional representation. In addition, it has proved much harder to find qualified, available attorneys for 2255 matters than for capital trial cases.

JON B. GOULD & LISA GREENMAN, UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES (September 2010), at 105, *available at* http://www.uscourts.gov/services-forms/defender-services/publications/update-cost-and-quality-defense-representation-federal (last visited Feb. 8, 2016)

therefore ineligible for the death penalty; also neither explored nor presented to the jury was a deeply mitigating childhood history characterized by exposure to community violence and poverty. The two CJA lawyers who represented the individual in district court in § 2255 proceedings were deprived of funding to develop necessary evidentiary support for the intellectual disability and other claims and stood little chance of protecting their client in the face of their well-resourced adversary. The same federal defender office was finally appointed to the case on appeal, and at that point was able to find the evidence to support the *Atkins* claim; however neither the district court nor the court of appeals has been willing to consider any of this information because of untimeliness.

- Similarly, in a case in which we recommended appointment of a CJA attorney with capital habeas expertise, the district court instead chose two local attorneys with neither the relevant experience nor resources to adequately investigate, identify, and develop the death-sentenced prisoner's post-conviction claims. The choice had significant implications for the client, which came to light only after the court relented and, at the request of the appointed attorneys, allowed out-of-district lawyers with habeas expertise to assist local counsel after the § 2255 was denied. Without an attorney with adequate experience representing prisoners in capital habeas proceedings, key issues, including those relating to sexual abuse endured by the client in his childhood, were missed in the statute of limitations period. These were issues that any seasoned capital habeas lawyer would have identified, but no court has ever properly considered them because appointed counsel did not develop and present them in a timely manner.

- In another case, a district court insisted on appointing only one CJA panel attorney to shoulder the full burden of capital § 2255 representation, even though the court was informed that district judges in every other current federal capital post-conviction case had appointed either a federal defender office or (at least) two lawyers to share the onerous responsibilities, pursuant to provisions of 18 U.S.C. §3599 and consistent with the guidelines for appointment in capital § 2255 cases adopted by the Administrative Office of the U.S. Courts. Here, too, an institutional defender office was available at the time the statute of limitations began to run, and would have been much better equipped to handle the case. The appointed panel attorney could not have reasonably been expected to do what was necessary without assistance from at least one other attorney. This case, not atypically, had a voluminous record, a mentally ill client whose background was not thoroughly investigated at trial, and a social history that required investigation in various parts of the country that were thousands of miles from where the offense took place. Reviewing the

existing record itself was difficult enough for one lawyer, but on top of that she alone could not identify and implement investigative needs, work with mental health experts, visit the client, and oversee both a social history investigation and offense investigation herself. She was eventually able to obtain assistance from a federal defender office, more than seven months into the statute of limitations period, but not before many precious months had been lost and the harm to the prisoner was done. Every task, from record review to investigation to ensuring that all available cognizable claims were identified, developed, and pled with sufficient factual support to survive preliminary review, was conducted in the severely curtailed timeframe resulting from an avoidable but, for this indigent and mentally ill client, damaging appointment decision.

- The district judge in another case rejected the recruited team, which included an experienced capital habeas practitioner, in favor of appointing two local CJA counsel with whom he was familiar. Unfortunately, those lawyers both had conflicts, a fact appellate counsel had to investigate and then litigate with our help. The court ultimately went with the original recommended team, seven weeks after the initial appointment motion was filed.

- Disastrous consequences were narrowly avoided in a case where the district judge signaled his preference for appointing one local experienced federal practitioner and a "trainee." The district court ultimately, and quite frankly, luckily, changed course only after listening to a well-respected attorney in the area who, at our request, advised the court that under no circumstances would he take on a case of such magnitude with a "trainee" because the expectation that he properly litigate the case and simultaneously take limited time to train someone else was unrealistic and would deprive the client of a full post-conviction presentation.[12]

In some of the older capital § 2255 cases, the harm done from appointing inexperienced counsel is unfortunately already apparent. For example, in one of these cases in which CJA counsel were appointed prior to our Project's inception, the district court appointed counsel who were primarily trial lawyers and had little, if any, post-conviction litigation experience. That lack

