S. HRG. 107–485

PROTECTING THE INNOCENT: ENSURING COMPETENT COUNSEL IN DEATH PENALTY CASES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

JUNE 27, 2001

Serial No. J–107–29

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

79–994 DTP WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PROTECTING THE INNOCENT: ENSURING COMPETENT COUNSEL IN DEATH PENALTY CASES

WEDNESDAY, JUNE 27, 2001

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Feingold, Hatch, Specter, and Sessions.

Chairman. LEAHY. Good morning. I am going to withhold my opening statement for a few minutes to accommodate two of the most distinguished members of the House who have a vote in a short while.

I would just note that the Members are Congressman Ray LaHood, of Illinois, and Congressman William Delahunt, of Massachusetts. Both Mr. LaHood and Mr. Delahunt are close personal friends, one a Republican, one a Democrat. They are the main sponsors of this legislation in the other body, and with the permission of Senator Collins, I thought we would go first with their statements. I appreciate very much their taking the time to be here. I also applaud the enormous amount of work done in a totally bipartisan fashion in the other body.

Congressman LaHood?

STATEMENT OF HON. RAY LAHOOD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Representative LAHOOD. Thank you, Mr. Chairman. Thank you very much for accommodating our schedule and the fact that we have a vote. I am going to be very brief. I assume our statements will be made a part of the record.

Chairman LEAHY. They will.

Representative LAHOOD. Let me just say, as a Republican, as much as I dislike the idea of all of you folks taking over the Senate, I think this really enhances our opportunity to pass this bill, your bill, and thank you for your leadership in this and getting us all involved in the House. You really have shown extraordinary leadership on this issue.

Just very briefly, Mr. Chairman, I have been a proponent of the death penalty and still am a proponent of the death penalty, but I do believe that when the death penalty is meted out and adminis-

tered, we have to have 100-percent certainty that it is done correctly.

I think the Innocence Protection Act, which Mr. Delahunt and I and others—now we have 203 cosponsors in the House, which is far in excess of what we had a year ago, and I think it shows, again, leadership on the part of many organizations.

I have sort of taken the lead from my own Governor, Governor George Ryan, whom you know and is a good friend of yours. I know you have had many discussions with him and he has been to Washington and testified before the House Judiciary Committee subcommittee a year ago. I have taken my lead from him because he did place a moratorium on the death penalty because he wanted to be sure there was certainty when the death penalty is administered.

So I think our bill is a good bill. It requires and calls for DNA testing, it requires competent counsel. I think it is a well-worded bill. I have talked to Chairman Sensenbrenner, the chairman of the House Judiciary Committee, about this issue, and I believe he has a great deal of interest in it.

So again, Mr. Chairman, thank you very much for the opportunity to speak here ahead of everyone else, and thank you again for your leadership. We look forward to working with you and hopefully passing this bill and having it signed into law.

Chairman LEAHY. Well, after all the enormous amount of work you and Congressman Delahunt have done over there in obtaining over 200 co-sponsors, we should move along with it. I hope to sit down with Chairman Sensenbrenner after the 4th of July break and, among other things, talk about that with him. I also want to see how our committees can work well together.

So thank you very much. Give my best to the Governor. He has not wavered on this issue at all, and I appreciate that.

Representative LAHOOD. Thank you.

Chairman LEAHY. Congressman Delahunt. I should note for the record that the Congressman and I helped keep New England safe for years in our roles as prosecutors, he in Massachusetts, I in Vermont.

Go ahead.

STATEMENT OF HON. WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. DELAHUNT. Well, thank you, Mr. Chairman, and I would just associate myself with the kudos that were put forth about you from my friend and colleague, Ray LaHood. I would also add that it warms the cockles of my heart to address you as "Mr. Chairman."

In any event, thank you for inviting us to come here and to testify on behalf of 200 of our House colleagues who have cosponsored the Innocence Protection Act. We introduced this Act because the reality is our Nation's system for trying capital cases is failing, and this has been demonstrated by a series of studies such as the one conducted last year by researchers at Columbia University.

I want to acknowledge the Ranking Member.

Senator HATCH. Good to see you.

Mr. DELAHUNT. Senator, good to see you.

The study at Columbia examined over 4,000 capital cases in 28 States over a 23-year period, and the study concluded that 7 out of every 10 death penalty cases contained serious reversible error—7 out of 10. A failure of that magnitude calls into question the fairness and integrity of the American justice system itself.

Some suggest that the high rate of reversals showed that the system is working. Let me suggest that is absurd. We cannot know whether the appeals process is catching all the errors or not, but what we do know definitively is that errors are not being caught at trial. We do know that innocent people are serving lengthy sentences for crimes that they did not commit.

What is heartening and encouraging is that the public understands this. Polls reveal growing misgivings about the administration of the death penalty and overwhelming support for reforms that would provide some degree of reassurance that it is being properly and fairly implemented.

Now, the catalyst for this sea change can be summed up in one word, or actually three words—DNA. Science has given us a new forensic tool which can conclusively establish guilt or innocence, and this tool has been used to exonerate nearly 100 people who spent years on death row for crimes they did not commit, some of whom came within days of being put to death. Fortunately, their lives were spared, but the system failed them, and it failed society as well by leaving the real perpetrators out walking the streets.

DNA is the spotlight that has enabled us to focus on this problem with our criminal justice system, and our bill would help ensure that defendants have access to testing in every appropriate case. But we should be under no illusion that by granting access to DNA testing we are solving the problem. DNA is not a panacea for the frailties of the justice system. To suggest otherwise would be tantamount to fraud, particularly when, in the vast majority of cases, biological evidence that can be tested does not even exist.

What DNA has revealed is that the lack of adequate legal services is the crux of the problem. The adversary process is the heart and soul of our system of justice, a chance to put evidence on trial and confront the witnesses in open court.

As you indicated, I was a prosecutor for over 20 years, and I know that the process, the system can work only when lawyers on both sides are up to the job. Those kinds of lawyers aren't as easy to find as some may think. We have a lot of lawyers in this country, but very few of them are engaged in trial practice, and fewer still have ever tried a criminal case from beginning to end. And it is a tiny percentage of that percentage who are equipped to shoulder the immense responsibility of trying a case in which a human being is on trial for his or her life.

These are complex matters which cannot be handled by lawyers who lack the training, experience and resources to prepare a proper defense, let alone by lawyers who are incompetent, unprepared, or impaired by substance abuse. We cannot tolerate a system that relies on reporters and journalism students to develop new evidence that was never presented at trial, a system in which luck or chance plays such a profound role in determining whether a defendant lives or dies.

The Innocence Protection Act encourages States to develop minimum standards for capital representation, as some States have already done, and it would provide the States with resources to ensure that indigent defendants have access to a lawyer who can meet those standards.

If we are successful, the impact of these measures will be felt far beyond simply death penalty cases. By raising standards, we can help restore public confidence not just in the fairness and reliability of capital trials, but in the integrity of the American justice system itself.

The American people have a right to expect that the truth will be relentlessly pursued, that every needed resource and every possible safeguard will be brought to bear. Yet, if that does not happen in death penalty cases, how can they have confidence that the justice system is any less fraught with error in non-capital cases? Without that confidence and respect, our system of justice, so essential in a democracy, is at grave risk.

I thank the Chair.

Chairman LEAHY. Well, I thank both you and Congressman LaHood.

I would note for the record that the good-looking group of people who have joined us here are all relatives of Senator Hatch. You might not have known that if I hadn't pointed it out, because they are all better looking than he is.

Senator HATCH. That is not saying much.

Chairman LEAHY. We are delighted to have them here.

I don't know if you wanted to make a comment.

Senator HATCH. Well, thank you. I am very happy to have them here to listen to the three of you. I am also very interested in what you have to say.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Congressman Delahunt and Congressman LaHood, I understand you do have a vote. If you wanted to leave at any point, just feel free to do so.

Representative LAHOOD. Thank you.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Collins, I appreciate your courtesy in letting our two colleagues from the other body go forward at this point.

I thank you both. We obviously will be talking about this a lot more during the summer. Thank you both.

Senator Collins, we appreciate you being here. As I have noted before, we have withheld the opening statements myself and by Senator Hatch to allow the witnesses to testify. Senator Collins, as will the rest of us, will also have a vote very shortly.

Go ahead.

STATEMENT OF HON. SUSAN COLLINS, A U.S. SENATOR FROM THE STATE OF MAINE

Senator COLLINS. Thank you, Mr. Chairman. Mr. Chairman, Senator Hatch, members of the committee, thank you for inviting me to testify before you this morning.

I feel compelled to say a few words to Senator Hatch's relatives to tell you what an outstanding Senator he is. He has been such a help to me as a first-term Senator, and I take great pleasure in working very closely with him.

Senator HATCH. You can see why I love this woman, that's all I can say.

Senator COLLINS. Mr. Chairman, I also want to commend the efforts of our two House leaders on this important issue. It is extraordinary that they have been able to sign up more than 200 cosponsors, and I believe that bodes well for enactment of this important legislation.

To appreciate the importance of the issue of procedural safeguards in death penalty cases, consider what price our society would be willing to pay to prevent the execution of just one innocent individual. The price, of course, cannot be measured, and yet the threat of such a wrongful execution is all too real.

Since the reinstatement of capital punishment in 1976, 720 people have been executed nationwide, including 37 this year alone. In this same time period, nearly 100 individuals who were sentenced to die had their convictions overturned and were released from death row. Each of these individuals has lived the Kafkaesque nightmare of condemnation and imprisonment for crimes that they did not commit. 3,700 prisoners now sit on death row. It is impossible to know for certain how many of them are innocent of the crimes for which they have been sentenced to die. But if history is any guide, some of them undoubtedly are innocent.

My home State of Maine ushered in the first era of death penalty reform in 1835 with what came to be known as the Maine Law. The Maine Law held that all felons sentenced to death had to remain in prison at hard labor and could not be executed until 1 year had elapsed, and then only on the Governor's order. No Governor ordered an execution under Maine law for 27 years, and Maine finally abolished the death penalty in 1887 after a botched hanging.

But Maine is one of only 12 States to abolish the death penalty, and so under the great majority of State court systems and under the Federal system, executions can and do occur. It is our responsibility to make sure that this frightening power to take another's life is wielded judiciously, with the greatest care.

I am proud to join many in this room in cosponsoring the Innocence Protection Act, and I commend the chairman, Senator Gordon Smith and Senator Feingold for their tireless efforts to see this bill through to passage. I believe that over time, as more and more capital convictions are overturned, more and more Americans will come to embrace the principles of this important bill.

Take Title II of the bill, for example, which is designed to ensure competent legal counsel in death penalty cases. Instead of attempting to impose Federal requirements created out of whole cloth, the bill establishes a commission of prosecutors, defense attorneys and judges tasked with developing standards for providing adequate legal representation for those facing the death sentence. It then provides grants to help States implement the commission's standards, as well as disincentives for States that choose to ignore them.

I also strongly support the DNA testing provisions of this bill. Convicted offenders ought to have access to DNA testing in cases

where it has the potential to help prove an inmate's innocence. The Innocence Protection Act sets procedures governing DNA testing in the Federal courts and encourages States to adopt their own procedures to ensure that testing is available and that biological material is preserved. In recognition that the States are higher in death penalty cases, our bill would prohibit States from denying applications for DNA testing by death row inmates if the testing could produce new exculpatory evidence.

Mr. Chairman and Senator Hatch, thank you again for inviting me to testify today on an issue of such profound significance. I am hopeful that this Congress we will reach across the aisle to enact meaningful safeguards to protect the innocent from paying the ultimate price and society from making the ultimate mistake. This is an issue that should unite all of us, whether we are opponents or proponents of the death penalty. Surely, we can come together to ensure that important procedural safeguards and protections are provided in these cases.

Thank you, Mr. Chairman, Senator Hatch, members of the committee.

Chairman LEAHY. Well, thank you, Senator Collins. I appreciate your support of this.

I will also place in the record a statement by Senator Gordon Smith, who is a proponent of the death penalty but a cosponsor of this legislation. That will be part of the record.

I appreciate you being here.

Senator COLLINS. Thank you.

Senator HATCH. Thank you.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I know that we will having a vote soon. I am going to give my opening statement and then yield to the distinguished senior Senator from Utah for his.

Obviously, we are pleased to have all of you who have taken the time to come here. Certainly Senator Collins' testimony and Senator Smith's testimony is very welcome, as were the statements of the lead House cosponsors, Congressmen Bill Delahunt and Ray LaHood. We have already heard their testimony, one a proponent of the death penalty, one an opponent of the death penalty, and one a former prosecutor. They make it very clear that they are united on the question of competent counsel in capital cases and, of course, on the availability of whatever evidence may be there.

We now have 200-or-so cosponsors in the House and 19 in the Senate, including three members of this committee—Senators Feingold, Kennedy and Cantwell. I am grateful to each of them for their help, and also for the interest that Senator Hatch and Senator Feinstein have shown on this issue.

I am really very pleased because we have had liberals, conservatives, supporters of the death penalty, opponents of the death penalty, Republicans and Democrats, on this. That is the way it should be. This should not be a partisan issue. It is an issue of conscience, but also an issue of confidence in our criminal justice system. A criminal justice system only works if people have confidence in it,

and it totally falls apart—especially in a democracy—if people lose confidence in it.

I may disagree with some of my friends on this committee on some issues, but none of us disagrees with the principle that somebody who is on trial for his life deserves a fair trial and deserves a competent defense attorney. We are talking about the ultimate penalty that can be imposed. I appreciated Senator Specter's comment on Sunday that competent counsel is fundamental.

Let's look at what has happened while the Innocence Protection Act has been pending in the Congress. In the last 6 months, more than a dozen people have been cleared of the crimes that sent them to prison. In 6 cases they were convicted and sent to death row, and then we find we made a mistake.

Let's go with this: Jerry Frank Townsend was sentenced to seven concurrent life sentences in Florida, in 1980—seven concurrent death sentences. And then we found, "Sorry, we made a mistake." You are free to go.

Joaquin Martinez, sentenced to death in Florida, in 1997—sentenced to death. Fortunately, they found out they had the wrong person before he was actually executed.

Gary Wayne Drinkard was sentenced to death in Alabama, in 1995. I understand Mr. Drinkard is here today with his attorney. The headline in the Associated Press says it all: "He Fought Fear of Death Everyday." He was on death row, knowing he was innocent, wondering what it would be like to be executed as an innocent man.

Of course, in every one of these cases, while they had the wrong person on death row, that meant whoever committed the crime was out free and able to commit the same crime again.

Jeff Pierce was sentenced to 65 years in Oklahoma, in 1986. I would ask anybody at this hearing, what would you think if you heard the cell door close and knew you had been sentenced for 65 years for something you didn't do. Then they find out, well, a chemist made a mistake and they had the wrong person.

Danny Brown was sentenced to life in Ohio, in 1982. Nineteen years you can never give back to somebody in their life; 19 years behind bars, and they had the wrong person.

Richard Danziger was sentenced to 99 years in Texas, in 1990. Now, he was finally cleared, but he has an uncertain future, as it says here. Why does he have an uncertain future? He was beaten so badly while in prison that he now has brain damage. He was in prison for a crime he did not commit.

Kenneth Waters was sentenced to life in Massachusetts. I think the headline says it all from the Boston Globe: "'After 18 years in prison, it is great to be free,' ex-inmate says." I can well imagine.

In 1984, Earl Washington was sentenced to death in Virginia. He came within days of execution, and then they did a DNA test and they found they had the wrong person. Mr. Washington is here with us today and I appreciate him coming here to join us.

David Pope was sentenced to 45 years Texas, in 1986. He served 15 years and then they did a DNA test, and again, sorry, wrong person. Again, I would point out not only the injustice of serving that time behind bars, but it also means that the guilty person is free to commit more crimes.

Peter Limone was sentenced to death in Massachusetts, in 1968. He spent 33 years in prison after his conviction, and they say again, wrong person, we will let you go. His wife had eked out a living by sewing so the family could visit him every week in prison, convinced of his innocence.

Christopher Ochoa was sentenced to life in Texas. It turns out he was falsely accused and he was freed from a life term.

Michael Graham and Albert Burrell were sentenced to death in Louisiana, in 1987. Mr. Graham is here as a witness today; death row inmates exonerated, having served time facing death, expecting to be executed. Wrong person, and they were finally let out.

Gerald Harris was sentenced to 9 to 18 years in New York, in 1992. Guess what? The headline says it all in Newsday: "He Was the Wrong Man." He served the time, but the wrong man; the right man was out free.

Frank Lee Smith was sentenced to death in Florida, in 1986. It turns out the DNA tests cleared him.

Now, we didn't go back through a long, long history to get these. These people were all released in the last 6 months. What should we learn from these cases? Well, some have argued these cases in which innocent people were cleared after years and sometimes decades in prison show that the system is working. Working? Something is tragically flawed with the system if they can serve all that time.

I have only one thing to say. Listen to Michael Graham testify today about 14 years on death row, knowing that they had the wrong person. Listen to what he has to say. Put yourself in the place of sitting there, waiting to be executed for a crime that you didn't commit. Then ask yourself whether finally being released is a triumph of the judicial system or whether there was a failure that put you there in the first place.

The Innocence Protection Act proposed some basic, commonsense reforms to our criminal justice system to reduce the risk of mistaken execution. We have listened to a lot of good advice. We have made refinements to the bill since the last Congress. Again and again, experts in the field have told us that ensuring competent counsel is the single most important thing we can do to get to the truth and protect innocent people. I will tell you what we have done.

The bill would establish a national commission which would consist of distinguished American legal experts who have experienced the criminal justice system firsthand—prosecutors, defense lawyers and judges. They would formulate reasonable minimum standards for ensuring competent counsel at each stage of a capital case, something that the Conference of Chief Justices has been calling for for years.

The IPA uses a "carrot and stick" approach to ensure that counsel standards are met. The carrot is more than $50 million in grants to help put the new standards in effect. The stick is that States that fail to meet the standards would have their death sentences given less deference and subjected to more rigorous Federal court review. This is because we would not have the confidence that comes from knowing that competent counsel represented the

defendant. These states would forfeit some of their prison grant funding over time.

Now, I want to stress the importance of these enforcement mechanisms. Without them, standards developed under the IPA would merely gather dust on a shelf, like a lot of the other voluntary counsel standards that we have seen over the years.

Critics of the bill raise two arguments against its mandate for competent counsel in death penalty cases. Let me briefly discuss them.

The first argument I have heard is that there is no real problem because the States are already providing decent defense counsel in capital cases. The facts show otherwise. The problem is real, it is urgent and it is well-documented. It has been more than a decade since the U.S. Judicial Conference and the ABA issued reports on the widespread problem of incompetent and underfunded capital defense counsel. It has been 8 years since this committee held a hearing on innocence and the death penalty, in which witness after witness spoke to the same issue.

In March of 2000, the Justice Department released a report on indigent defense services across the country and concluded that "Indigent defense in the United States today is in a chronic state of crisis, resulting in legal representation of such low quality to amount to no representation at all, delays, overturned convictions, and convictions of the innocent."

In June of 2000, Professor Jim Liebman and his colleagues at the Columbia Law School released the most comprehensive statistical study ever undertaken of modern American capital appeals. They found that serious errors were made in two-thirds of all capital cases. The most common problem was grossly incompetent defense lawyers.

Today, in Alabama, there are 42 prisoners on death row who have no lawyer to pursue appeals. Today, in Texas, one out of every four death row inmates was defended by a lawyer who has been disciplined, suspended or disbarred. This is not competent counsel, and it is certainly not the counsel that any Senator on this panel would expect to have if they were accused of a capital crime. Today in America, there are people awaiting execution whose lawyers slept through part of their trials. That is unjust, it is shocking, and it ought to be unacceptable in this country.

The other argument I have heard against our bill goes something like this: maybe some States could do a better job providing counsel for indigent defendants. Maybe some States do skimp on funding. Maybe this has resulted in a few innocent people being sentenced to death here and there. But that is no reason for Congress to get involved.

In fact, it is a reason for Congress to get involved. There should be zero tolerance for mistakes in death penalty cases. We have a duty to get involved to try to contain the crisis before innocent people are put to death. Congress has the duty to get involved because the crisis is national scope.

Since 1973, 96 people who were sentenced to death and were heading to death row have been exonerated—one for every seven or eight who have been executed. These 96 exonerations span 22

different States, which is a substantial majority of the States that have a death penalty.

In Illinois, the Governor, a conservative Republican, imposed a moratorium on executions because of the State's dismal record of sending innocent people to death row. But this isn't an Illinois problem or a Texas problem; it is a national problem. It calls into question the legitimacy of criminal convictions, but it also undermines public confidence in the integrity of the criminal justice system as a whole.

If mistakes occur when a life is at stake, what happens when the crimes and penalties are less severe? Witnesses and juries and judges become more skeptical about how well the police and prosecutors are doing their jobs. If they do not trust the jobs that are being done, what does that mean for our prosecutors and police? It means that it is going to be far more difficult to get convictions when they have the right person if they show sloppiness when they have the wrong person.

And let us not forget that when an innocent person is put in prison, that doesn't protect us. The person who committed the crime is out there, free to do the same thing. If you convict the wrong person, leaving the actual murderer free, what does that do?

In 1985, Rolando Cruz and Alejandro Hernandez were wrongly convicted and sentenced to death for the murder of a 10-year-old girl. DNA tests ultimately linked another man to the little girl's death, clearing them. In the meantime, because the wrong men were convicted and the right person was still out there, the actual criminal committed another murder. This is a national problem. It is not a question whether Congress should act, but when.

Last year, we passed the Paul Coverdell National Forensic Sciences Improvement Act. I was proud to cosponsor this bipartisan legislation which will improve the quality and credibility of our Nation's crime labs. We are still working to fund it. When the Senate took up the Paul Coverdell bill, I proposed a sense of the Congress amendment which the Senate adopted. In it, we resolved to work with the States to improve the quality of legal representation in capital cases through the establishment of counsel standards. Congress has already gone on record in recognizing what has to be done; now is the time to do it.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

I want to welcome all of the witnesses and thank you for coming today. I am particularly pleased to welcome Senator Smith and Senator Collins, as well as our lead House cosponsors, Congressman Bill Delahunt and Congressman Ray LaHood. I thank them for their commitment to our legislation, the Innocence Protection Act of 2001.

We now have 19 cosponsors in the Senate. That includes three members of this committee: Senator Feingold, Senator Kennedy, and Senator Cantwell. I am grateful to each of them for their support. I also want to thank Senator Feinstein and Senator Hatch for the interest that they have shown in this issue.

I could not be more delighted with the progress that the IPA has been making in the House. There are now more than 200 House cosponsors, including Republicans and Democrats from all parts of the country, conservatives and liberals, supporters and opponents of the death penalty.

That is how it should be, because this is not a partisan issue; it is an issue of conscience and confidence in our criminal justice system. I may disagree with some

of my friends on this committee on some issues, but none of us disagrees with the principle that someone on trial for his life deserves a fair trial and a competent defense lawyer. I appreciated Senator Specter's comment on Sunday that competent counsel is "fundamental."

Let's look at what has happened while the Innocence Protection Act has been pending in the Congress. In the last six months, more than a dozen people have been cleared of the crimes that sent them to prison or, in six cases, to death row.

- Jerry Frank Townsend, sentenced to 7 concurrent life sentences in Florida in 1980
- Joaquin Martinez, sentenced to death in Florida in 1997;
- Gary Drinkard, sentenced to death in Alabama in 1995;
- Jeff Pierce, sentenced to 65 years in Oklahoma in 1986;
- Danny Brown, sentenced to life in Ohio in 1982;
- Richard Danziger, sentenced to 99 years in Texas in 1990;
- Kenneth Waters, sentenced to life in Massachusetts in 1983;
- Earl Washington, sentenced to death in Virginia in 1984;
- David Pope, sentenced to 45 years in Texas in 1986;
- Peter Limone, sentenced to death in Massachusetts in 1968;
- Christopher Ochoa, sentenced to life in Texas in 1988;
- Michael Graham and Albert Burrell, sentenced to death in Louisiana in 1987;
- Gerald Harris, sentenced to 9–18 years in New York in 1992;
- Frank Lee Smith, sentenced to death in Florida in 1986.

What should we learn from these cases:' Some have argued that these cases, in which innocent people were cleared after years and sometimes decades in prison, show that the system is "working." To them, I have only one thing to say: Listen to :Michael Graham testify today about his 14 years on death row. Then ask yourself whether his case represents a triumph of our judicial system. We must do better.

The Innocence Protection Act proposes some basic, common-sense reforms to our criminal justice system. The goal of our bill is simple, but profoundly important: To reduce the risk of mistaken executions.

We have listened to a lot of good advice and made refinements to the bill since the last Congress. Again and again, the experts in the field have told us that ensuring competent counsel is the single most important thing we can do to get at the truth and protect innocent lives. So let me briefly describe our proposals regarding counsel.

The bill would establish a national commission, which would consist of distinguished American legal experts who have experienced the criminal justice system first hand-prosecutors, defense lawyers, and judges. The commission would formulate reasonable minimum standards for ensuring competent counsel at each stage of a capital case—something that the Conference of Chief.Justices has been calling for many years.

The IPA uses a "carrot and stick" approach to ensure that counsel standards are met. The "carrot" is more than S50 million in grants to help put the new standards into effect.

As for the "stick": States that fail to meet the standards would have their death sentences given less deference and subjected to more rigorous federal court review, because we will not have the confidence that comes from knowing that competent counsel represented the defendant. These States would also forfeit some federal prison grant funding over time.

I want to stress the importance of these enforcement mechanisms. Without them, standards developed under the IPA would merely gather dust on a shelf like the many other voluntary counsel standards developed over the last decade.

Critics of the bill have raised two arguments against its mandate for competent counsel in death penalty cases. I will address these arguments briefly.

The first argument I have heard is that there is no real problem because the states are already providing decent defense counsel in capital cases. The facts show otherwise. The problem is real, it is urgent, and it is well-documented.

It has been more than a decade since the U.S. Judicial Conference and the ABA issued reports on the widespread problem of incompetent and underfunded capital defense counsel.

It has been eight years since this committee held a hearing on "Innocence and the Death Penalty," where witness alter witness described the same problem.

In March 2000, the Justice Department released a report on indigent defense services across the country. The report concludes that "indigent defense in the United States today is in a chronic state of crisis," resulting in "legal representation

of such low quality to amount to no representation at all, delays, overturned convictions, and convictions of the innocent."

In June 2000, Professor Jim Liebman and his colleagues at the Columbia Law School released the most comprehensive statistical study ever undertaken of modern American capital appeals. They found that serious errors were made in two-thirds of all capital cases. The most common problem: Grossly incompetent defense lawyering.

Today in Alabama, there are 42 prisoners on death row who have no lawyer to pursue appeals. Today in Texas, one out of every four death row inmates was defended by a lawyer who has been disciplined, suspended, or disbarred. Today in America, there are people awaiting execution whose lawyers slept through parts of their trials. This is unjust, shocking and unacceptable.

The other argument I have heard against our bill goes something like this. "Maybe some states could do a better job providing counsel for indigent defendants. Maybe some states do skimp on funding. Maybe this has resulted in a few innocent people being sentenced to death here and there. But that is no reason for the Congress to get involved."

In fact, it is a reason for Congress to get involved. I would go farther than that. I think that we have a duty to get involved—to try to contain the crisis—before an innocent person is put to death.

Congress has a duty to get involved because the crisis is national in scope. Since 1973, 96 people who were sentenced to death have been exonerated—one for every seven or eight who have been executed. These 96 exonerations span 22 different states, which is a substantial majority of the states that have the death penalty.

In Illinois, the Republican governor imposed a moratorium on executions because of the state's dismal record of sending innocent people to death row. But this is not just an "Illinois problem" or a "Texas problem." This is a national problem.

It is a problem that calls into question the legitimacy of criminal convictions and undermines public confidence in the integrity of the criminal justice system as a whole. If mistakes occur when a life is at stake, what happens when the crimes and penalties are less severe? Witnesses, juries and judges become more skeptical about how well the police and prosecutors are doing their jobs. That skepticism makes their jobs harder.

We must also remember that when all innocent person is put in prison, then the person who committed the crime stays free. In 1955. Rolando Cruz and Alejandro Hernandez were wrongly convicted and sentenced to death for the murder of a 10-year-old girl. DNA tests ultimately linked another man to the little girl's death, but only after he had committed another murder.

This is a national problem, and as a nation, we need to step up to the plate and deal with it.

The question is not whether Congress should act, but when. Last year, we passed the Paul Coverdell National Forensic Sciences Improvement Act. I was proud to cosponsor this bipartisan legislation, which aims to improve the quality and credibility of our nation's crime labs. Many of us are still working to fully fund this new law.

When the Senate took up the Paul Coverdell bill, I proposed a Sense of Congress amendment, which the Senate adopted. In it, we resolved to work with the states to improve the quality of legal representation in capital cases through the establishment of counsel standards.

Congress has already gone on record in recognizing what has to be done. Now it is time to do it.

Chairman LEAHY. Senator Hatch, would you like to speak now or break for the vote? It is your call.

Senator HATCH. Why don't I see if I can get through what I would like to get through and then we will go vote?

Chairman LEAHY. Fine.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. Good morning to everybody who is here. Before I begin, I would just like to say how much I appreciate the chairman's leadership on this important issue. He has worked tirelessly both in the Senate and in the media to raise public awareness on this important topic and I want to commend him for his hard work.

The death penalty is an issue that engenders great passion both among its supporters and among its opponents. There are those among us who sincerely believe that the power of the state simply should never, under any circumstances, be used to put someone to death. There are others who believe that some crimes are simply so heinous, so evil, that there is no punishment short of death that will adequately express the outrage of society at the perpetrator of such a crime.

Each of us must make our own decision on this issue. It is a matter of personal conscience. There can be no question, however, that the imposition of the death penalty is an awesome power. And with that awesome power comes a solemn responsibility, a responsibility to ensure that the death penalty is imposed only on those criminals who are truly guilty of these horrible crimes, and only on those criminals who have the benefit of all the procedural protections provided by our centuries-old system of justice.

In this vein, I believe it is important to acknowledge the study that was recently completed by the United States Department of Justice, which revealed no racial bias in the administration of the death penalty by the Federal Government.

That important study, which found that a minority defendant was actually slightly less likely to be subject to the death penalty when facing a capital charge, has helped to alleviate the concern that the death penalty is being implemented in a racially biased fashion. The study reaffirmed the preliminary conclusion reached late last year by Janet Reno's Justice Department.

The concern that is the subject of today's hearing is equally important: whether capital defendants are being systematically deprived of their right to competent counsel. Obviously, we can only have confidence in our criminal justice system if every defendant, whether they are charged with a capital crime or even a simple misdemeanor, has the benefit of representation by an able attorney.

Today's hearing is not about whether defendants charged with capital crimes are entitled to competent counsel. The right to a competent attorney is already guaranteed by the Sixth Amendment to the United States Constitution and by innumerable decisions of our own U.S. Supreme Court.

A defendant who does not feel that he has received adequate legal representation has numerous avenues of relief. The defendant may raise his concern to the trial judge prior to or after the trial. If convicted, the defendant may raise on appeal a claim of ineffective assistance of counsel. If his appeal is denied, the defendant may challenge his conviction in Federal court on a writ of habeas corpus. If the writ is denied, the defendant may appeal that decision, and if that appeal is denied, the defendant may bring his case all the way to the U.S. Supreme Court.

Thus, at an absolute minimum, a defendant has an opportunity to persuade five different courts that he has received ineffective assistance of counsel. Five different courts have an obligation of ensuring that the defendant's attorney has provided competent representation.

Is the system working? Some would say that it is not. Such people point to several highly publicized instances in which a capital

defendant has not received the effective assistance of counsel. We have all heard the horror stories of the attorney who fell asleep during his client's trial and the attorney who showed up for trial intoxicated.

Some opponents of the death penalty seek to portray these stories as par for the course. This view ignores the hundreds, if not thousands, of capital cases in which no flaw was found in the quality of the legal representation. It also ignores the hundreds of capital cases in which defendants were either acquitted or sentenced to a penalty less than death due at least in part to the vigorous efforts of their able attorneys.

Far more often than not, a capital defendant is represented by multiple outstanding attorneys. Some of this Nation's finest legal talent is attracted to the challenging, high-stakes arena of capital case defense. As several of today's witnesses will testify, the prosecution team in a capital case often finds itself overwhelmed by defense teams funded by a combination of public and private sources.

More importantly, what opponents of the death penalty would have us ignore is that those defendants represented by sleeping or intoxicated attorneys, or attorneys who fall below the level of acceptable lawyering for whatever reason, routinely have their convictions overturned either on appeal or on habeas corpus review.

Make no mistake, it is completely unacceptable for any criminal defendant to be represented by a sleeping or intoxicated or incompetent attorney. But as unfortunate as these rare cases are, they do demonstrate unequivocally that the appellate system and our system for habeas review remain robust and entirely capable of identifying and rectifying instances of deficient legal representation. The examples that the distinguished Senator from Vermont has shown are all examples of horrible situations. There is no question about that, and they should not have occurred.

Currently, each of the States that chooses to implement the death penalty has different qualifications for attorneys assigned to represent defendants in capital cases. This makes sense, given the different number of criminal lawyers in various jurisdictions, the different frequency that the death penalty is sought from State to State, and the differing systems that the States have established for assigning lawyers to indigent defendants.

Obviously, a rural jurisdiction with few lawyers in a State that requests the death penalty relatively infrequently will have different requirements for capital case attorneys than those of an urban jurisdiction with many criminal lawyers in a State that seeks the death penalty more often.

The legislation that is the subject of this hearing would seek to paper over the differences between the States and create a one-size-fits-all national standard for capital case attorneys. If I believed this was a good idea, and I do not, I cannot see how it would address the supposed problems in capital case representation that are trumpeted by the opponents of the death penalty.

No legislative scheme we enact will be able to predict prior to trial whether a particular lawyer will asleep during trial or whether he or she will develop a problem with alcoholism. That is why our current system is designed the way it is, to evaluate after the

trial whether a lawyer has provided competent representation to his or her client.

Capital representation standards already exist in nearly every State that has implemented the death penalty. There has been a recent movement in many States to make such standards more exacting, and I agree with that. Yet, incompetent attorneys still slip through the cracks, and regardless of their good intentions, capital representation standards simply cannot ensure that every defendant will receive competent representation. That assurance will continue to be provided, as it is now, by the appellate process and by the system for habeas corpus review.

My concern is that the only group likely to benefit from the legislation we are discussing today are those individuals intent on eliminating the death penalty altogether. Capital representation standards could easily be written so that many isolated jurisdictions would have no attorneys judged capable of handling death penalty cases. A system already renowned for its glacial pace would experience further massive delays as the few death-penalty-eligible attorneys are rationed out among competing jurisdictions.

Mr. Chairman, I share your concern that the innocent must be protected. It is intolerable for even one innocent person to reside on death row, much less that we ever allow an innocent person to be actually executed.

We have reached substantial agreement on some important reforms that would go a long way toward protecting the innocent. We agree that potentially exculpatory DNA testing must be provided to inmates on death row who did not have access to such testing at the time of their trial. We agree that the Nation's forensic laboratories must receive increased funding to enable them to process evidence more expeditiously, leading to exoneration for some defendants and in some cases to the arrest of the actual perpetrator.

We agree that increased funds must be provided for the treatment and prevention of drug abuse to break the cycle of addiction which underlies many of these violent crimes. And with respect to capital representation standards, I have no problem with the Federal Government providing the States with financial assistance available on a voluntary basis to ensure competent counsel at trial.

With all due respect, Mr. Chairman, I basically cannot support the provisions that are the subject of today's hearing, but I want to work with you and I want to acknowledge your outstanding leadership on this issue. We are in complete agreement as to the goal for which we must be striving that our criminal justice system operate fairly and efficiently and that no innocent person be wrongfully convicted.

While I disagree with the approach that is being debated today, I hope that we will be able to continue to work together on this important issue. So I want to thank you, Mr. Chairman.

I ask unanimous consent to submit my full written statement for the record. I want to thank you for your efforts in this regard. I fully respect them. I respect your experience in these types of cases and in prosecutions in general, and I intend to work with you to make sure that we resolve these problems in ways that bring American together and not keep us apart, and hopefully in ways that will prevent any innocent person from ever being convicted, let

alone being sentenced to death going to death under our current laws or laws in the future.

So I will work with you and will see what we can do to resolve these problems. I just think we can do better a job and I am going to do everything in my power to see that we do.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch follows:]

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Before I begin, I would just like to say how much I appreciate the Chairman's leadership on this important issue. He has worked tirelessly, both in the Senate and in the media, to raise public awareness on this important topic, and I want to commend him for his hard work.

The death penalty is an issue that engenders great passion, both among its supporters and among in its opponents. There are those among us who sincerely believe that the power of the state simply should never, under any circumstances, be used to put someone to death. There are others who believe that some crimes are simply so heinous, so evil, that there is no punishment, short of death, that will adequately express the outrage of our society at the perpetrator of such a crime.

Each of us must make our own decision on this issue as a matter of personal conscience.

There can be no question, however, that the imposition of the death penalty is an awesome power. And with that awesome power comes a solemn responsibility—a responsibility to ensure that the death penalty is imposed only on those criminals who are truly guilty of these horrible crimes, and only on those criminals who have had the benefit of all the procedural protections provided by our centuries-old system of justice.

It is incumbent on us in the federal government, as well as in the states themselves, to remain eternally vigilant to ensure that our system of administering the death penalty is completely fair and respectful of the rights of the accused.

In this vein, I believe it is important to acknowledge the study that was recently completed by the United States Department of Justice, which revealed no racial bias in the administration of the death penalty by the federal government. That important study, which found that a minority defendant was actually slightly less likely to be subject to the death penalty when facing a capital charge, has helped to alleviate the concern that death penalty is being implemented in a racially biased fashion. The study reaffirmed the preliminary conclusion reached late last year by Janet Reno's Justice Department.

The concern that is the subject of today's hearing is equally important—whether capital defendants are being systematically deprived of their right to competent counsel.

Obviously, we can only have confidence in our criminal justice system if every defendant, whether they are charged with a capital crime, or even a simple misdemeanor, has the benefit of representation by an able attorney.

Today's hearing is not about whether defendants charged with capital crimes are entitled to competent counsel. The right to a competent attorney is already guaranteed by the Sixth Amendment of the United States Constitution, and by innumerable decisions of the United States Supreme Court.

A defendant who does not feel that he has received adequate legal representation has numerous avenues of relief. The defendant may raise his concern to the trial judge prior to, or after, the trial. If convicted, the defendant may raise on appeal a claim of ineffective assistance of counsel. If his appeal is denied, the defendant may challenge his conviction in federal court on a writ of habeas corpus. If the writ is denied, the defendant may appeal that decision, and if that appeal is denied, the defendant may bring his case all the way to the United States Supreme Court.

Thus, at an absolute minimum, a defendant has an opportunity to persuade five different courts that he has received ineffective assistance of counsel. Five different courts have an obligation of ensuring that the defendant's attorney has provided competent representation.

Is the system working? Some would say that it is not. Such people point to several highly publicized instances in which a capital defendant has not received the effective assistance of counsel. We have all heard the horror stories of the attorney who fell asleep during his client's trial, and the attorney who showed up for trial intoxicated.

Some opponents of the death penalty seek to portray these stories as "par for the course." This view ignores the hundreds of capital cases in which no flaw was found in the quality of the legal representation. It also ignores the hundreds of capital cases in which defendants were either acquitted, or sentenced to a penalty less than death, due, at least in part, to the vigorous efforts of their able attorneys.

Far more often than not, a capital defendant is represented by multiple outstanding lawyers. Some of this nation's finest legal talent is attracted to the challenging, high stakes arena of capital case defense. As several of today's witnesses will testify, the prosecution team in a capital case often finds itself overwhelmed by defense teams funded by a combination of public and private sources.

More importantly, what opponents of the death penalty would have us ignore is that those defendants represented by sleeping or intoxicated attorneys—or attorneys who fall below the level of acceptable lawyering for whatever reason—routinely have their convictions overturned, either on appeal, or on habeas corpus review. Make no mistake—it is completely unacceptable for any criminal defendant to be represented by a sleeping or intoxicated attorney. But as unfortunate as these rare cases are, they do demonstrate unequivocally that the appellate system, and our system for habeas review, remain robust and entirely capable of identifying and rectifying instances of deficient legal representation.

Currently, each of the states that chooses to implement the death penalty has different qualifications for attorneys assigned to represent defendants in capital cases. This makes sense, given the differing number of criminal lawyers in various jurisdictions, the differing frequency that the death penalty is sought from state to state, and the differing systems that the states have established for assigning lawyers to indigent defendants.

Obviously, a rural jurisdiction, with few lawyers, in a state that requests the death penalty relatively infrequently, will have different requirements for capital case attorneys than those of an urban jurisdiction, with many criminal lawyers, in a state that seeks the death penalty more often.

