

**Testimony of Terryl Rushing, Death Penalty Law Clerk  
for the Southern District of Mississippi  
before the Judicial Conference of the United States’  
Ad Hoc Committee to Review the Criminal Justice Act Program  
Birmingham, Alabama – February 18, 2016**

Thank you for the opportunity to address the Committee on the structure and function of the Criminal Just Act, particularly with regard to capital habeas cases.

By way of introduction, I have been admitted to the Bar for almost thirty-one years. I clerked for the Mississippi Supreme Court immediately after graduation from law school, where I worked on several capital cases, including one in which the prisoner was executed during my tenure at the court. After leaving the court, I was in private practice for ten years. During that time, I represented a death row inmate, first on a volunteer basis for the American Bar Association’s Post-Conviction Relief Project. After my client’s sentence was vacated and remanded, I was appointed as trial counsel in state court and served as his lawyer through the appellate process, although I had to withdraw after taking a job with the Southern District. For ten years, I clerked for a Magistrate Judge, working on numerous habeas cases. In 2007, I was named to my current position.

The invitation to participate in this program listed fourteen areas of review, not all of which are relevant to the management of capital habeas cases. To the extent that I can address the specific areas of review, I offer the following remarks.

**3) Judicial involvement in the appointment, compensation, and management of panel attorneys and investigators, experts, and other service providers.**

Capital habeas representation differs from criminal trial representation in that, rather than being largely conducted through hearings, habeas cases are handled almost exclusively on paper. Only a few of the attorneys on the Court’s regular CJA Panel seek appointment in capital habeas cases. Additionally, by statute, attorneys must meet certain requirements to be appointed as lead counsel in a capital habeas case. For this reason, we maintain a Capital Habeas Panel that is managed separately from the CJA Panel. To be considered for the Capital Habeas Panel, counsel must submit an application that is consonant with the requirements of 18 U.S.C. § 3599(c). If counsel meets those requirements and is accepted on the Panel, he is included in the list of those eligible to serve as lead counsel. If he does not meet the statutory requirements, but his qualifications convince the Committee to name him to the Panel, he is put on the list of those who are limited to appointment as second chair counsel. Counsel may be moved from the second list to the first after meeting the statutory requirements. For the rare federal death penalty case in which outside counsel is appointed, they are chosen from the regular CJA Panel.

Typically, a capital habeas case originates with a motion to proceed *in forma pauperis* and a motion to appoint counsel, in which attorneys who are willing to take the case are already identified and are known to the petitioner. It is often the case that one of the lawyers requesting to be appointed represented the petitioner in the state court proceedings and is, therefore, familiar

with the record. Because the habeas case must be based on the state court record, and in order to reduce attorneys' fees, we have typically appointed the state court attorney. If that attorney is not a member of the Capital Habeas CJA Panel, but appears to be well qualified, the appointment will be made contingent upon the lawyer's applying for Panel membership, which will be granted at the next meeting of the CJA Committee. While this practice makes economic sense, it prevents us from relying on the strict rotation system that is used with the regular CJA Panel. Since the Supreme Court's opinions in *Martinez* and *Trevino* held that ineffectiveness of state court post-conviction counsel may be an issue in capital habeas proceedings, state court counsel may have a conflict. For that reason, we have made every effort to pair state court counsel with a strong Panel member who can identify ineffectiveness issues. It may be that we will ultimately appoint entirely new attorneys to the case.

There was a suggestion made several years ago that resource counsel under contract with Defender Services identify counsel to be appointed in capital habeas cases. There was, however, some concern that the lawyers would be limited to a small group with whom resource counsel was familiar. Lawyers in that group were already appointed to several cases and appeared to be struggling with their workload. The approach taken by the Court serves to promote parity and diversity in appointing counsel in these cases.

Appointing investigators, experts, or other service providers in a capital habeas case requires consideration of issues beyond the mere expenditure of funds. The only viable issues in a habeas case are those that have been presented to the state court, and, after *Pinholster*, in almost all cases, the habeas argument must be based on the record that was presented to the state court. These requirements impose a stringent review of requests for expert funding, since they must not only be "reasonably necessary for the representation," but also designed to support viable claims. A claim that was not presented in state court is not a viable claim, and evidence beyond the state court record is likely not reasonably necessary, since it cannot be considered. Funding requests presented prior to the filing of the state court record are generally denied, but without prejudice to re-urge them at a later stage in the proceedings.

#### **4) The adequacy of compensation for legal services provided under the CJA, including maximum amounts of compensation and parity of resources in relation to the prosecution.**

We are in the apparently anomalous position of having an ample number of Panel members to take our capital habeas cases, and we have never used a Capital Habeas Unit. It may be that the hourly rate, which is substantially higher than the hourly rate for non-capital cases, is not an unattractive sum in our District. The Fifth Circuit has a presumptive cap for attorneys' fees in a capital habeas case of \$35,000; however, that amount can be exceeded upon request to the Chief Judge, as described more completely in the discussion on the next issue.