[12] Courts making these appointments are not required to say why they chose particular lawyers or rejected a proffered team. In some instances, the district court may be seeing its only federal capital post-conviction case: federal death penalty cases can be prosecuted in any district in the country, and the great majority of capital prosecutions do not result in death sentences, so most of our federal district judges may never see a federal capital collateral case. Judges may therefore be unfamiliar with the litigation. One judge for example thought he did not need to appoint counsel until *after* the prisoner filed his own § 2255 motion (the statute says otherwise, and in practice this could never work in death penalty cases); another believed that only record-based claims could be raised (the opposite is true). The lack of familiarity with these cases is another reason why the courts may not be in the best position to choose counsel for the defense.

of experience fundamentally impeded the client's opportunity to develop and present cognizable claims in his § 2255 proceeding. For example, CJA counsel never requested funding for a mitigation specialist, believing that they could assess the reasonableness of trial counsel's mitigation investigation simply by reviewing the extant trial record. But because post-conviction claims about trial counsel's representation almost always involve counsel's omissions (which are by definition absent from the record), and because the legal claim requires a showing of prejudice, or harm, the lawyers failed to perform the type of post-conviction investigation into the client's background and social history that represents the bare minimum of the standard of representation required in a capital habeas case. CJA counsel were also unfamiliar with the procedural rules and special pleading requirements in habeas cases, and therefore failed entirely to raise certain ineffective assistance of counsel claims and pleaded other claims too narrowly to be able to properly amend the § 2255 motion with facts later discovered that might support a claim for relief. After the district court denied the § 2255 motion, substitute counsel was appointed with our Project's assistance, which consisted of a federal public defender office with expertise in capital habeas litigation, as well as CJA counsel with extensive experience handling capital habeas cases. Substitute counsel conducted a mitigation investigation for the first time in post-conviction and uncovered a wealth of readily available mitigation evidence, including critical evidence of the dire poverty and urban violence in which the client was raised, as well as compelling mitigation evidence about the effect that the client's chronic exposure to trauma had on his mental health. This information could have been presented in support of cognizable claims for relief to the district court, but the same issues must now be litigated in a successor posture, where significant procedural hurdles make it difficult if not impossible for the client to get back into court and have this evidence heard and considered.[13]

In another of these cases, appointed CJA counsel failed to support a meritorious ineffective assistance of trial counsel claim with available evidence of their client's extraordinarily traumatic childhood. A seasoned capital habeas attorney would have identified these influential events from the prisoner's childhood as central to a case in mitigation and would have shared them with a mental health expert. Yet, because appointed counsel barely scratched the surface of their client's social history and failed to present the compelling evidence in the § 2255 motion, no court was ever able to consider whether the level of abandonment, neglect and violence to which he was exposed, along with a family history of mental illness and drug addiction, might have swayed a single member of the sentencing jury. This individual is now out of available legal remedies to remedy his trial counsel's failure to adequately defend him, and, like several other prisoners, can turn only to executive clemency for a chance at relief.

In another case in which CJA counsel were put in place prior to the Project's creation, appointed counsel lacked familiarity with the pleading requirements for § 2255 cases and inexplicably failed to proffer evidence to the district court that supported one of the main ineffective assistance of trial counsel claims present in the case: i.e., trial counsel's failure to challenge an aggravating factor about "future dangerousness" that was premised on junk science. The claim was denied without an evidentiary hearing, and after CJA counsel belatedly proffered

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[13] Section 2255 was revised along with § 2254 as part of the 1996 Anti-Terrorism and Effective Death Penalty Act to preclude defendants from filing more than one habeas petition. A federal death row prisoner cannot file what is known as a "successive" petition unless he can establish innocence of the offense or unless his claim rests on a new rule made retroactive by the Supreme Court. 28 U.S.C. § 2255(h).