Whatever method a state uses to appoint capital case attorneys, the standard for their performance is exactly the same from state to state. An attorney must provide effective assistance of counsel as defined by the United States Supreme Court.

The legislation that is the subject of this hearing would seek to paper over the differences between the states and to create a one-size-fits-all national standard for capital case attorneys. Even if I believed this was a good idea, and I do not, I cannot see how it would address the supposed problems in capital case representation that are trumpeted by the opponents of the death penalty.

No legislative scheme we enact will be able to predict, prior to trial, whether a particular lawyer will fall asleep during trial, or whether he will develop a problem with alcoholism. That is why our current system is designed the way that it is—to evaluate after the trial whether a lawyer has provided competent representation to his or her client.

Capital representation standards already exist in nearly every state that has implemented the death penalty. There has been a recent movement in many states to make such standards more exacting. Yet incompetent attorneys still slip through the cracks. Regardless of their good intentions, capital representation standards simply cannot ensure that every defendant will receive competent representation. That assurance will continue to be provided, as it is now, by the appellate process, and by the system for habeas corpus review.

My concern is that the only group likely to benefit from the legislation we are discussing today are those individuals intent on eliminating the death penalty altogether. Capital representation standards could easily be written so that many isolated jurisdictions would have no attorneys judged capable of handling death penalty cases.

A system already renowned for its glacial pace would experience further massive delays as the few death-penalty-eligible attorneys are rationed out among competing jurisdictions.

As I said at the beginning of this statement, the death penalty is a subject that engenders great passion. Although a substantial majority of the American public remains solidly in favor of the death penalty, there is a vocal minority that is passionately opposed to the imposition of the death penalty under any circumstances.

I fear that the adoption of national capital representation standards, although undoubtedly well-intentioned, would provide a mechanism for those who would thwart the will of the majority of American citizens, and achieve what the minority failed to achieve at the ballot box—the complete evisceration of the death penalty.

While it is true that a small proportion of capital defendants do not currently receive effective assistance of counsel, it is also true that in these rare cases, the convictions do not withstand appellate and collateral review. If national capital rep-

resentation standards are established, the situation will not be changed—there will still be a small proportion of capital defendants who do not receive effective assistance of counsel. What will be changed, is that opponents of the death penalty will be handed yet another procedural tool with which to manufacture delay.

Mr. Chairman, I share your concern that the innocent must be protected. It is intolerable for even one innocent person to reside on death row, much less, God forbid, that an innocent person ever be executed.

We have reached substantial agreement on some important reforms that would go a long way towards protecting the innocent. We agree that potentially exculpatory DNA testing must be provided to inmates on death row who did not have access to such testing at the time of their trial. We agree that the nation's forensic laboratories must receive increased funding to enable them to process evidence more expeditiously, leading to exoneration for some defendants and, in some cases, to the arrest of the actual perpetrator. We agree that increased funds must be provided for the treatment and prevention of drug abuse, to break the cycle of addiction which underlies many of these violent crimes. And with respect to capital representation standards, I have no problem with the federal government providing the states with financial assistance, available on a voluntary basis, to ensure competent counsel at trial.

With all due respect, Mr. Chairman, I cannot support the provisions that are the subject of today's hearing. The provisions are harmful to the efficient administration of justice; they are harmful to the rights of the states to order their own affairs; and above all, they are harmful to the victims, and their families, who are entitled to a fair and speedy justice being meted out to the perpetrators of these heinous crimes.

Mr. Chairman, I want again to acknowledge your outstanding leadership on this issue. We are in complete agreement as to the goal for which we must be striving: that our criminal justice system operate fairly and efficiently, and that no innocent person be wrongfully convicted. I hope that we will be able to continue to work together on this important issue.

Chairman LEAHY. Well, I thank the Senator from Utah. He and I have worked closely together for over 20 years on many different issues and I am sure we will continue to work together on this one. I also thank him for bringing members of his family here today.

We are going to recess for about 10 minutes while Senator Hatch and I go to vote, and then we will be back and resume the hearing.

[The committee stood in recess from 10:49 a.m. to 11:15 a.m.]

Chairman LEAHY. Senator Hatch is on his way back. I just checked, and we will start. I see Senator Sessions, of Alabama, is here, and we will begin with the Attorney General of Alabama, William Pryor.

We will give 5 minutes to each of the witnesses. They will be able to put their full statements in the record. When Senators get the record back, they understand that you will be able to expand it. You will all have a chance to see your transcript. If you find that there is something you want to add or detract from your statement, feel free.

Attorney General Pryor?

STATEMENT OF HON. WILLIAM H. PRYOR, JR., ATTORNEY GENERAL, STATE OF ALABAMA, MONTGOMERY, ALABAMA

Mr. PRYOR. Thank you, Mr. Chairman and members of the committee, Senator Sessions. Thank you for inviting me to comment on the problems posed by S. 486, which has been referred to as the Innocence Protection Act of 2001.

As the Attorney General of Alabama, my office defends the death sentences in capital murder cases and all direct appeals, State post-conviction proceedings, and Federal habeas corpus proceedings. My office also occasionally prosecutes capital murder charges at the trial level.

In my 4 1/2 years as Attorney General, 10 capital murders have been executed, after pursuing an average of 16 years and 5 months of appeals and other post-conviction proceedings. Our process is much longer and involves more levels of review than the relatively speedy execution of Timothy McVeigh.

My concerns about the legislation before you are that it would lengthen and complicate an already byzantine system, create perverse incentives for the criminal justice systems of each State, and harm the real innocents in this process. The real innocents, of course, are the families of victims of capital murderers and the future victims of those murderers who either escape justice or are not deterred by a system that fails to punish swiftly and adequately the most heinous crimes in our society.

If your concern is to protect the innocent from being executed, then you need not worry. It is not occurring and it is highly unlikely to occur. As Professor Paul Cassell of the University of Utah School of Law has stated, "The death penalty system in America is the most accurate criminal sanction in the world."

Consider first how this legislation would cause unreasonable delays and complications. Section 201 would shift the appointment of defense lawyers in capital cases from the independent judges of the State to a so-called independent appointing authority. The evaluation of fitness to practice as defense counsel in capital cases would shift from the State bar and courts to the independent appointing authority.

I am concerned that this authority might be captured and staffed by attorneys who favor the abolition of capital punishment and therefore are not independent. It is unreasonable and contrary to basic constitutional principles of federalism to expect that an independent authority would be more objective, balanced and diligent than the judges of the State courts who now appoint counsel in capital cases. Judges are independent. For that matter, so are prosecutors whose ethical duty, in contrast with the defense attorneys, is to pursue truth and justice.

A group of anti-death penalty lawyers would have many incentives to set the performance standards and qualifications of attorneys on their roster unreasonably high so that few lawyers would be placed on the roster. This perverse incentive would then mean that indigents who face capital murder charges would not have competent counsel for trial. The system created by this legislation could become a self-fulfilling prophecy where capital murder trials come to an abrupt end because of an alleged lack of competent counsel.

Moreover, this legislation could empower attorneys who favor the abolition of capital punishment to inflict real harm on the corrections system of each State. Under the guise of serving as the independent appointing authority, these attorneys could ensure that each State that administers capital punishment fails to meet the standards set by the attorneys, and as a result the State loses Federal funds for prisons.

States that desire to forgo the burdens of this legislation would also have to forgo the benefits of Federal funds for the prisons of that State, which many States would do, to the detriment of inmates, the vast majority of whom are not on death row, and vic-

tims of criminals who could be released from prison. In my State, the amount of Federal funds at stake this year is over $1.3 million.

Finally, this legislation would create incentives for States to abolish post-conviction proceedings for capital murderers. Currently, under the Anti-Terrorism and Effective Death Penalty Act of 1996, States with post-conviction proceedings receive deference for the determinations made by their courts in respect of fundamental principles of federalism.

By removing the benefits of AEDPA, this legislation would offer the States no incentive to maintain post-conviction proceedings, which are not required by the U.S. Constitution. With the elimination of these proceedings after a trial and direct appeal, an inmate on death row would have access only to Federal courts and habeas corpus proceedings as a process for review of his death sentence. This disincentive for access to State post-conviction proceedings runs directly contrary to the entire purpose and rationale for AEDPA.

In 1996, Congress wisely concluded that the Federal process for review of death sentences should accord deference to State courts and be streamlined to make capital punishment a more effective deterrent of heinous crimes and a better system of justice for the innocent families of victims of capital murder.

I have also made available to you today for filing with my statement my written remarks that I gave last year to the Board of Bar Commissioners of the Alabama State Bar to defend our system of capital punishment against charges of unfairness and the alleged risk of executing an innocent person.

I want to thank you again for this opportunity on this most important issue. I look forward to answering any questions you have about the matter.

[The prepared statement and an attachment of Mr. Pryor follow:]

STATEMENT OF HON. BILL PRYOR, ATTORNEY GENERAL OF THE STATE OF ALABAMA

Mr. Chairman and Members of the Committee:

Thank you for inviting me to comment on the problems posed by S. 486, which has been referred to as the Innocence Protection Act of 2001. As the Attorney General of Alabama, my office defends the death sentences in capital murder cases in all direct appeals, state post-conviction proceedings, and federal habeas corpus proceedings. My office also occasionally prosecutes capital murder charges at the trial level. In my four and a half years as attorney general, ten capital murderers have been executed after pursuing an average of 16 years and 5 months of appeals and other post-conviction proceedings. Our process is much longer and involves more levels of review than the relatively speedy execution of Timothy McVeigh.

My concerns about the legislation before you are that it would lengthen and complicate an already Byzantine system, create perverse incentives for the criminal justice systems of each state, and harm the real innocents in this process. The real innocents, of course, are the families of victims of capital murderers and the future victims of those murderers who either escape justice or are not deterred by a system that fails to punish swiftly and adequately the most heinous crimes in our society. If your concern is to protect the innocent from being executed, then you need not worry; it is not occurring and is highly unlikely to occur. As Professor Paul Cassell of the University of Utah School of Law has stated, "The death penalty system in America is the most accurate criminal sanction in the world." Marcia Coyle, 66% Error Rate Found In Death Case Study: Author Calls Serious Problems "Epidemic," Nat' L.J., June 19, 2000, at A1 (col.2).

Consider first how this legislation would cause unreasonable delays and complications. Section 201 would shift the appointment of defense lawyers in capital cases from the independent judges of the state to a so-called independent appointing authority. The evaluation of fitness to practice as defense counsel in capital cases

would shift from the State Bar and courts to the independent appointing authority. I am concerned that this authority might be captured and staffed by attorneys who favor the abolition of capital punishment and, therefore, are not independent.

It is unreasonable and contrary to basic constitutional principles of federalism to expect that an independent authority would be more objective, balanced, and diligent than the judges of the state courts who now appoint counsel in capital cases. Judges are independent. For that matter, so are prosecutors whose ethical duty, in contrast with defense attorneys, is to pursue the truth and justice. A group of anti-death penalty lawyers would have many incentives to set the performance standards and qualifications of attorneys on their roster unreasonably high so that few lawyers would be placed on their roster. This perverse incentive would then mean that indigents who face capital murder charges would not have competent counsel for trial. The system created by this legislation could become a self-fulfilling prophecy where capital murder trials come to an abrupt end because of an alleged lack of competent counsel.

Moreover, this legislation could empower attorneys who favor the abolition of capital punishment to inflict real harm on the corrections system of each state. Under the guise of serving as the independent appointing authority, these attorneys could ensure that each state that administers capital punishment fails to meet the standards set by the attorneys and, as a result, the state loses federal funds for its prisons. States that desire to forego the burdens of this legislation would also have to forego the benefits of federal funds for the prisons of that state, which many states would do to the detriment of inmates, the vast majority of whom are not on death row, and victims of criminals who could be released from prison. In my state, the amount of federal funds at stake this year is $1,389,635.

Finally, this legislation would create incentives for states to abolish post-conviction proceedings for capital murderers. Currently, under the Anti-Terrorism and Effective Death Penalty Act of 1996, states with post-conviction proceedings receive deference for the determinations made by their courts in respect of fundamental principles of federalism. By removing the benefits of AEDPA, this legislation would offer the states no incentive to maintain post-conviction proceedings, which are not required by the U.S. Constitution. With the elimination of these proceedings, after a trial and direct appeal, an inmate on death row would have access only to federal courts in habeas corpus proceedings as a process for review of his death sentence. This disincentive for access to state post-conviction proceedings runs directly contrary to the entire purpose and rationale for AEDPA. In 1996, Congress wisely concluded that the federal process for review of death sentences should accord deference to state courts and be streamlined to make capital punishment a more effective deterrent of heinous crimes and a better system of justice for the innocent families of victims of capital murder.

The entire rationale for the competency requirements in this legislation is flawed. After many years of review, capital murderers are executed because they are guilty, not because their counsel is incompetent. Take, for example, in my state, the case of Phillip Wayne Tomlin, who last year was tried by prosecutors in my office, convicted, and sentenced to death for the fourth time for the murders of 19 year old Ricky Brune and 15 year old Cheryl Moore on January 1, 1977. None of the reversals of his first three convictions was related to competency of defense counsel. He received a death sentence for the fourth time even though he was represented by Stephen Bright, who is testifying today because of his expertise as a defense lawyer and opponent of capital punishment.

I will also make available to you written remarks that I gave last year to the Board of Bar Commissioners of the Alabama State Bar to defend our system of capital punishment against charges of unfairness and the alleged risk of executing an innocent person.

Thank you again for this opportunity and I look forward to answering any questions you may have about this matter.

ADDITIONAL STATEMENT OF HON. BILL PRYOR, ATTORNEY GENERAL OF THE STATE OF ALABAMA

President Rumore, members of the Executive Committee, and Commissioners, I appreciate this opportunity to speak to you today regarding a proposed death penalty moratorium in this State. The death penalty has the support of a majority of Americans and a large majority of Alabamians. Depending on which poll you view,

the death penalty in this state is supported by anywhere from 65% to 80% of our State's citizens.

The public support for the death penalty is for good reason. The statistics kept by the FBI show that there is a strong correlation between murder rates and capital punishment. When these statistics are graphed, a trend is reflected showing that when executions go up, murder rates go down and vice versa. A graph reflecting this trend is included in a handout my office has prepared for you which will be available after my remarks. Even if you don't believe statistics, because—as the saying goes—figures lie and liars figure, it is still clear that the death penalty has overwhelming public support for good reason. As Professor McAdams of Marquette University put it:

"If we execute murderers and there is in fact no deterrent effect, we have killed a bunch of murderers. If we fail to execute murderers, and doing so would, in fact, have deterred other murders, we have allowed the killing of a bunch of innocent victims. I would much rather risk the former. This, to me, is not a tough call."

The truth of this statement is irrefutable and opponents of the death penalty know it. That is why the attack on the death penalty no longer focuses on its deterrent effect, but instead focuses on the alleged risk that we will execute an innocent person or that we have executed an innocent person. Make no mistake about it, the death penalty moratorium movement is headed by an activist minority with little concern for what is really going on in our criminal justice system. You need look no further than the origin of this moratorium movement to see that. This movement started in the American Bar Association, from which I resigned eleven years ago. The moratorium issue was placed before the ABA's House of Delegates not by the Criminal Justice Section, but by the ABA's Section on Individual Rights and Responsibilities.

The Criminal Justice Section of the ABA is defense-oriented. A study on the ABA's Criminal Justice views, written by a board composed of former U.S. Attorney General Edwin Meese, former U.S. Attorney General Richard Thornburgh, and the Attorneys General of Idaho, California, and Colorado examined how defense-oriented the ABA' Criminal Justice Section is. They found that between 1994 and 1996, 11 of the 15 positions taken before Congress through the CJS's lobbying were defense-oriented. The remaining 4 issues were neutral, such as gun control where prosecutors and defense attorneys can agree without regard to their positions in our legal system. The defense-oriented positions included favoring the de novo review of state court decisions in habeas corpus, and abolishing, through legislation, exceptions to the exclusionary rule established by U.S. Supreme Court precedent. The study also found that of 20 articles between the spring to 1995 and winter of 1997 in the CJS's publication, 11 articles took defense-oriented positions, 3 too a prosecutor's side, and the remaining articles were neutral. The various amicus curiae briefs filed by the CJS with the U.S. Supreme Court on the behalf of the ABA also Section of the ABA.

The revealing factor, however, is that despite its defense-orientation, the Criminal Justice Section did not report the moratorium issue to the House of Delegates. Instead, the even more liberal Section on Individual Rights and Responsibilities did. One need only look at the ABA's proposal to see how liberal its moratorium proposal is.

The proposal is to adopt a moratorium until certain standards can be imposed to ensure fairness in the system. Insuring fairness in the system would involve the following:

1) the ABA would not allow experienced capital appellate attorneys to represent capital defendants at trial, even as second chair. Attorneys experienced in trying capital cases at the federal habeas corpus level would also be excluded from representing defendants in state trials, even as second chair.

2) Even more revealing is that, under the ABA's plan, former prosecutors who have tried capital cases for years would be barred from representing capital de3fendants in state trials, even as second chair, because the lack the necessary "defense" experience. Again, this is one of the many areas where the ABA is consistently anti-prosecution in its views.

3) Under the ABA moratorium proposal, the procedural bars enacted by Congress and our legislature would not be recognized in habeas proceedings. Never mind the will of the people as expressed through their elected representatives. The public supported these actions, such as the Anti-terrorism and Effective Death Penalty Act, which made federal habeas corpus proceedings more efficient and reflected the constitutional principles that our State courts are able to address constitutional claims as well as,

if not better than, federal courts, something the Section on Individual Rights and Responsibilities deliberately ignores.

4) the ABA moratorium proposal rejects the presumption of correctness of state court findings of fact under the AEDPA.

Before I return to why the proposed moratorium is not needed in Alabama, allow me to offer you one lesson the ABA is learning the hard way. The ABA has always billed itself as the representative of the nation's lawyers. In the past 20 years, however, the ABA has started taking more and more politicized views, and as I mentioned earlier, has started supporting more and more criminal defense-oriented and liberal positions. Today, there are an estimated 900,000 to 1,000,000 lawyers in the United States. Of that number, the ABA says it represents approximately 400,000, or less than 50%. Of that number, many are first-year lawyers taking advantage of the ABA's free year of membership.

In 1991–1992 the ABA;s retention rate was 92%. By 1995–1996, the retention rate had fallen to 83.9%. The ABA's decision to take on political issues that have nothing to do with advancing the legal profession has resulted in its decline. This year, there are reports that the ABA lost money on its annual conference. The ABA is losing members because it is turning into a political action committee. Although you might think to yourself that membership in this organization is mandatory, so the Alabama State Bar cannot suffer the same fate, that is not true. The decision that this body makes COULD deprive this organization of its status as an integrated bar, but I will explain that later.

Recently, a report from Columbia University written by a liberal professor named James Liebman has been touted as proof that our system is broken and that we run the great risk of an innocent person being executed. Overlooking, for the moment, that the study's conclusion is a non sequitur, there are several problems with this study. First this study is skewed because it covers the time period in which *Beck* v. *Alabama* was decided by the United States Supreme Court, resulting in 48 reversals in Alabama, without covering the past five, practically flawless, years. The *Beck* decision, for those of you unfamiliar with Alabama's capital system, invalidated Alabama's entire capital statute in 1980. The study covers the *Beck* period yet it stops in 1995, although Alabama's error rate in the past 5 years is less than 5%. These are concerns about the validity and motivation of the study, but they are not even the most glaring irregularities.

I am sure all of you are familiar with the United States Supreme Court's *Daubert* analysis, used for determining the admissibility of scientific evidence at a trial. One of the *Daubert* factors is whether the expert's methodology has been subjected to peer-review. If you apply that test to the Liebman study, you will find that the study does not define "error rate." If you call Liebman, he cannot tell you what he used as the basis for qualifying something as "error." He cannot supply you with a list of the names of all of the cases he considered. He cannot prove to you that he examined every case in Alabama where the death penalty was imposed. Liebman cannot give you a baseline of non-capital cases with which to compare his error rate.

Finally, Liebman cannot defend his conclusion that the high error rate he found—even if he could prove it was accurate—means that there is a risk of an innocent person being executed, as opposed to being evidence that the Alabama judiciary is doing a fine job of giving these cases serious review.

The Liebman study is more evidence of the ideological nature of this issue. if there is a high error rate—presumably meaning a high number of reversals or other corrective actions by appellate courts at the State and federal level—the anti-death penalty movement argues that there is a high level of risk that an innocent person will be executed. If there is a low error rate, the argument then becomes that the reviewing courts are simply "rubber stamping" these cases and they are not receiving meaningful review. You cannot have it both ways, however.

In the spirit of "put up or shut up," I am going to put up. I have brought with me today handouts for each of you. In these handouts you will find the procedural histories of the 281 cases in which the death penalty has been imposed since 1975. To the best of my office's knowledge, this represents all of the cases. You can review these cases for yourself and decide if the 80% error rate cited by Liebman is illustrative of the fact that his study is propaganda or if you think he was right. In any case, the State of Alabama is doing what the author of this study cannot or will not do; we are giving you the information from which our opinion has been reached.

Our list reveals 281 individuals sentenced to death since 1975. Our first important statistic is that our error rate, the number of innocent people executed by the State of Alabama is 0%. Because there are no cases of actual innocence, we must turn to the more practical outcome-based analysis. Of the 281cases, 23 people have been executed. Another 180 of those cases represent active cases that my office is currently involved in. Because they are active, meaning still moving towards an exe-

cution date, it cannot be said that there is error in those cases. Of those 180 cases, we are awaiting execution dates from the Alabama Supreme Court on 2 of the cases. Another 10 individuals have died while on death row. One person's sentence was commuted by the Governor FOB James. Four people settled their cases for sentences less than death.

Of all of these cases, no court found error resulting in the reversal of the conviction or sentence. Thus, there can be no legal error cited as to these cases. That leaves, of the original 281 cases, 63 cases. Even if the remaining 63 cases were legally flawed, the resulting error rate would still only be 22.4%.

But of the remaining 63 cases, we know that 47 of them received a sentence of less than death. Most of these sentences were life without parole or life, or in the case of Dudley Wayne Kyzer, a 10,000-year sentence. Thus, the error was not with the guilt or innocence of the individual, but involved sentencing. Defining these cases as error would be understandable. The risk of executing an innocent person, however, is not increased by having a death sentence later decreased to 10,000 years, or life without parole, if the inmate is guilty. Thus, these cases should be subtracted from the remaining 63 cases to which I referred earlier. This leaves 16 cases. Our "error rate" when we are left with 16 problematic cases after we started with 281 cases is 6%, if you round the number up. Of those 16 cases, 8 are awaiting new trails. If any of these 8 cases are retired and a new death sentence is imposed, there is arguable no error. If history is any guide, and I will get to this in a moment, at least 4 of these cases will result in a new death sentence. Using history as a guide, at least 7 of these 8 cases will be retried and will result in death or life in prison without parole.

Thus, the number of cases where it can be said there is error can probably be decreased to about 10 of the original 281 cases. That results in an error rate of 4%, if you round the numbers up.

There are eight cases that are unaccounted for. We do not know what happened after they were reversed. Of these 8 cases, 5 were *Beck* reversals from the 1980–1981 time period, which is why they are difficult to track. Another case is twenty-one years old and involved a fatal variance between the indictment and the jury's verdict, which is why is was difficult to find any records documenting the ultimate disposition of this case.

Even if you do not look at individual cases and outcomes, and instead rely on reversals by higher courts, the Liebman study is inaccurate. First, it would not be wise to base a study on the number of times an appellate court reverses a particular defendant's case. There are several persons who have been executed whose cases had been reversed and then were re-sentenced to death. The reversal had nothing to do with the person's guilt or innocence. The risk of executing an innocent person, if you recall, is the reason the Liebman study's error rate was considered so important. Phillip Wayne Tomlin, for example, has been tried and convicted of capital murder and sentenced to death 4 times. The total number or reversals, then, is not persuasive evidence of a problem in our system. If we executed Phillip Wayne Tomlin tomorrow after 4 trials, four guilty verdicts, and four death sentences, the risk of executing an innocent person would be minimal, though Liebman's study asks you to assume otherwise. To be fair, I will also discuss what my office has discovered in regard to the overall number of reversals.

Our findings are that there have been 136 reversals of cases since 1975. Of that number, 24 of those sentences were later reinstated by a higher appellate court, reducing the total number of actual reversals to 112. Of the 112 reversals, 46 of the cases were re-sentenced to death. Another 47 were sentenced to a punishment less severe than death, ordinarily life without parole. Another 8 cases are awaiting new trials, so they cannot be included in determining the percentage of cases that are later re-sentenced to death. Another 47 were sentenced to a punishment less severe than death, ordinarily life without parole. Another 8 cases are awaiting new trials, so they cannot be included in determining the percentage of cases that are later re-sentenced to death or less than death. That leaves a total of 104 reversals. Of 104 reversals, 89% of the reversals later resulted in the new death sentences or sentences of less than death.

Interestingly, of the 136 overall reversals, 48 were the result of the United States Supreme Court's *Beck* decision. That is 35.3%.That is why the starting date of 1975 and cut-off date of 1995 skewed Liebman's study and reflects the bias behind the study. Another 9 of those reversals were due to *Batson* violations, which have absolutely nothing to do with the defendant's guilt or innocence. An additional 36 reversals were as to the defendant's sentence only. Again, this shows that the reversals had noting to do with the defendant's guilt or innocence. These 45 reversals make up 33% of the total number of reversals.

If anyone still believes that the overall number of reversals is relevant, then there is a final statistic to consider. Of the 281 cases mentioned, we have compiled record of 1145 instances of review by courts. This compilation does not include ordered remands where the court does not undertake a review of the case. This compilation also does not count the pending reviews in courts at both the federal and state levels. This compilation includes only reviews where the courts were presented with an opportunity to reverse the sentence of conviction of an inmate. Finding error in 136 of these 1145 reviews would mean out error rate is approximately 11.9% If you discount the reversals that were later reversed by a higher court, using the 112 actual reversals, our error rate in those 1145 instances of judicial review falls to 9.8%.

The bottom line is this: If you look at the persons who have been sentenced to death and what has happened in each of their cases, you will see that the system in Alabama is not flawed but is working. In fact, it is getting better.

1. Attorneys at the trial level are paid $60/hour in court and $40/hour out-of-court on these cases, plus overhead. With overhead, the hourly rate easily exceeds $100 per hour. There is not cap on these fees.

2. The law in Alabama guarantees you an attorney with five years criminal trial experience if you are appointed an attorney.

3. Death row inmates are routinely represented in post-conviction proceedings by the top law firms in the nation, including Wall Street law firms.

Jimmy Davis, for example, is represented by the law of Chadbourne and Parke, LLP. This is a law firm with offices in New York, Los Angeles, Washington, DC., Hong Kong, Moscow, and London. This law firm has over 2000 attorneys. In addition to Chadbourne and Parke, Davis is also represented by Foley and Lardner, a Law firm with offices in Brussels, Chicago, Los Angeles, Washington, D.C., San Francisco, San Diego, Sacramento, Tampa, and West Palm Beach. Foloey and larder employs over 750 attorneys. Another inmate, Joseph Hooks is represented by Palmer & Dodge. This law firm in Chicago employs more then 190 lawyers. Another inmate, Christopher Less Price, is represented by Ropes & Gray. This law firm over 325 attorneys has offices in Boston, Providence and Washington, D.C.

These are not isolated cases. Huge corporate, high-powered law firms get involved in a majority of these cases. You, the State Bar, review and retain the pro hac vice requests on these case. Look them up and see what is happening in these cases. You can easily see that these inmates are well represented at all levels of review. Most of us in this room could not afford to pay these to do work for use, yet our death row inmates get representation from them. The system is working.

4. One Large, out-of-state law firm recently spent $100,000 solely to investigate an inmate's claims for a Rule 32 proceeding.

5. A majority of the death row inmates in Alabama are represented by Bryan Stevenson's organization, the Equal Justice Initiative. Stevenson was recently named one of the top 100 lawyers in the Nation by the National Law Journal. Additionally Stevenson has been named the public interest Lawyer of the Year, has been awarder the ABA Wisdom Award for Public Service, the Thurgood Marshall Medal of Justice, and the ACLU Medal of Liberty.Those who are not represented by Stevenson or his organization are represented by lawyers, found by Mr. Stevenson, who rely heavily on his expertise. I understand that you have heard already a presentation by Mr. Stevenson, Who is an able and articulate supporter of abolishing capital punishment.

6. Many Alabama death row inmates are also represented, at some point, by Stephen Bright and his organization, the Southern Center for Human Rights. In *Williams* v. *Head*, 185 F.3d 1223 (11th Cir. 1999), the Eleventh Circuit had this to say about Stephen Bright, singling him out in the opinion of the court:

> Mr. Bright is a nationally known expert who has been litigating against the death penalty for twenty years. He has taught on that and related subjects at Harvard, Yale, Georgetown, Emory and other universities, has written numerous law review articles on the subject, and has testified extensively about it before committees of Congress and many state legislatures. For his efforts and dedication, Mr. Bright was awarded the Roger Baldwin Medal of Liberty by the American Civil Liberties Union in 1991, the Kutak-Dodds Prize by the National Legal Aid & Defenders Association in 1992, and last year he received both the American Bar Association's Thurgood Marshall award and the Louis Brandeis Medal given by the Brandeis Scholars at Brandeis School of Law at the University of Louisville.

7. Death row inmates are given at least 10 opportunities to present their claims to Alabama and federal courts after a death sentence is imposed.

8. Governor Siegelman has offered to grant DNA testing for any inmate for whom the test could be determinative of guilt or innocence. May office will not deny DNA

test to any inmate who presents a valid claim of innocence, if they present the claim in a timely manner, not on the eve of execution.

9. In case reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court, oral argument is granted usually as a matter of right. I have an attorney in my division who has been in practice for 1 year who has argued in the Alabama Supreme Court 3 times and the Court of Criminal Appeals 11 times. How many of you know lawyers who have had oral arguments granted in non-capital cases that many times in their careers, let alone in one year of practice?

10. Although the trend in Alabama is for Rule 32 petitions in non-capital cases to be dismissed or denied without an evidentiary hearing, capital cases often involve evidentiary hearings that last from 2 days up to a week in length. That is longer than many non-capital trials in this State.

11. Although non-capital cases are bound by the "contemporaneous objection" rule requiring lawyers to preserve error for appellate review, in Alabama we allow courts to notice any plain error at any stage of the direct appeal proceedings. BY law, we require the Court of Criminal Appeals to search the record for error, even if the error was not preserved by the defendant.

12. Earlier this year, the Supreme Court of Alabama unanimously adopted a change in Rule 39 of the Rules and Appellate Procedure that I and Governor Siegelman proposed to streamline appeals of death sentences, which have received more scrutiny in Alabama than in any other state. The Supreme Court obviously believe the system is working.

There is no crisis or problem in our capital system. We do not need a moratorium to fix the system, because the system is not broken. This brings me to my final point.

Keeping in the tradition of saving the best for last, here is the best reason why you should not get involved with the moratorium issue: *Keller* v. *State Bar of California*, 496 U.S. 1 (1990).

Should you choose to move this organization away from its purpose of regulating the legal profession and into the realm of taking political and ideological positions on issues, you invite a legal challenge to the status of our Alabama State Bar as an integrated bar. The decision to take an ideological position will invite a federal lawsuit challenging the use of compelled dues to finance this organization, which would be departing from its purpose.

Even to invite an unsuccessful *Keller* challenge would cause hardship to this group. According to *Keller*, a challenge would require placing the challenging members' dues into an escrow account while an accounting is given. If successful, the challenge would result in the loss of those dues.

Consider the question left unresolved by *Keller*: Can an integrated bar be totally disbanded based on freedom of association grounds? In my office there are 10 attorneys who prosecute the 180 cases currently moving towards execution of their sentences. In addition, there are dozens of district attorneys and their hundreds of assistants who regularly integrated bar be totally disbanded based on freedom of association grounds? In my office there are 10 attorneys who persecute the 180 cases currently moving towards execution of their sentences. In addition, there are dozens of district attorneys and their hundreds of assistants who regularly try these capital murder cases. If the Bar adopts the proposed resultion in favor of a moratorium, you will declare that you believe the system is flawed and that we run a grave risk of executing an innocent person. That declaration would imply that you believe that the district attorneys, their assistants, my assistant attorneys general and I would violate our duty to see justice done if we sought to allowed an execution to proceed. You cannot expect the prosecutors of Alabama to be forced to join an organization that impugns our integrity. You will invite a challenge by those who wish not longer to be forced to associate and contribute financially to a group that insults our professional work. Such a challenge might very well succeed.

For several reasons, this body should drop this moratorium proposal. First, This body cannot and should not go against the will of a majority of the citizens of this state on this political issue. I again mention public support for capital punishment for this reason: the public holds capital punishment in higher esteem than the members of our profession. I believe the low regard of the public of our profession is too often deserved. If you want death row inmates to obtain better representation, then encourage more members of the Bar to perform that public service. If you desire to enhance the image of our profession, then you should reject the proposed resolution before you.

Second, regardless of what ideologies say in their studies while hiding their underlying data, there is no problem in Alabama's capital system as the handout my office has prepared evidences. Our defense attorneys are paid reasonable fees and two of the top lawyers in the national are continuing to represent these death row

inmates, along with some of the top law firms in the United States. The appellate courts scrutinize these cases with a fine-toothed comb under the plain error standard. Finally, because we are an integrated the Alabama State Bar has absolutely no business taking a position on this political and ideological issue.

Thank you for your time.

Chairman LEAHY. Thank you. I should also note for the record that General Pryor follows in distinguished footsteps. He was appointed to fill the vacancy as attorney general when his predecessor left the power and glory of that office for the anonymity of the U.S. Senate. But you did follow in distinguished footsteps, Mr. Pryor, following Senator Sessions.

I would also note that Kurt Bloodworth, one of the exonerees mentioned earlier, is now here with his wife, Brenda. I appreciate them joining us today.

Senator SESSIONS. Mr. Chairman, if I could just add——

Chairman LEAHY. Sure. Do you want to contradict my statement about distinguished footsteps?

Senator SESSIONS. No. He has carried the office to greater heights. Bill Pryor was appointed when I was elected to the Senate. He has been reelected by the people of Alabama. He has a wonderful family. He is committed to the rule of law as deeply as any person I know. He is a great constitutional scholar, a man who is running his office in an extraordinarily fine way, and such things as editor of the Tulane Law Review when he was in college and just the kind of person that we are proud to have in law enforcement.

Chairman LEAHY. Thank you.

Senator Rodney Ellis is a State senator from Texas representing Houston in his fifth term in office, I believe. He had served as chief of staff to the late U.S. Congressman Mickey Leland. One of his colleagues in that office, Leah Gluskoter, then also of Harris County, is now a key staff member in my office.

Senator Ellis has fought to improve the indigent criminal justice system and to ban the execution of the mentally retarded. His most recent effort in the Texas Legislature to ban the execution of mentally retarded inmates passed the Texas Legislature, but was vetoed 10 days ago by the Governor of Texas.

Senator Ellis, go ahead, sir.

STATEMENT OF HON. RODNEY ELLIS, TEXAS STATE SENATOR, AUSTIN, TEXAS

Mr. ELLIS. Thank you, Mr. Chairman and members. I appreciate being invited here and I applaud your efforts.

I make my living as an investment banker, and I am also a corporate lawyer, not a criminal lawyer. From the State legislative standpoint, I know how difficult it is to take these issues on. They are not issues where there is generally an organized constituency.

I chair the Senate Finance Committee in the State of Texas. We have a very bipartisan body. In fact, I was named as Chair by a Republican lieutenant Governor. It is a body that has 16 Republicans and 15 Democrats, so anything we pass out of the senate has to have bipartisan support.

During the legislative interim, I served as president pro tem of the Senate, not because I am so bright; we do it by rotation. It was my term. Under the Texas Constitution, the president pro tem is the person who serves as Governor of the State of Texas when the

Governor and the lieutenant Governor are out of the State. Obviously, our Governor was busy during the interim, and the lieutenant Governor was out of the State a bit as well, so I served as Governor of Texas for a total of 50 days. During that period, I had the awesome responsibility of presiding over three executions and granting one reprieve.

I support the death penalty. Some of my critics, because of the legislation I carry, have wondered if I support the death penalty. I am one of a handful of people who work in the Texas State capital who has both filed death penalty legislation—I did it in my freshman term as a senator—and who has had the dubious distinction of presiding over an execution. It changes one's life and I think gives one greater commitment to a number of these issues.

While I remain a supporter of the death penalty, as I stated, that experience has changed me and has made me to fight to ensure greater fairness in our death penalty system in Texas, particularly Texas because we are the global leader on executions in the world.

We need to ensure that only competent counsel and adequate funding handle these life-and-death cases. We need to make sure that cases receive full and fair judicial review. In addition, we must ensure that execute only the most culpable. I applaud the Innocence Protection Act of 2001 for its embodiment of these ideals.

In Texas, I have been working to see similar reform enacted. In each of the last two legislative sessions and, in fact, over the last decade, I have authored numerous bills to promote increased fairness in our criminal defense system in Texas, particularly in capital punishment cases.

I proposed and cosponsored the post-conviction DNA testing bill that has been signed into law by our Governor. I passed a bill to increase compensation for people who have been wrongfully convicted. This will be one area where Texas, I guess, will be on the cutting edge and ahead of many other States. As you mentioned, I passed a bill to ban executing persons with mental retardation that was unfortunately vetoed.

But perhaps the most significant and far-reaching reform that I have championed in Texas is the Texas Fair Defense Act. It is the culmination of nearly a decade of work to reform our tattered indigent defense system in Texas. We have 254 counties in Texas. The counties have the primary responsibility for our indigent defense system, so that means that in the second largest State in the country we have 254 different ways of administering the indigent defense system in our State. We have over 500-some-odd trial court judges, and under the current system, prior to enactment of the bill, each judge essentially determines the indigent defense system in his or her courtroom.

The effects of the bill that we passed will be felt for years to come and, in my judgment, should lay the foundation for a criminal defense system in Texas that is both tough and fair. For some time now, the Texas criminal justice system has been under the glare of the national spotlight. I guess some of my colleagues would say I have done a little bit to fan that flame occasionally.

This attention provided us with many examples of how the poorest among us are treated in Texas. From sleeping lawyers to allow-

ing a person's race to be used as a reason for execution, we saw that poor Texans were being sentenced to a poor defense as well.

I, like many of my colleagues, both Democrats and Republicans, was outraged by the problems that we were alerted to by that media spotlight; for example, a recent report on how in the Ricardo Aldape Guerra case defense lawyers fought to get authorization for the court to pay $700 for an investigation matter and were denied it. Meanwhile, the prosecution spent $7,000 alone on a pair of mannequins depicting the suspects. Seventeen years later, after $2 million of work by a large law firm in the State on a pro bono basis, Guerra was freed from death row based on a finding of police and prosecutorial misconduct. The Harris County district attorney's office declined to re-prosecute the individual.

Since that case, some changes have been made in the Texas criminal justice system, but recent reports reveal that funding for investigations remains minimal in our State. I think we have a long way to go. The Texas Fair Defense Act addresses several critical concerns—timeliness of appointment, method of appointment, reporting of data regarding indigent defense services, experience requirements for defense attorneys in capital cases, and development of statewide standards for provision of indigent defense services through an appointed task force.

I worked for 2 years with everyone involved in the system because the previous bill that I passed was vetoed. I worked with judges, prosecutors, defense lawyers, legislators, the State bar and a number of advocacy groups to craft a strong, effective and bipartisan reform bill.

But I must emphasize that the bill is a compromise, something that I am sure you are accustomed to doing even in this great body. As a result, Texas has launched a series of reforms that will eliminate the worst abuses and provide some State oversight of our tattered system, without bankrupting our counties or mandating a one-size-fits-all approach.

That means, members of the committee, that in Texas we made a good start. What it does not mean is that we have finished the job. Still more must be done to ensure a completely fair system of indigent defense in our State. The Innocence Protection Act provides safety measures that will fill many of those gaps that are left in State law.

I know my time is ending, so I appreciate being invited and I will obviously submit the rest of my testimony.

[The prepared statement of Mr. Ellis follows:]

STATEMENT OF RODNEY ELLIS, TEXAS STATE SENATOR, AUSTIN, TEXAS

Good morning, Chairman Leahy and members of the committee. Thank you for conducting this hearing, and for inviting me to lend my support to the need for minimum standards for attorneys in capital cases. I sincerely appreciate your efforts.

I am especially pleased to appear today because of the enormous respect I have for the U.S. Congress. As you may know, prior to my becoming an elected official, I had the honor of serving as Chief of Staff for the late Congressman Mickey Leland. It was an eye-opening experience and it gave me the opportunity to witness, firsthand, the many responsibilities and challenges each of you faces every day.