In capital habeas cases, there is no "prosecution," in the strictest sense; opposing counsel for the petitioner will be one of the three employees of the Capital Litigation Division of the Office of the Mississippi Attorney General. The issue of parity of resources has never been raised in our District.

**5) The adequacy and fairness of the billing, voucher review, and approval processes relating to compensation for legal and expert services provided under the CJA.**

The nature of capital habeas proceedings requires a different method of monitoring expenses for legal and expert services. Since federal law limits the issues that can be reviewed at the district level, and expenses must be scrutinized during the approval process to insure that time has not been spent to develop issues that are barred from review or to improperly augment the record that was available to the state court. For these reasons, and because of the Fifth Circuit's \$35,000 limitation on attorneys' fees, this Court strongly encourages capital habeas counsel to prepare a budget of their expenses at the outset, particularly if attorneys' fees are anticipated to exceed \$35,000. This Court can then approve the budget and send it to the Fifth Circuit for approval, thereby removing the necessity of getting approval at that level on a voucher by voucher basis. The Court's participation in the budgeting process speeds up the process of voucher approval, and the lawyers who have engaged in this process have welcomed it.

Other than the clerical errors or reductions made by the Panel Administrator, vouchers are seldom cut in these cases. I am not aware of any case in which a reduction was made without an explanation to counsel. In one case where substantive reductions were made, the presiding judge sent a letter to counsel beforehand, explaining his concerns about the number of associates and summer interns that were billing on the case and asking whether counsel wanted to revise his voucher. Counsel did voluntarily remove some questionable charges, and the revised voucher was approved.

**6) The quality of representation under the CJA.**

Representation in a capital habeas case is qualitatively different from federal criminal trial practice, and that area of the law appeals to a different segment of the legal community. In the past, the Court had to rely on attorneys in public interest groups or on a handful of private attorneys who took these cases because of their moral opposition to the death penalty. The quality of the legal work was very good; however, these attorneys often carried a staggering work load. This created two problems: (1) their inability to meet deadlines made it nearly impossible to establish a case schedule; and (2) because they were so overworked, they had difficulty establishing a relationship with their clients, who are housed over 100 miles away, sometimes resulting in pro se motions for new counsel to be appointed.

These problems emphasized the need to expand the Capital Habeas CJA Panel. Over time, young lawyers in large firms who were interested in the complex legal issues presented in these cases began applying for appointment to the Panel. Several of them have worked on multiple cases, and they have moved from the second chair list to the first chair list. The size of the Panel now ensures an adequate number of attorneys to spread the cases around and keeps the quality of the legal representation high.

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### **7) The adequacy of support provided by the Defender Services Office to federal defender organizations and panel attorneys.**

The Defender Services Office has a contract attorney in Mississippi to assist capital habeas attorneys in finding training programs and also on an individual case basis. The Court refers attorneys who are interested in getting on the Capital Habeas Panel to consult with that lawyer and obtain some training prior to applying for appointment. That practice appears to be working well.

### **9) The availability of qualified counsel, including for large, multi-defendant cases.**

As discussed earlier, at this time, the Court believes the Capital Habeas Panel has sufficient qualified attorneys. Our state court has, however, recently held that there is a state law right to effective assistance of counsel in a post-conviction proceeding in a capital case. Several of the cases on our docket have returned to state court to exhaust that claim. The cases that return will come with a finding that post-conviction counsel was not ineffective. If that lawyer has also been serving as federal habeas counsel, he will have an actual conflict and must be replaced. At the last meeting of the CJA Committee, we discussed this issue and the fact that it might put a strain on our Panel resources. Because additional attorneys were added to the list at that meeting, we believe that we still have an adequate number of capital habeas lawyers.

### **10) The timeliness of appointment of counsel.**

The one-year statute of limitations in death penalty cases requires that the Court not delay in opening a capital habeas case. As part of my job, I track all of the capital cases that are pending in state court from the counties that comprise our District, including those that are before the Mississippi Supreme Court on post-conviction review. As soon as post-conviction relief is denied, I notify the clerk's office that a new capital habeas case will likely be filed soon, so that the mechanism for assigning the case gets started. The first documents received to open the case are typically a motion to proceed *in forma pauperis* and a motion for appointment of counsel. The clerk's office notifies me when those documents are received, and they are ruled on as soon as soon as possible after they are filed, so that counsel can begin preparing the habeas petition.

### **14) The availability and effectiveness of training services provided to federal defenders and panel attorneys.**

In addition to local training programs, we understand that the Defender Services' contract resource counsel also refers Capital Habeas CJA Panel attorneys to national training programs. There has been no complaint raised in our District about the quality or the availability of that training.

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Thank you for the opportunity of addressing the Committee on these issues. This concludes my prepared testimony, and I would be happy to answer any questions that the Committee may have.