the relevant supporting information in a post-judgment motion--including materials demonstrating that the Government's own mental health expert had repudiated his prior opinion--the district court excoriated them for failing to timely submit the relevant affidavits with the § 2255 motion (or at any other point in time during the course of the litigation) and denied relief. Additionally, CJA counsel never requested funding for a mitigation specialist, and therefore failed to investigate whether there was readily available mitigating evidence at the time of the client's trial that trial counsel failed to develop and present. In other words, CJA counsel failed to investigate and present one of the standard claims in post-conviction litigation: ineffectiveness for failing to present mitigating evidence. When qualified successor counsel were appointed, they discovered many fruitful areas of mitigation that were readily available but previously unexplored, including evidence that the client was sexually assaulted as a child and suffered abuse at the hands of a violent step-father and in a juvenile prison plagued by corruption. Here too, the procedural rules governing federal capital habeas cases make it highly unlikely that a court will be able to consider this evidence.

I offer these examples not as isolated "outlier" cases, but rather to highlight for the Committee a recurring problem—one inextricably tied to the judiciary's administration of the indigent defense function—that has grave consequences for the men and women the system is meant to assist. The district judge may delay ruling on a pending motion for the appointment of post-conviction counsel for as long as he or she wishes. By the time the court has rejected a timely recommendation for a qualified team in favor of the court's preferred choice of counsel, the statute of limitations has already begun to eat into the death-sentenced prisoner's only opportunity to vindicate his constitutional rights. There is no reliable mechanism for extending the statute of limitations period to make up for precious time lost. An adverse appointment decision of this kind is essentially unreviewable. This system also leads to an appointment practice that varies widely from one federal court to the next.[14]

Appointment of federal defender offices outside their home districts. Given the size of these cases, the inflexibility of the statute of limitations, and the vast array of resources available to opposing counsel (the Department of Justice), we have found that it is useful to consider institutional defender offices for appointment when possible.[15] These offices usually have sufficient resources to move quickly, and a number of them have lawyers who specialize in capital habeas litigation.[16] For several reasons, offices able to take federal collateral cases are

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[14] The rejection of qualified capital post-conviction teams has occurred most in the Fourth, Fifth and Eighth Circuits. These are also the circuits that send the most defendants to federal death row. Of the 60 prisoners currently under sentence of death, 27 – or nearly half – come from these three circuits alone.

[15] We do not mean to suggest that we never call on panel attorneys. In fact, we often seek to pair an experienced capital habeas lawyer with a defender or large firm that lacks such experience. The availability of qualified CJA-appointed counsel for these cases is also frequently limited. In jurisdictions where the state has no death penalty, there is rarely a pool of lawyers familiar with the law and practice. In cases with large death rows, such as Florida or Texas, individual practitioners are often tied up with § 2254 representations. The size of most of the cases and the rigidity of the statute of limitations often means that CJA counsel will spend much of her or his year on the capital § 2255. Where the district or circuit courts regularly cut attorney vouchers, lawyers may not be able to afford to take on the case. (On the other hand, we have been told that when a district judge asks a practitioner to take a CJA appointment, even where he or she is not well versed in the law or is concerned about resources, there is a general reluctance to decline.)

[16] These units were established to take capital § 2254 cases in some jurisdictions with a state death penalty. There is no single federal institutional entity responsible for representing prisoners under federal sentence of death.

likely to be outside the jurisdiction where the case was tried. One is that the local federal defender has often been tapped at trial to represent the client, a codefendant, or a witness, or was precluded from doing so due to an existing conflict. Alternatively, the defender may have recommended trial counsel pursuant to 18 U.S.C. § 3005 and cannot now be put in a position of questioning his or her effectiveness. Of great significance to our population, the local office may also lack habeas expertise, as most federal public defender offices are comprised of trial and appellate lawyers. (This is particularly true where the United States brings capital charges in a jurisdiction located in a state that has no death penalty.)