Today, I am serving my fifth term as a member of the Texas Senate, where I am Chairman of the Senate Finance Committee as well as a member of the Jurisprudence and Redistricting Committees. During the last interim, I served as President Pro Tempore of the Texas Senate. Under the Texas Constitution, the President Pro

Tempore becomes the Acting Governor when the Governor and Lieutenant Governor are out of state. During the 50 days that I served as Acting Governor, I had the unenviable task of presiding over three executions and granting one 30-day reprieve. Like many who must take the grim responsibility for overseeing executions, the experience made me reflect deeply on the entire practice of executing our citizens. While I remain a supporter of the death penalty, that experience made me even more committed to ensuring fairness in our death penalty system. We need to ensure that only competent counsel with adequate funding handle these life and death cases. We need to make sure that cases receive a full and fair judicial review. In addition, we must ensure that we execute only the most culpable. I applaud the Innocence Protection Act of 2001 for its embodiment of these ideals.

In Texas, I have been working to see similar reform enacted. In each of the last two legislative sessions, I authored numerous bills to promote increased fairness in the criminal defense system, particularly the capital punishment system. I proposed and co-authored the post-conviction DNA testing bill that has been signed into law in Texas. I passed a bill to increase compensation for people who have been wrongfully convicted in Texas. I passed a bill to ban executions of persons with mental retardation in Texas, which unfortunately was vetoed by Governor Rick Perry.

But perhaps the most significant and far-reaching reform I championed was Senate Bill 7, the Texas Fair Defense Act. It was the culmination of nearly a decade of work to reform Texas's tattered indigent defense system. The effects of this bill will be felt for years to come and should lay the foundation for a criminal defense system that is both tough and fair.

For some time now, Texas's criminal justice system has been under the glare of the national spotlight. This attention provided us with many examples of how the poorest among us are treated. From sleeping lawyers to allowing a person's race to be used as a reason for execution, we saw that poor Texans were being sentenced to a poor defense. I, like many of my colleagues, was outraged by the problems we were alerted to by that spotlight.

For example, a recent report related how in the Ricardo Aldape Guerra case, defense lawyers fought to get authorization from the court for payment of $700 for investigation. Meanwhile, the prosecution spent $7,000 alone on a pair of mannequins depicting the suspects. Seventeen years later, after $2 million of work by a large private law firm, Guerra was freed from death row based on a finding of police and prosecutorial misconduct. The Harris County District Attorney's Office declined to re-prosecute him. (Source: *A State of Denial: Texas Justice and the Death Penalty*, published by Texas Defender Service in 2000.) Since that case, some changes have been made to the Texas criminal justice system. But recent reports reveal that funding for investigations remains minimal. We still have a long way to go.

The Texas Fair Defense Act addresses several critical concerns:

1) timeliness of appointment of attorneys for indigent persons accused of crimes;
2) method of the appointment;
3) reporting of data regarding indigent defense services;
4) experience requirements for defense attorneys in capital cases; and
5) development of statewide standards for provision of indigent defense services through an appointed task force.

I worked for two years with everyone involved in the system—judges, prosecutors, defense attorneys, legislators, the State Bar and advocacy groups—to craft a strong, effective, and bipartisan reform plan.

But I must emphasize that the plan is a compromise. It goes too far for some and not far enough for others. As a result, Texas has launched a series of reforms that will eliminate the worst abuses and provide some state oversight of the system, without bankrupting our counties or mandating a one-size-fits-all approach. What that means, members of the Committee, is that we have a good start in Texas. What that does not mean is that we have finished the job. Still more must be done to ensure a completely fair system of indigent defense in Texas.

I have said that I had to make a lot of compromises in Senate Bill 7, and I have said that some of those compromises kept me up at night. Stronger enforcement mechanisms could be in place to require adherence to the task force standards. We could have gone farther on the capital standards. And more needs to be done on fees. In one large urban county, compensation for out-of-court time is limited to 60 hours, a tiny fraction of the average time needed to defend a capital case. (Sources: Texas Appleseed Fair Defense Project, *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas* (2000); Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998).)

The Innocence Protection Act includes provisions that will ensure gaps in state law get addressed. For example, the Texas Fair Defense Act, by design, focuses on trial-level representation and does not address adequate counsel for appeals and on habeas corpus writs. But we know the stage at which most innocent people get freed on the basis of new evidence is the habeas stage. When it comes to these areas of critical national concern, it is useful for Congress to make sure all states are on an equal footing. I welcome the federal government's standard-setting in the area of capital qualifications and pay.

When the state or federal government takes the life of a person using the immense power of the government, we must be ever-vigilant in protecting the rights of those individuals and check that the criminal justice system operates correctly throughout the process. Having carried out three executions and been engaged on this issue in Texas, I must say that I have serious concerns with how the death penalty is applied and believe we can and should do much more to ensure fairness in the system. I think we have seen that states can achieve positive improvements on some issues. For example, each state can determine appropriate local rates for attorneys. On the other hand, we ought to have a national statement of the national consensus that the death penalty is not appropriately applied to the mentally retarded. And we should have a national panel that ensures that no state fails to provide adequate and well-funded counsel to a citizen facing the ultimate penalty.

Title II of the Innocence Protection Act establishes the National Commission on Capital Representation to give us that assurance we need as a nation. As a supporter of the death penalty, I want to sleep at night, even nights when an execution is taking place. I need to be satisfied that we are doing everything we can to keep the system honest and fair. I believe that the Commission established by the Innocence Protection Act is a good first step to achieve this with respect to capital counsel standards. I believe that low standards and pay for capital defense counsel has been a problem in all states with the death penalty, and the problem needs to be solved across the board. I urge the members of the Committee to support the establishment of the Commission, and the entire Innocence Protection Act.

Thank you for giving me the opportunity to share the experiences of Texas with you today. I will gladly answer any questions you might have.

Chairman LEAHY. Thank you very much, Senator Ellis. With you and General Pryor traveling this far, it must seem awfully arbitrary to have a 5-minute limit. But I can't emphasize enough how important it is that you are here. Your experience with your legislation in Texas, the fact that you were acting Governor during executions, and everything else is extremely important to us.

Stephen Bright is the H. Lee Sarokin Director for the Southern Center for Human Rights and, in fact, has directed that organization since 1982. The Center provides legal representation to defendants facing the death penalty and works to ensure that they have qualified attorneys.

He has written widely on this subject. He teaches courses on the death penalty and criminal law at both Yale and Emory Law Schools. I wanted to mention Emory because my oldest son graduated from law school at Emory.

Mr. Bright?

STATEMENT OF STEPHEN B. BRIGHT, DIRECTOR, SOUTHERN CENTER FOR HUMAN RIGHTS, ATLANTA, GEORGIA

Mr. BRIGHT. Mr. Chairman, thank you. Thank you for having me, Senator Hatch, Senator Feingold, Senator Sessions. It is an honor to be here to testify about this Act because it is urgently needed.

Mr. Chairman, you said earlier that the need was urgent, real and well-documented. I just want to say *Powell* v. *Alabama* was decided in 1932. That case said, in capital cases, that people had a right to a lawyer. That was 70 years ago. *Gideon* v. *Wainwright* was decided in 1963. It said people had a right to a lawyer.

Senator Hatch, in your opening statement you said there is not a systematic denial of counsel. What there is in many States is a systematic failure to provide counsel. That is the problem we have. I think what a lot of people don't realize is how many States there are that still don't have public defender offices.

We have offices that specialize in the prosecution of these cases. They have lawyers there who are trained, who are veterans, who know what they are doing, who bring an expertise to the table when they try these cases. Then on the other side, often we have a general practitioner or somebody like that representing people.

I will give you just one recent example, which is Gary Drinkard, one of our clients, Mr. Chairman, just 3 weeks ago acquitted at a capital trial. Mr. Drinkard is sitting right here directly behind me. What happened to him is typical, I am afraid, of too many cases in our system.

Gary Drinkard was at home with his family the night the crime took place. He had been to the doctor that day because he had had a disk problem and was in such pain he couldn't have committed this crime, physically couldn't have committed this crime. But he was appointed lawyers, one who was a collections and commercial lawyer with virtually no criminal experience, another lawyer who represents creditors in foreclosures and bankruptcies. That is the kind of representation people often get. A foreclosure lawyer should not be representing somebody in a death penalty case.

What happened was they never called the doctor to testify about his medical condition. They just dumped the medical records into the evidence. The jury didn't know what to do with that. There was nobody to explain, nobody to talk about the pain, nobody to talk about how disabling it was. So the jury didn't have that critical information.

There was a man about 70 years old who was just by the home that evening, didn't even know Mr. Drinkard, was there with somebody else who was there with him during the crime went down, the most objective person never called as a witness.

Now, fortunately, Mr. Drinkard was represented at his retrial by Richard Jaffe, a very distinguished and good lawyer from Birmingham, Alabama; John Mays, a lawyer from Decatur; and Chris Adams from our office. The two people who investigated that case are also here today, Kate Weisberg and Jason Marks. But that is the exception, Mr. Chairman.

Most people in Alabama, and I notice the attorney general—I will mention that I tried a case there, the *Tomlin* case. I tried the *Tomlin* case because I went to Mr. Tomlin's earlier trial and I watched the two court-appointed lawyers trying that case and I said after the case was over, if this case gets reversed, I am going to come back here and try this case, because the lawyering was just dreadful.

By the way, it said that *Tomlin* four times got the death sentence. Actually, in Mr. Tomlin's case the jury unanimously give him a life sentence. Judges in Alabama are allowed to override the jury, and they have. About a fourth of the death row, as I am sure Senator Sessions and Mr. Pryor know, are cases where juries in Alabama gave life, but the judges overrode and gave the death penalty.

That judge, Farrell McRae, was a judge who ran for office showing on his TV commercials all the people he had sentenced to death on the TV commercials. Now, that is the same judge who appoints the lawyers in these cases, which is why we need an independent appointing authority. Judges who run for election and who unfortunately can't resist sometimes the temptation to demagogue on some of these issues should not be appointing either the prosecutor or the defense. The judge ought to be fair and impartial.

There are other cases: Anthony Porter, who came within 2 days of execution in Illinois. His execution was stayed 2 days before it was to take place only because there was a question of whether he was mentally competent to be executed, only because it wasn't clear he could understand why he was being executed.

It was only after that that the journalism class at Northwestern became involved. And as I have often said, thank goodness those students decided to take journalism that semester instead of chemistry, because if they had taken chemistry, Anthony Porter would have been executed and we would never know. We would be saying no innocent people have been executed.

Look at Earl Washington, who is sitting right here beside me. Mr. Washington is a man who confessed to a crime he didn't do. It is a classic example of the vulnerability of some of the mentally retarded people who come into our criminal justice system. But for so many people, there is no journalism class, there are no lawyers like the ones that Senator Ellis described, the Guerra lawyers who come in and take the case.

I want to mention one other thing. It was said earlier that the sleeping lawyer cases are routinely thrown out. There have been three cases where the lawyers slept during the trial out of one jurisdiction alone, and that is Houston. And in all three of those cases, Senator Hatch, they have been upheld by the courts.

I was at the Fifth Circuit in January and saw 14 life-tenured United States judges agonizing over the question of whether the lawyer who slept during Calvin Burdine's trial denied him a fair trial. The panel held two to one that he was not denied, that in an 18-hour trial—that is all it took—that the fact that his lawyer slept through the trial didn't deny him a fair trial. Now, that is what it means to get the dream team if you are poor in this country. And that lawyer, Joe Cannon, put 14 people on death row.

I will say this: the judges in Houston are not appointing Mr. Cannon anymore, but I think it is only because he is no longer in life. I am not sure that that would be the case otherwise.

We need programs to provide competent legal representation, lawyers who are trained, who know what they are doing. They need to be independent. It has been suggested with this parade of horribles here, well, what if we get people who zealously want to defend these people? Well, the cases are zealously prosecuted. Why shouldn't they be zealously defended? My understanding is that is what the Constitution and what the Canons of Ethics require, is that the case be zealously defended.

Thank you, Mr. Chairman.

Chairman LEAHY. You would agree with Senator Ellis, if I might paraphrase him, that poor defendants should not be sentenced to a poor defense?

Mr. BRIGHT. Well, I wrote an article one time that said the death sentence for the worst lawyer, not for the worst crime. That is the system we have in Georgia, Alabama, Mississippi, Texas. In a number of the States that are sentencing the vast majority of people to death row, Mr. Chairman, in this country people are getting the death penalty not because they committed the worst crime, but because they often have lawyers who have no more business trying a death penalty case than I would have trying an antitrust case. That is just not right.

And somebody said we shouldn't have one-size-fits-all. The Constitution doesn't come in different sizes. Everybody, no matter where they are charged—whether it is Tupelo, Mississippi, or Mobile, Alabama, or Atlanta, Georgia, everybody is entitled to competent legal representation, with the resources necessary to investigate the case and present it. Thank you.

[The prepared statement of Mr. Bright follows:]

STATEMENT OF STEPHEN B. BRIGHT, DIRECTOR, SOUTHERN CENTER FOR HUMAN RIGHTS, LECTURER, YALE, HARVARD AND EMORY LAW SCHOOLS

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to address the committee regarding Title II of the Innocence Protection Act of 2001, which is absolutely essential to minimizing the risk of executing innocent people.

I have been interested in the quality of legal representation for the poor for over 25 years, as a public defender, as the director of a law school clinical program here in the District of Columbia, for the last 19 years as director of the Southern Center for Human Rights, and, since 1993, as a teacher of criminal law, including the right to counsel, at Yale, Harvard and Emory Law Schools. I have testified as an expert witness on the subject in the courts and have written a couple of law review articles on the subject.[1]

People are wrongfully convicted because of poor legal representation, mistaken identifications, the unreliable testimony of informants who swap their testimony for lenient treatment, police and prosecutorial misconduct and other reasons. Unfortunately, DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system—in which the defense lawyer scrutinizes the prosecution's case, consults with the client, conducts a thorough and independent investigation, consults with experts, and subjects the prosecution case to adversarial testing—to bring out all the facts and help the courts find the truth. But even with a properly working adversary system, there will still be convictions of the innocent. The best we can do is minimize the risk of wrongful convictions. And the most critical way to do that is to provide the accused with competent counsel and the resources needed to mount a defense.

I.

We have been very fortunate that the innocence of some of those condemned to die in our courts has been discovered by sheer happenstance and good luck. A few of many examples illustrates the point.

Anthony Porter came within hours of execution before his innocence was established by the journalism class at Northwestern. Porter had been convicted by a jury. He had been sentenced to death. His case had been reviewed and affirmed on appeal by the Illinois Supreme Court. He had gone through the state and federal post-conviction processes and every court had upheld his conviction and sentence. He was scheduled to be executed.

However, a question arose as to whether Porter was mentally competent to be executed; that is, whether he understood that he was being put to death as punish-

[1] "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," volume 103 of the Yale Law Journal, page 1835 (1994) and "Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake," Volume 197 of the New York University Annual Survey of American Law, page 783 (1997) Both available at http://www.schr.org.

ment for the crime of which he had been convicted. A person who lacks the mental ability to understand this relationship cannot be executed, but is instead treated until he is "restored to competency." When he has improved to the point that he can understand why he is being executed, he is put to death. Anthony Porter was a person of limited intellectual functioning and mental impairments. Because there was a question about whether he could understand why he was being executed, a court stayed his execution in order to determine his competency to be executed.[2]

After the stay was granted, the journalism class at Northwestern University and a private investigator examined the case and proved that Anthony Porter was innocent. They obtained a confession from the person who committed the crime. Anthony Porter was released from death row.[3] He was the third person released from Illinois's death row after being proven innocent by the journalism class at Northwestern.[4] Since Illinois adopted its present death penalty statute in 1977, thirteen people sentenced to death have been exonerated and twelve have been executed.[5]

In 1994, the governor of Virginia, Douglas Wilder, commuted the sentence of a mentally retarded man, Earl Washington, to life imprisonment without parole because of questions regarding his guilt.[6] Six years later, DNA evidence—not available at the time of Washington's trial or the commutation—established that Earl Washington was innocent.

Frederico Martinez-Macias was represented at his capital trial in Texas, by a court-appointed attorney paid only $11.84 per hour.[7] Counsel failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have testified in rebuttal of the prosecutor's case. Martinez-Macias was sentenced to death. Martinez-Macias received competent representation for the first time when the Washington, D.C., firm of Skadden, Arps, Slate, Meagher & Flom volunteered to take his case and represented him without charge. After a full investigation and development of facts regarding his innocence, Martinez-Macias won federal habeas corpus relief. A grand jury refused to re-indict him and he was released after nine years on death row.

Similarly, volunteer lawyers from the Houston firm of Vincent & Elkins established in federal habeas corpus proceedings that Ricardo Aldape Guerra had been convicted in violation of the Constitution and was innocent. He was released and he returned to Mexico.

Gary Nelson was represented at his capital trial in Georgia by a solo practitioner who had never tried a capital case. This court-appointed lawyer, who was struggling with financial problems and a divorce, was paid at a rate of only $15 to $20 per hour. His request for co-counsel was denied. The case against Nelson was entirely circumstantial, based on questionable scientific evidence, including the opinion of a prosecution expert that a hair found on the victim's body could have come from Nelson. Nevertheless, the appointed lawyer was not provided funds for an investigator and, knowing a request would be denied, did not seek funds for an expert. Counsel's closing argument was only 255 words long. The lawyer was later disbarred for other reasons.

Nelson had the good fortune to have some outstanding lawyers volunteer to represent him in post-conviction proceedings, who devoted far more time to the case than had the court-appointed lawyer and spent their own money to investigate Nelson's case. They discovered that the hair found on the victim's body, which the prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison. Indeed, they found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared. As a result of such inquiry, Gary Nelson was released after eleven years on death row.

But for the vast majority of those sentenced to death, there are no journalism students or volunteer lawyers who come forward and examine their cases.

For example, Exzavious Gibson, a man whose IQ has been tested between 76 and 82, was forced to represent himself at his state post-conviction hearing in Georgia because he could not afford a lawyer. There are dozens of people on death row in

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[2] Pam Belluck, "Class of Sleuths to Rescue on Death Row," New York Times, Feb. 5, 1999, at A14.

[3] Jon Jeter, "A New Ending to an Old Story," Washington Post, Feb. 17, 1999, at C1.

[4] Don Terry, "DNA Tests and a Confession Set Three on a Path to Freedom in 1978 Murders", New York Times, June 15, 1996, at A6.

[5] Ken Armstrong & Steve Mills, "Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions," Chi. Trib., Jan. 31, 2000, at 1.

[6] Brooke A. Masters, "Missteps On Road To Injustice: In Va., Innocent Man Was Nearly Executed," Washington Post, Dec. 1, 2000, at A1.

[7] Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992).

Alabama who do not have lawyers to represent them in post-conviction proceedings. And the statute of limitations is running on them.

Some of the lawyers provided in post-conviction proceedings are worse than no lawyer at all. Ricky Kerr was assigned a lawyer by the Texas Court of Criminal Appeals who had been in practice only four years, had no capital experience and suffered serious health problems. Federal Judge Orlando Garcia said the appointment of the lawyer "constituted a cynical and reprehensible attempt to expedite [the] execution at the expense of all semblance of fairness and integrity."

If the journalism class had not become involved in Anthony Porter's case, he would have been executed and we would never know to this day of his innocence. Those who naively proclaim that no innocent person has ever been executed would continue to do so, secure in their ignorance. If Martinez-Macias, Guerra, Nelson and others had been left without any post-conviction representation, as was Exzavious Gibson in Georgia, or had been provided a lawyer like the one assigned by the Texas Court of Criminal Appeals to represent Ricky Kerr, they would be dead and their innocence would have gone to the grave with them.

We should not count on luck to discover the innocent. We do not know how many Anthony Porters have been put to death and we never will. We can be confident that innocent people will be convicted and sentenced to death so long as those accused receive inadequate representation at trial and equally inadequate representation—or no representation at all—during post-conviction review.

Some have said that the fact that Anthony Porter and others have been released shows that the system works. However, someone spending sixteen years on death row for a crime he did not commit is not an example of the system working. When journalism students prove that police, prosecutors, judges, defense lawyers and the entire legal system did not discover a man's innocence and instead condemned him to die, the system is not working. And it is not a system of justice. It is a cruel lottery.

II.

The major reason that innocent people are being sentenced to death is because the representation provided to the poor in capital cases is often a scandal. The state legislatures have been unwilling to provide the resources and structure necessary to provide competent legal representation. And the courts have been willing to tolerate representation that is an embarrassment to our legal system and the legal profession.

In at least four cases in Georgia, counsel referred to their clients before the jury with a racial slur. A woman in Alabama was represented by a lawyer so drunk that her trial had to be suspended for a day and the lawyer sent to jail to sober up. The next day, both lawyer and client were produced from jail and trial resumed. Defense lawyers in Alabama and Missouri cases had sexual relations with clients facing the death penalty. There have been far too many cases in which defense lawyers defending capital cases were impaired by alcohol, drugs or infirmity.[8] In case after case, defense lawyers for people facing the death penalty are denied investigators and funds for expert assistance.[9]

Last January, 14 judges of the United States Court of Appeals for the Fifth Circuit earnestly considered the issue of whether a death sentence can be carried out in a case in which the one lawyer appointed to defend the accused slept through much of a trial that lasted only 18 hours. The Texas Solicitor General's office argued that Calvin Burdine's conviction and death sentence should be upheld because a sleeping lawyer is no different from a lawyer who is intoxicated, under the influence of drugs, suffering from Alzheimer's disease or having a psychotic break. The judges engaged the assistant solicitor general on this argument, asking whether there was not some difference between a lawyer who was merely impaired by alcohol and a lawyer who was completely unconscious. A panel of three members of that court had previously concluded in a 2-1 opinion that sleeping did not violate the right to counsel. The two judges in the majority held that the record did not show that the lawyer slept through an important part of the trial.[10] Of course, the person responsible

[8] See Jeffrey L. Kirshmeier, Drink, Drugs and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement, 75 Nebraska Law Review 425, 455-60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill).

[9] Numerous examples are collected in Stephen B. Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer," volume 103 of the Yale Law Journal, page 1835 (1994) (also available at http://www.schr.org.)

[10] *Burdine* v. *Johnson*, 234 F.3d 1339 (5th Cir. 2000), reversing *Burdine* v. *Johnson*, 66 F. Supp. 2d 854, 866 (S.D. Tex. 1999).

for making the record was the lawyer. And he was asleep. The entire Court is now reconsidering the case.

The standard for counsel is so low that Judge Alvin Rubin of the U.S. Court of Appeals for the Fifth Circuit, once observed that, "The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel."[11] A trial judge in Houston put it even more bluntly, saying that while the Constitution guarantees a lawyer, "[t]he Constitution doesn't say the lawyer has to be awake." That judge presided over the case of George McFarland, another of the three capital cases tried in a single city, Houston, in which the defense lawyers slept through trial. The Houston Chronicle described McFarland's trial as follows:

> Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.
>
> His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.
>
> Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.
>
> When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.
>
> "It's boring," the 72-year old longtime Houston lawyer explained.
>
> Court observers said Benn seems to have slept his way through virtually the entire trial.[12]

The Texas Court of Criminal Appeals affirmed McFarland's conviction and death sentence, as it did in the cases of Calvin Burdine and Carl Johnson.[13] Johnson was executed by Texas in 1995.[14]

For poor people facing the death penalty, this is what is means to be represented by the "dream team."

The old adage "you get what you pay for" applies with particular force in the legal system, and many states pay very little to lawyers appointed to defend capital cases. Studies of capital cases in Illinois, Kentucky and Texas have found that about one-third of those sentenced to death in those states were represented by lawyers who were later been disbarred, suspended or convicted of crimes.[15]

States also fail to provide a structure, such as there is on the prosecution side, so that lawyers defending the poor are trained and supervised and develop an expertise in criminal law and the sub-speciality of capital punishment law. The lawyer who defended Wallace Fugate at his capital trial in Georgia had never heard of *Furman* v. *Georgia*, the case which declared Georgia's death penalty law unconstitutional in 1972, or *Gregg* v. *Georgia*, the case which upheld Georgia's current death penalty law in 1976. He could not recall ever having had an investigator in over 40 years of defending people in court-appointed cases and thought he may have had an expert on one occasion. He failed to find out that the gun, which his client said had fired accidentally, had a design defect that made it susceptible to accidental discharge.

Another lawyer who handled the cases of a several people sentenced to death in Georgia, when asked to name all the criminal cases with which he was familiar, answered, "the *Miranda and Dred Scott*." (*Dred Scott* was not a criminal case.)

These are only a few of the most egregious examples of the poor quality of legal representation that one sees every day in states that lack a structure for providing indigent defense, that fail to provide the resources to defend a case properly and that fail to provide for the independence of defense counsel from the judiciary. But they tell you how urgently this legislation is needed.

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[11] *Riles* v. *McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

[12] John Makeig, "Asleep on the Job; Slay Trial Boring, Lawyer Said," Houston Chronicle., Aug. 14, 1992, page A35.

[13] Burdine v. Johnson, 66 F. Supp. 2d 845 (S.D. Tex. 1999).

[14] A full description of the case is provided by David R. Dow in his article, "The State, the Death Penalty, and Carl Johnson," published in volume 37 of the Boston College Law Review page 691 (1996).

[15] Ken Armstrong & Steve Mills, "Inept defense cloud verdicts," Chicago Tribune, November 15, 1999 (reporting that in 33 of the 285 cases in which death was imposed in Illinois the defense lawyers were later disbarred or suspended); Steve Mills & Ken Armstrong, "Flawed trials lead to death chamber," Chicago Tribune, June 11, 2000 (reporting that in 43 of the 131 most recent executions in Texas prior to publication of the story the defendants were represented by an attorney who was later disbarred, suspended or otherwise sanctioned).

Unfortunately, many jurisdictions—including many which are sending large numbers of people to their death rows—still do not have a working adversary system, even in cases in which a person's life is at stake. In those states, it is better to be rich and guilty than poor and innocent because the poor are represented by court-appointed lawyers who often lack the skill, resources, and, on occasion, even the inclination to defend a case properly.

There are exceptions. Some states, like Colorado and New York, not only have public defender offices, but capital defender offices that specialize in the defense of capital cases. But other states, such as Alabama, Georgia, Mississippi, Texas and Virginia have no state-wide public defender system. There are some outstanding lawyers who will occasionally take a capital case, but they find those cases drain them emotionally and financially. In states where at any one time there are hundreds of people facing capital trials and hundreds more on death row whose cases are under review in the courts, there are not nearly enough good lawyers willing to take the cases for the small amount of money paid to defend them. There are also lawyers who, although lacking in experience, training and resources, make conscientious efforts to do the best they can in defending people in capital cases, but many find it simply impossible to overcome these disadvantages in these complex and difficult cases. And, unfortunately, there are too many lawyers who are taking court-appointed cases because they can get no other work and do not even make conscientious efforts.

III.

One of the very important provisions of Title II is the requirement of an independent authority for appointing attorneys in capital cases. Lawyers are ethically, professionally and constitutionally required to exercise independent professional judgment on behalf of a client.[16] The appointment of counsel by judges creates—at the least—the appearance that lawyers are being assigned cases to move dockets and that lawyers may be more loyal to the judge than to the client. A lawyer's conduct in a case should not be influenced in any way by considerations of administrative convenience or by the desire to remain in the good graces of the judge who assigned the case. However, because some lawyers are dependent upon judges for continued appointments—which, in some cases, are the only business the lawyer receives—a lawyer may be reluctant to provide zealous advocacy for fear of alienating the judge. Some lawyers have remarked that one way to avoid being assigned indigent cases is to provide a vigorous defense in one.

Almost half of the judges in Texas, responding to a survey, said that an attorney's reputation for moving cases quickly, *regardless of the quality of the defense*, was a factor that entered into their appointment decisions.[17] One-forth of the judges said an attorney's contribution to the judge's campaigns was a factor in appointing counsel. When the judges were asked whether contributions influenced appointments by other judges they knew, over half said that judges they knew based their appointments in criminal cases in part on whether the attorneys were political supporters or had contributed to the judge's political campaign. The perception of lawyers and court personnel is that the influence of campaign contributions on elected judges decisions is even more significant, with 79 percent of the lawyers and 69 percent of the court personnel saying they believe campaign contributions effect judges' decisions.

The same factors influence some judges in other states. But even if a judge appoints laywers based their reputation for providing competent representation, there is the danger that some lawyers may not always provide the zealous representation that the Constitution requires because of the fear—whether justified or not—that the lawyer risks losing future appointments from the judge. For lawyers whose entire practice is made up of appointments from the court, such fears may considerably chill their performance.

This is a system riddled with conflicts. A judge's desire for efficiency conflicts with the duty to appoint indigent defense counsel who can provide adequate representation; a lawyer's need for business taints the constitutional and ethical requirement of zealous advocacy. And later, if there is a claim of ineffective assistance, the judge who appointed the lawyer is the one to decide the claim. This is not a good way

[16] American Bar Association, Canons of Ethics, Canon 5.

[17] See Allan K. Butcher & Michael K. Moore, Committee on Legal Services to the Poor in Criminal Matters, Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas (Sept. 22, 2000), available at http://www.edu/pols/moore/indigent/whitepaper.htm. Judges in the survey were specifically asked to discount their experiences in capital cases, but there is no reason to believe that their motivations for appointment decisions would vary depending on the type of case.

to run a system of justice. Judges do not appoint prosecutors to cases. Judges should be fair and impartial. They should not be managing the defense.

Accordingly, Standard 5-1.3 of the American Bar Association's Criminal Justice Standards, provides:

> (a) The legal representation plan for a jurisdiction should be designed to guarantee the integrity of the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs.
>
> (b) An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. Assigned-counsel and contract-for-service components of defender systems should be governed by such a board. Provisions for size and manner of selection of boards of trustees should assure their independence. Boards of trustees should not include prosecutors or judges. The primary function of boards of trustees is to support and protect the independence of the defense services program. Boards of trustees should have the power to establish general policy for the operation of defender, assigned-counsel and contract-for-service programs consistent with these standards and in keeping with the standards of professional conduct. Boards of trustees should be precluded from interfering in the conduct of particular cases. A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction.

The Innocence Protection Act will bring jurisdictions to where they should have been long ago in having independent defender programs whose primary concern is providing zealous and effective representation to those facing the death penalty so that the adversary system can work properly.

CONCLUSION

The states have received enormous amounts of federal funds to improve their law enforcement and prosecution functions. But they have failed to develop and maintain a properly working adversary system in criminal cases involving poor defendants. Many states—those I have mentioned and many others—lack the key elements of an effective indigent defense system: a structure, independence from the judiciary and the prosecution, and adequate resources.

It is much easier to convict a person and obtain the death penalty when the defendant is represented by a lawyer who lacks the skill and resources to mount a defense. And it is much easier to execute people who are not adequately represented in post-conviction proceedings. But there is a larger question than whether adequate indigent defense systems make it harder for prosecutors to obtain convictions and for attorneys general to carry out executions swiftly. There is the question of fairness. It is not supposed to be easy to convict someone. Under our system required by our Constitution, the prosecution's case is supposed to undergo a vigorous adversarial testing process.

The American people are realizing that we have sacrificed fairness for finality and reliability for results. They want protection from crime, but they want fairness. The system is woefully out of balance. The many exonerations from DNA evidence as well as the release of over 95 people those sentenced to death shows that the system is broken. A major component, the defense function, lacks the structure, independence and resources to contribute to a fair, reliable and just result. It is not unreasonable for Congress to require the states as a condition of receiving millions of federal dollars to implement an adequate indigent defense system to protect the innocent at least in capital cases.

Chairman LEAHY. I want to make sure that General Pryor gets a chance to give us his views on that, too.

To give you an example of what happens, Michael Graham was wrongly convicted of murder. He spent 14 years on death row in Louisiana. The majority of U.S. Senators have not served here in the Senate for 14 years. Last December, after a 9-month investigation, the Louisiana Attorney General dismissed the charges against Mr. Graham and his co-defendant, who had also been sentenced to

death, citing the total lack of credible evidence linking either of them to the crime.

Mr. Graham?

STATEMENT OF MICHAEL R. GRAHAM, ROANOKE, VIRGINIA

Mr. GRAHAM. Thank you, Mr. Chairman. It is an honor to be here.

My name is Michael Graham. In 1986, I was 22 years old, working as a roofer and living with my mom and my two little brothers in Virginia Beach. That summer, I met a family from Louisiana and became friends with their son, Kenneth. They suggested that I return with them to Louisiana for a vacation and I took up their offer.

While down in Louisiana, Kenneth and I got arrested for writing some bad checks. I wasn't an angel back then, but I never physically hurt anyone and was never accused of hurting anyone, that is until a couple of months later. While in jail for the bad checks, I was arrested for the brutal murders of an elderly couple. I couldn't believe it and I told the police that I didn't know anything about the murders and I had never met the couple. All the time, I was sure that the truth would come out and I would be found innocent. It seems funny now, but I even asked one of my public defenders if he would represent me in a false arrest lawsuit.

My trial was in early 1987. One of my two lawyers had some criminal law experience, but had never tried a death penalty case. My other lawyer just graduated from law school. The State didn't have any physical evidence against me. Basically, all it had was three witnesses, including a jailhouse snitch with a history of serious mental illness.

The lawyers had a tough time at the trial. They didn't investigate the snitch's deal with the prosecution. They didn't know the rules of evidence. They didn't object to a jury instruction that I later learned was totally illegal under Louisiana law. They did nothing to prepare for my sentencing phase. They didn't ask my mother to come down and testify on my behalf.

My trial only lasted a few days. When the jury convicted me of capital murder, I was stunned. So was my experienced lawyer, who disappeared. That left with my inexperienced lawyer, just 1 year out of law school, to handle the sentencing hearing by himself.

When the jury sentenced me to death, I could hardly talk and I was in a state of shock. A few months later, my co-defendant, Albert Burrell, was also convicted and given the death sentence. I understand that his lawyers were even worse than mine.

I will never forget my first night on death row. The night before, the State had executed another inmate and I was given his cell. During the night, I looked down on the floor and completely freaked out. I thought I saw a pool of blood and it turned out to be rusty water. That pretty much set the tone for the next 14 years.

I spent 23 hours a day in my 5-by–10-foot cell alone. I was allowed out 1 hour a day to shower and walk up and down the tier. Three times a week, I could go outside and spend an hour by myself in an exercise yard. Whenever I left my tier, my hands and

legs were shackled. Everyone in my world was either a prison guard who considered me an animal or a condemned man.

The guards told me when to wake up and when to go to sleep, and just gave me a few minutes to eat. I tried not to go crazy by reading and praying to the Lord. I also passed the time by trying to keep up on my case and what was happening in the outside world. I studied for the GED, but the prison ended the program right before I was going to take the test.

Each day, I would beg the Lord to make sure nothing happened to my family. My family was poor, and my mother was only able to visit me twice. My brothers never made it. The Lord answered my prayers, but my co-defendant wasn't so fortunate. My co-defendant's mother died while we were on death row. One of the guards told me that it was the hardest thing he has ever had to do.

As in many cases, there was no DNA evidence to exonerate me and Albert, but we were two of the lucky ones. We both had pro bono lawyers who worked diligently for us and stuck with our cases for many years. If we had depended on State lawyers, we probably would still be on death row, or worse.

After years of hard work, my attorneys got me a new trial on March 3, 2000. It was the second greatest day of my life. My lawyers proved that the prosecution had withheld evidence showing I was innocent. They also proved that the jailhouse snitch was a pathological liar. They got sworn statements from the two other witnesses recanting their testimony. They even got a statement from the prosecutor saying that the case should never have been brought to trial to begin with because the evidence was too weak.

Ten long months later, in December, the State dismissed the case against me and Albert. The attorney general said that there was a total lack of credible evidence linking us to the crime. On December 28, 2000, the best day of my life, I was released from Louisiana's death row, where I had spent close to 14 years for two murders I did not commit. I was the 92nd innocent person released from death row since 1973. My co-defendant was released a few days later and became the 93rd innocent person released.

Half of my adult life had been taken from me. I had been falsely branded as a murderer in connection with horrible crimes. Meanwhile, the suffering family of the victims was misled into believing that the crime was solve when, in fact, the real murderer or murderers had not been brought to justice.

In compensation, the State gave me a $10 check and a coat that was five sizes too big, not even the price of a bus ticket back to Virginia. My lawyers had to buy that for me.

At first when I got back to my family in Virginia, I was afraid to go out. I thought people would guess from my complexion that I had just come out of prison. I couldn't stop guzzling down my food and pacing the floor. Men in uniform freaked me out. Nowadays, I am just trying to put my life back together. I am getting to know my family again, including my brothers, who are now young men. I have a job as a roofer and I am getting married in October.

During my 14 wasted years on death row, I always hoped that my nightmare would count for something. That is why I am here today. Mistakes like my nightmare are real. I never figured that

this could happen to an innocent person before it happened to me, and I am sure that many people listening today feel the same way. I ask you to listen to my story and to the many others like mine and do what you can to fix the process.

Thank you.

[The prepared statement of Mr. Graham follows:]

STATEMENT OF MICHAEL GRAHAM, ROOFER, VIRGINIA BEACH, VIRGINIA

My name is Michael Graham. In 1986, I was 22 years old, working as a roofer, and living with my mom and my two little brothers in Virginia Beach. That summer, I met a family from Louisiana and got friendly with their son, Kenneth. They suggested that I return with them to Louisiana for a vacation. I took up their offer.

While down in Louisiana, Kenneth and I got arrested for writing some bad checks. I was no angel back then, but I never physically hurt anyone, and was never accused of hurting anyone.

That is, until a couple of months later. While in jail for the bad checks, I was arrested for the brutal murders of an elderly couple. I couldn't believe it. I told the police that I didn't know anything about the murders and had never met the couple.

All the time, I was sure that the truth would come out and I would be found innocent. It seems funny now, but I even asked one of my public defenders if he would represent me in my false arrest lawsuit.

My trial was in early 1987. One of my two lawyers had some criminal law experience, but had never tried a death penalty case. My other lawyer had just graduated from law school. The state didn't have any physical evidence against me. Basically, all it had was three witnesses, including a jailhouse snitch with a history of serious mental illness.

My lawyers had a tough time at the trial. They didn't investigate the snitch's deal with the prosecution. They didn't know the rules of evidence. They didn't object to a jury instruction that I later learned was totally illegal under Louisiana law. And they did nothing to prepare for my sentencing phase. They

didn't even ask my mother to come down and testify on my behalf.

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murder, I was stunned. So was my experienced lawyer, who disappeared. That left my inexperienced lawyer, just out of law school, to handle the sentencing hearing by himself. When the jury sentenced me to death, I could hardly talk - I was in such a state of shock.

A few months later, my co-defendant, Albert Burrell, was also convicted and given a death sentence. I understand that his lawyers were even worse than mine.

I'll never forget my first night on death row. The night before the state had executed another inmate, and I was given his cell. During the night, I looked down at the floor and completely freaked out. I thought I saw a pool of blood. It turned out to be rusty water.

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As in many cases, there was no DNA evidence to exonerate me and Albert. But we were two of the lucky ones. We both had pro bono lawyers who worked their tails off for us and stuck with our cases for many years. If we had depended on state lawyers, we probably would still be on death row, or worse.

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snitch was a pathological liar, and got sworn statements from the other two witnesses recanting their testimony. They even got a statement from the prosecutor saying that the case should never have been brought in the first place because the evidence was too weak.

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Chairman LEAHY. Thank you very much, Mr. Graham, and I wish you and your fiancee well. I met her earlier this morning.

Mr. GRAHAM. Thank you.

Chairman LEAHY. I will submit for the record a letter I received from Mr. Charles Lloyd, who represented your co-defendant, Albert Burrell. Mr. Lloyd took the case pro bono after Burrell was convicted and sentenced to death. The letter describes the shocking incompetence of Burrell's trial lawyers, who were just a few years out of law school, apparently did little investigation before the trial, were ineffective during the trial, and did nothing to prepare for the penalty phase. Mr. Burrell was sentenced to death, both of his lawyers were indicted and convicted, one on a drug charge, the other for stealing client money. Both were later disbarred.

Ronald Eisenberg is the Deputy District Attorney in Philadelphia. He previously served as chief of the Appeals Unit in Philadelphia, an office where he began work as a prosecutor in 1981. Mr. Eisenberg served on the Task Force on Death Penalty Litigation of the Third Circuit Court of Appeals. He is a member of the Pennsylvania Supreme Court's Criminal Rules Committee.

Mr. Eisenberg, thank you for taking the time to come down and join us today.

STATEMENT OF RONALD EISENBERG, DEPUTY DISTRICT ATTORNEY, PHILADELPHIA, PENNSYLVANIA

Mr. EISENBERG. Thank you, Mr. Chairman, and members of the committee. I would like to touch briefly on two points from my written testimony that I have submitted to the committee.