Despite these practical considerations, there is a bureaucratic obstacle to having a defender appear out-of-district even in federal cases. Several years ago, a time-consuming protocol was established which requires notification of both the chief circuit judge in the district where an individual was sentenced as well as the chief circuit judge in the district where the federal defender office seeking appointment is located. In other words, the defender office must first provide a justification to the Administrative Office of the Courts and then await two chief judges' acceptance of the notification prior to proceeding with seeking formal appointment. While the protocol may seem on its face an uncomplicated or small step in the appointment process, in our experience it adds a layer of administration that causes significant delays in the ability of available defender offices to obtain timely appointment, and exacerbates situations in which district judges wait for several weeks to rule on a pending appointment motion.

The pool of federal defender offices with the capacity to take on a capital § 2255 case is limited to begin with. As noted above, the in-district defender is often conflicted out, these cases require specialized expertise, and the office has to have room on its docket when the need arises. Signing on to one of these cases is a huge undertaking that requires geographically widespread investigation and careful review of voluminous records. We have thus out of necessity in our recruitment relied heavily on federal defender offices across the country—and out-of-district—to assist in these cases. Their involvement serves as a potential cost-containment measure in many respects, as discussed above, and they are often best situated for the representation, but the added layer of judicial administrative review of the out-of-district protocol and the time spent working to comply with its requirements has proved to be a costly barrier to the timely appointment of available, qualified counsel in capital § 2255 cases. It bears noting that the local prosecutors in federal capital cases, in contrast, usually have assistance from U.S. Department of Justice attorneys from Washington D.C. or elsewhere and no equivalent barriers exist for the procurement of these resources. The Government presumably sees this kind of assistance as part and parcel of the federal unitary system of justice; it should be no different for individuals facing execution within the same system.[17]

Problems with Funding Capital § 2255 Cases

The second major problem we face with capital § 2255 cases is ensuring that, once qualified counsel are identified to represent a client, they are able to obtain the

[17] It is our understanding that this protocol was instituted to address out-of-district federal representation by defender offices in § 2254 cases which arise out of state court convictions. As federal capital convictions are all based on a single statutory system, with a single legal opponent, the concerns motivating the protocol are not likely at issue here.

resources necessary to competently carry out their representation. While funding is a necessary component of all complex litigation, the one-year statute of limitations in § 2255 cases brings funding issues into sharp relief, as weeks or months spent seeking resources or budgetary approval can cut deeply into necessary investigative hours. There are three different mechanisms by which counsel for the indigent federal death row prisoner may secure funding.

- Defendants represented by panel attorneys seek funding directly from the district court hearing the case. (This is generally the same court that heard the case at trial.)

- Clients represented by attorneys from federal public defender offices with budgets sufficient to cover the case manage the funding in-house, subject to the approval of the chief Defender in the district.

- Clients represented by federal defender offices without adequate budgets to accommodate large, complex cases, must request funding from the Defender Services Budget Subcommittee, through the "mega-budgeting" process.

As I have noted, capital § 2255 litigation is time- and resource-intensive. It requires a full re-investigation of both the guilt/innocence and sentencing phases of the trial, including a comprehensive search of the client's social history for evidence of mitigation, all within the one-year statute of limitations. This task necessarily requires the assistance of other experts and professionals, including a fact investigator, a mitigation specialist, and other experts dictated by the specific needs of the case. Some paralegal help is usually required to manage a case that could have dozens of boxes of records from each trial attorney or considerable electronic discovery from the trial prosecutors. Qualified mental health experts are frequently necessary to assert claims related to sentencing and competency. Likewise, forensic experts are often required to challenge evidence introduced in guilt/innocence.[18]

Qualified counsel simply cannot competently litigate a capital § 2255 case absent these investigative and expert resources; they are the means by which counsel develop the extra-record facts which are the basis for the § 2255 litigation.[19]

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[18] Unlike a direct appeal case, where counsel are restricted to raising legal claims based on the trial record, the claims in capital § 2255 cases involve facts outside the extant record: primarily, ineffective assistance of counsel, prosecutorial misconduct, and juror misconduct. Accordingly, the focus of § 2255 practice is not "issue spotting" based on a review of the transcripts, but the investigation and development of extra-record facts. Handling these different kinds of cases requires distinct skills and resources on the part of counsel.

[19] By way of example, a claim that trial counsel was ineffective for failing to present mitigating evidence requires post-conviction counsel to prove what kind of mitigating evidence trial counsel *could have presented* but for her deficient performance in order to meet the prejudice prong of the legal inquiry. Such proof requires extra-record evidence because, by definition, the claim concerns an alleged omission by trial counsel, and therefore the trial record will contain no facts regarding what trial counsel failed to do, or what trial counsel could have presented at trial after conducting a reasonable investigation, or why counsel may have done what she did. Post-conviction counsel must therefore undertake the investigation that trial counsel failed to perform in order to demonstrate to the court what the fruits of such an investigation would have been, and how that previously unpresented – but readily available – mitigation evidence might have altered the jury's sentencing determination. Such work requires the

Obtaining funds from the district court. Most judges require the lawyers to submit a budget for all or part of the case. This will include both attorneys' fees and expert and investigative expenses. Most courts should and do handle these matters *ex parte*. In some circuits, case budgeting attorneys assist the court in determining the reasonableness of the budget. Circuit approval is sometimes also required. For CJA attorneys without an in-house staff, much of the investigation must await funding. Preparing a budget can itself be time consuming, and, for a newly appointed attorney in a big case, it is difficult to know at the outset just what the particular funding needs may turn out to be.

Despite the fact that these resources are fundamentally necessary to the defense function in post-conviction proceedings, counsel's ability to obtain adequate funding when they must request it from the district court varies greatly from one jurisdiction to another. The result is that similarly-situated clients convicted of the same crimes receive very different levels of process in the adjudication of their claims. For example:

In one case, CJA counsel was denied all funding by the district court for a routine and necessary request to hire a mitigation specialist to conduct a social history investigation in the foreign-national client's home country, where nearly all of the client's family, friends and other mitigation witnesses were located. The district court's reasoning was that because trial counsel had been granted funds to conduct a mitigation investigation in that country, there was no need for post-conviction counsel to independently conduct its own mitigation investigation, as it could simply "evaluate the reasonableness of trial counsel's efforts without a separate government-funded investigation requiring travel" to the client's country. The district court also denied a motion for substitution of counsel to replace one of the CJA lawyers with a federal defender office with particular expertise and the resources necessary to conduct such a mitigation investigation. CJA counsel was thus impeded from investigating and developing any legal claims concerning the effectiveness of trial counsel's mitigation presentation, which is one of the most basic--and frequently meritorious--post-conviction claims for relief. After the district court denied the § 2255 motion without an evidentiary hearing, the Circuit Court granted the re-filed motion for substitution of counsel, the federal defender office briefed and argued the case, and the Circuit Court remanded the case to the district court for an evidentiary hearing. The federal public defender thereafter conducted a post-conviction mitigation investigation in the client's home country and developed a number of critical areas of mitigation evidence about the client's background and life history that had never been previously presented, including significant evidence of the client's victimization and repeated sexual assault during his childhood years.

In another case, the district court denied all of CJA counsel's requests for expert services, with the exception of $1,000 for a fact investigator (explicitly limited to the investigation of a single claim of government misconduct). Among the requests that were denied was an application for the services of a forensic pathologist to examine the wounds present on the body of the deceased which the Government successfully argued at trial proved the aggravating factor that the victim had been tortured by a stun gun before being killed. Habeas counsel was unable to

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services of a qualified mitigation investigator; securing funding for those services is therefore critical to the development and presentation of a meritorious claim of ineffective assistance of trial counsel at the penalty phase.

challenge the Government's version of the crime because of the court's funding denial. After the § 2255 motion was denied without an evidentiary hearing, a forensic pathologist opined that the alleged "stun gun wounds" were actually the product of post-mortem insect bites, thus fundamentally contradicting the Government's aggravation evidence.