First, one of the arguments that has been made in favor of Federal intervention into the State appointment process in capital cases is that there is a chronic lack of funding for lawyers in State capital cases, and that, in fact, previous Federal funding for those cases, for assistance in State capital cases, was cutoff by Congress in 1996.

In fact, however, while that money was cutoff in the form of one program, it was then paid out again ever since in the form of another program administered by the United States courts. And in fiscal year 2001, over $20 million was paid by the Federal Government to lawyers for assistance and training in State capital cases, not Federal cases like the McVeigh case, but State capital cases.

Now, I know that the argument will be made that, well, if they were paying out that money and we still have a bad system, it must not be enough money. The point is that for opponents of capital punishment, and I understand their position, there is no amount of money or Federal intervention that is ever going to be enough to solve the problem as long as juries in State capital cases, on review of all the evidence, keep returning death penalties in some cases.

Chairman LEAHY. So your position is totally the opposite of what the three Members of Congress testified earlier, that it is not a question of whether you are for or against the death penalty, and it is totally different from that of the position of the pro-death penalty Members of Congress who have supported this legislation?

Mr. EISENBERG. Senator, my point was that I understand that for people who are opponents of the death penalty—and as we have acknowledged, there are many who are and I can understand their position—the amount of money or the nature of the standards will not be enough, whatever they are, and that leads me to my next point about standards.

Chairman LEAHY. So you do not accept the testimony of Congressman LaHood, for example?

Mr. EISENBERG. I don't think it is a contradiction, Senator.

Chairman LEAHY. OK.

Senator SESSIONS. He is simply saying if you oppose the death penalty, Senator Leahy, deeply and personally and so greatly, nothing is going to make you satisfied with the system.

Chairman LEAHY. I just wanted to make sure I understood him.

Mr. EISENBERG. Thank you, Senator.

On the issue of standards, there has been a lot of talk about the absence of standards in State courts. The reality is that most death penalties arise in States that do have standards for the appointment of counsel. In fact, those standards are in most cases much stricter, much higher, than the standards that the Federal Government itself imposes for appointment of counsel in Federal capital cases such as the McVeigh case.

The Justice Department, not the current Justice Department but the previous Justice Department, did a study reviewing standards for appointment of counsel in capital cases and collected all of this information. Those States have been doing that, have been promulgating these standards on their own, without Federal compulsion, for many years.

Now, there has been talk about State courts today and about the claim that we can't trust the State courts, that there are a lot of errors found in death penalties, reference to the study by Professor Liebman. While I certainly believe that the numbers in his study are greatly exaggerated, there is no question that death penalty cases are reversed at a significantly higher rate than other cases, even cases that were tried under identical circumstances but simply resulted in the end in a non-capital verdict rather than a death penalty verdict, and that significant numbers of those reversals occur in the State courts.

Now, the question arises, I believe, that if the State legislatures and courts are already out in front in many areas in the standards that they have promulgated, and if the State courts are already out in front in the number of death penalty cases that they are reversing, that they are reviewing and reversing, I think it is quite questionable whether it is necessary for the Federal Government then to come in and mandate different standards for those States and different procedures than they have already been following.

I understand the argument—and I believe that this is Professor Liebman's argument—that if lots of cases are being reversed in the State courts, then there must be lots more that should have been reversed. In other words, in effect, what we are saying is we can trust the State courts completely to the extent they reverse death penalty cases, but they must be wrong as to the cases they are not reversing.

I think really that the argument goes the other way that if we are going to trust the State courts are properly reversing in the cases where they are, then we should trust the results in the cases where, after years of review, they do not reverse those cases.

The argument has been made that because of the alleged politically biased nature of those same State courts that are reversing so many death penalty cases, we can't let those courts appoint counsel; we have to have an independent appointing authority that will be run by zealous advocates against the death penalty. After all, it is argued, prosecutors can be zealous advocates for the death penalty.

Well, an independent counsel-appointing authority is not performing a function of an advocate; it is a performing a function of the court, of a neutral arbitrator and it controls access to the system. That access can have a great effect on the ability of the capital litigation system to proceed or not.

In California, for example, death penalty cases are routinely delayed for 3 and 4 years at the appellate stage after the conviction merely to wait for the court to try to find lawyers to take the cases. So if the access of available lawyers is restricted, these cases can't proceed and delay results.

We already have, on average, 10 and 20 years of delay in these cases. If we put the access to the system in the hands of lawyers whose job it is to be against the death penalty, we cannot assume a proper result. The appointment process is a function that we put in the hands of a neutral body, the court system. People can make complaints about the court system, but certainly it is far more neutral, we can assume, than either adversary on either side. And if

we want the system to be able to function at all, we have to make sure that that neutrality remains.

The current proposal, as I understand it, would penalize the States or not adopting such a proposal. It would penalize the States for not paying defense lawyers, for example, at local markets rates, which in my jurisdiction for lawyers for complex litigation may be $200, $300, $400 an hour.

One of the penalties that the States will suffer is the elimination of various provisions for Federal habeas corpus review of State courts. Right now, the Federal courts that have these cases, after three and sometimes four appeals in State courts, are required to abide by the factfinding and give deference to the legal rulings of the State courts.

The argument is made that if the State courts aren't following mandated Federal standards, we can't trust their results, and the Federal courts therefore should ignore them. As I have said, however, we trust the State courts to reverse death penalty cases that we know they are doing in large numbers. We trust the State courts to appoint counsel on standards which are higher than the current Federal standards.

I think that if we want to encourage a system, as Attorney General Pryor said, where the States provide this process, we must continue current law that gives effect to the process that occurs in the State courts.

Thank you very much.

[The prepared statement and an attachment of Mr. Eisenberg follow:]

STATEMENT OF RONALD EISENBERG, DEPUTY DISTRICT ATTORNEY, PHILADELPHIA, PENNSYLVANIA

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to address the Committee on the important issue of competency of counsel in state capital proceedings. I believe there is no real disagreement on this goal; I know of no prosecutor who does not desire an active, ethical capital defense bar pursuing clients' interests. Such quality representation is necessary to achieve justice, public confidence, and efficiency.

The real question here is whether it is appropriate and productive for the federal government to intervene in the states' processes for appointing counsel in state criminal proceedings. I would like to address two points that may bear on that question: the existence of federal funding for state capital litigation, and the existence of standards for appointment of counsel.

Existing federal funding. Capital punishment opponents charge that defense lawyers in state capital cases are chronically underfunded. Much of the impetus for the complaint stems from the so-called defunding of the capital resource centers, set up by Congress in 1994 to provide legal advice, training and assistance in state death penalty cases. While it was largely unreported, however, federal assistance for state capital defense was not actually cut off. Instead, the funding was picked up by the Administrative Office of United States Courts. This reallocation process began at the end of 1995, before the resource center cutoff date, so that new funding would be immediately in place. There was never any gap, and many of the new federal court-funded attorneys were the very same lawyers who had worked for the resource centers.

Each year, the funding level has risen. In FY 2001, the total amount was over $20,000,000. The money went to many of the most active capital litigation jurisdictions: California, Pennsylvania, Georgia, Oklahoma, Arizona, Nevada, and Tennessee. The federal office administering the program reports that no defender organizations in other states have been refused funding. (The list does not include states such as Florida and New York that have independently established highly-funded statewide capital defense organizations.)

Ostensibly, this money is to be used for representation of state capital defendants in federal habeas proceedings, after the case has already moved through the state courts. In my jurisdiction, however, capital defense lawyers paid by the federal government have spent at least as much of their time in state court as in federal court.

At the very minimum, the federal millions free up considerable resources for direct use in state court, at the trial, appeal, and post-conviction level. Undoubtedly, capital defense lawyers will still claim it is not enough. (I am not personally aware of any government-funded lawyers, at least at the state and local levels, who believe they have enough resources to perform their jobs optimally.) But the existence of this funding stream surely impacts on the question of whether Congress need impose new federal mandates on the states, with significant financial and legal penalties for those jurisdictions that devise their own different solutions to the problem.

Existing counsel standards. Opponents of the death penalty claim that the system is unfair because lawyers are not sufficiently qualified. The deficit can be redressed, it is argued, only if the federal government steps in to force states to adopt federal standards for appointment of counsel in capital cases.

Under the previous administration, however, the Department of Justice performed a study finding that most state death penalty cases arise in jurisdictions that have already adopted standards for appointment of capital counsel. And in most cases, those standards exceed the qualifications that Congress chose to require for appointment of counsel in federal capital cases.

The Clinton Justice Department study can be found on the internet at http://www.ojp.usdoj.gov/indigentdefense/compendium/pdftxt/vol3.pdf. It concluded that at least 17 states have by statute or court rule promulgated standards for appointment of counsel at various stages of a capital case. These states include California, Florida, Georgia, Missouri, New York, North Carolina, Ohio, and Utah. (The list does not include Pennsylvania, which does not have statewide standards, but does have detailed standards for Philadelphia, which represents the majority of capital cases in the state.)

At least 14 other states, according to the study, have public defender systems for capital representation. These states include Colorado, Delaware, Maryland, New Jersey, New Mexico, Oklahoma, and Oregon. (The study predates the recent establishment of a statewide indigent defense system in Texas.)

Standards for appointment of counsel in federal cases carrying a potential death sentence are set forth in 21 U.S.C. § 848(q)(4)(A) and (5)–(7). They provide only that the court appoint one (and for good cause shown, a second) attorney, who has been a member of the bar for five years and has three years of felony trial or appellate experience. Unlike many of the state appointment standards, the federal standards do not require experience in any prior capital cases, or any training in capital litigation.

This discussion of counsel appointment standards is not to suggest, however, that particular standards necessarily result in reduced claims of attorney error. Experience is actually to the contrary. In Philadelphia, for example, where capital appointment standards were adopted a decade ago, I am unaware of any capital case that does not involve claims of ineffective assistance of counsel. Frequently, counsel whose ineffectiveness is raised will testify that they did indeed err in some fashion. Of course, a lawyer who avoids a death sentence for his client by confessing his own ineffectiveness is, paradoxically, supremely "effective."

But if the goal is to achieve effective counsel in the constitutional sense, rather than simply to reduce the number of successful capital prosecutions, then it is unclear that any particular appointment methods are optimal whether or not Congress chooses to punish states that diverge from federally mandated provisions.

DISTRICT ATTORNEY'S OFFICE
PHILADELPHIA, PENNSYLVANIA 19102
July 5, 2001

Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510–6275

Dear Chairman Leahy,

I was a witness at the June 27, 2001, Judiciary Committee hearing exploring issues related to competency of counsel in state capital proceedings. During the

hearing, you read from the posed questions to me concerning an April 2001report by Janice L. Bergmann entitled "The Crisis in Post-Conviction Representation in Capital Cases Since the Elimination by Congress of Funding for the Post-Conviction Defender Organizations."

Because I was previously unaware of the report, I would like to add to my responses to your questions, which focused on the report's discussion of post-conviction capital litigation in the Commonwealth Pennsylvania.

At page 75, the report alleges that Pennsylvania fails "to provide trained legal counsel for indigent death row prisoners." The report attempts to justify this charge with several assertions.

First, the report states that the post-conviction capital defender organization originally funded by the federal government in 1994 was downsized and eventually forced to close entirely in 1999. In reality, as I mentioned at the hearing, federal funding for post-conviction capital defense in Pennsylvania never ended; on the contrary, it has increased ten-fold since 1994.

It is true that the organization originally called the Pennsylvania Capital Case Resource Center has changed its name several times—but not its function. The resource center changed its title to the Pennsylvania Post-Conviction Defender Organization, and then, after the so-called "defunding," to the Center for Legal Education, Advocacy, and Defense Assistance.

At the same time that the CLEADA title emerged, however, so did another; the Capital Habeas Unit of the Federal Defenders Office for the Eastern District of Pennsylvania. This was the entity that officially received the continuing federal funding for post-conviction capital defense in Pennsylvania. The report acknowledges that this organization was created "not long after" the ostensible defunding of the resource center. In reality, there was no gap at all; the Administrative Office of United States Courts Defender Services Division officially acted, months before the "defunding," to appropriate money to the new Capital Habeas Unit.

The overlap between the resource center and the Capital Habeas Unit was more than temporal. The staff of the habeas unit largely consisted of attorneys who had, until the moment of the unit's creation, been resource center lawyers. Indeed, while two of the resource center's lawyers worked under the separate letterhead of CLEADA, the remainder officially became employees of the capital habeas unit.

But these lawyers did not have to go far to communicate. CLEADA and the capital habeas unit shared offices on the same floor of the same building. While they had different suite and telephone numbers, lawyers from these offices answered the phones and used the face machines interchangeably, regardless of their official title. (The rest of the Federal Defenders Office, of which the Capital Habeas Unit was officially a part, was housed in a different location.)

Most importantly, however, all of these lawyers continued to work together on state capital cases. The Bergmann report implies that lawyers of the Capital Habeas Unit represent capital defendants only in federal court, after state post-conviction proceedings have been completed. That is flatly false. Lawyers employed by the Capital Habeas Unit represent capital defendants in the majority of—indeed, in almost all—post-conviction proceedings in state court. My colleagues deal with these lawyers, in writing and in person and in state court, every day.

So when in 1999 CLEADA chose to end its independent existence, there was no question what would happen to its lawyers and state court caseload. All were immediately assumed by the Capital Habeas Unit staff. The report carefully asserts that, when CLEADA dissolved, "no state entity in Pennsylvania" was available for capital defense. The author seemingly was aware that an entity did indeed exist, although it had been created and funded by the federal government though the AOUSC.

And that entity has flourished. In 1995, the Defender Services Division allocated $1,590,744 to the Capital Habeas Unit for the portion of FY96 following the upcoming resource center "cut-off" date of March 31—apparently far more federal funding than the resource center ever received as such. For FY97, the Division allocated $2,327,600. In FY98, the allocation was $2,485,100. In FY99, the unit received $2,904,800. And for FY2000, Capital Habeas Unit funding jumped to $5,565,000. When the Pennsylvania resource center was supposedly cut off, there were four federally funded lawyers providing assistance, training, and most of all, direct representation of state capital defendants. Today, there are at least fifteen. The report says none of this.

The report misrepresents Pennsylvania conditions in other respects as well. The report implies that capital defendants go unrepresented, stating that the Commonwealth adopted a one-year filing deadline for state post-conviction petitions (as Congress did for federal post-conviction petitions), yet has no state standards for appointment or funding of post-conviction counsel. In reality, Pennsylvania has a guaranteed right to appointment of counsel for one full round of post-conviction counsel,

but to the effective assistance of post-conviction counsel, to be judged on Strickland standards. No court can dispose of the first post-conviction petition without appointing counsel, even if the one-year filing deadline has passe. I am aware of no case in which an unrepresented capital defendant was time-barred from an initial State post-conviction petition. The report says none of this.

As to appointment standards and funding, the report makes no effort to gauge conditions. Instead it simply takes the position that, since these functions are not mandated at the state level in identical, centralized terms for all of Pennsylvania's 67 counties, they must be performed inadequately. Astonishingly, the report fails to discuss practices in Philadelphia, which accounts for roughly three fourths of all homicides in Pennsylvania, and two-thirds of the capital cases.

As I mentioned at the hearing, Philadelphia has for more than a decade had in place appointment standards that far exceed federal standards. The standards apply not just for appointment of trial and direct appeal counsel, but for appointment of post-conviction counsel as well. They require that the court appoint at least one attorney (and two attorneys if the case presents numerous or complex issues). The attorney must have at least five years of litigation experience, must have handled at least ten trials or hearings to final factual resolution, must have taken training within the previous two years focusing on capital post-conviction litigation, and must submit an adversary writing sample and questionnaire to a screening committee of defense lawyers. The report says none of this.

All these commissions are not surprising. The report states that it was prepared "with the assistance of local practitioners.' I know of no Pennsylvania prosecutors, however, who were consulted under the auspices of the report, or who were even informed of its existence after completion.

The report's author is identified as "a federal defender staff attorney." It is unclear to me from this description whether the author is a direct employee of the Defender Services Division of AOUSC, or whether she is in fact a practicing capital defense attorney; at the least, as a Westlaw search shows, her training and experience are as a capital defense attorney. What is clear, then, it that this report is hardly an objective analysis by a neutral government agency. It is an advocacy document, written by an advocate.

Still, the existence of the report underscores two points made at the hearing: that many state and local governments are now taking great efforts to provide competent capital defense counsel, and that, in many areas, their primary opponent in defending capital convictions is an agency of the federal government. I hope that this more complete discussion of the Pennsylvania experience in capital litigation will aid the Committee in the consideration of the issues before it.

Thank you for this opportunity to supplement the record of the hearing.

Sincerely,

RONALD EISENBERG
Deputy District Attorney

Chairman LEAHY. Unfortunately, in Illinois, we had to trust some teenage or just-out-of-their-teens journalism students to do what the courts and the whole criminal justice system had not done—to find innocent people.

Beth Wilkinson, our next witness, was the lead prosecutor in the Oklahoma City bombing case. She delivered the closing arguments in the sentencing phase of the McVeigh case—in which he received the death penalty—and delivered also the arguments in the Nichols trial.

She began her legal career as a captain in the U.S. Army, where she served as an assistant to the general counsel for the Office of the Army General Counsel. She has also served as an Assistant U.S. Attorney in New York and as the principal deputy chief of the Terrorism and Violent Crime Section at the Department of Justice. She is now a partner with Latham and Watkins here in Washington, and serves as co-chair of the Constitution Project's Death Penalty Initiative.

Ms. Wilkinson, I thank you very much for taking time in what I know has already been a very busy day to be here with us. Go ahead.

STATEMENT OF BETH WILKINSON, CO-CHAIR, CONSTITUTION PROJECT'S DEATH PENALTY INITIATIVE, WASHINGTON, D.C.

Ms. WILKINSON. Thank you very much, Mr. Chairman. It is a privilege to be here with you; Senator Hatch, to see you again; Senator Sessions and Senator Feingold to speak about something that is so important to, I believe, everyone on this panel.

I come to you today not just in my personal capacity as a former Federal prosecutor, but also as the co-chairman of the Death Penalty Initiative that made its recommendations public this morning. We are a bipartisan group of people who are in favor and oppose the death penalty, and have worked in a similar way that I think you, Senator Leahy, and you, Senator Hatch, are trying to do on these very important issues.

We have brought together people as diverse as Paula Kurland, who is here today, who is a mother of a victim of a murder who actually witnessed the execution of her daughter's murderer. Her daughter, Mitzi, was murdered at age 21.

We are also joined on our committee by Judge William Sessions, the former Director of the FBI, a proponent of the death penalty and a strong supporter of DNA evidence and analysis.

On the other side of the aisle is David Bruck, a prominent capital defense lawyer who has chosen in his career to defend many people who have faced capital punishment. We even are joined by Reverend James Andrews, who represents a variety of the clergy, including the Presbyterian Church, who oppose the death penalty.

We took the time to come together with our divergent views and make 18 recommendations for what we saw as the minimum standards that States and jurisdictions across the country needed to employ to ensure that capital litigation was improved in our country.

Today, we have announced those recommendations, and three are directly related to the topic of your hearing today and that is the competency of counsel. I personally believe there is nothing more important in any type of litigation, but especially in capital litigation, that defendants receive good and zealous representation.

It is important for obvious reasons, to protect the system, to protect the victims who want to know that the right person was convicted fairly, to streamline the appellate process so we don't have the long delays that some of the other panelists have alluded to this morning, and so that we know our system is working properly and is tested at every level.

As a former prosecutor, I found great comfort in participating in the McVeigh case knowing that Mr. McVeigh and Mr. Nichols were represented by very fine, experienced advocates. In the end, when Mr. McVeigh challenged most recently his death penalty conviction and sentence, I think Judge Matsch and the rest of us found great comfort in knowing that there had been a thorough investigation, a thorough pre-trial process, extraordinary resources expended by the defense that left no doubt that Mr. McVeigh was the perpetrator of the crime.

I believe that most people who participate in the system want to know on both sides that the defendant is being represented zealously. Unfortunately, that doesn't happen in our system in very many instances. While States across the country do have standard, as Mr. Eisenberg noted, few or any of them are enforced on a regular basis. It does us no good to have those standards if those counsel that represent indigent defendants are not actually accomplished, experienced criminal lawyers. As Mr. Bright was saying, many of these lawyers have no experience in criminal law.

What the Constitution Project's Death Penalty Initiative recommends to you, and is consistent with the legislation that we support, the Innocence Protection Act, is that three main fixes be made in the system.

First, there is an independent authority that appoints counsel, sets the standards, and ensures that each individual defendant has adequate and well-trained counsel. Now, Mr. Eisenberg noted that if such an independent authority were established, it might be taken over by people who are zealous anti-death penalty advocates.

Well, first of all, I think most people who defend death penalty defendants are opposed to the system. Few other people would ever take on that type of representation. It is emotionally exhausting, it is intellectually challenging, and it is not well-paying. So I don't think that it should surprise anyone that if there is an independent authority that the people who actually take on the representation would oppose the death penalty. That should make no difference in how they zealously represent the defendants. In fact, if it improves their skills—that is, if they receive more training and they have more experience—that is only to all of our benefit.

Second, we want to ensure that all of the counsel who represent individuals in this system are paid properly. Everyone knows and has heard of the stories of people who receive $20 to $40 an hour in Alabama, Tennessee where there is a $20 to $30 limit, and in Mississippi a $1,000 cap. No attorney, no matter how zealous, who has to pay their bills, pay back their law school loans, can afford to take on those types of representations.

It is essential that attorneys are well compensated, and that not only are they compensated but that their investigators and experts can be paid so that they can pursue all of their rights under the system.

Finally, the third recommendation we make is that the current standard under the Supreme Court precedent of *Strickland* v. *Washington* for competency of counsel be changed for capital litigation. The idea that you can have effective assistance but fatal assistance, as we have heard described here so dynamically by Mr. Graham, is shocking. We should hold defense counsel who represent capital defendants to a higher standard.

I come here today to thank all of you for all the hard work that you have been doing, and I know you will continue to do on this bipartisan issue, and to provide the support of our committee and me personally for the Innocence Protection Act. I look forward to answering any questions you may have.

[The prepared statement of Ms. Wilkinson follows:]

STATEMENT OF BETH WILKINSON, CO-CHAIR, CONSTITUTION PROJECT'S DEATH PENALTY INITIATIVE

Good morning, Mr. Chairman and Members of the Committee. My name is Beth Wilkinson. I presently serve as co-chair of the Constitution Project's Death Penalty Initiative. I am here today to speak on behalf of the Committee and personally, as a former federal prosecutor, about the importance of competent counsel for defendants facing capital punishment.

The members of the Committee are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. We are former judges, prosecutors, and other public officials, as well as victim advocates, defense lawyers, journalists, scholars, and other concerned Americans. We disagree on much, including whether abolition of the death penalty is warranted. But we agree that insufficient safeguards are in place to assure fairness in the administration of capital punishment. We have come together not to abolish the death penalty, but to improve the administration of capital litigation.

We have conducted extensive research and have deliberated long and hard about the issues presented today, seeking consensus because we recognized the need to overcome past divisions. For too long, society has cast the death penalty debate as one between "liberals" and "conservatives," those who are "soft on crime" and those who "care about victims of crime."

This morning our Committee announced to the public some of the minimum reforms essential to a fair and just death penalty system. One of our paramount concerns is competent counsel for indigent defendants facing the death penalty. All of our citizens, regardless of ability to pay, and especially those facing capital punishment, should be well represented.

As a prosecutor in the federal system and specifically, as a prosecutor in the Oklahoma City bombing case, this is especially important to me. Timothy McVeigh and Terry Nichols were defended by highly skilled teams of lawyers, experienced in capital cases. All of the participants in the process wanted a fair trial, and with talented and zealous counsel, McVeigh and Nichols indeed received fair trials.

Far too few capital defendants have quality defense attorneys at trial, and while not every defendant may be entitled to a dream team of defense lawyers, every defendant facing the death penalty is entitled to qualified counsel who meet minimum qualifications.

As a prosecutor, I wanted both Timothy McVeigh and Terry Nichols to be represented by a good defense lawyer for many reasons. First and foremost, a competent defense lawyer is essential in getting at the truth. I wanted the defense to do a thorough investigation to make it easy for the appellate court to decide there had been a fair trial. Substandard counsel is likely to result in an inadequate trial record, through failure to investigate and failure to preserve objections. I also wanted the families of the victims to rest knowing the perpetrators were punished. When a defendant has ineffective counsel the state, the families of victims, and society all suffer. Litigation becomes protracted, complicated and costly, putting legitimate convictions at risk. This subjects the victims' families to continuing uncertainty, and deprives society of the knowledge that the real perpetrator is behind bars. This means that ensuring competent counsel to defendants facing the death penalty benefits not only the defendant, but also victims and society at large.

We have all heard the stories of wrongful convictions involving defense lawyers who lacked the appropriate experience and resources. We hear that sometimes, capital defense lawyers were under the influence of alcohol or drugs, or slept through parts of a trial; and that there have been a number of capital defense lawyers who were subsequently disbarred or otherwise cited for serious ethical violations.

For example, in 1986 in Georgia, defendant Aden Harrison, Jr. was all but abandoned by his court-appointed attorney James Venable. Not surprising since Harrison was a black man and his attorney was a former imperial wizard of the Ku Klux Klan who was later disbarred.

In 1992 in Texas, defendant George McFarland's attorney admitted to sleeping through parts of the trial. The judge permitted the trial to continue saying "the Constitution guarantees the right to an attorney. It doesn't say the lawyer has to be awake." McFarland is currently on death row.

The state of Oklahoma paid approximately three thousand dollars for Ronald Keith Williamson's defense. His lawyer conducted no investigation and failed to mention to the jury that another man had confessed to the killing.

These cases highlight the need for death penalty reform on a National level. Today we announced to the public a number of recommendations for reform, including three provisions dealing specifically with representation of capital defendants.

First, we recommend every jurisdiction create an independent authority to screen, appoint, train, and supervise capital defense attorneys, and to set minimum standards for capital representation.

Without such a process, as numerous studies have shown, competent representation becomes more a matter of luck than of constitutional guarantee. The independence of the authority and its freedom from judicial or prosecutorial conflicts is crucial to ensure that its members can act without partisanship and in a manner consistent with the highest professional standards.

Instead, many states award capital cases by contract or appointment, employing explicit or implicit incentives to these attorneys to keep their costs low and their hours on the case few. The attorneys may be chosen based on friendship with the judge, a desire not to "rock the boat," their willingness to work for low wages, their presence in the halls of the courthouse, or other factors poorly correlated with competent representation. Many of them have little knowledge of capital litigation or even criminal law in general. Many have little experience or skill in the courtroom. A disproportionate number have records of disciplinary action, even disbarment. Establishing independent appointing authorities to alleviate many of these problems is a crucial and central recommendation of this committee.

All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation. The standards for qualified counsel will vary according to the requisites of the particular stage of proceedings. There is some flexibility as to which minimum standards a jurisdiction ought to adopt. However, we suggest that minimum standards should, at the least, require two attorneys on each capital case, and at the trial level that: (1) the lead attorney have at least five years of criminal litigation experience as well as experience as lead or co-counsel in at least one capital case; (2) co-counsel have at least three years of criminal litigation experience; (3) each counsel have significant experience in jury trials of serious felony cases; (4) each attorney have had recent training in death penalty litigation and (5) demonstrated commitment and proficiency. Similar standards should be met at the appellate and post-conviction stages, although at these stages the type of relevant prior experience will vary. The important thing is that a set of stringent and uniform minimum standards should be adopted, implemented and enforced.

Second, we recommend that each jurisdiction adopt standards ensuring adequate compensation of counsel appointed in capital cases, as well as adequate funding for expert and investigative services. Many jurisdictions impose shockingly low maximum hourly rates or arbitrary fee caps for capital defense (Alabama $20–40 an hour, up to $2000 cap, meaning that an attorney devoting 600 hours to pretrial preparation in Alabama would earn $3.33 an hour; Tennessee, $20–30 an hour; Mississippi, a $1000 cap). Courts often will not make funds available for reasonable expert, investigative, support or other expenses that are crucial to the adequate preparation for both trial and sentencing in capital cases. Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators. Failure to provide adequate funding and resources is a failure of the system which forces even the most committed attorneys to provide inadequate assistance.

Third, we recommend that the current standard of review for ineffective assistance in capital sentencing be replaced with a more stringent standard better keyed to the particulars of capital representation.

The current Supreme Court (*Strickland* v. *Washington*, 466 U.S. 688 (1984)) standard for effective assistance of counsel permits "effective but fatal counsel." Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context.

In support of the Death Penalty Initiative, my law firm, Latham & Watkins, took on a research project of death penalty laws in 6 states. All of the states, Texas, Virginia, Indiana, Pennsylvania, Tennessee, California, have laws governing standards for counsel in capital cases. Yet, stories like Aden Harrison, Jr., George McFarland, and Ronald Keith Williamson are rampant. This is why it is so important to address this issue on a National level with an enforcement mechanism to ensure counsel standards are actually met.

There are very few ways to ensure from a federal perspective that indigents facing the death penalty have effective counsel. We all can agree that there is a problem. The question becomes how can the federal government help enforce and resolve the problem. The reforms proposed today, coupled with the Innocence Protection Act of 2001, will ensure that minimum standards for competent counsel will be met in all States. This is why the Committee and I, personally, am such a strong supporter of this legislation.

The Act rightly enforces standards for qualified counsel through monetary incentives, both through award and withholding of grants; and through the invocation of certain procedural advantages in federal habeas corpus review for those states that provide competent counsel to capital defendants. Unless these standards are enforced in ways that assure compliance, the mere adoption of standards is meaningless.

The lack of adequate counsel to represent capital defendants is likely the gravest of all problems, which makes the death penalty arbitrary, unfair, and rife with error. I urge the Congress to support the reforms establishing a National standard for competent counsel in death penalty cases. These reforms will benefit not only defendants, but also victims and society at large.

In closing, I urge the Congress to pass the Innocence Protection Act of 2001 in order to fulfill the Constitutional guarantee of effective assistance of counsel to all defendants.

I look forward to answering any questions that you might have.

Thank you.

Chairman LEAHY. Thank you, Ms. Wilkinson. You never taught me how to hold on to some of these props, Senator Hatch. You were supposed to teach me some of these things before I took over the chairmanship.

Senator HATCH. I would just like you to share them with the Minority, because we asked for it yesterday and still don't have a copy.

Chairman LEAHY. I got this about a half hour ago and I will be glad to give you my copy, if you would like.

Senator HATCH. If you would, we would be glad to have it.

Ms. WILKINSON. I would be happy to provide one.

Chairman LEAHY. Why don't you bring it up right now?

Senator HATCH. We will send somebody down.

Chairman LEAHY. I just want to make sure you get it. I have not read it.

Kevin Brackett is the Deputy Solicitor of the 16th Judicial Circuit in South Carolina. You have been there for 10 years. You have prosecuted capital cases, you have trained colleagues in handling such cases. You were named the Ernest F. Hollings Prosecutor of the Year in 1998.

Mr. Brackett, I appreciate you taking the time to come here, and I hope while you are here you have a chance to stop by and say hello to both of your Senators. For one you have an award named after him; the other, Senator Strom Thurmond, is a member of this committee.

STATEMENT OF KEVIN S. BRACKETT, DEPUTY SOLICITOR, 16TH JUDICIAL CIRCUIT, YORK, SOUTH CAROLINA

Mr. BRACKETT. Thank you, Mr. Chairman, Senator Hatch, members of the committee. As Chairman Leahy has said, my name is Kevin Brackett, and I am honored and pleased to be here to participate in this discussion on this very important topic.

I have been a prosecutor for nearly 10 years and I have been serving the citizens of York and Union Counties in South Carolina. I have prosecuted the last five capital murder cases that have occurred in our jurisdiction. Prior to my employment with the solicitor, I worked as a law clerk with the Richland County Public Defender's Office, which is down in Columbia, the capital city of South Carolina. And while employed there, I was privileged to participate in the defense of a capital murder case in which the defendant was sentenced to life in prison. I feel that my experience

on these issues on both sides gives me a good perspective on some of the issues that we are discussing here today.

My written statement which I have submitted for the consideration of the committee details my thoughts on the necessity of this legislation in the State of South Carolina. In sum, I believe that South Carolina already complies with any reasonable standards which the proposed commission may choose to suggest. Minimum standards of competence for counsel in capital cases are already in place.

This year's budget provides $2.75 million to compensate counsel and for the purpose of retaining experts and investigative services in capital cases. In addition, that $2.75 million is augmented by a special levy that is attached to every fine imposed in any court in the State of South Carolina. If a fine is given of $50, there is an additional $50 levy that is placed on that. Eleven percent of that levy goes into the fund for the defense of indigents. So the $2.75 million is just the baseline funded by the legislature. Additional funds are available throughout the year as these fines and fees are paid.

I believe if the committee's proposals are reasonable, I don't think that Title II of the Innocence Protection Act is really going to have any kind of noticeable impact on capital case processing in South Carolina.

I would point out that we just finished a capital case about 3 months ago, *State* v. *Bobby Lee Holmes*. It was a retrial. It was a 10-year-old murder case and Mr. Holmes was represented by two very capable counsel, one of whom is basically a specialist in defending capital cases, defends them all across the State, and the other of whom has approximately 15 years' experience on both defense and prosecution.

In addition to these two lawyers, they were supported by a phalanx of attorneys. I think there were four or five other attorneys who were volunteering pro bono to assist in this case. There were investigators in the courtroom at all times. They had numerous experts. Six, eight, ten experts testified, and there were other experts who were retained to assist who never testified.

There is no shortage of assistance to indigent capital defendants in South Carolina, and the system there I believe works to give them every opportunity. In fact, were I charged with a capital murder in South Carolina, I would divest myself of every asset I have and ask to be given indigent representation so that I could access this quality of representation because I could not afford to mount the defense that Mr. Holmes mounted 3 months ago.

Nobody can quibble with the contention that capital defendants are entitled to competent representation and adequate resources to help assist in their defense, hiring experts and investigators. That notwithstanding, I cannot support or endorse Title II of the Innocence Protection Act as it is proposed.

First, while there may be isolated incidents of incompetence and insufficient funding for capital defendants, there is already a mechanism in place to remedy the problem. It is called the Sixth Amendment and the Due Process Clause.

The courts do a fine job. They are in the best position to evaluate these situations on a case-by-case basis and determine whether

there is any merit to these claims. I submit that the courts do an excellent job of this, and this legislation only tends to indicate a lack of faith in their ability.

Second, Title II appears to put the cart before the horse by accepting that there is a need for change prior to undertaking an objective assessment of the situation and the system. The Act is premised on the supposition that incompetence and underfunding are rampant through the system. I know that this is the position taken by those who are opposed to capital punishment under any circumstances.

I do not believe that an objective study of capital punishment in this country would support this premise, however. It would be much more practical to undertake a thorough, objective assessment of the system first and then proceed to recommend positive changes.

Finally, if the Congress feels it is necessary to mandate changes—in other words, if we must do this, if we are going to make these changes, it should resolve to correct as many of the flaws in the system as it can. Perhaps it would be prudent to rename the bill the Truth Protection Act.

As our Supreme Court noted in Oregon v. Haas, we are, after all, engaged in a search for the truth. Mandating safeguards for the truth-seeking function of the courts of this country achieves the goal of protecting the innocent. The truth will also set the innocent man free. It also has the added benefit of ensuring that the guilty are held accountable.

A Truth Protection Act could embrace all the concerns addressed in the Innocence Protection Act. It could mandate minimum standards of competence and experience for all capital counsel, but this should also include, however, a requirement that any defense attorney found to be ineffective in more than a set number of habeas proceedings, or grossly ineffective in just one, should be barred from ever representing capital defendants again. Currently, there are no ramifications for such a finding, and thus no deterrent to prevent an over-zealous defense attorney from falsely confessing to incompetence to secure a new trial for his client.

It could also set reasonable standards for the appropriation of expert and investigative funding for indigent defendants. This should include a requirement that any experts retained be required to generate reports, to be turned over to the State, to preclude expert witness-shopping and frivolous expenditures of public money. This should be mandated for non-indigent defendants as well.

These are not the only areas of the system that need attention. Most Americans would be appalled to learn that a criminal defendant is required to be given the entire State's file and access to all the evidence prior to deciding what his defense will be. Originally intended to prevent trial by ambush, the criminal discovery laws now serve only to frustrate the search for the truth by allowing the defendant to conform his defense to the State's evidence. This is an example of another problem that a Truth Protection Act could address. There are problems on both sides and they both need to be addressed.

In conclusion, I submit that the issues this bill addresses are more complex than they may first appear. I urge the committee to

study the matter more carefully before acting, and if action is taken, the committee should resolve to take a more comprehensive approach to the system's problems.

I would ask that my statement be made part of the record. Thank you again, Mr. Chairman, for this opportunity to be here today and I look forward to answering your questions.

[The prepared statement of Mr. Brackett follows:]

[Additional material is being retained in the Committee files.]

STATEMENT OF KEVIN S. BRACKETT, DEPUTY SOLICITOR, 16TH JUDICIAL CIRCUIT, YORK, SOUTH CAROLINA

I am honored to be here today to participate in this important debate on the quality of our criminal justice system as it relates to capital murder trials. I have been a prosecutor for ten years now and have participated in the prosecution of six capital murder trials in South Carolina. While in law school I also enjoyed the experience of participating in the defense of an individual on trial for capital murder. Additionally, I was witness to the first execution in South Carolina by lethal injection. More than this though, I think a lot about what I do. The prosecution of capital cases demands a great deal of sober reflection: This is a business with no room for regrets.

I take no exception to the goals of Title II of the Innocence Protection Act. Who, after all, could be opposed to protecting the innocent? In fact, I believe that I come from a jurisdiction that will, in all likelihood, probably be found to already meet any standards set by the proposed commission:

I am not aware of any sleepy or drunken capital defense attorneys in South Carolina. No judge I know would tolerate it.

Nor have I seen any incompetent attorneys take up the cause of a man on trial for their life. South Carolina already imposes minimum standards for capital defense counsel and the judges are required to find affirmatively that any prospective capital defense attorney is qualified. Five years of recent felony trial experience is the minimum requirement for the lead attorney. In most cases the actual level of experience far surpasses this. South Carolina law requires indigent defendants be appointed at least two attorneys.

I have also had the pleasure of meeting many fine defense experts over the last 10 years. South Carolina provides ample funding for retaining expert witnesses and private investigators. This year's budget provides $2.75 million for use in paying appointed counsel and hiring experts and investigators. In addition, state law allows for part of every dollar paid in criminal fines to be deposited into the same account. When you consider that South Carolina tries approximately 15 capital cases per year you realize that our legislature is not stingy in this regard.

In short, I believe that Title II of the Innocence Protection Act won't really have much of an impact on my state. South Carolina should have an impact on the Innocence Protection Act though. Consider this case study:

Three months ago our office concluded the retrial of Bobby Lee Holmes. Mr. Holmes was being retried for the rape and murder of 86-year-old Mary Stewart. He was granted a new trial after a post-conviction relief hearing in which he asserted that he was denied a fair trial because the judge led him to believe that he OR his attorney could make a closing argument instead of he AND his attorney. Had he realized that both he and his attorney could have addressed the jury he asserted that he would have spoken in his own defense. Both of his experienced attorneys from the first trial conceded at the hearing that they had failed to properly advise Mr. Holmes of his rights. The court granted his request.

The evidence against the defendant was straightforward: Blood from the victim (who was sodomized) was found on the defendant's underwear, the defendants bodily fluids were found on a paper towel in the victims apartment. Fibers consistent with the defendant's clothes were found in the apartment and fibers consistent with the victims bedding were found on the defendant's clothes. Finally, the defendants palm print was found in the victim's apartment. The defendant told the police he had never been in the apartment.

Mr. Holmes was represented by at least five attorneys. I say at least because I am still not sure who at the defense table was an attorney and who was not. The "lead" attorney specialized in capital murder litigation in South Carolina and his co-counsel has approximately 15 years felony trial experience. I don't know who paid for the other attorneys.

During jury selection there appeared to be a jury consultant working with the defense. Throughout the trial there was a social worker/therapist by the defendants side at almost all times. There was at least one investigator in the courtroom at all times. Possibly two.

During the defendants case in chief numerous experts from various parts of the country were called on his behalf. An expert on DNA, an expert from New Mexico on laboratory standards, one hair and fiber expert from Alabama, a fingerprint expert from South Carolina, an expert on criminal investigation from North Carolina, a professor of neuro-psychology from the University of South Carolina, a psychiatrist from the Medical University of South Carolina, the former Director of the Indiana State Department of Corrections and a social worker all were paid to give testimony on the defendants behalf. There were at least four other experts who were retained yet never used.