One district judge demonstrated a fundamental misunderstanding of habeas proceedings, rejecting a request for investigative services to develop extra-record evidence stating: "I can't imagine why you would need an investigator to file a Section 2255 petition which should only involve legal issues." The judge also refused to fund routine mental health experts, informing counsel that he could obtain the services of either a psychologist or a psychiatrist, but not both, despite a demonstrated need in the case for the different types of expertise each could offer. The district judge then cut the requested amount of funds for this expert by two-thirds without explanation. CJA counsel was only able to conduct a more substantial post-conviction investigation because a firm provided *pro bono* funding. That investigation yielded significant mitigating evidence about the client's background and social history that was readily available, but never presented at trial, regarding the abject poverty in which the client was raised, exposure to violence and trauma throughout his childhood and adolescent years, and evidence of his own and his caretakers' mental illness.

Under the existing system, capital litigants simply have no recourse when a district court denies necessary resources for the post-conviction investigation. There are no alternate funding sources available to CJA counsel to pay for services like a fact investigator, a mitigation specialist, or case-specific experts. This problem is compounded by the fact that the same district judge who denies funding necessary for the adequate development of a claim can then not only deny the claim for lack of proof, but can subsequently deny the litigant the opportunity for appellate review of the denial of the claim. Unlike trial-level cases, where a defendant can take an appeal as of right, a § 2255 movant cannot obtain appellate review absent the issuance of a Certificate of Appealability ("COA"), which the district court is authorized to deny. If the circuit court also denies a COA, then a § 2255 litigant will go through the entire proceeding without ever having received meaningful process in his post-conviction challenge nor any subsequent review to remedy a lack of process. Unreviewed capital post-conviction decisions in the federal system allow a prisoner to be executed after having only a single judge scrutinize his case post-appeal. When that minimal review is further truncated by the denial of discovery and other factual development, there is an even greater risk that serious errors may remain uncorrected.[20]

Even in those cases where a district court might agree that the requested services in a proposed budget are reasonably necessary, there remains a regional disparity at the circuit court level, which has ultimate approval authority for such budgets. While some circuit courts extend deference to the district court's judgment that the requested services are necessary, others routinely cut and/or deny the level of funding approved by the district court.

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[20] As in many other aspects of federal capital cases, the arbitrariness of geography dictates whether a COA is likely. The Fifth Circuit, for example, which accounts for over 22% of the current federal death row population, has denied COAs to more than 88% of federal death row prisoners sentenced there. In contrast, over 87% of the prisoners from the rest of the country have been granted COAs.

There are also evident regional disparities as to the compensation of CJA counsel. For example, despite the fact that under the CJA Guidelines[21] promulgated by the Administrative Office of the U.S. Courts, "[t]here is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the judge of the circuit of the case compensation amount in capital cases," CJA Guideline § 630.10.20, the Fifth Circuit has established such presumptive caps on compensation in capital cases. *See Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases*, The Judicial Council of the Fifth Circuit (as amended, February 1, 2005). In § 2255 cases, any request for compensation in excess of $35,000 at the district court level or $15,000 at the appellate level is "presumptively excessive." Under the current CJA rate of $183/hour, that amounts to roughly 191 hours of work in the district court. These presumptive caps are for the *entire* CJA fee per lawyer for the duration of the § 2255 proceeding.[22] These caps make it difficult to recruit qualified CJA counsel, who knows that many hours are required to represent a client adequately in his sole post-conviction challenge, to undertake the representation.

Let me give an example as to why this matters. A recent capital § 2255 prison homicide case contained thousands of pages of discovery in addition to thousands more related to the client's social history. The prisoner was on death row despite the fact that the offense that purportedly made the case death eligible likely did not qualify (an issue not raised by trial or appellate counsel) and despite the fact that he suffered from mental retardation (also not explored by trial counsel). Although these were two of the most compelling issues in the case, post-conviction counsel spent hundreds of hours poring over documents not ostensibly related to either. In so doing, he discovered that the Bureau of Prisons, an agency of the Department of Justice, had diagnosed the prisoner as suffering from schizophrenia prior to the time of the offense. The prisoner ultimately obtained relief due to the Government's failure to turn over this powerful mitigating evidence to trial counsel. Had the salaried defender on the case not been able to spend hundreds of hours reading all the documents, this claim might never have been found, and the defendant might still be under sentence of death. Unfortunately, some courts are unwilling to pay for the time for counsel to read every document associated with the case.

A problem relevant to both recruitment of counsel and the adequacy of their representation is routine reduction, denial or delay in the payment of CJA vouchers. For example, in one case in which CJA counsel had been paid for less than half the hours that he had billed the court, the district court told counsel that a CJA-appointed lawyer should consider himself to be partly *pro bono* and should thus not always expect compensation for his billable hours. In another case where counsel had submitted vouchers to the circuit for appellate work on a § 2255 case, the vouchers were cut nearly 25% without any explanation from the circuit court as to why the reductions were made, and despite explanations from CJA counsel documenting the reasonableness of the hours incurred in researching and preparing the pleadings. In yet another case, the district court ordered a hearing on whether the defendant was intellectually disabled, but would not pay CJA counsel for all the in- and out-of-court time necessary to meet

[21] Guide to Judiciary Policy, Volume 7, Part A; Guidelines for Administering the Criminal Justice Act and Related Statutes (hereinafter the "CJA Guidelines").

[22] In other words, even if the § 2255 motion were dismissed immediately at the conclusion of the one-year statute of limitations period, which it legally cannot be, that would amount to payment for counsel for roughly 3.67 hours of work per week.

and prepare numerous lay and expert witnesses, create and organize exhibits, and prepare direct- and cross-examinations.

CJA counsel also report that, even when they are paid for their time, vouchers are often not processed and paid for many months. Needless to say, it is extremely challenging to recruit qualified counsel to accept CJA appointments for these highly complex and time-intensive cases under such circumstances; unlike salaried attorneys, CJA counsel constantly face the prospect of having to wait months to be compensated for work that they have already performed, as well as the threat that they may have vouchers arbitrarily reduced by the courts without explanation, despite documentation demonstrating the reasonableness of the hours expended.

The payment of CJA fees varies widely by jurisdiction. As a result, prisoners who must apply to their district or circuit courts for funding in some regions are frequently denied the same funding for attorneys, experts and investigative support that similarly situated litigants in other regions receive. The level of funding litigants receive for expert and investigative services, as well as the compensation their CJA counsel receive, appears to be an accident of geography, rather than the result of any uniform standard applied across all federal jurisdictions. Certainly some differences may be expected across the country. But where neither state law concerns nor state practices are legally relevant, the wide variation in the kind of process a federal capital prisoner receives in his collateral proceedings is troubling at best.

Obtaining Funds from the Defender Services Budget Subcommittee. Federal defender organizations that do not have sufficient budget allocations to cover a large new case, including a capital § 2255, are required to apply for funding from the Defender Services Budget Subcommittee. The Budget Subcommittee is composed of federal judges and makes funding decisions nationwide for all types of complex cases, capital and non-capital, at the trial level as well as in post-conviction. These are known as "mega-cases" and the process is called mega-budgeting.

As soon as it is feasible for defender counsel to ascertain the needs in the case, he or she will assemble a budget for approval, usually to cover the entire statute-of-limitations period. Because the budget is submitted to the Administrative Office four weeks before the Subcommittee's monthly meeting, it is in the client's interest to generate a budget as soon as possible. On the other hand, it will take counsel some time to become familiar with the trial record, to gather records not obtained at trial, and to begin to figure out any problems with the case; indeed, the case may require funding for paralegal or other services just to get a handle on the record.[23] Funding via mega-budgeting has several advantages over seeking funds from a district court. First, applying to a funding authority that has no current or prior connection to the parties removes a potential source of friction from the case litigation; one does not run the risk of alienating the judge presiding over the client's case by challenging the court on funding issues. Second, because the Budget Subcommittee oversees cases nationwide, regional disparities in case funding, a huge problem in capital § 2255s, can potentially be eliminated. Third, at least in theory, the Budget Subcommittee sees more cases of any particular type than most district courts are likely to see and can become familiar with the needs of defendants in the litigation.