The first point to be made concerns the attorneys who represented Mr. Holmes in his first trial. There are no apparent consequences in South Carolina for being found to be an ineffective attorney in a post conviction relief hearing. It is close to impossible to prove but it is the opinion of many prosecutors who spend any time in capital litigation that some defense attorneys will deliberately infect a record with error or, confess to error at a later habeas hearing in order to secure a new trial for their client. A competent prosecutor worries not only about their own case but also must be vigilant to protect the record to ensure that the conviction can withstand appellate and habeas scrutiny.

If Congress intends to compel the states to maintain rosters of qualified capital defense attorneys they should establish as a criteria for determining competence the number of times the attorney has been adjudicated ineffective. This should then be tracked to guarantee continued competence.

The second point concerns effective allocation of resources. Everyone agrees that an indigent defendant should be entitled to the reasonable resources needed to present his defense. But consider the defense in Mr. Holmes' case. How many Americans could afford to mount such an extravagant defense?

Unfortunately this sword has two edges. If we spend the money then the cost of the death penalty is cited as a reason for it's abolishment, if we don't then the battle cry becomes "No justice for the poor".

The solution to the problem has to lay in stricter accountability. The law allows for ex parte applications for funding. These must be explicitly detailed by defense counsel and then more carefully scrutinized by the judiciary. In addition, no funds should be disbursed until a detailed report from the expert or investigator is tendered to the court. The report should include the results of any testing done along with a strict accounting of the time spent. Lastly, judges should not hesitate to limit the amount that any expert can charge. The former director of the Indiana Department of Corrections was paid five hundred ($500.00) dollars per hour to testify in the Holmes case. Would he have refused to participate if the court had told him that he could only charge $150.00 per hour? How about if they had capped his total payment at $2000.00?

A balance must be struck between the need to provide adequate resources to indigent defendants and the need to prevent frivolous expenditures of public funds. The Constitution guarantees every criminal defendant to equal access to justice. This does not absolve the legislatures or the courts of their responsibility to regulate the spending of these monies.

In conclusion it is my opinion that while the goals of the Innocence Protection Act are laudable I am concerned about the methods that will be employed to achieve these goals. We don't know what conclusions or recommendations the proposed commission will make. Perhaps it would be a more intelligent use of our time and resources to commission the study first and then draft the legislation needed to address the problems the commission identifies. The scope of the study could be widened to include an investigation into the issue of incompetent counsel and inadequate resources. Our course could then be charted based on reliable information rather than anecdotal evidence and reports issued by individuals and organizations with a known bias towards the death penalty.

Chairman LEAHY. I thank you for making the trip to Washington to do this. I appreciate it very much.

Senator Hatch has a scheduling conflict. Normally, I would begin questioning, but to accommodate him, of course, I will yield to him first.

Senator HATCH. Well, thank you, Mr. Chairman. I only intend to take a minute or so.

I apologize for not being here for your testimony, General Pryor, and yours, Senator Ellis. I apologize for that, but I have really appreciated this whole panel. Each of you has, I think, presented your case very persuasively and well.

Let me also say I want to make a point about the cases Chairman Leahy mentioned in his opening statement. Many, if not all, of these individuals were released because of DNA testing, not all, but many of them. Senator Leahy's bill contains two major parts, one dealing with DNA testing, and the other addressing competency of counsel. As you can tell, the competency of counsel provisions are controversial.

The DNA provisions, however, are similar to a bill I introduced last year and a bill Senator Feinstein recently introduced. Indeed, DNA legislation enjoys nearly universal support in this committee. I notice Mr. Scheck here, for whom I have a great deal of respect, who has been a great advocate on this and has been persuasive to me.

Now, I am confident that we could reach an agreement on DNA immediately. We very quickly could get it through both Houses of Congress. I think we could have done this 2 years ago, to be honest with you, or at least a year ago, on the DNA provisions. I am equally confident the House would move quickly on such a bill. This would ensure that innocent individuals in prison have the opportunity to prove their innocence, and immediately, not while we argue this other part.

I am also concerned about this other aspect. I think all of you have made good cases, but I am concerned about competency of counsel. Let me just say that I will commit to continue to work with the chairman of this committee on the issues related to competency of counsel, but let us at least accomplish what we can to help remedy some of the injustices that the distinguished chairman has described, and let's do that right away.

I think we should have done this a couple of years ago and we were just unable to, but I would like to offer that to the chairman and get that done, and then make a good-faith effort to try and solve the competency of counsel difficulties that all of you have spoken eloquently about on both sides.

In particular, I am very happy to have your report, Ms. Wilkinson. I appreciate the work that you have done and I appreciate the bipartisan nature of your testimony, and we will read that very carefully and see what we can do to help here.

So, I would like to have that done. It is something that can be done now, and the other we may be able to do also, but I don't think that it can happen as quickly as we can solve the DNA problem. So I just want to make that good-faith offer here so that we don't waste another day not providing this type of resource, help from the Federal Government, in both State and Federal cases in ways that will help to alleviate and remedy some of these problems. And then I commit to work on the competency of counsel aspect in good faith and try and see what we can do, taking into consideration all of the testimony and the evidence to see what can be done in that particular area.

But thank you, Mr. Chairman. I will get out of your hair.

Chairman LEAHY. It is very easy to get out of my hair with my hair line. But if you could hold just for a moment, do we agree that DNA evidence should be available? Of course, we all do on this panel. That is not an issue.

Senator HATCH. But every day we delay——

Chairman LEAHY. That is not an issue. But let's not fool ourselves. You have got to have competent counsel to know when and how to ask for DNA evidence and determine whether it is available. It is not so that the person charged can prove their innocence. That is not their burden. The burden is on the state to prove their guilt beyond a reasonable doubt. The burden is on the state in this case.

I would remind everybody—every prosecutor and former prosecutor knows this—a lot of the cases aren't going to have DNA evidence of any sort anyway, just like a lot of cases don't have fingerprints. I recall once when I was prosecuting cases, I had to put an investigator on the stand to testify that, one, he or she didn't find any fingerprints at the scene; second, they had investigated several hundred cases; and, third, it is not unusual that there are no fingerprints. In the large majority of the cases they investigated, there were no fingerprints. Well, in the large majority of cases that are going to be raised here, there is not going to be any DNA evidence.

An easy example is somebody goes into a bank to rob the bank. On the way out, they shoot the guard and the guard dies. We have got a Federal case against this bank robber. In most States, it would be a felony murder; if the State had the death penalty, it would carry the death penalty. But it would be awfully hard to think where there was going to be DNA there. Now, there may have been three people who identify somebody as being the perpetrator. Then you go in to question everything from alibi to eyewitnesses, and so on.

In Mr. Graham's case, a man who served years upon years upon years on death row, who was finally released with a check for $10 and a suit that was too big, there was no DNA. So we want access to DNA, of course; to fingerprints, of course; to blood samples, of course. But you are not going to get any of these things unless you have competent counsel.

Senator HATCH. If the Senator would yield, I am, of course, talking about post-conviction DNA for people who already may be unjustly convicted. I think we could start that tomorrow and I think we could get it through both Houses even before we leave this week, if we really wanted to do it.

Why not do that, and at the same time accept by good-faith offer to try and resolve the competency of counsel issue, taking into consideration all these respective points of view that are sincere and educated and well thought through?

That is my point. There is no reason to continue to hold post-conviction DNA from being enacted when we can do that right off the bat. And hopefully we can solve this other problem, too, because I am concerned about it; anybody with brains would be concerned about it. But there are two sides to that issue. That is my point, and both sides have good arguments. I think we have got the abil-

ity on this committee to resolve these conflicts and to try and do what is in the best interests of people.

I don't think you need to hold up the passage of post-conviction DNA solutions in order to solve trial competency problems, but I do think it is going to take more effort to solve the competency of counsel problems. We can do the post-conviction DNA stuff, like I say, right now.

Well, I need to leave, but I want to thank you for letting me make that statement.

Chairman LEAHY. I appreciate it, and I will continue to work with you on that. Obviously, post-conviction DNA is a small part of this problem. We can work on achieving that. We should also make sure that if we are going to have post-conviction DNA, we also have counsel competent enough to know when to ask for it.

We will start questions on 5-minute rounds.

Ms. Wilkinson, you described your committee's recommendations regarding competence counsel, and I am going to submit for the record the executive summary of your committee's report.

What are some of the other recommended reforms, if you could just briefly mention them?

Ms. WILKINSON. Yes, Mr. Chairman. Some of them are so basic, I think they are recommendations that many people would hope are already in place across the jurisdictions, but they are not.

For example, we recommend that no one who is mentally retarded or a juvenile who commits the crime under 18 be subject to the death penalty. We did that because, as we saw most recently in Texas, jurisdictions have refused to set that standard, and so we think that is a minimal standard that should be set in all jurisdictions.

We have also asked for things like the felony murder rule to be limited in capital cases so that a felony defendant who had no intent to commit the murder or did not commit the murder would not be subject to the death penalty, even though they would under the precedent of the felony murder rule in many jurisdictions.

We made recommendations about the roles of prosecutors and judges. We asked that judges ensure that every capital defendant be provided with a jury instruction to jurors to choose between death and life without parole, meaning truly life with no reduced sentence, and that juries understand what those sentencing options are, just like a judge would if he or she were to make that determination.

We talked about open-file discovery, which I know Mr. Brackett was saying has been used by some defense counsel in nefarious ways. I found just the opposite. I found that as a prosecutor in the McVeigh and Nichols cases what really saved our conviction at the very end was that we did have open-file discovery, and that the defense has access to all the information that honestly we couldn't have known at some points whether it was Brady or not. And only by sharing all of it with the other side were we able to know that they could pursue whatever they thought was appropriate during the pre-trial phase.

So those are some of the recommendations that we made as a committee. There are 18 recommendations that we are going to send obviously not just to you, but to State legislatures and policy

advocates around the country, hoping that other jurisdictions will pursue these recommendations.

Chairman LEAHY. I appreciate that. When I looked at the list of people who were there, you went about as far across the spectrum on this issue as possible, people with a lot of experience, and I commend you in reaching the agreement that you did.

Mr. Bright, I was taking some notes here. I was wondering if you could respond to Mr. Eisenberg's statements about what he calls the de-funding of the Federal resource centers.

Mr. BRIGHT. Yes, Mr. Chairman. I must say both from my own practical observations and also from reading some of the reports that have been done, I don't understand those comments.

It is true that some Federal defender offices have provided some representation in Federal post-conviction. In Georgia, for example, there is only one defender, obviously, and that is in the Northern District of Georgia. So for a small number of cases that are in the Northern District of Georgia, the Federal defender may be involved in the Federal post-conviction.

In the Middle and Southern Districts, which is where most of the death cases come from, there is no Federal defender office. It is a court-appointed system. There is no provision at all. Those lawyers are not providing any assistance in State court. The result of that is a man named Exzavious Gibson, with an I.Q. measured on various tests at 76 to 82, represented himself in his first State post-conviction case. The result of that in Alabama is that there have been a number of people for whom the statute of limitations ran who were not represented at all just simply because the time ran out.

There is a report here, Mr. Chairman, "The Crisis in Post-Conviction Representation Since Elimination of Funding." I would ask, Mr. Chairman, to make this a part of the record, if you would like. It was issued in April of 2001 and describes this in much greater detail than I can here.

Basically, there is a real crisis particularly in those States that have not been willing to provide lawyers at the post-conviction stage. I mean, Alabama theoretically does; it will pay $1,000, but you don't get much of a lawyer for $1,000. Georgia doesn't pay anything at all. Some of the lawyers appointed in Texas have missed the deadlines.

Federal Judge Orlando Garcia, in San Antonio, said in one case that the lawyer who was appointed, who was a kid right out of law school with no experience and was very, very ill—that the appointment of this lawyer to handle post-conviction was a cynical and reprehensible attempt to expedite his execution without even the pretense of fairness. Now, that is a Federal judge getting this case when it comes into the Federal court.

There is a tremendous crisis in this area, and I don't quite understand how someone objectively could claim to the contrary.

Chairman LEAHY. Thank you.

Mr. Graham, could I ask you a question? You spent 14 years on death row waiting to be executed for a crime you did not commit. When it was finally admitted that you shouldn't have been on death row, you said that the State of Louisiana gave you $10 and a coat that was a few sizes too big.

Did the State of Louisiana do anything else? Did they apologize to you or to your family, or compensate you or your family for locking you up for 14 years?

Mr. GRAHAM. A couple of delegates from the legislature apologized, but as far as compensation, nothing.

Chairman LEAHY. Senator Ellis, one of the criticisms of the Texas system of appointed counsel includes allegations that some judges appoint specific counsel who, for example, will move cases quickly and cheaply through the system, or who contribute to the judge's reelection campaign coffers.

You acknowledge that the Texas Fair Defense Act does not go as far as you would like in establishing a neutral system of appointment for indigent counsel. Does it address the conflict of interest problem?

Mr. ELLIS. No, it does not, Mr. Chairman, directly, and that would have been very difficult to do. Obviously, judges jealously guard that prerogative of appointing lawyers. The judges are elected in our State; a good number are appointed and then run for election. But nobody in their right mind would run a campaign for a judge, not even me, on the notion of fairness. You run on the notion of efficiency. For whatever reason, the word "fairness" denotes coddling to criminals.

You run on efficiency, and efficiency generally means that you want people who work the docket. I mean, I don't think it is really fair to criticize the judges directly. I criticize the system because the system just breeds that kind of cynicism, but the bill does not directly address it.

I think the spotlight on the issue nationally and the spotlight that will remain in the local press make it more difficult for judges to appoint people just because people gave them contributions. But obviously, you wouldn't necessarily, even if you or I were a judge, appoint someone that you thought would be financing your opponent's campaign. That is just not how the system works.

Chairman LEAHY. Thank you, Senator Ellis.

Senator Sessions, you have been waiting patiently and I appreciate your time. You are also a former prosecutor, and that has been very valuable to all of us here on this committee.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Graham, your story is something that touches all of us. Anybody in the criminal justice system who is involved in a circumstance where an innocent person has been charged has got to be affected, also, and all of us who believe in law, who believe in the justice system, the jury system and the criminal justice system have got to be extremely troubled to hear your story. I think truly it is an unusual event, but that it happens at all is something that should give us all cause for pause.

I know I used to tell my prosecutors on my staff if they believed a defendant was innocent or the did not believe they had sufficient evidence to proceed with the case, they should never proceed with it; come tell me about it, but never prosecute a case you don't believe in. That would be a horrible thing to do, and to convict someone who is innocent is a great and tragic event.

These cases are for the most part, in my background, pretty aggressively defended—Mr. Brackett, you have testified about that—

and pretty intense sometimes. I have a quote here from one defense lawyer: "Sometimes, counsel should file motions just to make trouble. It is part of a capital defense attorney's job to do that. If the prosecution wants to kill the client, they have to go through the defense attorney. File motions for money for special investigations, for opinion polls of the community; file all kinds of motions, support them as much as possible with affidavits or proffers that can be introduced in evidentiary form. Constantly make a record and constantly make trouble." That is a quotation from an article by the head of the Illinois Capital Resource Center, a defense attorney.

Was that what you were referring to? Is that the kind of aggressiveness that you see?

Mr. BRACKETT. Well, sir, I have certainly experienced what that article describes, and I have had capital murder cases where the motions come piling in and a lot of them have very little merit. We have had cases where 20 or 30 motions were filed, and on the day of trial when these motions were to be heard a great number of them were abandoned.

It seems to be part of the strategy, and whether it is legitimate or not I am not going to debate. But it seems to be part of the strategy to make capital litigation as expensive as possible because that is one of the things that you can then argue. Is it worth the cost? I think that the courts need to step in and take a more active role in monitoring the expense of capital cases to ensure that the moneys that are being expended are being expended wisely.

Senator SESSIONS. Well, I think there is something there. It does appear to me that there are groups—I know Mr. Bright is very talented, and certainly not timid about expressing his views and defending people in criminal cases. That is healthy.

It does not bother me that attorneys who are absolutely opposed to the death penalty are hired to defend the cases. It doesn't bother me at all. I am troubled, Mr. Chairman, by funding organizations who are advocacy organizations in many ways against the death penalty. That troubles me.

I will ask Mr. Eisenberg and General Pryor, are you aware of any other criminal legal system in which a lawyer, an office of the court, is appointed by some advocacy or independent, non-legal organization to represent somebody at the taxpayers' expense? Are you aware of anything like that?

Mr. EISENBERG. Senator, I am not aware of anything like that, but I will say, to echo these comments, that in death penalty cases specifically we are essentially fighting against the Federal Government, in the sense that our opponents in virtually every case, from the point of the death penalty verdict onward for years, are funded by the Federal Government.

It has been commented that those lawyers don't come into State court. I can tell you they do. I see them everyday in State court, in court itself and in legal filings. It has been commented that a lot of jurisdictions don't have those kinds of federally funded lawyers. Well, the Administrative Office of U.S. Courts says that they have given funding to every defender organization under this program that has asked for it.

Senator SESSIONS. So they are getting money now? Mr. Bright's group is——

Mr. BRIGHT. Senator, my group has never, ever gotten a penny of State or Federal money, ever.

Mr. EISENBERG. I am not talking about Mr. Bright's group. In addition to all those privately funded organizations and in addition to all those non-profit corporations, et cetera, there are lawyers that are hired in the same manner as Federal public defenders are in Federal criminal cases, but whose job is to litigate State capital cases. That is the $20 million-plus that I referred to in my testimony earlier.

I agree with you, there is nothing wrong with zealous attorneys representing the defendants in capital cases. They should be zealous. The question is whether we should hand them administrative control over the appointment process.

Senator SESSIONS. General Pryor, do you want to comment on that?

Mr. PRYOR. I do.

Senator SESSIONS. First, the historic uniqueness of a plan to allow that to happen.

Mr. PRYOR. Well, that is exactly what I wanted to refer to, Senator. I am not aware of anything like this, and I think that the most troubling aspect of this legislation as it pertains to the competency of counsel is the notion that we are totally rejecting the perspective that judges are independent, that they do not perform their sworn duty.

They take oaths of office to uphold the Constitution and the rule of law. The overwhelming majority of judges in our system do that work diligently and honestly and with integrity, and the entire premise of this legislation is that they do not.

Senator SESSIONS. General Pryor, can you see this chart from where you are?

Mr. PRYOR. Yes.

Senator SESSIONS. You have good eyes. This is a chart I put together to deal with the appellate process. I do think that we could do a better job with trial attorneys. I think every State needs to look at that. That is the most critical phase of it. I know Ms. Wilkinson would agree that is the most critical phase, but these cases receive extraordinary review.

This is a typical appeal of a criminal case in Alabama. Would you run through real briefly—my time is expired—how that appellate process would work?

Mr. PRYOR. Yes, it is typical capital case, which is quite different from a typical criminal case. After a trial where you have two attorneys—the lead attorney would have to have at least 5 years' criminal trial experience. The payment for the attorneys, in contrast to what was said earlier, is there are two kinds of payments, $60 for in-court work, $40 for out-of-court work, plus overhead, which really works out to be an effective rate of about $100 an hour. There is no cap. We have been doing more work to make that a better system.

Senator SESSIONS. You are working on improving it?

Mr. PRYOR. Yes, we have done that in recent years and I have been supportive of it.

Then there is an appeal to the Alabama Court of Criminal Appeals, a direct appeal. At that level, two lawyers each receive $2,000, plus the overhead. Then there is an appeal to the Supreme Court of Alabama. By the way, I favored raising that to $15,000 per lawyer; again, the same method of payment.

Then there is an appeal to the Supreme Court of the United States. Then there are State post-conviction proceedings under Rule 32 which go to the circuit court, the Court of Criminal Appeals, the Alabama Supreme Court and the U.S. Supreme Court.

Now, in many of those instances which Mr. Bright referred to the $1,000 cap, there are international law firms, Wall Street law firms representing inmates on death row in Alabama. Then there is the Federal habeas process in the Federal district court, the Federal court of appeals, and the U.S. Supreme Court. Of course, there is taxpayer-financed representation throughout that system. So there are ten levels of appellate review and post-conviction review of death penalties.

Senator SESSIONS. Are you aware of any of the cases, unless the defendant just insisted it be short-cut, that those ten steps at least did not occur?

Mr. PRYOR. Yes, there have been a couple of recent instances, and this Congress passed a law that was meant to streamline the death penalty appeals process and provide a statute of limitations. Despite that statute of limitations, two executions in Alabama have been stayed without real regard to what the statute of limitations is.

Senator SESSIONS. Well, at any rate, it is a remarkable appellate process. When I was attorney general, I think there were two executions. One had been to the U.S. Supreme Court three times and had a long history of appellate review. They are given a great deal of scrutiny, but perhaps if we did a better job at the trial, we wouldn't have as much fussing on appeal.

Chairman LEAHY. Am I correct, General Pryor, that the two people whose executions were stayed obtained those stays because they didn't have any lawyers at all?

Mr. PRYOR. No, that is not the reason for the stays, Senator.

Chairman LEAHY. Did they have lawyers?

Mr. PRYOR. Well, they certainly did when they obtained the stays.

Chairman LEAHY. But had they not had lawyers before?

Mr. PRYOR. There were some periods in which—let me take the two cases. One is Thomas Arthur. Mr. Arthur has been tried three times and convicted. At his last trial, he testified that he wanted the death penalty; he asked the jury to give him the death penalty because he wanted the heightened scrutiny and additional counsel that the system provides. He was represented, of course, until the Rule 32 stage. He did not file a Rule 32 petition, despite his great experience with the death penalty system. He has been tried three times.

Chairman LEAHY. So that qualified him as a good lawyer. Is that what you are saying?

Mr. PRYOR. No, I didn't say it qualified him as a lawyer.

Chairman LEAHY. Well, anyway, we are going into Senator Feingold's time. I will come back.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman.

First of all, in his opening statement Senator Hatch spoke briefly about the Federal system and he said that the Department of Justice has confirmed that there is no evidence of bias in the Federal death penalty system. But he didn't mention that the Department of Justice has a renewed commitment to studying racial and geographic disparities.

So I would like to correct the record at this point and note that at the subcommittee hearing that I held on this issue following the release of the June report, the Justice Department announced that it would proceed with a thorough examination of these disparity issues. Deputy Attorney General Thompson acknowledged that the June report was not the Department's final word on this matter. So I simply want to clear the record on that.

Mr. Chairman, I want to thank you for this hearing. It has been extremely good. I want to commend you for your efforts on this issue overall. I think it is one of the finest legislative efforts I have witnessed since I have been in the U.S. Senate and I am grateful to you for it.

Chairman LEAHY. Thank you.

Senator FEINGOLD. I wish every American could hear Mr. Graham's words and the words of other people in the room that I have met and the stories that they have to tell.

Mr. Chairman, I would ask that my full statement be placed in the record.

Chairman LEAHY. Without objection.

[The prepared statement of Senator Feingold follows:]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Mr. Chairman, I commend you for holding this hearing. I am proud to be an original cosponsor of your bill, the Innocence Protection Act. I am very pleased that this Committee—and, more importantly, our nation—is beginning to re-examine the administration of the ultimate punishment a society can impose, the death penalty.

Mr. Chairman, the American people are becoming increasingly uncomfortable with the fact that our criminal justice system runs the very real risk of executing innocent people. Many believe that we have already executed innocent people. Since 1973, close to 100 people who were sentenced to death were later found innocent and released from death row. And the number of innocent people walking free keeps growing.

We know that one of the primary factors resulting in wrongful convictions across the country is the fact that all too often, incompetent counsel defend those needing the best legal representation, and at a very minimum, competent representation. It is clear, to even the most cursory observer of our nation's death penalty system, that the standards for competent counsel and the process for assigning counsel to capital cases is in dire need of repair. I hope the national attention brought to this issue by this hearing will do much to begin to repair that breach.

Mr. Chairman, I think Congress should pass your bill. But Congress should do even more, and I think the American people expect more. A key part of the Innocence Protection Act focuses on the need for a national commission to develop standards for competent counsel in death penalty cases. I think this is such a good idea that I propose Congress go a step further. A national, blue ribbon commission can not only provide excellent guidance for counsel standards but can provide Congress and the American people with a thorough, top-to-bottom review of all the flaws in the administration of the death penalty at the state and federal levels. There are

a number of additional issues that can be addressed by a commission—issues like racial disparities, geographic disparities and other questions of arbitrariness in the application of the death penalty, police or prosecutorial misconduct, and the fallibility of eyewitness testimony.

I hope my colleagues would agree that a matter as grave as the risk of executing innocent people should be reviewed at the highest levels of our government, with input from experts. An independent, blue ribbon commission could do just that.

Furthermore, if we are prepared to acknowledge that our death penalty system is broken, we should not go forward with executions. As most Americans have come to realize, a suspension of executions while a thorough study is undertaken is the fair and just approach. It is time we had a time-out on executions and review of why basic fairness and due process are sometimes ignored. Yes, we should consider legislation like the Innocence Protection Act but as part of a broader program that includes a thorough review of the death penalty system at the state and federal levels and a suspension of executions while it takes place. That is why I encourage my colleagues to join me on the National Death Penalty Moratorium Act.

Mr. Chairman, I thank you again for holding this hearing, and I look forward to hearing from the witnesses.

Senator FEINGOLD. I would also like to commend Ms. Wilkinson. I am very impressed with the report of your group, the Death Penalty Initiative group. It is a thoughtful set of recommendations to improve our criminal justice system and, very importantly, reduce the risk that innocent people are executed.

The recommendations touch on a number of areas that are in dire need of reform and some of the issues that are addressed in the Innocence Protection Act, like competent counsel, access to DNA testing, and the right to an informed jury. I, of course, am a proud cosponsor of the Innocence Protection Act. The Death Penalty Initiative's report clearly and unequivocally makes the case for why this has to become law, and I hope the Congress takes up this legislation soon and passes it.

I also believe that the Innocence Protection Act is part of a broader program to ensure fairness and restore public confidence in our criminal justice system. In fact, I believe that, given the grave issues we are confronting—obviously, the risk of executing innocent people—that the work of the Initiative should be elevated to the national level. I have a bill that would do that.

The National Death Penalty Moratorium Act would create a national blue-ribbon commission to review the fairness of the administration of the death penalty, and I believe it is time for Congress to create a commission to thoroughly review the State and Federal death penalty systems.

Mr. Chairman, in the couple of minutes I have, I would like to ask a couple of questions, first, of Mr. Brackett.

You mentioned that you witnessed, I believe, a lethal injection. Was that the execution of Sylvester Adams on August 18, 1995?

Mr. BRACKETT. Yes, it was.

Senator FEINGOLD. Now, the Adams case, I am told, arose from your home county of York. Is that right?

Mr. BRACKETT. That is correct.

Senator FEINGOLD. Isn't it true that no mitigation evidence was presented to the jury by Adams' court-appointed attorneys, even though his I.Q. scores were in the mentally retarded range?

Mr. BRACKETT. Well, I didn't come prepared to discuss that in any detail, but I did review the file before I went down to see the execution. I wanted to know exactly what it is that I was going to witness, so I took the time to go to the police department and re-

view the file. I did not have a copy of the transcript, so I couldn't read the transcript of the trial so I don't know exactly what took place there.

However, I also went and reviewed the physical evidence in that case. It involved the kidnapping of a 12-year-old boy from his home. He was taken out back into the woods and a piece of cloth tied around his neck. A stick was stuck inside the piece of cloth and twisted like a tourniquet until he was choked to death. He was then buried under a pile of leaves and sticks. Mr. Adams then went to a telephone and attempted to ransom the boy to his mother. Apparently, they believed that the family had money, and they did not. The police——

Senator FEINGOLD. Is that your way of suggesting that his I.Q. was not in the mentally retarded range?

Mr. BRACKETT. Well, no, sir. In the course of investigating the case and making these determinations, I wanted to give you some background on the crime. But I did review some of the files and it appeared from the files that the individual who tested his I.Q. at the Department of Disabilities and Special Needs found him to be malingering when they were attempting to determine what his I.Q. was.

The expert that was appointed by the court to evaluate his I.Q. said that basically I can't tell you what is I.Q. is because he appears to be attempting to fake the results to this test to possibly get an advantage. I think that is indicative that perhaps he was not mentally retarded.

Senator FEINGOLD. Mr. Chairman, I would ask if we could supplement the record subsequently with information regarding this individual.

Chairman LEAHY. Yes. In fact, the record will remain open for a week and further questions from Senators can be submitted until Thursday, July 5.

Senator FEINGOLD. Let me ask you one other question, sir, about this case. Isn't it true that on the day you watched Mr. Adams die, his lead defense attorney at his trial was sitting in Federal prison?

Mr. BRACKETT. I have no knowledge of that. I know Mr. Bruck, who is seated in the room here, was standing behind me. And I suppose that Mr. Bruck was involved in his defense, but I have no knowledge of who his defense counsel were at the various stages of the proceedings or where they might have been. I know that he was allowed to have one attorney in the chamber with him, and then ultimately Mr. Bruck stepped out of the chamber and was standing behind me. I assumed that he was the counsel for Mr. Adams.

Senator FEINGOLD. Now, I would like to ask Beth Wilkinson and Stephen Bright, how do you respond to the argument that the fact that innocent people have been freed from death row is a sign that the system is working and that there is no need for the Innocence Protection Act and other legislation to ensure fairness?

We will start with Ms. Wilkinson.

Ms. WILKINSON. Well, just simply I think it is a red herring and really doesn't get to the point that we are trying to get to today. The fact that the system somehow, through efforts of individuals like college journalism students or pro bono lawyers who come in

at the last minute and find that there are facts, obvious facts in some cases, that would free individuals like Mr. Graham, only tells me that with more diligence and better representation, we will find that there are more of these problems, not less.

So I don't understand the argument that somehow, because the system has thankfully freed people like Mr. Graham, it is working properly. I don't think anyone sitting here today believes that these stories of sleeping counsel, drunk counsel, or lack of investigation, lack of mitigating evidence is something any of us should be proud of. We shouldn't here one of those stories in capital litigation.

Senator FEINGOLD. Mr. Bright?

Mr. BRIGHT. Well, I would just echo that. I think somebody spending 16 years on death row for a crime they didn't commit is not an example of the system working. I think when undergraduate journalism students—and I should have pointed out when I talked about Anthony Porter that he was the third person freed from Illinois' death row by the journalism students, not by the police, not by the prosecution, not by defense lawyers, not by judges, but by journalism students who took this on as a class project. I would also point out that Illinois is a State that provides a much better quality of representation than a lot of the States in the Death Belt where so many people are sentenced to death.

It has been suggested that the notion of an independent appointing authority would somehow be unusual. Florida, Tennessee, Kentucky—there are a number of States where the defense function is independent of the courts. In fact, we recently had hearings in Georgia where the public defenders in both Florida and Tennessee came and said the judges were relieved not to have that responsibility anymore. And the system was working a lot better; it was a real adversary system. So it is not true.

The ABA standards say that the appointment function should be independent. In Illinois, for example, the Cook County public defender's office has an excellent capital defender unit where people are represented by lawyers who really specialize and who know what they are doing, investigate the cases, and you don't have these sorts of things happening.

Not a single one of the 13 innocent people freed from death row in Illinois was represented by that public defender's office. It shows what a difference and how fundamental counsel is. Counsel is the most fundamental because DNA doesn't apply in the vast majority of cases. So what Senator Hatch was saying about DNA—in the small number of cases where there is biological evidence that is very helpful, but really what is fundamental is that people be adequately represented by real lawyers who know what they are doing.

Senator FEINGOLD. I thank you for that.

Mr. Chairman, I just have one more question, if I could.

Chairman LEAHY. Go ahead.

Senator FEINGOLD. Ms. Wilkinson, the Justice Department, as I pointed out, recently renewed its commitment to continue a study by the NIJ on racial and geographic disparities in the Federal death penalty system.

As a former Federal prosecutor, were you troubled by the Justice Department's September 2000 report on the Federal death penalty

system that related to these issues of racial and geographic disparities, and do you support a thorough examination of these disparities to be conducted by the National Institute of Justice?

Ms. WILKINSON. I do, and I am glad that finally this Justice Department has supported that, although belatedly, this new and more thorough investigation. I believe last year when the initial report came out, Ms. Reno and the rest of the Justice Department recognized that we needed a more thorough, extensive study.

One of the recommendations that we put forward as the bipartisan Committee for the Death Penalty Initiative was to look at racial bias. People who are much more experienced than I am who have lived through the system in the 1950's, 1960's, 1970's, former prosecutors and defense attorneys, all say they are very troubled by the history of racial bias in capital litigation. So I think it is something we should pursue vigorously and I am happy, although it is belated, that the Justice Department has authorized the study.

Senator FEINGOLD. Thank you very much. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Sessions?

Senator SESSIONS. Well, Ms. Wilkinson, a study had already been done in great depth by Attorney General Reno, who opposes the death penalty herself, and this was just an additional study that focused, I think, on one additional aspect. Isn't that correct?

Ms. WILKINSON. That is part of it, but I don't believe that the study was exhaustive. As you know, there are very few Federal defendants on death row, and so it makes a statistical study very difficult to pursue. And I think Ms. Reno and others determined that there was additional research that needed to be done, and I am sure most people——

Senator SESSIONS. And that is being done by General Ashcroft. But let me ask you, just basically on the death row and death penalty charges in Federal court, you have to do, as a prosecutor, a prosecutorial memorandum to the Department of Justice, and a committee reviews that for objectivity and fairness and legal soundness. Isn't that correct?

Ms. WILKINSON. Yes, that is right.

Senator SESSIONS. The individual prosecutors don't have that authority.

Ms. WILKINSON. No, they don't have the authority to make the ultimate decision, but obviously they are, with the Federal agents that are normally involved in the State, law enforcement agents, conducting the investigation, developing the facts that they would put forward in the memorandum. As we all know, prosecutors have extraordinary discretion, and that includes how they develop the case and present it to the Justice Department.

Senator SESSIONS. One more thing, General Pryor and Mr. Eisenberg. You work on appeals, do you not, Mr. Eisenberg?

Mr. EISENBERG. Yes, Senator.

Senator SESSIONS. My question is simply this: do you have an opinion, Mr. Eisenberg, on generally what percentage of the appeals actually focus on guilt or innocence as a primary part of the appeal, and what percentage of the appeals focus on issues such as ineffective counsel or other issues of that kind?

Mr. EISENBERG. In our capital cases, Senator, I would be surprised if it is even more than 1 or 2 percent. In fact, the Department of Corrections in Pennsylvania——

Senator SESSIONS. Only 1 or 2 percent focus on guilt or innocence?

Mr. EISENBERG. On issues related to guilt or innocence.

In Pennsylvania, the Department of Corrections wanted to take DNA samples from every death row inmate in the State. There are over 200. The lawyers for those defendants opposed that effort to have DNA samples taken from those death row inmates. We have only had one case in my experience, death penalty case, where the defense lawyers asked for DNA testing. We agreed to that testing. The testing was done by the defense and they then refused to turn over the results to us, as they had previously promised to do.

Senator SESSIONS. General Pryor, is that somewhat consistent with your experience?

Mr. PRYOR. Yes.

Senator SESSIONS. You handle all the appeals in Alabama?

Mr. PRYOR. We do, and some trials as well. I don't know if I would characterize it as less than 1 percent, but it is a very small percentage.

Senator SESSIONS. Mr. Chairman, I think in many of these cases lawyers defend them aggressively and it is a question of whether death should be the jury verdict or other questions. But for the most part, most cases that come to a trial of this kind, the guilt or the innocence of the defendant is pretty plain, almost undisputed.

Chairman LEAHY. All those "guilty accused," is that it, as a former Attorney General once said?

Senator SESSIONS. Well, the evidence is overwhelming many times. I mean, sometimes the murders are committed, filmed by the cameras in the 7-Eleven store and things of that kind.

Chairman LEAHY. I understand. Like you, I prosecuted my share of murder cases, and I think most prosecutors do want to make sure they are convinced in their own mind of the guilt of the accused, before they go pursue a charge. But we also know of a number of people on death row who were about to be executed. Suddenly somebody says, "Wait. We made a mistake". But it is usually not the prosecutor who says, "wait." It is usually not the judge. Typically, it is somebody on the outside that makes that statement. This is a cause for worry.

I will let his Mr. Eisenberg's testimony speak for itself. But I would like to point out that it gives the impression that there are no problems. I read a very recent report by the Administrative Office of the U.S. Courts about Pennsylvania. Allow me to read this.

In that report it says, "The Commonwealth of Pennsylvania has long been widely regarded as having one of the worst systems in the country for providing indigent defense services. Indeed, Pennsylvania's death penalty representation crisis has been recognized for years. As early as 1990, the Joint Task Force on Death Penalty Litigation in Pennsylvania warned of a problem of major proportions in the provision of legal representation to indigent death row inmates, and noted several series problems including the shortage of qualified counsel to assist inmates in State and Federal post-con-

viction proceedings, the lack of standards governing the qualifications for capital counsel or the appointment of counsel at any stage of State capital proceedings, the lack of standards for the compensation of counsel, the lack of State funding for investigation of capital cases, and the lack of any mechanism for the identification and recruitment of qualified counsel. In the decade since the Task Force report, little in Pennsylvania has changed."

Mr. EISENBERG. Senator, I would like to comment on those points briefly.

Chairman LEAHY. Of course. Please go ahead.

Mr. EISENBERG. Well, thank you.

Chairman LEAHY. I would not present this material without giving you a chance to respond.

Mr. EISENBERG. Thank you, Senator. Pennsylvania is a State where appointment of counsel standards funding is done at the county level rather than on a uniform statewide basis. So that report, when it referred to, for example, an absence of State standards, what it meant was not that there were no appointment standards; it meant that the standards are implemented at the county level rather than the State level.

Let me tell you briefly about the standards for appointment of counsel in Philadelphia, which represents over two-thirds of the death penalty cases in the State. They were promulgated in 1991. To get appointed to a murder trial, any murder trial, since it could be capital, you have to have 5 years of trial or appellate criminal law experience. You have to have previously been the sole or lead counsel in 10 serious criminal jury trials.

You have to have previously been the sole or lead counsel in at least one homicide case that went to verdict, or assisted in two homicide cases that went to verdict. And you have to have taken continuing legal education classes within the previous 2 years focusing on capital cases. You are then screened by a committee of defense lawyers in order to get on to the roster for appointment by the court. Those standards are well in excess of the standards that the Federal Government implemented for appointment of counsel in Federal death penalty cases.

Chairman LEAHY. It is interesting, with those standards, that they still say the Commonwealth of Pennsylvania has long been widely regarded as having one of the worst systems in the country for providing indigent defense services. Pennsylvania's death penalty representation crisis has been recognized for years.

Mr. EISENBERG. Based, Senator, on the technicality that those standards are implemented at the county level, and the Commonwealth is the Commonwealth, the State. The report that you mention makes no reference to the kind of protections that I have just outlined. It doesn't dismiss them. It doesn't say that they weren't good enough. It just doesn't talk about them.

Chairman LEAHY. The executive summary of that report will be part of the record.

General Pryor, is your office seeking execution of any people who have never had State or Federal post-conviction review of their cases?

Mr. PRYOR. Well, in our earlier colloquy that we were not able to finish that Senator Feingold began——

Chairman LEAHY. That is why I wanted to give you a chance to respond.

Mr. PRYOR. There are two cases where we have moved to set execution dates where, at least after the last conviction, there had not been—there had been, of course, the direct appeal process with an appeal to the Court of Criminal Appeals.

Chairman LEAHY. Was there any State or Federal post-conviction review?

Mr. PRYOR. There had not been a Rule 32 proceeding in the State courts as to Mr. Arthur. There had been an evidentiary hearing and a Rule 32 as to Mr. Barber. There was no appeal taken from that, and neither filed a petition for a Federal writ of habeas corpus within the statute of limitations. They did so outside of the statute of limitations and Federal courts have stayed both of those executions.

Chairman LEAHY. Let me ask you this, and then I will go back to that other question. Do you have any death row inmates in Alabama who are currently not represented by lawyers?

Mr. PRYOR. That is a difficult thing for us and the prosecution to know.

Chairman LEAHY. Are you aware of any death row inmates in Alabama who are currently not represented?

Mr. PRYOR. I am aware that Brian Stevenson, who heads the Equal Justice Initiative of Alabama, sometimes claims that there are not attorneys for some inmates.

Chairman LEAHY. Are you aware of any inmates on death row in Alabama who do not have lawyers? Are you aware of any?

Mr. PRYOR. No, I am not, because I don't represent inmates.

Chairman LEAHY. Is it your understanding that all death row inmates in Alabama are represented?

Mr. PRYOR. It is my understanding that all inmates on death row in Alabama can obtain counsel and have counsel appointed by the courts at all stages, including Rule 32 stages.

Chairman LEAHY. Notwithstanding your earlier comment to me suggesting that if one went through a death penalty case as a defendant, one would have a pretty good understanding of the system—would it be fair to say that if you really wanted to file for post-conviction relief in State or Federal court, with the standards required in State and Federal court, you had better have a lawyer to do it for you, a lawyer who is competent in such post-conviction relief acts?

Mr. PRYOR. I think the obsessions with Federal and State post-conviction proceedings is a bad one. I think that we need to spend much more of our resources at the trial and direct appeals stage.

Chairman LEAHY. I must be having a difficult time conveying my question to you, and it is probably my Vermont accent. I apologize for that. I don't think you understand my question, so I will ask it again.

Is it your understanding that if somebody wants to take a post-conviction relief act remedy in State or Federal court that they are hampered at the very least in that effort unless they are represented by counsel who has some experience in that type of post-conviction relief act?

Mr. PRYOR. They are certainly assisted by counsel, Senator.

Chairman LEAHY. Mr. Bright, what do you think?

Mr. BRIGHT. I think having just any lawyer in town represent somebody in a death penalty case is sort of like if someone in town brain surgery and you say, well, we don't have any brain surgeons in this town, but there is a chiropractor down the street, so we will just take this person down to the chiropractor and have him do the brain surgery.

The Barber case is a good example of that, Mr. Chairman. Barber was given a local lawyer who had no idea what he was doing. The lawyer showed up for a little evidentiary hearing. He didn't even file the notice of appeal.

A few years ago, Mr. Chairman, the idea of a person not having a lawyer during the post-conviction process and being executed because they were too poor to afford a lawyer would have been unthinkable, absolutely unthinkable. Now, we have got two people, and there are more in the pipeline in Alabama, who have missed the statute of limitations. Or in Barber's case, the lawyer shows up for this hearing, doesn't file a notice of appeal, and then misses the Federal statute. So this fellow has no post-conviction review at all. That is unthinkable in any system that says we are going to have equal justice. If he had been a person of means, he would have had State post-conviction review and he would have had Federal post-conviction review.

I agree there is a need to provide lawyers at trial for people, and the quality of representation at trial is a scandal and something has to be done about it and this bill is a small first step toward that. But people have to be represented all the way through this process if this system is going to be fair.

I will give you another example, Walter McMillan, the innocent man who was freed in Alabama by Brian Stevenson, first with our office and then with the Equal Justice Institute. Walter McMillan would have never been freed if he had not had post-conviction review. Brian Stevenson got his case. He proved that Walter was in another community at the time the crime took place, and he was ultimately exonerated and released from death row after a number of years.

Mr. Chairman, one other thing that I just think is important to point out here. Brian Stevenson's office, the Equal Justice Institute, and our office, the Southern Center for Human Rights, receive no State or Federal money. We simply are there providing representation to people because there are people that desperately need legal assistance that don't have any other source of it.

The lawyers from law firms that provide pro bono assistance are recruited by the American Bar Association or by our office to provide that representation, but none of these people are paid anything. The State of Alabama has no system for providing people, and some people that we represent or the firms represent do get good representation. Many other people don't get any representation at all, and that is just a cruel lottery that says that one person, because their number comes up, gets competent legal representation, and the next person the statue of limitations expires on because they are not represented at all.

Chairman LEAHY. Mr. Pryor, I don't want you to feel that you were treated unfairly. Did you want to respond to that?

Mr. PRYOR. Whenever Stephen speaks, there are so many things I would like to respond to, but the notion that Walter McMillan would have been executed had he not had post-conviction proceedings is not true. His conviction was overturned in the direct appeal stage, in the first level of review, where we ought to spend most of our considerable resources in this system, and do.

Chairman LEAHY. Do you disagree with the article in the New York Times which said the lack of appeals lawyers in Alabama is one reason the State has the fastest growing death row in the country and the second largest number of condemned prisoners per capita?

Mr. PRYOR. Yes, I disagree, and I was, I think, quoted in that article.

Chairman LEAHY. I would note in the article that you were quoted as saying the State should increase the money paid to trial lawyers for indigent defendants, which is consistent with what you have said here.

Mr. PRYOR. Right, trial and direct appeals.

Chairman LEAHY. I understand, and I will put that article in the record.

Well, General Pryor and Senator Ellis and Mr. Bright and Mr. Graham and Mr. Eisenberg and Ms. Wilkinson and Mr. Brackett, we have kept you here a long time. I appreciate you being here. I realize we have gone back and forth with some of you, and I am sure each of you can think of other things you would like to say. I will keep the record open for a week. I will keep it open to Senators for additional questions until Thursday, July 5.

I think everybody agrees that there is a need to have evidence of all kinds available to both the prosecution and the defense. I think there is a need to have standards for competent counsel throughout the country.

When I prosecuted cases I wanted the best counsel possible on the other side because I didn't want the case to be remanded 5 or 6 years later for lack of competent counsel. Every prosecutor knows it is extraordinarily difficult to retry a case 5 or 6 years later. You want to get it right the first time.

I hope that if any of you have further material you want to add, you will do so. If you feel that you were not given adequate time to answer any of the questions and want to add to your answers, feel free to do that.

We have several statements that have been submitted for the record and we will include them in the record at this point.

With that, we stand in recess.

[Whereupon, at 1:06 p.m., the committee was adjourned.]

[Submissions for the record follow.]

[Additional material it being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

Statement of Administrative Office of the U.S. Courts

EXECUTIVE SUMMARY

In 1995, during consideration of the federal judiciary's annual appropriations request, Congress defunded Post-Conviction Defender Organizations (PCDOs), providing a small amount of fiscal year 1996 money for an orderly termination of the program. Only seven years earlier, Congress had authorized the federal judiciary to

support the creation of the PCDOs to address a looming crisis in state and federal post-conviction death penalty cases. There were too few competent lawyers willing and able to represent the indigent condemned, and too few resources provided to those who stepped forward. In those states with large death-row populations, the dearth of qualified counsel willing to provide representation in capital cases had brought the process to a standstill.

To address these problems, PCDOs were established in 20 states where the death penalty is authorized. PCDOs were staffed by counsel experienced in the intricacies of capital litigation. They provided numerous death-sentenced individuals with competent representation, and offered training and assistance to private counsel, thereby increasing the pool of attorneys willing to accept appointment in capital cases. In 1995, the federal judiciary concluded that the PCDOs played a vital role in providing cost-effective, qualified counsel to death-sentenced individuals.

PCDOs, however, received a harsh reaction from death penalty proponents. Prompted by criticism of the program from the National Association of Attorneys General and others, Congress eliminated funding for PCDOs. With the termination of federal funding, many of the PCDOs had to dramatically scale back operations; seven of the 20 offices closed their doors entirely. This left hundreds of people facing the death penalty without adequate representation and some with no representation at all. The demise of the PCDOs also has made cooperation of private counsel less forthcoming. Many have refused to take capital cases without the backup of a PCDO. As a result, a growing number of cases have entered federal habeas corpus proceedings with no development of claims, no investigation of facts, and no competent counsel to continue on the case.

Shortly after defunding PCDOs, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which created a statute of limitations that in most states allows one year for filing a federal habeas corpus petition, usually from the denial of *certiorari* on direct appeal. AEDPA also established a scheme whereby if a state "opts in" by establishing a mechanism for the appointment and compensation of counsel in state post-conviction proceedings, it can obtain certain "benefits," including the reduction of the statute of limitations for filing a first federal petition from one year to 180 days, and an accelerated process of decision in the federal courts. Although no state has yet been held to qualify as an "opt-in" state under these provisions, in the wake of the enactment of AEDPA, many states created new post-conviction processes in an attempt to "opt in" and obtain these "benefits." Thus, while the availability of counsel was diminishing due to the defunding of PCDOs, the state and federal jurisprudence became more rigorous and complex.

When PCDOs were defunded, 3,045 individuals were under a state sentence of death; today more than 3,688 reside on death row. The vast majority are in states that once had a PCDO. Many of these inmates are in the state post-conviction process and will soon enter federal court.

Section I of this report traces the history of the PCDOs, from their creation to their demise. Section 11 describes the post-PCDO world state-by-state. This review leads to the conclusion that most of the problems that precipitated the creation of the PCDOs exist once again, but now there are more cases, fewer experienced attorneys, and an increasingly complex and accelerated jurisprudence.

I. HISTORY OF THE POST-CONVICTION DEFENDER ORGANIZATIONS.

In 1976, the Supreme Court's decision in *Gregg* v. *Georgia*[1] cleared the way for the reimposition of the death penalty in the United States. In the years following *Gregg*, an increasing number of states passed death penalty laws. This led to a greater number of criminal trials ending with a defendant sentenced to death and a rise in the number of death-row inmates who had completed direct appeal[2] and post-conviction proceedings[3] in the state courts. Those inmates denied relief by the

[1] 428 U.S. 153 (1976).

[2] On *direct appeal*, the defendant contends before state appellate courts that the trial judge committed an error of law that requires reversal of the conviction or sentence. Direct appeal is generally limited to those errors provable on the trial record. If state appellate courts find no error and affirm the conviction and sentence, the defendant can petition to the United States Supreme Court for *certiorari* review.

[3] State *post-conviction* review allows a defendant to raise claims of error that were not litigated on direct appeal because the constitutional violation did not appear in the trial record. Generally, post-conviction review follows the completion of direct appeal, although some states combine the two processes. In some states, the post-conviction petition is initially filed in the appellate court; in others, it is filed in the trial court and any denial of relief is appealed. At times, factual development of claims at an evidentiary hearing occurs. If the state courts ulti-

Continued

state courts then moved into the federal courts, seeking federal review of their cases by writ of *habeas corpus*. The federal *habeas corpus* statute[4] permits a state inmate to obtain federal court review of his conviction and sentence to determine whether any violation of the United States Constitution or federal laws occurred. Historically, *habeas corpus* has acted as a vital systemic check upon the state courts and their application of fundamental federal constitutional protections. This is especially true in cases where the inmate has been sentenced to death. Of the capital cases reviewed in federal *habeas corpus* proceedings between 1973 and 1995, two out of five (40 percent) were found to have constitutional error.[5]

A. WHY CONGRESS FUNDED PCDOS: TOO FEW LAWYERS FOR THE INDIGENT CONDEMNED, STALLED CASES, AND CHAOTIC REVIEW.

Little more than ten years after the *Gregg* decision, the review of capital cases in federal *habeas corpus* proceedings had become a quagmire. As more and more cases entered the federal courts, a greater number came to the district courts' attention not through the filing of an ably-written petition, but on a hastily-drafted emergency motion for a stay of execution filed by volunteer counsel recruited serendipitously only days before. In some states, emergency motions were filed by prisoners acting without counsel. Often, federal judges were forced to put aside scheduled work and consider, sometimes through the night, such emergency filings.

It soon became apparent why a growing number of state capital cases were arriving at the federal courthouse door slapped together at the last minute.[6] In many states, ill-funded indigent defense systems failed to provide sufficient numbers of seasoned defense attorneys for capital trials and subsequent state appeals. As a consequence, important issues were not litigated properly, or were not litigated at all, in those proceedings. Moreover, after the direct appeal was completed, indigent death-sentenced inmates had to fend for themselves to find *pro bono* counsel for state post-conviction proceedings.[7] Few states had in place a mechanism for matching qualified counsel with indigent capital inmates so that claims not resolved adequately on direct review could be promptly and thoroughly reviewed in the state post-conviction process. Finally, once they reached federal court, condemned inmates had no right to counsel to pursue *habeas corpus* relief; the appointment of counsel was within the discretion of the federal district court judge.[8] And even if the district court appointed federal habeas counsel, the appointment generally occurred after a *habeas corpus* petition was already filed, thereby precluding counsel's assistance at the most critical stage of any *habeas corpus* proceeding the preparation of the petition.[9]

During these years, the difficult and time-consuming task of recruiting and matching willing volunteer counsel with indigent capital prisoners in state post-conviction and federal *habeas corpus* proceedings usually fell to small, non-profit legal services organizations, national civil rights groups, the American Bar Association, and individual citizens. But by 1988, the demand for counsel greatly exceeded the number of volunteers these groups could identify. Indeed, the American Bar Association noted in 1988 that "there simply are not, and will not be, enough (qualified attorney) volunteers" to handle the death row cases generated by the states.[10] In

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mately deny post-conviction relief, *certiorari* review in the United States Supreme Court may be sought.

[4] 28 U.S.C. § 2254(a).

[5] JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 4 (2000).

[6] See generally American Bar Association Task Force on Death Penalty *habeas corpus* (Ira P. Robbins, rep.), Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 AM. U. L. Rev. 1 (1990) (containing materials produced by the American Bar Association Criminal Justice Section Project to Study *habeas corpus* Review of State Death Penalty Convictions); Report and Proposal of the Judicial Conference Ad Hoc Committee on Federal *habeas corpus* in Capital Cases at 1, 5 (1989) (also called the "Powell Committee Report" after its chair, former Supreme Court Justice Lewis Powell, Jr.).

[7] Although there is a constitutional right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and on direct appeal, *Douglas* v. *California*, 372 U.S. 353 (1963), there is no recognized constitutional right to counsel in state post-conviction or federal *habeas corpus* proceedings. *Murray* v. *Giarratano*, 492 U.S. 1 (1989); *Coleman* v. *Thompson*, 501 U.S. 722 (1991).

[8] U.S.C. § 3006A(g).

[9] Indeed, in *McFarland* v. *Scott*, 512 U.S. 849, 856 (1994), the Supreme Court noted that in light of the heightened pleading requirements for *habeas corpus* petitions, requiring an indigent capital petitioner to file a petition without the assistance of counsel "would thus expose him to the substantial risk that his habeas claims would never be heard on the merits."

[10] Linda Greenhouse, *Supreme Court Roundup*: *Right to Death-Row Lawyer Curbed*, N.Y. TIMES, June 24, 1989, at 8 (citing amicus curiae brief of the American Bar Association in *Murray* v. *Giarratano*, 492 U.S. 1 (1989), LEXIs, News Library, NYT File.

those states with large deathrow populations, the dearth of qualified counsel willing to provide representation in death penalty cases brought the process virtually to a stand still. And increasingly, state judges or governors, frustrated with the slow pace of capital appeals, set execution dates to move the cases through the system.

By this time, concerns over the large number of death penalty cases in the pipeline, and the limited number of attorneys familiar with the complexities of both death penalty and *federal habeas corpus* jurisprudence, caused the federal judiciary and bar to search for some vehicle to ensure that trained and adequately supported attorneys could be found. Without such a mechanism, neither the courts nor the bar could ensure that the death-penalty review process would continue to function. In June 1988, in cooperation with the Administrative Office of the United States Courts, the American Bar Association sponsored a national conference to address the growing crisis resulting from the unavailability of counsel in capital post-conviction and *habeas corpus* proceedings.[11] Following this conference, a number of states formed blue-ribbon panels—comprised of the state and federal judiciary, bar association leaders, state and local prosecutors, civil rights leaders, and the defense bar—to study the problem further. These committees found that the shortcomings within the states' systems were frustrating both the pace and quality of justice in the federal courts, and that federal *habeas corpus* review of state capital cases would continue to be chaotic and inefficient unless Congress took action to deal with the crisis realistically. In response, the committees recommended the creation of death penalty resource centers.

Soon thereafter, Congress took two important steps to address the chronic lack of seasoned and adequately compensated counsel in the capital process. First, recognizing that early assignment of competent counsel can greatly reduce both the length of time and the amount of resources required to litigate a death penalty case to conclusion,[12] Congress enacted a statutory right to counsel for condemned inmates in federal *habeas corpus* proceedings in the Anti-Drug Abuse Act of 1988.[13] Under section 848(q) of Title 21, federal courts are obligated by statute to appoint experienced attorneys to represent financially eligible federal *habeas corpus* petitioners under a sentence of death. So that counsel may assist in the preparation of the federal petition, section 848(q) also allows the inmate to request appointment before the petition is filed.[14] And to make such representation more financially feasible for experienced practitioners, it directs that appointed counsel handling capital *habeas corpus* cases be compensated higher than in non-capital cases.

Second, and importantly, Congress recognized that the complexity and demanding nature of capital cases required additional litigation resources. Following the recommendations put forth by the states' blue-ribbon panels, it approved the federal judiciary's request for federal funding of defender organizations to recruit, assist, and support the private bar with these cases. Congress also understood that the quality of review afforded in the state system had a direct bearing upon the cost, speed, and integrity of subsequent federal review. Thus, these organizations were also encouraged to seek state resources so that they could likewise aid counsel in state post-conviction proceedings. Such assistance in state proceedings would enhance the quality of representation, and thus simplify later federal proceedings. Moreover, such a system would encourage continuity of representation; lawyers recruited in the state system would remain with a case as it entered federal court.

Thus, in a model of cooperation between the federal judiciary, state governors, state judges, state and local prosecutors, private bar associations, and Congress, death penalty resource centers were established in a number of jurisdictions.[15] These resource centers, later known as Post-Conviction Defender Organizations (PCDOs), were structured as community defender organizations pursuant to subsection (h)(2)(B) of the Criminal Justice Act, 18 U.S.C. § 3006A. PCDOs received grants upon approval of the United States Judicial Conference, contingent upon each PCDO's ability to obtain funds to support the state-court-related work that it intended to perform. In FY 1995, grants totaling $19,354,400 supported PCDOs in 20 states.[16]

PCDOs performed a number of functions. They tracked the status of the appeals of those on death row so that counsel could be found and filings could be made in

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[11] Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 BUFF. L. REV. 329, 333 (1995).

[12] The Powell Committee Report reached similar conclusions.

[13] 21 U.S.C. § 848(q).

[14] *McFarland* v. *Scott*, 512 U.S. 849 (1994).

[15] *See* Roscoe C. Howard, Jr., The Defunding of the Post-Conviction Defense Organizations as a Denial of the Right to Counsel, 98 W. VA. L. REV. 863, 906–13 (1996).

[16] FY 1995 was the last year of full funding for PCDOs.

a timely, orderly fashion. They recruited volunteer attorneys and provided the assistance required to acquaint attorneys with the complex procedural and substantive aspects of capital *habeas corpus* representation. This assistance included training programs for volunteer and appointed counsel, consultations with counsel, assistance in investigating and litigating cases, and providing manuals, sample pleadings, briefs, and other support materials. Although counsel employed by the PCDOs personally represented a limited number of capital *habeas corpus* petitioners, direct representation was not their primary orientation.

B. THE COX COMMITTEE REPORT: THE JUDICIARY RECOMMENDS CONTINUED PCDO FUNDING WITH INCREASED DIRECT REPRESENTATION.

Six years after their creation, the federal judiciary concluded that the PCDOs played a vital role in providing cost-effective, qualified counsel in capital cases. In 1994, Judge Gustave Diamond, Chair of the Committee on Defender Services of the United States Judicial Conference, named three members of the Committee to a Subcommittee on Death Penalty Representation.[17] The Subcommittee's task was to evaluate PCDO performance in assisting the federal judiciary in meeting its goals of making qualified counsel available for appointment, and providing quality cost-effective representation in capital federal *habeas corpus* proceedings.

The Subcommittee's "Report on Death Penalty Representation" (hereinafter the "Cox Committee Report," after its chair, Judge Emmett Ripley Cox), concluded that PCDO handing should continue because PCDOs "play a vital role in providing representation in capital cases."[18] The Subcommittee found that the very presence of PCDOs, and their ability to offer training and expert advice regarding each step of the *habeas corpus* process, emboldened private attorneys to accept assignments in capital *habeas corpus* cases. "Private lawyers who communicated with the Subcommittee almost uniformly expressed the view that they would not willingly represent a deathsentenced inmate without the assistance of a PCDO or similar organization. State and federal judges agreed that PCDO assistance was critical to the recruitment of private attorneys to represent death sentenced inmates."[19] Much more importantly, the Subcommittee noted that PCDOs brought for the first time some coordination in the delivery of defense services into the state and federal post-conviction process. These offices were crucial in motivating private attorneys to represent condemned inmates in state post-conviction proceedings, where often there is little or no compensation.[20] Created at a time when the lack of competent and knowledgeable counsel in state post-conviction and federal *habeas corpus* proceedings often resulted in confusion, delay, and increased costs, the PCDOs dramatically expanded the pool of qualified counsel willing to accept these demanding cases.

However, this reliance on private counsels central tenet of the PCDO concept caused the Subcommittee concern. It found that "the availability of private counsel both *pro bono* and compensated is diminishing across the country, despite PCDO assistance."[21] For example, the Report noted that at the time, 28 condemned inmates were without counsel in state post-conviction proceedings in Texas. To address this concern, the Subcommittee recommended that PCDO funding be continued, but that PCDO counsel represent more death-sentenced inmates directly, rather than simply providing consultation and training to appointed counsel. The reason for this recommendation was twofold. First, because PCDOs received both federal and state resources, PCDO counsel could work in both state and federal court, thereby providing quality representation in state post-conviction proceedings and continuing that representation into federal court two factors that tend to decrease costs of federal habeas representation. Second, the cost of experienced salaried counsel employed by PCDOs was less than private counsel compensated under the CJA. Thus, to the extent PCDO counsel were able to provide representation in lieu of private appointed counsel, cost savings in capital cases could be achieved. In September 1995, the United States Judicial Conference approved the recommendations in the Cox Committee Report.

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[17] Judge Emmett Ripley Cox, of the United States Court of Appeals for the Eleventh Circuit, chaired the Subcommittee. Judge Arthur L. Alarcon of the Ninth Circuit Court of Appeals and Judge Miriam Goldman Cedarbaum of the Southern District of New York served as Subcommittee members.

[18] Cox Committee Report at 7.

[19] *Id.* at 6.

[20] *Id.*

[21] *Id.* at 8.

C. CONGRESS DEFUNDS THE PCDOS.

PCDOs received a harsh reaction from death penalty proponents.[22] In the spring of 1995, South Carolina Attorney General Charles Condon, testifying for the National Association of Attorneys General, urged Congress not to fund PCDOs unless state prosecutors got equal funding.[23] Representative Bob Inglis, a Republican from South Carolina, and Representative Charles Stenholm, a Republican from Texas, in an open letter to their congressional colleagues in June 1995, assailed the PCDOs as "'one of the major reasons that justice is being frustrated in capital cases around the country' and blamed 'the flow of federal money (to the PCDOs) that goes to finance endless and fruitless appeals.'" The two congressmen persuaded the Subcommittee of the Departments of Commerce, Justice, and State of the House Appropriations Committee to eliminate funding for PCDOs.[24] On January 5, 1996, Congress passed H.R.#1358, which called for a budget of $262,217,000 for the federal judiciary's Defender Services program so long as none of the funds were expended on PCDOs after April 1, 1996.[25] With the termination of federal funding, many PCDOs closed their doors.

II. POST–PCDO PROBLEMS: ALL OF THE OLD ONES PLUS MORE CASES, FEWER EXPERIENCED ATTORNEYS, AND AN INCREASINGLY COMPLEX AND ACCELERATED JURISPRUDENCE.

The PCDOs were defunded before they achieved a uniform system of qualified representation in state post-conviction and federal *habeas corpus* cases. Nevertheless, in less than seven years, these offices had dramatically improved the level of defense services provided to hundreds of death sentenced inmates. With the withdrawal of PCDO funding, the national picture of post-conviction representation now resembles a tattered patchwork quilt.

After Congress eliminated funding for the PCDOs, those in Arkansas, Florida, Mississippi, Nevada, Oklahoma, Tennessee, and Texas closed their doors almost immediately. Drastically scaled-back services survived in Arizona, Alabama, California, *Georgia*, Illinois, Kentucky, Louisiana, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, and Virginia. In a minority of states, the surviving organizations receive limited state funds. In only a very few does the level of funding come close to that previously provided the PCDOs. Many no longer provide representation or assistance to counsel appointed in capital *habeas corpus* proceedings before the federal courts. Federal defender offices in some states have been called upon to represent death row inmates in federal habeas proceedings. The resulting hodgepodge of post-conviction representation since the withdrawal of PCDO funding has caused the cases of many indigent condemned inmates to slip through the cracks.

Other recent actions by the states since the defunding of the PCDOs have also affirmatively deepened the crisis in post-conviction representation. Many states, frustrated with the slow pace of executions, enacted new statutes imposing time limitations on the filing of capital post-conviction petitions. Counsel representing death-sentenced inmates in Arizona, *Georgia*, Illinois, Missouri, North Carolina, Oklahoma, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia must now file post-conviction petitions and litigate their claims under accelerated timetables. Many private attorneys are unwilling to accept appointments in light of these changes. By speeding up the capital post-conviction process, these states have caused cases that would have worked their way through the state system over a period of time to become a tidal wave. The result: too many cases, too few experienced attorneys, and too little time.

But the old problems have hardly gone away. A large number of states still fail to provide adequate defense services for capital trial, appellate, and post-conviction

[22] PCDOs never had universal support. The Cox Committee heard complaints that in some states, PCDO staff worked to abolish the death penalty rather than recruit attorneys or represent inmates. Cox Committee Report at 6 n.12.

[23] In fact, a number of studies on the relative resources available for the prosecution and defense in capital cases have found that there is a disparity of funding in favor of the prosecution at all levels of capital cases. For example, in 1991, the American Bar Association study of the cost of the death penalty in state jurisdictions, made at the request of Congressman Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights, reached this conclusion.

[24] Roscoe C. Howard, Jr., The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel, 98 W. VA. L. REV. 863, 913–14 (1996) (citing Marcia Coyle, Republicans Take Aim at Death Row Lawyers, NAT'L L. J., Sept. 18, 1995, at A 1, and Lis Wiehl, Program for Death-Row Appeals Facing Its Own Demise, N.Y. TIMES, Aug. 11, 1995, at A13).

[25] Act of Jan. 6, 1996, Pub. L. No. 104–91, 110 Stat. 7.

proceedings, with some furnishing none at all after direct appeal. As before, a substantial and growing number of condemned inmates who have completed direct review have no legal representation, nor any immediate prospects of being matched with competent counsel. Once again, in many states the difficult and time-consuming task of recruiting and matching willing volunteer counsel with indigent capital prisoners in state post-conviction and federal *habeas corpus* proceedings has fallen on nonprofit organizations, national civil rights groups, the American Bar Association, and individual citizens, but without the assistance of PCDOs.

For example, in response to the growing crisis in post-conviction representation following the demise of the PCDOs, the American Bar Association Death Penalty Representation Project has accelerated its efforts to recruit volunteer lawyers. The process of recruitment, however, is a protracted one. Because law firms are aware that capital cases demand attorney time and resources at a level few other *pro bono* cases demand, approval, on average, takes four to six months. In addition, many of the firms recruited have no previous capital experience and require the guidance of experienced capital litigators. But without the support of the PCDOs, this guidance is difficult to find.[26] Since early 1998, the Project has successfully recruited some 60 major law firms to represent capital inmates in post-conviction proceedings. But these efforts cannot come close to meeting the need. Indeed, in 1997 the American Bar Association called for a moratorium on executions, noting that the death penalty is administered through "a haphazard maze of unfair practices," that many defendants facing the death penalty are represented by inadequately paid or incompetent lawyers, and that hundreds of the men and women on death row nationwide have no lawyers to represent.them in post-conviction appeals.[27] The call for a moratorium was recently reemphasized by the ABA in light of mounting evidence of exonerations of death-row inmates, and the role that inadequate counsel played in their wrongful convictions.[28]

One reason for the devastating shortage of qualified counsel is the failure of most states to provide adequate compensation in capital post-conviction cases. Some states still provide no compensation for post-conviction counsel at all. A 1987 study commissioned by the American Bar Association Death Penalty Representation Project found that the average time devoted to a case by post-conviction counsel was 2,000 hours.[29] These figures were gathered before the decade of United States Supreme Court decisions that substantially increased the complexity of *habeas corpus* litigation,[30] and prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[31] More recently, the Spangenberg Group conducted a study of time and expenses required in Florida capital post-conviction cases. It concluded that "the most experienced and qualified lawyers at [one of Florida's three Capital Collateral Regional Offices] have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of *certiorari* by the United States Supreme Court following direct appeal to the denial of *certiorari*" through that state's post-conviction proceedings.[32] The study found that these estimates were "consistent with" those reported by a number of *pro bono* firms involved in capital post-conviction litigation that were also surveyed.[33] In addition, the ancillary costs expended by volunteer firms ranged from approximately $14,000 to in excess of $1.5 million.[34] These reported costs far exceed those compensated by the vast majority of states. Moreover, the failure of the states to provide adequate compensation and reimbursement of costs not only contributes to

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[26] Recognizing that it cannot persuade firms to undertake capital post-conviction cases without the kind of direction formerly offered by PCDO lawyers, the Project, through grants and other fund-raising efforts, now underwrites the salaries of six experienced capital litigators in Alabama, *Georgia*, Missouri, Texas, and Virginia who are designated as "resource counsel" to the *pro bono* firms the Project recruits. This action is viewed by the Project as a necessary, short-term response to the current crisis in post-conviction representation.

[27] Saundra Torry, ABA Endorses Moratorium on Capital Punishment, WASH. POST, Feb. 4, 1997, at A4, available at 1997 WL 2249666.

[28] *See* Bill Rankin, Critics Speak Out on Death Penalty: Citing Shift in Attitudes on Capital Punishment, Lawyers Continue to Urge Execution Moratorium, ATLANTA CONST., Oct. 13, 2000, at D1, available at 2000 WL 5480954.

[29] The Spangenberg Group, Time and Expense Analysis in Post-Conviction Death Penalty Cases, 11, 20 (Feb. 1987).

[30] *See*, e.g., *League* v. *Lane*, 489 U.S. 288 (1989); *Coleman* v. *Thompson*, 501 U.S. 722 (1991); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1 (1992); *Herrera* v. *Collins*, 506 U.S. 390 (1993); *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993).

[31] Pub. L. 104–32, 110 Stat. 1214 (1996).

[32] The Spangenberg Group, Amended Time and Expense Analysis of Post-Conviction Capital Cases in Florida, 16 (April 1998).

[33] *Id.*

[34] *Id.* at 13.

the unavailability of lawyers, but also to the poor quality of performance that is actually rendered.[35]

And all of these problemsboth new and old have only been exacerbated by the accelerated timetables and legal complexities arising from enactment of AEDPA. Several key provisions of AEDPA have heightened the obligations of counsel in state post-conviction proceedings. AEDPA has rendered the state post-conviction process more fraught with peril to the client who does not have a lawyer, or whose lawyer is unable, because of inadequate funding, to fully investigate, prepare, and present all claims in the first round of state post-conviction litigation.

A. AEDPA: A SWIFTER, MORE COMPLICATED HABEAS JURISPRUDENCE.

The withdrawal of PCDO funding could not have come at a worse time. On April 24, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.[36] Although AEDPA has transformed an already painfully complex habeas jurisprudence in many ways, exactly how it has done so is still not entirely clear. Indeed, although five years have passed since its enactment, the interpretation and implication of many of AEDPA's provisions are still being litigated.

One of the dramatic changes wrought by AEDPA is the creation of a statute of limitations which in most states allows one year for filing a federal *habeas corpus* petition, usually from the denial of *certiorari* on direct appeal.[37] Although AEDPA deals strictly with cases being litigated in federal court, the statute of limitations provision creates a de facto statute of limitations for filing a post-conviction petition in state court. Some federal courts have held that even if the state post-conviction application would be considered timely under state law if filed at a later date, AEDPA's limitations period is not tolled until a state post-conviction application is actually filed in state court.[38] Thus, for all practical purposes, death-sentenced inmates must file their state post-conviction petitions within one year, or more accurately, early enough to ensure that there will be time to investigate and prepare a federal habeas petition should the state challenge fail.

AEDPA thus creates a dire situation for unrepresented death row inmates. Once the United States Supreme Court denies *certiorari* following affirmance on direct appeal, the limitations period begins running. But without counsel, these inmates have no ability to investigate the kind of claims that form the basis of most successful post-conviction applications, that is, those that are developed from facts outside the record. Moreover, they have no ability to prepare and file for post-conviction relief. In an increasing number of cases, the state courts have appointed post-conviction counsel with only weeks left in the limitations period to file a state post-conviction petition, or the federal courts have appointed counsel with only weeks or days within which to file a federal *habeas corpus*petition. In a few cases, the limitations period has passed without appointment of counsel.

AEDPA also creates a quid pro quo whereby if a state "opts in" by establishing a mechanism for the appointment and compensation of counsel in state post-conviction proceedings,[39] it can obtain certain "benefits," including the shortening of the statute of limitations for filing a first federal petition from one year to 180 days,[40] and an accelerated process of decision in the federal courts.[41] No state has yet been held to qualify as an "opt-in" state under these provisions. However, in the wake of the enactment of AEDPA, many states created new post-conviction processes in an attempt to "opt in" and obtain these "benefits."[42] Thus, in many states, not only have post-conviction capital counsel had to unravel the mysteries of AEDPA, but have also had to learn, and litigate, the meaning of totally new state post-conviction statutes.

These and many other AEDPA provisions have significantly complicated and increased the uncertainty inherent in both state and federal post-conviction practice. Many part-time capital lawyers appointed in state post-conviction and federal *habeas corpus* proceedings who came to depend upon the PCDOs to keep them abreast

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[35] American Bar Association Task Force on Death Penalty *habeas corpus* (Ira P. Robbins, rep.), Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 AM. U.L. Rev. 1, 78 (1990).

[36] Pub. L. 104–132, 110 Stat. 1214 (1996).

[37] 28 U.S.C. § 2244(d)(1) (2000).

[38] *See Webster* v. *Moore*, 199 F.3d 1256, 1259 (11th Cir.), *cert. denied*, 121 S. Ct. 481(2000); *Bingham* v. *Anderson*, 21 F. Supp. 2d 639 (S.D. Miss. 1998).

[39] 28 U.S.C. §§ 2261, 2265 (2000).

[40] 28 U.S.C. § 2263 (2000).

[41] 28 U.S.C. § 2266 (2000).

[42] *See*, e.g., ARIZ. REV. STAT. § 13–4041 (1999); ARK. CODE. ANN. § 16–91–204 (2000) (legislative intent of statute is to obtain expedited federal review under AEDPA); S.C. CODE ANN. § 17–27160(B) (1999) ("South Carolina Effective Death Penalty Act of 1996 ").

of significant legal developments are now required to master these comprehensive alterations to post-conviction practice in an accelerated environment. Some have failed to understand AEDPA's implications, and unwittingly forfeited their clients' right to federal *habeas corpus* review.[43] Many others are simply refusing to represent capital clients altogether.

EJI's small staff is unflaggingly dedicated in its attempt to fill the huge gap in capital representation in Alabama, but it simply cannot do it all. Although EJI represents almost 100 deathrow inmates,[44] and the American Bar Association Death Penalty Representation Project and other groups have had some very limited success identifying volunteer counsel willing to represent capital prisoners in Alabama post-conviction proceedings *pro bono*, in no way can these resources meet the need. Approximately 31 Alabama inmates under sentence of death do not have lawyers to represent them in state post-conviction proceedings.

Other than EJI, there is no one else to provide these services. Alabama law does not require appointment of counsel in post-conviction proceedings.[45] Resources for capital representation in Alabama are virtually nonexistent. Alabama has no statewide public defender system,[46] nor is any other state or local entity including the state courts responsible for identifying counsel willing to represent death row inmates in post-conviction proceedings. No court in Alabama routinely appoints counsel for death row inmates who have concluded direct appeal. If a condemned inmate files a post-conviction petition pro se, the circuit court may appoint a local lawyers.[47]

But there are few financial resources to work the case even if counsel is identified. On October 1, 2000, following the first rate increase in 18 years, post-conviction counsel in a capital case is now paid $60 per hour for in-court work and $40 per hour for out-of-court work, but there remains a $1,000 cap.[48] There continues to be no state statutory right to funds for investigative or expert assistance. Moreover, there are no qualifications for capital post-conviction counsel required under state law or rule, and no state entity provides training or resource materials to those attorneys who are appointed.[49]

It is therefore not surprising that even if counsel is appointed by the state court, these attorneys usually have no post-conviction experience, and rarely investigate claims, gather evidence, or seek evidentiary hearings.[50] Even those attorneys recruited by EJI and the ABA Death Penalty Representation Project rarely have any experience in capital litigation. Most are *pro bono* civil attorneys from outside Alabama who need substantial guidance. At present, the ABA Death Penalty Project provides limited funding for one EJI attorney to act as resource counsel to assist *pro bono* post-conviction counsel, but one person can only do so much.

The need to provide guidance to inexperienced capital counsel is made even more critical by recent events. At the urging of the Alabama Attorney General and the Governor,[51] the Alabama Supreme Court enacted a rule change, made retroactive to pending cases, that eliminates the Court's automatic review of capital cases, and also imposes strict deadlines.[52] In a rather bizarre twist, although the rule change

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[43] *See*, e.g., *Kreutzer* v. *Bowersox*, 231 F.3d 460 (8th Cir. 2000); *Goodman* v. *Johnson*, No. 9920452 (5th Cir. Sept. 19, 1999) (unpublished), *cert. denied*, 528 U.S. 1131 (2000); *Cantu-Tzin* v. *Johnson*, 162 F.3d 295 (5th Cir. 1998), *cert. denied*, 528 U.S. 1091 (1999); *Calderon* v. *United States District Court (Kelly)*, 127 F.3d 782 (9th Cir. 1997), *cert. denied*, 528 U.S. 1063 (1998). Spencer Goodman was executed by the State of Texas on January 18, 2000, and Andrew Cantu-Tzin was executed by Texas in January 1999.

[44] Rimer, *supra*, note 46 at Al.

[45] *Ex parte Cox*, 451 So.2d 235 (Ala. 1983).

[46] *See* Rimer, *supra*, note 46, at A1 In 2000, legislation to create a statewide public defender office in Alabama failed to pass.

[47] In one such case, *Henderson* v. *State*, 733 So.2d 484 (Ala. Crim. App. 1998), an appointed lawyer, who successfully ran for District Attorney a few months later, told the court that the trial lawyer was not ineffective as had been alleged in the pro se petition and that the claim and the petition should be dismissed, which they were. The client contacted ER on the last day for filing a notice of appeal and asked for help. An appeal notice was filed and EJI recruited counsel. The client was nonetheless precluded from further post-conviction review because of the conduct of appointed counsel.

[48] ALA. CODE 15–12–23.

[49] EJI provides these services as its budgetary and staffing constraints allow.

[50] Elisabeth Semel, Representing Death Row Inmates at the Outskirts of the Southern Front, CACJ FORUM, vol. 26, no. 1, at 37, 40.

[51] Analysis: Alabama State Officials Continue to Rely on Electric Chair as Alabama's Primary Means of Execution, (All Things Considered, NPR radio broadcast, Feb. 17, 2000), available at 2000 WL 21469803.

[52] *See* Court Comment to Ala. R. App. P. 39. The May 2000 amendment completely revises Rule 39 to remove the provision in the former rule that provided that a petition for writ of *certiorari* in a death penalty case would be granted as of right. Review is now at the discretion

was made effective in May 2000, the rule was not actually published until August 2000.

There is no doubt that capital post-conviction representation is in crisis in Alabama. But perhaps most unsettling is the fact that numerous unrepresented Alabama death row inmates now face the expiration of the federal statute of limitations. Indeed, in an unprecedented move, the State recently asked the Alabama Supreme Court to set execution dates for two unrepresented death row inmates for whom the federal statute of limitations has run.

Pennsylvania.

At the time of the defunding of the PCDOs, about half of the then nearly 200 death row inmates in Pennsylvania had no lawyer.[53] The Commonwealth has long been widely regarded as having one of the worst systems in the country for providing indigent defense services. Indeed, Pennsylvania's death penalty representation crisis has been recognized for years. As early as 1990, the Joint Task Force on Death Penalty Litigation in Pennsylvania warned of a "problem of major proportions" in the provision of legal representation to indigent death-row inmates, and noted several "serious problems" including: the shortage of qualified counsel to assist inmates in state and federal post-conviction proceedings; the lack of standards governing the qualifications for capital counsel or the appointment of counsel at any stage of state capital proceedings; the lack of standards for the compensation of counsel; the lack of state funding for investigation of capital cases; and the lack of any mechanism for the identification and recruitment of qualified counsel.

In the decade since the Task Force's report, little in Pennsylvania has changed. The Pennsylvania Capital Case Resource Center (PCCRC) was founded to address Pennsylvania's systemic and endemic failures to provide trained legal counsel for indigent death row prisoners. After more than a three-year delay in the provision of matching state funding, the PCCRC opened its doors as a federally-funded PCDO in July 1994. In FY 1995, its PCDO grant totaled $621,000. But after Congress defunded the PCDOs, state funding was also discontinued. After its defending and substantial downsizing, PCCRC became the Center for Legal Education, Advocacy and Defense Assistance (LEADA). LEADA received no governmental sustaining grants, and in 1996 the Legislature twice defeated measures to fund it.[54] Finally, because of a shortage of resources, LEADA closed its doors in June 1999.[55] At the time, it represented more than 70 of Pennsylvania's 227 death-row inmates.[56] When LEADA dissolved, no state entity in Pennsylvania was available to systematically obtain stays of execution, recruit *pro bono* counsel for state post-conviction and federal habeas proceedings, or provide consulting, training, and support for appointed counsel.