[23] These cases can be so big that funds might be needed just to get the boxes to new counsel, or to scan the records into a computer, or to input the documents into a case management system. All of these tasks are time consuming.

In practice, however, defender offices have found that the mega-budgeting process has some serious shortcomings. First, in our experience, mega-budgeting has proven cumbersome and extraordinarily time-consuming for defendant's counsel. In order to obtain funds, defense teams have to submit detailed memos and line-item budgets for all of their expected litigation expenses before they are provided with any funds. This is a particular problem in federal capital post-conviction litigation because of the strict statute of limitations and the fact that new counsel must be appointed as the litigation enters this stage.[24] We estimate that our Project probably spent one month of the yearlong statute engaged in the mega-budgeting process for one capital § 2255, and other lawyers have raised concerns to us about the time expended.

Second, as the Subcommittee considers a range of large complex cases, and as its members are drawn from districts across the country, some of the judges' habeas experience is necessarily limited. They may be unfamiliar with what constitutes mitigation, for example, or with the extent to which habeas counsel must reexamine all aspects of the prior proceedings in the case in order to determine what claims to raise. This can make evaluating the reasonableness of specific requests difficult and again more time-consuming.

Third, requiring teams to anticipate all their litigation needs upfront tremendously reduces the ability of post-conviction counsel to respond to investigative leads and to the always unpredictable aspects of complex litigation. Because the Government can act nimbly in response to the changing demands of the litigation, the defense is severely constrained, unable without the Budget Subcommittee's approval even to re-allocate funds already authorized from one use to any other. The mega-budgeting process, while created to assist defenders in these cases, unfortunately creates some obstacles to the capital § 2255 client's ability to fully pursue his claims.

Recommendation

The Project's extensive, in-depth experience with capital § 2255 cases has informed our strong belief that crucial decisions implicating defense needs in federal capital cases, including decisions regarding appointment of counsel and auxiliary funding issues, must be the result of an independent defense function. A fair and equitable process for capital § 2255 litigants can only be achieved when such decisions are made by an arbiter who is deeply familiar with the struggles and pitfalls of federal capital defense practice while remaining mindful of containing costs. If we are going to have an adversary system, there must be an independent defense component that has structure and the resources necessary to provide competent representation. Ideally, a discrete unit of the Federal Public Defender needs to be organized similar to the DOJ capital case unit--with

[24] For example, virtually every federal capital case requires the services of a mitigation specialist from the outset because every case requires an in-depth investigation into the client's life history by a trained expert. The mitigation specialist can, in fact, help identify other potential budget needs based on information and records already in the file. He or she can also begin building rapport with the client, a necessary bridge to the client's family and other potential witnesses. But defense teams cannot request funding for a mitigation specialist until the team is also in a position to identify its other funding needs, draft a budget, submit it (three to four weeks ahead of the Budget Subcommittee's monthly meeting), and then await the Budget Subcommittee's decision. Critical time can be lost during the statute of limitations year that could otherwise be spent investigating.

sufficient full-time staff, specialization in the complexity of § 2255 cases and appeals, reasonable workloads, and an independent budget, much like there is in the majority of the country for § 2254 cases.

At a minimum, we believe the crucial decisions concerning defense needs must be resolved by (or with deference to) an independent defense function. If these decisions continue to be made absent involvement of an entity with federal capital habeas expertise and knowledge of the capital § 2255 practice, the kind of problems noted above are likely to continue.

I hope that my testimony today informs the very important mission being undertaken by this Committee. Although what I have provided in terms of background about capital § 2255 litigation and examples from federal capital cases is merely a snapshot of what I and my colleagues at the § 2255 Project have seen over the past decade, I hope it illuminates for the Committee the persistent challenges indigent prisoners under death sentence in the federal system have faced in obtaining lawyers with the requisite expertise who have access to the resources necessary for representation; and the essentially irreversible effects the current decision-making process for appointment of counsel and approval of funding has had on those individuals sentenced in jurisdictions where the need for well-resourced and experienced counsel is the greatest.

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