Other actions by Pennsylvania affirmatively deepened the crisis in post-conviction representation. In November 1995, Pennsylvania amended its post-conviction statute so as to limit to one year the time in which condemned inmates may initiate collateral review.[57] But the Commonwealth still has no standards governing the appointment of post-conviction counsel, and still provides no statewide funding for compensation of counsel and reimbursement of expenses in capital post-conviction cases. Instead, Pennsylvania leaves the funding for such cases to county governments.[58] Indeed, 2000 was the first time Pennsylvania has ever provided any type of funding for post-conviction work, when the Legislature appropriated $600,000 for capital post-conviction training. However, this money is for training only. It cannot

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of the Supreme Court. Rule 39 also requires that a petition for rehearing be filed in the Court of Criminal Appeals before a *certiorari* petition may be filed in the Supreme Court, and that a *certiorari* petition be filed within 14 days of the denial of rehearing by the Court of Criminal Appeals, Rule 39(c). If *certiorari* is granted, the briefing on the merits is to be completed by both parties within 28 days of the date the writ issues. Rule 39(h). There is no guarantee that the Supreme Court will hear oral argument even if *certiorari* is granted. Rule 39(1)&(j).

[53] As of July 2000, Pennsylvania had a death row population of 235 men and women, the fourth largest in the nation. NAACP Legal Defense Fund, Death Row USA, July 1, 2000.

[54] In 1997, while continuing to deny funding for post-conviction representation for indigent capital inmates, the Pennsylvania Legislature appropriated $500,000 to create a resource center for prosecutors in the Attorney General's office to assist with the opposition of capital post-conviction appeals.

[55] Elizabeth Amon, No Stay for Pa. Defense Group: A Lack of Funding Shuts Down Death Row Advocate Group, NAT'L L. J., July 5, 1999, at A16.

[56] Charles Thompson, Advocate for Death Row Inmates Closes Its Doors: Agency that Represented More than 70 Convicted Killers Loses Battle for Funding, PATRIOT–NEWS (Harrisburg, Pa.), July 4, 1999, at A7, available at 1999 WL 5144962.

[57] 1995 Pa. Legis. Serv. 32 (Spec. Sess. No. 1), § 1, codified at 42 PA. CONS. STAT. § 9545(b)(I) (2000).

[58] Amon, *supra* note 249.

be used to compensate post-conviction counsel nor to reimburse expenses. Moreover, although the Governor's office was placed in charge of distributing these training funds, it has yet to do so.

Not long after the defunding of the resource center, a capital habeas unit was created in the Federal Court Division of the Defender Association of Philadelphia, the federal defender organization for Pennsylvania. Since its creation, the unit has attempted to take all new capital *habeas corpus* cases in the federal courts in Pennsylvania. This has recently become more difficult. The Pennsylvania Supreme Court has begun to dramatically reduce its backlog of capital cases, and headed for federal court is a wave of cases35 are now awaiting decision before the state supreme court, and another 15 have completed state evidentiary hearings and are awaiting decision by the trial court. At present, the unit represents over 50 capital habeas petitioners. Unfortunately, because of the lack of competent counsel and resources in state post-conviction proceedings in Pennsylvania, when cases come to the unit following completion of the state post-conviction process, usually no discovery has been undertaken and little independent investigation has been done in the case. The unit must therefore expend federal resources to uncover all colorable claims to be included in the federal petition, and must do so within the time constraints of AEDPA's statute of limitations.

In June 1996, South Carolina enacted the "South Carolina Effective Death Penalty Act of 1996."[59] The Act imposed for the first time a deadline for filing a post-conviction petition in state coup. Now, counsel in capital post-conviction proceedings in South Carolina must file an application for post-conviction relief within 60 days of appointment. The Act also expedites other aspects of South Carolina capital post-conviction proceedings.[60] Many South Carolina judges strictly adhere to the statutory time limits. Moreover, due to fears that South Carolina may at some point be held to be an "opt-in" state and therefore entitled to the expedited procedures of AEDPA, counsel are often required to file a state post-conviction application within only days or weeks of appointment.

The Act also provides for appointment and compensation of post-conviction counsel. Indigent death-sentenced inmates are entitled to the appointment of two attorneys.[61] Private counsel is compensated at the statutory rate of $50 per hour for out-of-court work and $75 per hour for incourt work. The statutory cap is $25,000.[62]

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544
July 5, 2001

Hon. Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I am providing this letter in response to your July 3, 2001 letter asking that the judiciary clarify the record with regard to testimony given at the hearing held by the Committee on "Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases." At that hearing the Committee heard testimony that the federal judiciary is spending more than $20 million in FY 2001 to fund "assistance and training in state capital cases-not federal cases. . . ." I want to assure the members of the Committee that this is not the case. The federal judiciary does not fund representation in state proceedings of individuals under a state-imposed death sentence, except in rare and limited circumstances.

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[59] 1996 S.C. Acts No. 448, § 1 (eff June 18, 1996), codified at S.C. CODE ANN. § 17–27–160 (1999).

[60] S.C. CODE ANN. § 17–27–160(C) (1999) (after the state files its return, the statute requires the court to hold a status conference within 30 days and to schedule an evidentiary hearing within 180 days of the conference, except for good cause shown.).

[61] *Id.*, § 17–27–160(B) (1999).

[62] *See Id.*; S.C. CODE ANN. § 16–3–26 (1999).

Let me provide some background information on this issue. The federal judiciary is required to appoint and compensate at least one lawyer for any death-sentenced inmate in a federal habeas corpus case. See 21 U.S.C. § 848(q). The federal courts provide counsel in one of two ways. They may appoint an attorney from the private bar (known as a Criminal Justice Act panel attorney) or they may appoint a federal defender organization (FDO).

At its December 1998 meeting, the Defender Services Committee of the Judicial Conference resolved that "Defender Services appropriation funds may not be used to represent an individual under a state-imposed death sentence in a state proceeding unless a presiding judicial officer in a federal judicial proceeding involving the individual has determined that such use of Defender Services appropriation funds is authorized by law." The Administrative Office (AO) monitors such appearances in state court by FDOs.

The most recent data available to the AO indicate that such appearances in state court are rare. For the period from April 1, 2000, through March 31, 2001, seven of the 67 FDOs reported a total of 47 state court appearances on behalf of 43 clients. The total cost of FDO appearances in state court, including out-of-court and in-court activities, was approximately $157,600. The state court activity was for specified purposes, including: matters related to exhaustion of remedies in state court; motions related to a stay of execution in state court; pleadings related to successor post-conviction litigation; and motions for release of public records. In accordance with the Defender Services Committee policy, these activities were pursued at the direction of a federal judge and in connection with a federal capital habeas corpus proceeding that had been filed in a federal court.

The $20 million referenced at the hearing as being available for state capital case assistance and training is, in fact, limited to use by FDOs to support the direct representation of petitioners in the federal review of state capital habeas cases pursuant to 28 U.S.C. § 2254. As noted above, in a limited number of circumstances, these FDOs are authorized to use federal funds to represent death-sentenced inmates in state court proceedings, but only where a federal judge determines that such use of funds is authorized by law.

We believe that part of the confusion on this point may stem from the fact that some attorneys represent indigent defendants in both state and federal capital cases, which may lead to an erroneous assumption that they are paid only by federal sources. The federal judiciary only reimburses counsel for representation in a federal proceeding (except in the circumstances identified above), and other sources of funding must be found to compensate an attorney appearing in a state court action. One defender organization, the FDO serving the Eastern District of Pennsylvania, does receive nonfederal money to support its staff appearing in state court. That FDO is a community defender organization receiving grant funds from the judiciary for its federal court work. It has secured non-federal funds through grants and private contributions to support state court representations. During the most recent reporting period, according to this organization's documents and the independent audit that was done, it did not use federal resources on state court activity.

I appreciate this opportunity to clarify any confusion about these issues. I ask that a copy of this letter be made a part of the record of the hearing. Please let me know if the AO can provide any additional information on this matter to the Committee.

Sincerely,

LEONIDAS RALPH MECHAM
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544
July 16, 2001

Hon. Orrin G. Hatch
Ranking Member
Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Senator Hatch:

Pursuant to a request from a member of your staff, I am writing to clarify the record with regard to a document referred to at the hearing held by the Committee on "Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases." I want to emphasize that the report, entitled "The Crisis in Post-conviction Representation in Capital Cases Since the Elimination by Congress of Funding for the Post-Conviction Defender Organizations," does not represent the official position or policies of the Administrative Office of the United States Courts or the Judicial Conference of the United States.

This report was drafted by Janice L. Bergmann, an attorney in a federal public defender organization, at the request of my staff to assist the judiciary in responding to its ongoing obligation to provide lawyers for death-sentenced inmates in federal capital habeas corpus cases. See 21 U.S.C. § 848(q). In that regard, it has been provided to Judicial Conference's Committee on Defender Services, as well as to capital habeas practitioners participating in the judiciary's strategic planning efforts.

The report was completed in 1999 and updated in 2001. A disclaimer was incorporated into the report in the hope that it would avoid any confusion. I regret that it was not more clear.

The opinions, findings, and conclusions expressed in the report are those of the author. As part of the updating process, portions of the report were sent to various capital habeas practitioners for fact-checking purposes in anticipation of having a revised report available to the Committee on Defender Services at its May 2001 meeting. In order to meet this deadline, Administrative Office staff incorporated a number of the suggestions made by these practitioners into the report when the report's author became unavailable for an extended period this Spring. This activity, however, did not cause the Administrative Office to adopt or endorse the report, and I want to reiterate that the report does not reflect the official position or policies of the Administrative Office or the Judicial Conference of the United States. Indeed, the judiciary's policy making process frequently is informed by materials garnered from a broad range of sources, and their use to educate judges and others involved in that process about particular points of view does not constitute an endorsement of either the source material or the opinions expressed therein.

I appreciate the opportunity to clarify this issue. I ask that a copy of this letter be made a part of the record of the hearing. Please let me know if the Administrative Office can provide any additional information on this matter to the Committee.

Sincerely,

LEONIDAS RALPH MECHAM
Director

Statement of Norman Lefstein, Dean, Indiana University School of Law at Indianapolis and Member, Standing Committee on Legal Aid and Indigent Defendants on behalf of The American Bar Association

Mr. Chairman and Members of the Committee:

My name is Norman Lefstein. I am currently Dean and Professor of Law at the Indiana University School of Law at Indianapolis.

For many years I have dealt extensively with issues concerning the legal representation of indigent defendants in criminal cases in the United States, including death penalty cases. I was a reporter for the American Bar Association in preparing

standards dealing with defense services in criminal cases[1] and directed a study on the cost and quality of defense representation in federal death penalty cases for a committee of the Judicial Conference of the United States.[2] I also have been an expert witness in post-conviction death cases in which the quality of representation furnished by counsel was attacked. Currently, I am a member of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants. Since 1989, I have served as Chairman of the Indiana Public Defender Commission, which developed death penalty representation standards for the consideration of the Indiana Supreme Court, most of which were later adopted.

This statement is submitted on behalf of the American Bar Association (hereafter ABA or Association). With the exception of its opposition to the use of the death penalty for the mentally retarded and for juveniles who committed their crimes when they were under the age of 18, the ABA has not adopted a position either for or against capital punishment. In 1997, however, because of its concern that the death penalty was not being carried out in accordance with due process principles, and did not adequately minimize the risk of executing innocent persons, the ABA called for a moratorium on the use of capital punishment in the United States.

Since the death penalty was held constitutional a quarter century ago, the Association has adopted policies concerning the administration of capital punishment. Underlying these policies is a concern for protecting the innocent. Thus, the ABA has made protection of the right to effective assistance of counsel a top priority and has developed standards or guidelines for the effective representation of criminal defendants in capital cases.

In 1989, the ABA adopted the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*. These guidelines deal with the structure of defense systems for capital representation, the qualifications of counsel to represent defendants in capital cases, and the ways in which counsel should perform their various defense functions. As stated in the introduction to the guidelines, "they enumerate the minimal resources and practices necessary to provide effective assistance of counsel." Because the guidelines are now more than 10 years old and outdated due to numerous changes in the law, the ABA has recently undertaken to review the guidelines and to propose necessary changes, which will likely be considered for adoption by the Association in 2002.

This statement addresses three fundamental issues that are bound up in the consideration of the Innocence Protection Act of 2001. First, why are standards for the representation of defendants in capital cases necessary? Second, what are the essential elements of a system for capital representation? And, lastly, why is it important that standards for representation in death penalty cases be enforceable?

I. WHY ARE STANDARDS FOR THE REPRESENTATION OF DEFENDANTS IN CAPITAL CASES NECESSARY?

There is an enormous amount of evidence that the quality of legal representation provided to defendants in capital cases in this country is woefully inadequate. If proof of this assertion is doubted, one need only recall that nearly 100 persons have been released from death rows in this country, with either substantial or incontrovertible evidence of their innocence. Ours is a country that prides itself on the quality of its criminal justice system. In the death penalty area, however, it is clear that something has gone wrong. Too often our adversary system of criminal justice, which requires that the accused be provided a vigorous defense, has not operated as intended. It is largely because of this that the ABA has called for a moratorium on the use of the death penalty, as noted earlier.

The problems in death penalty representation have been repeatedly documented in law journal articles, studies, newspapers, and in decisions of appellate courts. Too often the lawyer who represents the defendant in a capital case is inexperienced and lacks the requisite qualifications to defend a person on trial for his life. The lack of adequate compensation for counsel, experts and investigators sometimes means that the most qualified attorneys refuse to become involved in capital defense representation, thus leaving the defendant to be represented by an inexperienced and untrained attorney. Unfortunately, such lawyers all too frequently conduct inadequate factual investigations, fail to keep abreast of the complex and constantly changing legal doctrines that apply in capital litigation, and make procedural errors that later preclude review of meritorious claims. The deficiencies of lawyers in death

[1] *See* "Providing Defense Services," Chapter Five, American Bar Association Standards for Criminal Justice (2d ed., Little Brown & Co., 1980).

[2] *See* Federal Death Penalty Cases Recommendations Concerning the Cost and Quality of Defense Representation, Report of the Subcommittee on Federal Death Penalty Cases of the Committee on Defense Services of the Judicial Conference of the United States (1998).

penalty cases also have included the failure to make appropriate objections, to present mitigating evidence, and even to file briefs on appeal.

In one of his last opinions as a member of the United States Supreme Court, Justice Blackmun identified the lack of standards as one of the primary reasons why there are so many problems in the area of defense representation in capital cases. "The absence of standards governing courtappointed capital-defense counsel means that unqualified lawyers often are appointed, and the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense. Many states that regularly impose the death penalty have few, if any, standards governing the qualifications required of court-appointed capital-defense counsel. . . ."[3]

Justice Blackmun offered this analysis in 1994, but his assessment of the situation is still accurate in 2001. Although standards for the appointment of counsel have been adopted by rule or statute in some states, most are not comprehensive and thus fail to deal with all facets of capital representation. In about half of the death penalty states, moreover, there are no court rules or statutes of any kind governing capital defense representation, and this includes a number of jurisdictions that have large death row populations.

The importance of standards for capital representation can perhaps best be understood by recalling what has happened in Illinois. Governor Ryan, a proponent of the death penalty, imposed a moratorium on the use of the death penalty in that state because of the release from death row of numerous defendants determined to be innocent. In these cases, there was abundant evidence that the lawyers who represented the defendants were not qualified by either experience or training to do so. Significantly, until March of this year, Illinois did not have any standards governing the appointment of counsel in death penalty cases or any of the other facets of capital representation.

In contrast, Indiana has had since 1994, by virtue of a Supreme Court rule, one of the more comprehensive provisions governing capital defense representation in the country.[4] As a result of this rule, there is considerable evidence that the quality of defense representation in capital cases has improved, as documented in a study that I published in 1996.[5] The Honorable Randall T. Shepard, Chief Justice of Indiana, seemingly agrees with this conclusion. As he stated in a speech, "[t]he net result of our rule and [state] appropriations is some very thorough, high quality, and effective representation."[6] Since the adoption of Indiana's rules, no person has been released from the state's death row because of innocence. Nor has there been a case in which lawyers were appointed pursuant to the Supreme Court's rule, complied with its requirements, and were held to be ineffective.[7]

In short, whether contained in court rules or statutes, standards for capital defense representation can and do make a difference, just as in other criminal cases requiring counsel for the indigent. Standards can assure that only attorneys with appropriate experience and training are appointed to represent defendants. Thus, standards can be instrumental in assuring that defendants' constitutional rights are protected, reduce the likelihood of error in proceedings, diminish the number of appeals and ultimately enhance the efficiency and effectiveness of the criminal justice process.

The Innocence Protection Act of 2001 contemplates the creation of a National Commission on Capital Representation to develop standards for providing adequate legal representation for indigents in death penalty cases. Although the ABA has never taken a position on the establishment of such a commission, clearly the approach of the proposed legislation is fully consistent with the ABA's guidelines on defense representation in death penalty cases and with other policies of the Association.

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[3] *McFarland* v. *Scott*, 114 S. Ct. 2785, 2786 (1994)(Blackmun, J., dissenting).

[4] Ind. R. Crim. P. 24. The rule was originally effective January 1, 1990. Subsequently, it was amended on several occasions. The most important provisions related to defense representation in capital cases did not take effect until 1993.

[5] Lefstein, "Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation," 29 Ind. L. Rev. 495 (1996).

[6] "Capital Litigation from the State Court Perspective or Rushing to Judgment in Fifteen Years," Speech by Randall T. Shepard at Judicial Meeting of the U.S. Court of Appeals for the Seventh Circuit (May 2, 1996).

[7] There is one death penalty case in which lawyers appointed pursuant to the Indiana rule were found to be ineffective. However, the caseload of one of the lawyers substantially exceeded the caseload restrictions specified in the Indiana rule. See *State* v. *Prowell*, 741 N.E.2d 704 (Ind. 2001).

II. WHAT SHOULD BE THE ESSENTIAL ELEMENTS OF A SYSTEM FOR CAPITAL REPRESENTATION?

The ABA guidelines on capital defense representation call for an independent appointing authority to develop qualification and compensation standards, to recruit and train lawyers to handle capital cases, to certify them as competent in this specialty area, and to make the actual appointments of counsel in all cases. The guidelines also provide that this independent authority should establish standards of performance for counsel and monitor their conduct to assure that clients are receiving quality legal representation. In addition, this independent body should have the authority to remove unqualified lawyers from the roster of attorneys eligible to receive appointments in capital cases.

As long as state court judges continue to make capital case assignments without adequate regard for the qualifications and training of counsel, the problems of incompetent counsel will surely continue. Unskilled attorneys will continue to make serious errors during trial; subsequently, post-conviction counsel will seek to discover those errors and seek reversals of death sentences imposed; and state appellate courts and federal courts will bear the brunt of correcting those errors. The only longterm answer is to conduct trials correctly in the first place. In the Association's view, this requires independently appointed, competent counsel.

The recommendation in the ABA's guidelines that the program for furnishing counsel in capital cases be vested in an independent appointing authority had its genesis in earlier reports and standards of the Association. In 1973, for example, the National Advisory Commission, organized during the Nixon administration and comprised of criminal justice experts from across the country, expressed the following viewpoint: "The method employed to select public defenders should insure that the public defender is as independent as any private counsel who undertakes the defense of a fee-paying criminally accused."[8] This approach for providing defense counsel to the indigent was spelled out in further detail in the ABA's second edition of Providing Defense Services, adopted by the Association in 1979.[9] The current version of these standards, approved by the Association in 1990, reads as follows: "The plan and the lawyers serving under it should be free from judicial supervision only in the same manner and to the same extent as are lawyers in private practice. The selection of lawyers for specific cases should not be made by the judiciary or elected officials. . . ."[10]

There are a variety of reasons why judges should not appoint lawyers in indigent cases, or otherwise be involved in the overall supervision of indigent defense, and these arguments are even more compelling when capital cases are involved because the stakes are so much greater. The paramount reason for not having judges appoint defense lawyers is to assure that counsel always feels completely free to act in the client's best interest. While there are obviously many fine judges who preside over criminal cases, there are occasions when judges are angered by motions filed by defense attorneys, resent arguments advanced by counsel, and rule against lawyers insistent upon continuances. Judges, for example, are understandably concerned with moving their dockets, but this is not defense counsel's concern and should never be the reason that a lawyer fails to make arguments or take actions on the client's behalf.

A lawyer should not have to fear reprisals of any kind from either the judge before whom he or she is appearing or some other judge before whom the lawyer might later appear. The power of judges to appoint lawyers and approve claims for compensation necessarily includes the power to withhold appointments and to reduce payments for the time lawyers devote to indigent cases.

A lawyer's advocacy on behalf of an indigent defendant in an appointed criminal case, especially a capital case, should be no more inhibited than the lawyer's advocacy in representing a client in a retained private case. Judges do not select privately retained lawyers or prosecutors. Judges should not be involved in the selection and operation of indigent defense programs either. The appointment of counsel and the oversight of indigent defense by an independent authority should also alleviate the fear of defendants that the judge or some other court official in charge of assignments controls the defense lawyer.

While it was noted earlier that some changes in the Association's guidelines are likely to be recommended next year, clearly the call for an independent appointing authority, which is quite central to the guidelines, will not be one of them. As the

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[8] National Advisory Commission on Criminal Justice Standards and Goals, Courts 13.8 (1973).

[9] *See* supra note 1, Standard 5–1.3.

[10] "Providing Defense Services," Standard 5–1.3, *ABA Standards for Criminal Justice* (3d ed. 1992).

foregoing discussion demonstrates, the call for independence in the operation of indigent defense predates the development of the ABA's guidelines for capital representation.

But, in addition to an independent appointing authority, there are a number of other components deemed essential to a system of capital defense representation specified in the guidelines. Included among these are the following:

- The appointment of two qualified attorneys at trial, on appeal, and in post-conviction proceedings, due to the complexity of capital defense litigation;
- Specific, detailed qualification standards to assure that attorneys appointed to capital cases are capable of rendering competent representation by virtue of their prior experience and training;
- Adequate support assistance in the form of investigative, expert, and other services necessary to prepare and present an adequate defense;
- Mandatory training in capital defense representation as a precondition for continuing to be eligible to receive appointments in death penalty cases; and
- Reasonable compensation paid to defense counsel for actual time and service performed, based upon a rate of hourly compensation that is commensurate with the provision of effective representation and taking into account the extraordinary responsibilities inherent in death penalty litigation.

Obviously, there is a good deal of similarity between the ABA's guidelines for death penalty representation and the provisions of the Innocence Protection Act of 2001. In the view of the Association, the proposed statute is absolutely right in declaring that a "centralized and independent appointing authority," as specified in paragraph (c) of Title II, should be an element of an effective system for capital defense. The statute is also correct in granting to the independent authority broad responsibilities for administering the system of capital defense representation. The appointment of a National Commission on Capital Representation to develop national standards would be a monumental advance in addressing the many problems that exist in this country in capital defense representation.

III. WHY IS IT IMPORTANT THAT STANDARDS FOR DEATH PENALTY REPRESENTATION BE ENFORCEABLE?

The Innocence Protection Act of 2001 proposes that sanctions be imposed on states if they fail to maintain a system of capital defense representation consistent with the National Commission's standards. The sanctions would take the form of withholding from non-compliant states a portion of funds under prison grant programs and making habeas corpus relief more available to petitioners in capital cases from such states.

Although the Association has never addressed withholding funds from states failing to comply with national standards, in 1990 the ABA adopted a resolution urging that certain procedural barriers to habeas corpus review not apply if a state "failed to appoint competent and adequately compensated counsel to represent the defendant. . . ." As the resolution explained, this would help "[t]o assure that the state provides competent representation and to avoid procedural delays as well as multiple reviews of the same issues. . . ."

In addition, the Association adopted a resolution in 1998 calling upon state and local jurisdictions "to adopt minimum standards for the creation and operation of its indigent defense delivery systems" based upon previously approved standards, including the ABA's guidelines for capital defense representation. The resolution also calls upon government bodies, which fund indigent defense services, to insist that minimum standards for representation are being met "as a condition for receiving funds." As the commentary to the resolution explained, "standards have the greatest impact when the state or other funding entity reimburses a jurisdiction's indigent defense program for some or all of the cost of delivering services, but reimbursement is made only if the jurisdictions adopt and enforce standards for the delivery of indigent defense services."

In the commentary to this ABA resolution, Indiana is the state that is most prominently cited for linking compliance with standards to the funding of indigent defense. Pursuant to statute in Indiana, the Indiana Public Defender Commission is authorized in capital cases to reimburse counties for SO% of their defense service expenditures if county officials and the trial court certify compliance with the Supreme Court's requirements governing death penalty representation. The standards in Indiana are contained in a rule of the Indiana Supreme Court, which requires the appointment of two attorneys on trial and appeal; establishes experiential requirements for lawyers willing to serve as lead and co-counsel in capital cases at

trial and on appeal; sets caseload limitations for lawyers handling capital cases, as well as their rates of compensation; and requires that adequate investigative, expert and other services be provided to the defense.

Because counties do not want to forego 50% reimbursement of their defense expenditures in capital cases, which are often quite substantial, there has been almost complete compliance with the rule of the Indiana Supreme Court on capital defense representation. As noted earlier, there is also evidence that the system of indigent defense in Indiana has improved. However, the compliance of counties has not been 100%. Recently, as Chairman of the Indiana Public Defender Commission, I wrote to the Chief Justice of Indiana to advise him that the Commission has learned of instances where two attorneys were not appointed to a death penalty case and of capital cases where caseload restrictions of lawyers were violated. This leads, therefore, to this question: if you cannot achieve 100% compliance with a rule of the state's highest court on capital representation when a county has much to lose from non-compliance, are there not apt to be far more violations of requirements for death penalty representation if the officials have absolutely nothing to lose?

The incentives for a state to comply with requirements aimed at assuring that every capital defendant is vigorously represented must be strong. The history of the past 25 years in providing counsel in death penalty cases shows that many states are quite reluctant to spend the funds necessary to assure that every capital defendant is effectively represented. Although many legislators undoubtedly understand what is needed to improve the system, there is not a strong constituency advocating for reform of indigent defense in most states. If national standards are developed as envisioned in the Innocence Protection Act, the reality is that many state and/or local jurisdictions are going to ignore them unless they decide it is simply too costly to do so.

The opposite of enforceable standards for capital defense representation is voluntary standards. Essentially, this is what we have had in the United States for many years. Ever since 1989 when the ABA adopted its guidelines for the appointment and performance of counsel in capital cases, a detailed blueprint has been available to every state and local jurisdiction to adopt. But this has not happened in any systematic or organized way, and in many jurisdictions nothing at all has been done. Meanwhile, enormous problems in the defense of capital cases have been experienced in virtually all 38 of the nation's death penalty states.

Statement of Steven D. Benjamin, Benjamin & DesPortes, P.C., Richmond, Virginia

INTRODUCTION

I am a member of the Virginia State Bar, and have practiced in the Commonwealth of Virginia since 1979. I am admitted to practice in the United States District Court, Eastern and Western Districts of Virginia, the Fourth Circuit Court of Appeals, and the United States Supreme Court. I am a partner in the Richmond, Virginia, firm of Benjamin & DesPortes, P.C. My partner, Betty Layne DesPortes, and I limit our practice to the defense and appeal of criminal cases. I am a director of the Virginia College of Criminal Defense Attorneys and an active member of the National Association of Criminal Defense Lawyers. I am an adjunct professor of law at the University of Richmond School of Law. I present continuing legal education in all phases of criminal defense.

During my career, I have tried dozens of murder cases. I have represented as lead counsel approximately 15 to 20 defendants who were charged with capital murder in the Eastern District of Virginia, the City of Richmond, Henrico County, Chesterfield County, Fairfax County, Brunswick County, Henry County, and Ameba County. No defendant represented by me or Ms. DesPortes at the trial court level has ever received a death sentence.

In view of my experience and background, I have been asked to describe and comment generally on Virginia's provision of indigent defense in capital cases.

MECHANISM AND CRITERIA FOR APPOINTMENT

In Virginia, a Public Defender Commission is responsible for adopting standards for the appointment of counsel in capital cases which take into consideration the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the req-

uisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation. In addition, the Commission is required to maintain a list of counsel qualified to provide capital representation. In establishing this list, the Commission's mandate is to consider all relevant factors, including the Commissions's assessment of whether the attorney is competent to provide quality legal representation. In any case in which an indigent defendant is charged with a capital offense, the trial court judge is directed, but not required, to appoint one or more attorneys from that list.

To date, the Commission's promulgation of standards has been little more than a parroting of the statutory criteria. The list of qualified counsel has been compiled by the implementation of a questionnaire which requires only that an applicant confirm that he has met the specified criteria. The most egregious deficiency of this methodology is that the criteria of demonstrated proficiency and commitment to quality representation is satisfied on a purely self-reported basis. No administrative mechanism or procedure exists within the Commission or elsewhere to subjectively review this requirement or to deny placement on the list of any attorney who checks-off each of the specified criteria. Despite the statutory direction, the Commission undertakes no assessment of an attorney's competence to provide quality legal representation, and lacks any means to remove an attorney from the list.

The criteria in Virginia for capital appointment is meaningless and discretionary. As a consequence, attorneys who are only marginally competent in routine criminal cases are eligible for appointment even in those cases where a defendant might be sentenced to death. Because of a combination of factors in Virginia, the provision of indigent defense is characterized by the systematic appointment of attorneys who are either unqualified or too busy and conflicted with other cases to adequately represent their clients.

COMPENSATION

Virginia's compensation of assigned counsel in non-capital cases is wretchedly inadequate. Unlike any other state in the country, Virginia imposes an absolute, unwaivable cap on the compensation which can be paid to attorneys appointed to represent the poor in criminal cases. The maximum compensation for the defense of a single felony punishable up to twenty years is $318. If a felony carries a possible life term, the maximum compensation is $882. This inflexible disincentive to zealous representation is immune from pre-trial or post-conviction systemic review.

The compensation for the defense of cases punishable by death is not capped. Instead, the amount and rate of pay is left to the discretion of the trial court. This allocation is questionable, as the provision of adequate representation can conflict with the management of an efficient docket. Trial courts may cut the hours submitted for compensation, leaving attorneys with no opportunity for review. Attorneys who complain are threatened with the loss of appointed work.

Virginia's trial courts have generally approved compensation to attorneys in capital cases for all time expended at a rate deemed reasonable for indigent defense. This practice will soon change. Trial courts are required by statute to consider any guidelines for compensation established by the Supreme Court of Virginia. Effective July 1, 2001, the Virginia Supreme Court has suggested that trial courts provide compensation at the hourly rates of $75 and $125 for the respective provision of out-of-court and in-court representation. These levels represent a substantial reduction in the current rate of compensation. The (unintended) effect of this reduction will be to further discourage experienced and competent attorneys from undertaking the defense of these most serious and unpopular of cases.

SAME POOL

In any event, the absence of a cap on fees in capital cases accomplishes little towards the goal of ensuring the appointment of truly qualified attorneys. This is because the relatively generous death penalty fees are used to reward or subsidize the attorneys who accept the financially devastating non-capital fees. The result is that the attorneys who are appointed in capital cases are the same attorneys who depend on court-appointed work for their livelihood. Because the ordinary fees are hopelessly inadequate, the attorneys who handle the bulk of court-appointed representation must often carry staggering caseloads in a number of jurisdictions. Attorneys who are forced to rely on volume are reluctant to refuse appointment, especially in capital cases, and quite simply do not have the time to adequately defend any serious or complex criminal case. Some attorneys are appointed to defend multiple capital cases at the same time. Not surprisingly, these are the attorneys with multiple clients on death row. Regardless of an individual's motive for undertaking such crushing responsibilities, it is the client who suffers from the inevitable inattention

and neglect. Any system—such as Virginia's—which permits an attorney to assume the simultaneous responsibility for multiple lives asks too much, and sets up the innocent for execution.

EFFICIENCY

Another facet of capital appointment in Virginia is the premium placed on efficiency over zealousness. The attorneys who are appointed are only rarely known for innovation or indefatigable efforts on behalf of their clients. Instead, those attorneys are valued who can bring a capital case to judgment as smoothly and efficiently as possible. Unfortunately, these are often the same attorneys who file boiler-plate motions, raise no challenges, miss obvious objections, conduct ineffective voir dire, seek no forensic or investigatory assistance, preserve no record for competent counsel to appeal, and make little or no case for innocence or mitigation. Too often in Virginia the price of efficiency is the neglect of the client. Attorneys are not encouraged to rock the boat.

EXCEPTIONAL EFFORTS

Some courts diligently seek to provide capital defendants with the best representation available, and have reached out to a responsive private bar. In other instances, the quality of representation has been so manifestly inadequate that courts (or prosecutors) have intervened to correct an obvious injustice. That judges have done so is a testament to their commitment to the provision of adequate representation, and to an uncommon ability to divine omissions from an otherwise silent record. But a criminal justice system is flawed that depends on the judiciary or prosecution to discharge the responsibility of the defense. And a system lacks integrity which permits—as does Virginia—the continued appointment of attorneys obviously unwilling or incapable of providing zealous and competent representation. It is rarely a secret to the bench or the bar who should not be practicing; it is a shame of unparalleled magnitude that the lives of the indigent accused should be held in such a precarious balance.

First rate representation is uncommon, and when it occurs, it is the product of personal sacrifice and extraordinary dedication by an individual attorney abiding the dictates of his conscience and the ethics of his profession. Virginia boasts an exceptional bar, but neither the standards for capital representation nor the logistics of appointment are designed to draw representation from that bar. The reality in Virginia is that the provision of appointed counsel is a haphazard event. The quality of representation is inconsistent at best, and at times, so abysmally deficient as to amount to a complete charade.

STATE OF SOUTH CAROLINA
OFFICE OF THE SOLICITOR
SIXTEENTH JUDICIAL CIRCUIT
July 2, 2001

The Honorable Patrick Leahy
U.S. Senate Judiciary Committee
224 Dirksen Building
Washington, DC 20510

Dear Senator Leahy,

During my testimony before the committee on June 27, 2001, Senator Feingold asked me about an execution that I witnessed in August of 1995. In order for the record to be as complete as possible, I have researched the issues he inquired about and submit this letter to supplement my answers to his questions.

Senator Feingold first desired to know whether it was true that the defendant in that case, Sylvester Adams, had an IQ that was below normal. I am enclosing the psychiatric and psychological reports from his evaluation by the state Department of Mental Health in 1979. This was the agency charged by the court with the responsibility for making these determinations. These reports were made part of the court's record in Mr. Adams' Post-conviction Relief Hearings.

As you can see from the reports, the defendant "answers 'I don't know' to virtually every question and then asks why I am asking questions in a rather mocking manner". It goes on to say, his "entire demeanor is that of a coy cat and mouse game which he obviously enjoys".

The psychologist's scoring of his IQ test did place the defendant in the range of mild mental retardation, however "the psychologist reported) that he was uncooperative and made little effort during testing so that his intelligence is probably significantly higher than is reflected by the test data". In another section the psychologist puts it thus: "The lowered score on the performance section (of his IQ test) is a direct function of his negativism, belligerence and lack of concerted effort."

In addition, I also enclose copies of both sentencing reports that were filed by the two trial judges who presided over the two trials of this case. The judges in this case had the opportunity to interact with the defendant in court and both listed his intelligence level as "average".

I realize that the defense may tender evaluations performed by experts they paid to assist them however I do not believe that they are as credible as the evaluations I am submitting. Their experts have a financial interest in the matter and also can be chosen by the defense based on an anti-capital punishment bias. The South Carolina Department of Mental Health is not in any way beholden to our office and has often submitted reports and testified that capital defendant's are mentally ill.

The second area of inquiry focused on the post-trial status of Mr. Adams' attorney. I did not know who his attorney was at the various stages of litigation but have since informed myself on the topic. Sam Fewell represented the defendant at both his first trial and his retrial. He was also represented by James Boyd.

In the early 1990's, Fewell was convicted in federal court and sentenced to a term of imprisonment in a federal correctional facility. I believe this was due to a drug related conviction. I do not know whether or not he was incarcerated at the time of Adams' execution. That is irrelevant though as Fewell had no involvement with the appeal of the case

The question of his attorney's status is calculated to highlight the issue of attorney incompetence in capital cases. Instead, it only serves to highlight the type of specious logic employed by the anti-capital punishment groups to make their case. The fact that Fewell was convicted in 1991 or 1992 does not lead one to conclude that he was incompetent in 1981 or 1982. A former professor of mine has since been disbarred and removed from the faculty at the University of South Carolina. Should I be required to return my diploma?

In fact, Fewell's conviction in the early 90's was well known for some years before Adams was executed and if the defense were able to establish a connection between the two events, they surely would have. The issue of Fewell's competence was fully litigated and no basis found to warrant a new trial.

I hope this helps the committee as you grapple with these weighty and complex issues. If I may be of any further service to you at any time please do not hesitate to call me.

Sincerely,

KEVIN S. BRACKETT
Deputy Solicitor

Statement of David I. Bruck, Federal Death Penalty Resource Counsel, Columbia, South Carolina

Chairman Leahy, Senator Hatch, and members of the Committee:

I appreciate the opportunity to submit this statement as the Judiciary Committee considers the important question of how indigent capital defendants are represented at trial in the courts of this country. I would like to focus on the two jurisdictions I know the most about—the state courts of South Carolina, and the federal courts throughout the United States.

I have been a criminal defense attorney in Columbia, South Carolina, for the past 25 years, and have devoted most of that time to the defense of capital cases. I have served as lead counsel in 17 death penalty trials in the South Carolina state courts, have argued some sixty death row inmates' appeals in the South Carolina Supreme Court, and six before the United States Supreme Court. I have also been a close observer of the federal death penalty since early 1992, when the federal defender system contracted with me and a colleague in Frankfort, Kentucky, to provide expert assistance on as "as-needed" basis to federal defenders and court-appointed counsel in federal capital cases. In the nine-and-a-half years since then I have worked roughly half-time in assisting counsel who have been appointed to defend the increasing numbers of federal death penalty prosecutions brought under the Anti-Drug Abuse Act of 1988, 21 U.S.C. 848(e), and later under the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 *et seq.*). In addition to working with individual

court-appointed lawyers, our responsibilities as Resource Counsel include identification and recruitment of qualified, experienced defense counsel for possible appointment by the federal courts in death penalty cases, and development of training programs and publications, including a web site, *www.caydefnet.org*, to assist federal defenders and court appointed private counsel in death penalty cases.

In a few jurisdictions, the counsel standards in Title II of S. 486, the Innocence Protection Act of 2001, will effect little change, since these states already furnish highly-qualified and adequately-compensated counsel in capital cases. Other jurisdictions, however, have persistently refused to adopt the minimum safeguards that Title II would encourage. My own state of South Carolina is one of these.

SOUTH CAROLINA

1. THE PRESENT "SYSTEM"

South Carolina enacted its current death penalty statute in 1977. S.C. Code § 16–3–20 (Supp. 2000). Although from the outset the statute required appointment of two lawyers for each death penalty defendant, of whom only one could be a public defender, state law set counsel fees and litigation expenses at $10 per hour out-of-court and $15 per hour in-court, with total allowable counsel fees capped at $1500. Expert and investigative expenses were likewise capped at $2000 per case. S.C. Code §§ 16–3–26(B), –(C); 17–3–50 (1985). The only qualifications for this essentially *pro bono* service was that one of the two court-appointed lawyers had to have five years' bar membership and three years' felony trial experience. § 16–3–26(B).

In 1992, the state supreme court acknowledged the gross inadequacy of South Carolina's statutory counsel fees, and held that the local counties where capital prosecutions were brought had to provide minimally adequate counsel fees and expert funding. *Bailey* v. *State*, 424 S.E.2d 503 (S.C. 1992). As a result of *Bailey*, county officials were faced for the first-time with the problem of paying substantial legal bills in death penalty cases, and in 1994 the state legislature responded by increasing ten-fold the state funds available for attorney, expert and investigative services. S.C. Code § 16–3–26 (Supp. 2000). Accordingly, current law now provides for payment of up to $25,000 per attorney (which can be exceeded upon a showing of necessity) at $50 per hour for out-of-court work and $75 per hour in-court. Expert and investigative costs are now capped at $20,000 per case, which limit can also be exceeded for good cause.

Despite increased funding for capital defense during the 1990s, South Carolina's method of selecting and appointing counsel has remained essentially unchanged. Every South Carolina county has some sort of locally-organized public defender system, S.C. Code § 17–3–60 (Supp. 2000), but this extremely decentralized system includes no statewide oversight or training. State judges have unfettered discretion to select and appoint counsel, subject only to the "five year/three year" restriction and a requirement that one of the two appointed attorneys be a public defender whenever possible. S.C. Code § 16–3–26(B)(1) (Supp. 2000).[1] A statewide agency created in 1994 to administer state indigent defense funding, the South Carolina Office of Indigent Defense, performs no function other than disbursement of funds, and has no role in identifying, training or selecting defense counsel in capital cases. S.C. Code § 17–3–330 (Supp. 2000).

2. SOUTH CAROLINA REJECTS REFORM.

In 1997, the South Carolina Bar approved and submitted to the state supreme court a proposal to create modest experience and training qualifications for trial counsel in death penalty cases. The Bar proposal would have required only that one of the lawyers appointed in a capital case have substantial capital or non-capital trial experience, and that both lawyers have received some specialized training in capital defense by the time of trial, and have "demonstrated that level of knowledge, skill and commitment to the defense of indigent persons expected of defense counsel in capital cases." The South Carolina Supreme Court summarily rejected the Bar's

[1] An additional restriction is that no attorney may be appointed and compensated in a death penalty case who is not both a South Carolina resident and a member of the South Carolina Bar. S.C. Code § 17–3–330(C) (Supp. 2000). This restriction, which applies only in capital cases, was added as a direct legislative response to the appointment of Judy Clarke, a distinguished West Coast federal defender and University of South Carolina law graduate, as co-counsel in the highly-publicized Susan Smith death penalty case in 1995. Twila Decker, "Smith Case Spurs S.C. House to Rethink Indigent Defense," The State B–5 (Mar. 9, 1995) (quoting sponsor as explaining amendment: "If people come here and kill our citizens, they ought to have to use our attorneys. ").

proposal. Most recently, as part of a general revision of the court-appointment process in criminal and civil cases, the state court (without notice, hearings or public comment) promulgated the following rule:

CERTIFICATION OF ATTORNEYS IN DEATH PENALTY CASES

(a) *Classes of Certified Attorneys*. There shall be two classes of attorneys certified to handle death penalty cases: lead counsel and second counsel.
(b) *Lead Counsel*. Lead counsel shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases. The application for certification to act as lead counsel shall be on a form designated by the Supreme Court.
(c) *Second Counsel*. Second counsel shall have at least three years experience as a licensed attorney. Second counsel is not required to be further certified to be eligible for appointment.

RULE 421, SCACR; SC Order 01–7 (May 29, 2001; effective September 1, 2001).

Given South Carolina's persistent refusal, over nearly 25 years, to adopt meaningful standards to govern selection of counsel in capital cases, it should come as no surprise that the actual performance of appointed counsel has been, to be charitable, uneven. South Carolina has the eighth-highest ratio of executions to population of the 38 death penalty states, with 25 post-Furman executions and approximately 70 prisoners currently on death row. The cases of South Carolina's executed and condemned prisoners include:

State v. *Mitchell Sims*, in which court-appointed counsel began his penalty-phase summation as follows:

What we've got here is a very simple question of what do we do with our junk. In a few minutes [the defendant] will speak with you . . . I'm just going to ask you to listen to the junk that's been produced and that has done these unspeakable, heinous acts and then consider what to do. We kill our rabid dogs. And perhaps you may view him as that . . . . And that's the question: What do we do with our junk? (Trial transcript at 1488–89).

This lawyer continues to be appointed on capital cases in the Charleston, South Carolina area; all but one of his capital clients have been sentenced to death, and two have already been executed.

State v. *Joseph Gardner*, a highly-publicized and racially-charged rape-murder case in which, a year prior to his appointment, lead defense counsel had participated as a prosecutor in a nationwide manhunt for the perpetrators.

State v. *Robert Conyers*, in which a 74-year-old parttime public defender, handling his first death penalty case along with an annual caseload of 400 other courtappointed clients, advised his client to waive a jury sentencing by pleading guilty to a murder that he had committed at age 16. A state circuit judge, reviewing the case, recently found the attorney's performance inadequate; the state is appealing.

State v. *Johnny Ray*, in which defense counsel began preparing for their client's capital re-sentencing just about a week before it began, and were later forced to acknowledge that their efforts were "disorganized, rushed . . . seat-of-the-pants." A state judge, granting sentencing relief, noted that counsel had 11 months notice of the sentencing hearing, but that "[i]nexplicably, little or nothing was done until panic set in about two weeks before . . . ." and concluded that if the defense accorded to Mr. Ray were constitutionally adequate, "then we should dispense with the legalese and simply admit that the Sixth Amendment has no meaningful role in capital defense litigation." The state is appealing this ruling.

State v. *Edward Lee Elmore* is an interracial case involving the rape-murder of an elderly white woman and based entirely on circumstantial evidence. The county public defender was battling severe alcoholism at the time of the trial; his co-counsel, a private lawyer recruited and paid by other local attorneys hoping to avoid the appointment themselves, privately referred to his client as "a red-headed nigger." Neither lawyer challenged questionable physical evidence, and hair evidence suggesting the defendant's innocence remained tucked away in a state police locker for some 15 years. Raymond Bonner, "Old Evidence Resurfaces, Unsettling '82 Murder," New York Times (Dec. 12, 2000).

State v. *Robert Nance*. Lead counsel in this capital case, a veteran public defender who gave up practicing law not long after this trial, suffered from mental impairment caused by dementia, alcohol abuse, heart disease, blood sugar fluctuations and four prescription medications, all of which have psychological side effects including sedation, disturbance of sleep, and impaired memory and planning ability.

State v. *Ronnie Howard*. In this case, a South Carolina circuit judge solved the problem of whom to appoint by selecting the first two names—Acker and Ander-

son—from an alphabetical roster of the Greenville county bar. Neither lawyer had ever handled a capital case before, and failed to obtain such basic mitigating information as their client's school military records in time for the trial. However, their errors were held insufficiently prejudicial to interfere with Mr. Howard's execution on January 8, 1999.

This list could go on and on. Of course, not every South Carolina capital case has been marred by inadequate defense counsel, and some cases have been very well-defended. My point is simply that in the absence of any sort of system for identifying and training competent counsel, and then matching them with the cases where they're needed, compliance with the Sixth Amendment is hit-or-miss, and will remain so.

There are only between 15 and 20 death penalty cases in South Carolina in any given year (and, on average, about 5 new death sentences), so a reliable system for assuring adequate an defense in each case would not be difficult to create. A statewide capital defender unit with a staff of five or six lawyers could handle most of the work, supplemented by appointments (by the statewide capital defender office) from a small, carefully-screened list of private counsel. This is exactly the sort of system whose creation would be encouraged by Title II of the Innocence Protection Act. South Carolina, like many other states, has given every indication that in the absence of such encouragement, nothing will change.

THE FEDERAL COURTS

The relatively small number of capital cases in the federal courts make it difficult to compare the federal system for assigning counsel with those of the states. That said, it is notable that the capital-case counsel provisions of 21 U.S.C. § 848(q) and 18 U.S.C. § 3005 have worked to ensure that the federal system provides adequate resources for the defense in such cases. While the federal system lacks an independent appointing authority, a 1994 amendment to 18 U.S.C. § 3005 that mandates involvement of the Federal Defender system in the appointment process has provided some of the benefits of such a system. As a result, the federal courts have avoided replicating the seemingly chronic problems of under-funded, under-trained and under-motivated counsel that have plagued so many of the states' death penalty systems.

As amended by the 1994 Federal Death penalty Act, 18 U.S.C. 3005 provides, in pertinent part:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign two such counsel, of whom at least 1 shall be learned in the law applicable to capital cases . . . . In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts.

Reflecting and explicating this statutory provision, Judicial Conference policy specifies that:

As required by statute, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Ordinarily, "learned counsel" should have distinguished prior experience in the trial . . . of federal death penalty cases, or . . . in state death penalty . . . that, in combination with co-counsel, will assure high quality representation.

Judicial Conference of the United States, Subcommittee on Federal Death Penalty Cases, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Ouality of Defense Representation* (The "Spencer Committee Report") http://www.uscourts.gov/dpenalty/2TABLE.htm (May 1998). While the implementation of this statute has not been uniform, it has generally meant that in each federal capital case, the Federal Defender's office undertakes to identify highly-qualified capital defense counsel "with distinguished prior experience" for appointment. Most often, this effort to identify the best attorneys for appointment involves the assistance of contract counsel affiliated with the Federal Death Penalty Resource Counsel Project. The defender's recommendation is usually accepted by the court. Recruitment of top-flight capital defense attorneys has been made possible by a fairly uniform practice of compensating counsel at the statutory maximum rate of $125 per hour. 21 U.S.C. § 848(q)(10)(A).

It should be kept in mind that the federal death penalty system is still very small. Only a little over 200 capital prosecutions have been authorized by the Attorney

General since enactment of the first modern federal death penalty statute in 1988, and most of those cases ended in a less-than-death sentence without the necessity of a jury trial. Given the relatively small scale of the federal death penalty to date, and the fact that federal judges can and do select counsel from the capital defense bar of the entire nation, it should not be surprising that the over-all quality of representation has been fairly high. Nevertheless, the federal experience does demonstrate that by allocating reasonable funding to the defense as well as the prosecution, and by relying on a recruitment process that emphasizes skill and experience instead of expedience or patronage, a court system can ensure that defendants in capital cases are adequately defended. This is an experience that the states can and should be encouraged to emulate.

FEDERAL DEATH PENALTY RESOURCE COUNSEL
COLUMBIA, SOUTH CAROLINA 29201
July 2, 2001

Senator Patrick Leahy
Chairman
Senator Orrin G. Hatch
Ranking Minority Member
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Hatch,

At last Wednesday's hearing on Title II of S. 486, the Innocence Protection Act of 2001, some factual issues arose involving recent South Carolina capital cases. I write to set forth the relevant facts, and ask that this letter be accepted as a supplement to the statement that I previously submitted.

In his written statement, Deputy Solicitor Kevin Brackett of South Carolina's Sixteenth Judicial Circuit noted that he had personally attended the first lethal injection in South Carolina. After Mr. Brackett described the defense furnished to a defendant in one recent capital case in his circuit, Senator Feingold asked whether the execution Mr. Bracket had attended was that of Sylvester Adams on August 18, 1995. Mr. Brackett acknowledged that it was, and that Mr. Adams' case originated from Mr. Brackett's home county of York. However, when Senator Feingold then asked whether Mr. Adams had been sentenced to death by a jury that had heard no mitigating evidence on his behalf, despite the fact that Mr. Adams' IQ scores were in the mentally retarded range, Mr. Brackett responded as follows:

> Well, I didn't come prepared to discuss that in any detail. But I did review the file before I went down to see the execution . . . And it appeared from the files that the individual who tested his IQ at the Department of Disabilities and Special Needs found him to be malingering when they were attempting to determine what his IQ was. The expert that was appointed by the court to evaluate his IQ said that, basically, "I can't tell you what his IQ is because he appears to be attempting to fake the results to this test to possibly get an advantage." But I think that is indicative that perhaps he was not mentally retarded.

Sen. Feingold then asked whether "on the day you watched Mr. Adams die, his lead defense attorney at his trial was sitting in federal prison?" Mr. Brackett responded that he had "no knowledge of who his defense counsel were at the various stages of the proceedings or where they might have been." I represented Sylvester Adams in state and federal post-conviction proceedings, and thus am in a position to provide the information that Mr. Brackett did not have.

Mental retardation. Prior to Sylvester Adams' first trial, a state-employed examiner reported that Mr. Adams had a full-scale IQ score of 65.[1] This examiner did not, as Mr. Brackett claims, accuse Mr. Adams of "attempting to fake the results," but he did opine that Mr. Adams' true IQ level might be between 70 and 80. The state's chief forensic examiner nevertheless determined, and later testified in post-conviction proceedings, that Mr. Adams suffered from mild mental retardation. *Adams* v. *Aiken*, 965 F.2d 1306, Joint Appendix at 1567 (4th Cir. 1992) (testimony of Herbert D. Smith, M.D.). After Mr. Adams' convictions and death sentence were

[1] Mr. Brackett erroneously attributes this evaluation to the South Carolina Department of Disabilities and Special Needs. In reality, the IQ testing was performed by Mr. T. V. Smith, an employee of the Department of Mental Health with an M.A. degree in psychology.

reversed by the state supreme court, a second trial was held at which the defense presented no mitigation evidence whatever on Mr. Adams' behalf. He was again sentenced to death. In 1984, an experienced forensic psychologist retained by the defense retested Mr. Adams and found him to have a full-scale IQ of 69—still within the range of mental retardation. *Application for Executive Clemency in the Matter of Sylvester Lewis Adams*, Aug. 9, 1995, Appendix C]11 (Affidavit of David R. Price, Ph. D). As the Charlotte Observer summarized the facts in an editorial two days before Mr. Adams was executed, "the jurors who imposed the death sentence were never told that Sylvester Adams . . . is mentally retarded. Tests show he has an IQ of between 65 and 69." "Mercy Denied," *Charlotte Observer* at 10–A (Aug. 16, 1995).

Defense counsel's subsequent imprisonment. Senator Feingold also inquired of Mr. Brackett about the whereabouts of Mr. Adams' "lead defense attorney at . . . trial" on the day of his execution. While Mr. Brackett correctly recalled that I was present when Mr. Adams was executed, I did not represent him at trial. Mr. Adams' lead defense counsel at both of his trials was Samuel B. Fewell, Jr. Neither Mr. Fewell nor the young public defender who served as his co-counsel had ever tried another death penalty case. By the time of Mr. Adams' execution, Fewell had been disbarred, and was serving a federal prison sentence, after pleading guilty in federal court to tax fraud and possession of cocaine, and in state court to two counts of criminal conspiracy for having a client provide sexual favors to a family court judge in exchange for favorable rulings. *In the Matter of Samuel B. Fewell, Jr.*, 450 S.E.2d 46 (S.C. 1994). Bob McAlister, *Mitigating circumstances are there for Sylvester Adams, too," The State (Columbia, S.C.)* A–7 (Aug. 14, 1995).

In my statement to the Committee, I described several South Carolina capital cases in which the state clearly failed to provide minimally adequate defense representation. The *Adams* case was another. Mr. Brackett points to yet another York County case, *State* v. *Bobby Lee Holmes*, in which the quality of the defendant's legal representation was good.[2]

The conclusion that can and should be drawn from this record is that some capital defendants in South Carolina receive an adequate defense, and some don't. Until South Carolina and other states like it adopt some sort of fair and reliable system for identifying, training, appointing and monitoring the lawyers who represent the poor in death penalty cases—the sort of system that Title II of S. 486 would encourage—capital cases will continue to resemble a lottery, in which the right to counsel and to a fair and reliable trial turns on the luck of the draw.

Yours truly,

DAVID I. BRUCK

Statement of Constitution Project's Death Penalty Initiative, Washington, DC

SUMMARY OF RECOMMENDATIONS

I. EFFECTIVE COUNSEL

Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers'

[2] Mr. Brackett's account of the *Holmes* retrial calls for some additional comments. His claim that a defense correctional expert received $500 per hour is incorrect. The expert to whom he referred was paid $125 an hour, and no other witness received anything like the $500 rate about which he complains. His claim that he does not know "who paid" for Mr. Holmes, additional attorneys is hard to credit, since the trial record plainly reflects that these attorneys were volunteers from the Washington, D.C. firm of Akin, Gump, Strauss, Hauer & Feld who were not paid a penny, by anyone, for their unprecedented contribution to the defense of this indigent South Carolina death row inmate. Mr. Brackett also failed to note that Mr. Holmes' unusual defense team was assembled only after the trial judge arbitrarily refused to reappoint the lawyer who had successfully represented Mr. Holmes in post-conviction proceedings, former S.C. Death Penalty Resource Center Director John H. Blume.

Unfortunately, the *Holmes* case marks the only occasion in at least the past 25 years in which an out-of-state firm has volunteered to assist a South Carolina capital defendant at the trial level, and the appointment (or compensation) of any out-of-state attorney is expressly prohibited by South Carolina law. S.C. Code § 16–3–26(I) (Supp. 2000).

performance. An existing public defender system may comply if it implements the proper standards and procedures.

Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.

The current Supreme Court standard for effective assistance of counsel (*Strickland* v. *Washington*) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

II. PROHIBITING EXECUTION IN CASES INVOLVING QUESTIONABLE CATEGORIES OF DEFENDANTS AND HOMICIDES

Mentally retarded persons should not be eligible for the death penalty.

Persons under the age of eighteen at the time the crime was committed should not be eligible for the death penalty.

Persons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty.

III. EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.

The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as "truth in sentencing."

IV. SAFEGUARDING RACIAL FAIRNESS

All jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner.

V. PROPORTIONALITY REVIEW

Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, nonarbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process.

VI. PROTECTION AGAINST WRONGFUL CONVICTION AND SENTENCE

DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.

All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

VII. DUTY OF JUDGE AND ROLE OF JURY

If a jury imposes a life sentence, the judge in the case should not be allowed to "override" the jury's recommendation and replace it with a sentence of death.

The judge in a death penalty trial should instruct the jury at sentencing that if any juror has a lingering doubt about the defendant's guilt, that doubt may be considered as a "mitigating" circumstance that weighs against a death sentence.

The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

VIII. ROLE OF PROSECUTORS

Prosecutors should provide "open-file discovery" to the defense in death penalty cases. Prosecutors' offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (Brady material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.

Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifica-

tions and statements of informants and co-defendants) particularly subject to human error.

Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced.

BLACK LETTER RECOMMENDATIONS

I. EFFECTIVE COUNSEL

1) Creation of Independent Appointing Authorities

Each state should create or maintain a central, independent appointing authority whose role is to "recruit, select, train, monitor, support, and assist" attorneys who represent capital clients (ABA Report). The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and certiorari. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

2) Provision of Competent and Adequately Compensated Counsel at All States of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal postconviction and certiorari. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the "extraordinary responsibilities inherent in death penalty litigation" (ABA Report). Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

3) Replacement of the Strickland v. *Wahsington* Standard for Effective Assistance of Counsel at Capital Sentencing

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare. (NLADA Standards) Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney's incompetence. Moreover, there should be a strong presumption in favor of the attorney's obligation to offer at least some mitigating evidence.

II. PROHIBITING EXECUTION IN CASES INVOLVING QUESTIONABLE CATEGORIES OF DEFENDANTS AND HOMICIDES

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) the mentally retarded; (2) persons under the age of eighteen at the time of the crimes for which they were convicted; and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

III. EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

1) Availability of Life Sentence without Parole

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

2) Meaning of Life Sentence without Parole (Truth in Sentencing)

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

IV. SAFEGUARDING RACIAL FAIRNESS

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component—perhaps the most important—is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

V. PROPORTIONALITY REVIEW

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner; (2) provide a check on broad prosecutorial discretion; and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

VI. PROTECTION AGAINST WRONGFUL CONVICTION AND SENTENCE

1) Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public fimds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

2) Lifting Procedural Barriers to Introduction of Exculpatory Evidence

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

VII. DUTY OF JUDGE AND ROLE OF JURY

1) Eliminating Authorization for Judicial Override of a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death

Judicial override of a jury's recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury's recommendation of death.

2) Lingering (Residual) Doubt

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the crime,

even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant."

3) Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision-making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury's obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury's hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant's mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge's obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

VIII. ROLE OF PROSECUTORS

1) Providing Expanded Discovery in Death Penalty Cases and Ensuring That in Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.

Full "open-file" discovery should be required in capital cases. However, discovery of the prosecutor's files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witnesses' safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory (Brady) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for in camera review to determine whether such evidence meets the Brady standards of helpfulness to the defense and materiality to outcome. When willful violations of Brady duties are found, meaningful sanctions should be imposed.

2) Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon

these types of evidence and where independent corroborating evidence is unavailable.

3) Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.

Statement of Hon. Richard J. Durbin, a U.S. Senator from the State of Illinois

In the course of the past seventeen months since Governor George Ryan declared a moratorium on all executions in my home state of Illinois, a healthy national debate on the topic of death penalty has ensued. I want to thank Chairman Leahy for continuing to keep this issue in the forefront of our national agenda by holding this hearing today.

We cannot understate the importance of having competent counsel represent a person charged with a crime, especially if that person faces the ultimate penalty of death. Like prosecutors, defense attorneys play an integral role in our adversarial process. The criminal justice system works best when both sides are adequately represented as this judicial process is the most effective means of getting at truth and rendering justice.

But we cannot forget that for many criminal defendants, it is simply not possible to hire the best lawyers in town to represent them. For them, their only hope is to pray that the public defender or court-appointed counsel they will end up getting is an experienced lawyer with competence and conscience. But we have seen that often, this is a luck of the draw. We have all read about attorneys who were appointed to defend capital cases even though they have never handled a criminal case before, or attorneys who sleep through trials, or show up in court under influence of alcohol.

It has often been said that "it is better to be rich and guilty than poor and innocent." I hope this statement does not reflect the real state of affairs in the American criminal justice system. The witnesses we will hear from today will hopefully tell us that getting assigned an incompetent counsel is the rare exception rather than the norm. If not, it is incumbent upon this Senate to act in the best interest of our criminal justice system by identifying the causes of these problems, and providing innovative and common sense legislative solutions.

That is why today, I reintroduced a bipartisan legislation with Senator Chafee to provide student loan forgiveness for public defenders under the Federal Perkins Loan program. The Higher Education Act of 1965 already provides loan forgiveness for law enforcement officers, which the Department of Education interprets to include prosecuting attorneys. But the Department's interpretation excludes public defense attorneys. This policy creates an obvious disparity of resources between public defenders and prosecutors by encouraging talented law students and lawyers to pursue public service as prosecutors but not as defenders.

My bill provides parity to full-time public defenders who play an equally important role in the adversarial process of our judicial system. Like prosecuting attorneys, public defenders are law enforcement officers dedicated to upholding, protecting, and enforcing our laws. Providing loan forgiveness incentive to these attorneys will lead to a larger pool of competent counsel to defend death penalty cases, which is consistent with the goals set forth by the Supreme Court to equalize access to legal resources.

Question submitted by Hon. Richard J. Durbin to William H. Pryor, Jr., Alabama State Attorney General

In your prepared testimony, you state: "If your concern is to protect the innocent from being executed, then you need not worry; it's not occurring and is highly unlikely to occur."

Question: In Illinois, Governor Ryan declared a moratorium on the death penalty after 13 death row accused were found to be innocent during the same time that

12 people were executed by the state. How can you be so certain of a system which fails so often when the most severe punishment is involved?

Question submitted by Hon. Richard J. Durbin to Stephen B. Bright, Southern Center for Human Rights

You have stated that the old adage, "you get what you pay for," applies with particular force in the legal system, and many states pay very little to lawyers appointed to defend capital cases. You also indicate that in my home state of Illinois and in two other states, studies have found that a significant number of those sentenced to death were represented by lawyers who were later disbarred, suspended, or convicted of crimes.

I am concerned about the quality of counsel that are assigned to criminal cases; particular for those who face the death penalty. I believe that a part of the problem is the lack of financial incentives for potential lawyers to take on criminal defense work.

That is why I recently introduced bipartisan legislation to provide student loan forgiveness for public defenders under the Federal Perkins Loan program (S.1112). The Higher Education Act of 1965 already provides loan forgiveness for law enforcement officers, which the Department of Education interprets to include prosecuting attorneys. But the Department's interpretation excludes public defense attorneys. This policy creates an obvious disparity of resources between public defenders and prosecutors by encouraging talented law students and lawyers to pursue public service as prosecutors but not as defenders.

My bill provides parity to full-time public defenders who play an equally important role in the adversarial process of our judicial system. Providing loan forgiveness incentive to these attorneys will lead to a larger pool of competent counsel to defend death penalty cases.

Question: Do you agree that there are disparities in resources available to prosecutors versus defenders? How would you recommend we address these disparities?

Statement of Equal Justice Initiative, Bryan A. Stevenson,[1] Executive Director, Montgomery, Alabama

Thank you for the opportunity to address the much needed legislation pending before this Committee. The "Innocence Protection Act" is an enormously important step forward in the effort to improve the administration of criminal justice in the United States. DNA testing technology has dramatically advanced forensic science and criminal case investigations. However, unless addressed, the current crisis surrounding adequate legal assistance to death row prisoners and capital defendants will seriously compromise any meaningful, reform which attempts to reduce the incidence of wrongful convictions and executions through DNA testing.

The Innocence Protection Act will do much to restore confidence in many criminal cases where biological. evidence can resolve lingering questions about guilt or innocence. Our nation's status as the worlds leading democracy and our activism on human rights in the international context requires us to take all steps possible to protect against wrongful convictions and execution of the innocent. Improved procedures for postconviction DNA testing will tremendously aid the goal of more reliable and equitable administration of criminal justice. However, it is worth emphasizing that DNA testing will influence a relatively small subset of cases where innocent people have been wrongly convicted. Improved, access to DNA testing for. prisoners will be useful only in those cases where (1) biological evidence can determinatively establish guilt or innocence, most notably rape, rape-murder and sexual assault cases, (2) the accused is still in prison or on death row and, most likely, had his case tried before 1994, and (3) the biological evidence has been preserved and is still available for testing. This is a relatively fixed and finite universe of cases.

[1] I am the Executive Director of the Equal Justice Initiative (EJI) in Montgomery, Alabama. I have represented capital defendants and death row prisoners for nearly 17 years. I am also an Assistant Professor of Law at the New York University School of Law where I teach, among other things, Postconviction Remedies, Capital Punishment Law and Litigation, and Race, Poverty and Criminal Justice. I have handled dozens of capital cases, conducted postconviction litigation in the capital and noncapital areas and consulted on these matters for many years.

In most instances postconviction DNA testing has required the assistance of counsel to accomplish the exoneration of an innocent person who has been wrongly comvicted of a crime. The provisions in the Innocence Protection Acr for improving defense services to prisoners who have been wrongly convicted are thus crucial to the effectiveness of any effort to protect innocent people from wrongful incarceration or execution.

THE CRISIS SURROUNDING LEGAL REPRESENTATION OF DEATH ROW PRISONERS

In the last 30 years the number of people incarcerated in the United States has increased dramatically. In 1972, there were 200,000 people in jails and prisons. Today there are over 2,000,000 people incarcerated. The dramatic increase in the number of people imprisoned has presented enormous challenges to the fair administration of criminal justice.

The extraordinary increase in the number of people prosecuted and imprisoned has strained the ability of state governments to provide adequate legal representation to the accused or the indigent and to protect against wrongful conviction of the innocent.

In the death penalty arena this problem is especially acute. There are now close to 3,900 people on death row in the United States. Hundreds of these condemned prisoners have no legal representation. The ability of indigent death row prisoners to find competent legal representation throughout the litigation process has created tremendous uncertainty and raised serious concerns abouc the fairness and reliability of capital sentencing in many jurisdictions—The problems involved in providing adequate counsel to capital defendants and death row prisoners are the primary reasons why the American Bar Association has recommended that a nationwide moratorium on capital punishment be implemented.

The Crisis in Alabama

There are now 185 people under sentence of death in Alabama. The size of Alabama's death row has doubled in the last ten years. In 1989, there were 90 people under sentence of death, in Alabama. Alabama now has the third largest death row per capita in the United States and the number of death sentenced prisoners is growing at a pace that greatly exceeds other death penalty jurisdictions. In 1998–1999, the last year for which data is currently available, Alabama sentenced more people to death per capita than any other state in the country. (See Appendix A)

EJI's records indicate that there are currently over 300 people awaiting capital murder trials across the state of Alabama. This is an enormously high number of pending capital prosecutions for a state with a population of only 4.5 million people.

While lawyers are appointed to handle trials and direct appeals in Alabama death penalty cases, until recently, compensation to appointed lawyers in capital cases was capped at $1000 per case for an attorney's out of couxt time. Most of the people currently under sentence of death in Alabama were defended by attorneys whose compensation was severely restricted. The result is that many poor people were convicted of capital crimes in trials that lasted less than 2 days. Many death row prisoners were defended by attorneys who have subsequently been disbarred or suspended from the practice of law due to serious failures in adequately protecting the legal rights of clients.

Alabama is one of the few jurisdictions in the country that has no state funded mechanism for providing lawyers to death row prisoners once a conviction and death sentence is affirmed by state courts on direct appeal.[2] If a death row prisoner seeks review of his conviction and sentence on direct appeal in the United States Supreme Court, a volunteer lawyer must be found. If state collateral appeals are to be filed under Rule 32 of the Alabama Rules of Criminal Procedure, volunteer counsel must also be found.

The increasing number of death row prisoners needing counsel for postconviction appeals has greatly exceeded the supply of volunteer attorneys willing to take on these difficult cases. Consequently, there are many death row prisoners who are currently without legal representation and who have been unable to file appeals

[2] In the other states of the Eleventh Circuit there are state funded services to assist death row prisoners in the timley filing of state and federal collateral challenges to their convictions and sentences. The Georgia Appellate Practice and Educational Resource Center received nearly $1 million dollars in its 1999 appropriation from the Georgia legislature. Supreme Court of Georgia, 1998 Annual Report on the Work of the Georgia Courts, Judicial Branch in Review, Stare Appropriations for the Judicial Branch; Fiscal Years 1997, 1998 and 1999—Florida's Office of the Capital Collateral Representative exclusively represents death-sentenced inmates and received over $8,000,000 in its 1999 legislative appropriation. Mary Smith Judd, "Changes continue in death sentence appeals arena," The Florida Bar News, June 15, 1998.

under Rule 32 of the Alabama Rules of Criminal Procedure or under 28 U.S.C. § 2254.

While there is language that permits a trial judge to appoint counsel after a Rule 32 petition has been filed, Ala. R. Crim. Pro. 32.7(c), state law currently limits compensation to the appointed counsel to $1,000 per case.[3] The ridiculously low level of compensation makes involvement by counsel in these cases effectively pro bono work. Moreover, since hundreds of hours of work are required before a petition is filed,[4] there must be an assignment of counsel months before a petition is filed and much time-consuming and costly work undertaken.[5] Death row prisoners can not safely initiate litigation pro se with any protection against adverse rulings or summary dismissals.

In some jurisdictions, the state Supreme Court assumes responsibility for recruiting and assigning counsel to death row prisoners after the direct appeal is complete. *See e.g.*, Cal. Gov. Code § 68662 (2000) ("The Supreme Court of shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconvietion proceedings. . ."); Miss. Code Ann. § 99–39–23(9) (2000).

In many jurisdictions, either a state-wide public defender system ensures that indigent persons receive access to counsel or state-funded agencies have been created to provide legal representation to death row prisoners for state and federal, collateral review procedures. *See, e.g.*, Fla. Stat. § 27.702 (2000); 2000 Miss. Laws Ch. 569 (H.B. 1228); Tenn. Code. Ann. § 40–30–301–309 (1999); N.C. Gen. Stat. Ann. § 7A–486–3 (2000); Cal. Gov. Code § 68661 (2000); Ill. Stat. ch. 725 § 5,122–4 (2000); Okla. Stat. tit-22, § 1089 (2000).

Filing postconviction pecid.ons pro se is not a viable option for death row prisoners who do not have counsel. Alabama courts have interpreted its procedural rules to require the dismissal of claims that lack factual specificity. The Alabama Rules of Criminal Procedure provide that petitioners "shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Ala. Crim. R. Pro. 32.3.

Rule 32.6(b), requires that Rule 32 petitioners plead each claim by fully disclosing the factual basis for each claim. Claims not meeting this burden of pleading are due to be dismissed. Most claims in petitions filed pro se by indigent death row prisoners necessarily will be dismissed. Without the ability to investigate claims personally or pay for someone else to conduct an investigation, it is impossible for indigent prisoners in a maximum security prison to develop any facts to provide the required specificity needed to avoid summary dismissal for most constitutional claims.[6]

The crises surrounding counsel for indigent death row prisoners in Alabama is likely to get worse. There are forty-two (42) death row prisoners who currently need counsel. Many of these indigent prisoners have had their convictions and death sentences recently affirmed by the Alabama Supreme Court and are months away from deadlines which could bar their appeals.[7] There are dozens of other cases which could soon be affirmed where death row prisoners will need counsel.

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[3] This compensation was increased from $600 to $1,000 by the Alabama legislature, elective ,June 10, 1999. Ala. Code 415–12–23 (1975), as amended by Act 99–427 (1999).

[4] A survey of volunteer lawyers who took on death penalty appeals found the median amount of work on each appeal was 665 hours. Howard *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W.Va—L.Rev. 863, 893 (Spring 1996).

[5] Preparation and filing of a Rule 32 petition requires a complete reading of the trial transcript, appellate briefs and pleadings, an investigation into factual based claims such as innocence, jury misconduct, discovery violations, ineffective assistance of counsel anal thorough preparation for a host of complex procedural issues unique to collateral litigation relating to exhaustion, retroactiviry, procedural default, res judicata, the Anti-Terrorism and Effecrive Death Penalty Act (AFDPA) and federal habeas corpus jurisprudence. The Mississippi Supreme Court has recently recognized that "[applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the [state law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy." *Jackson* v. *State*, 732 So. 2d 187, 190 (Miss. 1999).

[6] The Attorney General's Office in Alabama will seek summary dismissal of claims even though death row prisoners are unrepresented, seeking counsel and filed petitions pro se. For example, in Donald Dallas' case, a pro se petition was filed. The trial judge then granted the State's motion to dismiss most of the claims in the petition eliminating the possibility of relief. Only months after most claims had been decided adversely to Mr. Dallas was counsel appointed to represent him. Donald Dallas' case is still pending in the Montgomery County Circuit Court. *See Dallas* v. *State*, Case No. CC–94–2142.

[7] *See e.g., Exparte Richard Flowers*,—So. 2d—, CR–97–1254 (Ala. Crlin. App. Oct. 27, 2000), *cent. deiced*, So. 2d—, No. 1000577 (Ala. Mar. 30, 2001); *Ex parte Roy Perkins*, —So. 2d—, No. (Ala. Mar. 30, 2001); *Ex parte Trace Duncan*, So. 2d—, No. 1990652 (Ala. Mar. 30, 2001); *Ex*

Continued

There is an immediate need to have a system established for providing adequately trained and compensated counsel to death row prisoners for postconviction review. Without such a system, unreliability and unfairness will continue to characterize the administration of capital punishment and the risk of executing the innocent will be unacceptably high.

Recent Congressional Enactments Have Exacerbated the Problem

The problem of providing lawyers to death row prisoners for state and federal post-conviction appeals has been acute for many years. The problem has been worsened by recent legal developments that have shortened the period of time by which collateral appeals should be filed. Under the Anti-terrorism and Effective Death Penalty Act ("AFDPA "), there is a one year statute of limitations for prisoners seeking habeas corpus relief in federal court 28 U.S.C. 2244(d). Under the AEDPA, the limitations period begins to run at the conclusion of direct review. 28 U.S.C. 2244(d)(1)(A). While the time during which a Rule 32 petition is pending does not count toward the federal statute of limitation period, 28 U.S.C. 2244(d)(2), a death row prisoner must file his Rule 32 petition within one year, to preserve an opportunity to appeal his conviction, and sentence in federal court Thus, although the statute of limitations under Rule 32 is two years, Ala. R—Crim. Proc. 32.2(c), ALDPA has effectively shortened the statute of limitations period to one year.

In addition to death row prisoners having one-half of the time previously available to file a Rule 32 petition, the number of death row prisoners needing lawyers has dramatically increased since the passage of AEDPA.[8] Because neither state courts nor the state legislature has provided a mechanism for appointing counsel to indigent death row prisoners, condemned inmates must rely on volunteer lawyers to come forward to file their appeals. The reduction of time during which lawyers can be recruited from two years to one year has made the dependence on volunteer counsel inadequate, the dramatic increase in the number of prisoners needing lawyers has made finding sufficient number of volunteer counsel impossible.

Without greater assurance that indigent death row prisoners will be provided legal representation, an unacceptable risk is created that innocent people will be executed.

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parte Andrew Apicella,—So. 2d—, No. 1992273 (Ala. Mar. 30, 2001); *Ex parte Joseph Smith*,—So. 2d—, CR–98–0206 (Ala. Crim. App. May 26, 2000), *cert. denied*,—So. 2d—, No. 1992220 (Ala. Mar. 16, 2001); *Ex parte Jarrod Taylor*,—So. 2d—, No. 1991307 (Ala. Mar. 9, 2001); *Ex parte LaSarguel Gamble*,—So. 2d—, CR–97–0698 (Ala. Crim. App. June 30, 2000), *cert. denied*,—So. 2d—, No. 1992229 (Ala. Mar. 2, 2001); *Ex parte Geoffrey West*,—So. 2d—, CR–98–1956 (Ala. Crim. App. Aug. 25, 2000), *cert. denied*,—So. 2d—, No. 1000231(Al.a. Feb. 23, 2001); *Ex parte Marcus Williams, So. 2d—, No. 1990902 (Ala. Jan. 12, 2001); F -x parte Eddie Powell,—So. 2d—, No. 1990546 (Ala. Jan, 12, 2001); Ex parte Nicholas Acklin,—So. 2d—–, CR–98–0330 (Ala. Crim. .App. Apr. 28, 2000), cert. denied*,—So. 2d—, No. 1991908 (Ala. Jan. 12, 2001); Ex harte Joe an les, -So. 2d—, CR–98–2417 (Ala. Crim. App. Apr. 28, 2000), cert, denied,- So. 2d—, No. 1991959 (Ala. Dec.15, 2000); *Ex parteTon.yBarhsdale,—So. 2d—, CR–96–07 54 (Ala. Crim. App. Mar. 31, 2000), cert. denied*,—-—So. 2d—, No- 1992230 (Ala. Dec. 15, 2000); *Ex parte Anthony Tyson*,—So. 2d—, CIZ–98–0267 (Ala. Crim. App. Feb. 4, 2000), *cert. denied*, ,—So. 2d—, No. 1991309 (Ala. Nov. 17, 2000); *Ex parte John Hardy*,—So. 2d—— No. 1981646 (Ala. Nov, 3, 2000); *Ex parte Jeremiah Jackson*,—So. 2d—, CR–97–0998 (Ala. Crim. App. Mar. 31, 2000), *cert. denied*, So. 2d—, No. 1991742 (Ala. Nov. 3, 2000); Ex parte Willie Burgess,—So. 2d—, No. 1980803 (Ala. Aug. 25, 2000); *Ex parte Casey McWhorter*,—So. 2d—, No. 1990427 (Ala. Aug. 11, 2000); *Ex parte Robert Melsod*, 775 So. 2d—904 (Ala. Aug. 4, 2400); *Ex parte Frederick WoodT1,—So. 2d—, No. 1990867 (Ala. Jan. 12, 2001); Ex parte Larry Whitehead*, 777 So. 2d—854 (Ala. Jun. 30, 2000); *Ex parte Artez Hammonds*, , So. 2d—, No. 1.990258 (Ala. juri. 23, 2000); *Ex parte Robert Ingram*, So. 2d—, No. 1990282 (Ala. Jun—23, 2000); *Ex parte Joseph Wilson*, 777 So. 2d—935 (Ala.—)un. 23, 2000); Ex parte Kenneth Loggins, 771 So. 2d—1093 (Ala. Jun. 2, 2000); *Ex parte Derrick Mason, 768 So. 2d—1008 (Ma. Apr. 7, 2000); Ex parte Marcus Presley*, 770 So. 2d—143 (Ala—— Apr. 7, 2000), and *Ex parte Marcus Presley*, 770 So. 2d 114 (Ala. Mar. 31, 2000); *Ex parte Wayne Travie*, 776 So. 2d—874 (Ala. Mar. 31, 2000); *Ex parte David Freeman*, 776 So. 2d—203 (Ala. Mar. 10, 2000); *Ex parte Matthew Hyde*, 778 So. 2d—237 (Ala. Mar. 10, 2000); *Ex arte Michael Samra*, 771 So. 2d—1122 (Ala. Mar. 3, 2000); *Ex parte Lines Borden*, 769 So. 2d—950 (Ala. Feb. 4, 2000); Ex parte Demetrius Frazier, 758 So. 2d—611(Ala. Dec. 30,1999); *Ex parte Ronald Smith*, 756 So. 2d—957 (Ala. Jan 21, 2000).

[8] Increases in the total number of people on death row, many of whom rely on pro bono legal assistance, has drained the available number of lawyers to assist Alabama prisoners. Less than 20 percent of the death row prisoners in Alabama, who have counsel, are represented by law firms or attorneys who are not members of the state bar. Moreover, there has been a general decrease in pro bono assistance among large law firms. In 1992 lawyers at the 100 highest-grossing law firms volunteered an average of 56 hours a year, in 1999 the lawyers at those same fines averaged 36 hours a year. Winter, "Legal Firms Cutting Back on Free Services for Poor," New York Times, Aug—17, 2000 at Al. See also, "Lack of Lawyers Hinders Appeals in Capital Cases," New York Times, July 5, 2001.

CONCLUSION

The Innocence Protection Act is desperately needed. Postconviction DNA testing and improving legal representation for death row prisoners is absolutely critical if we are to prevent innocent people from being executed and if we are to provide equal justice for all.

I strongly urge this Committee to recommend passage of this important legislation.

BRYAN STEVENSON, *Director*
Equal Justice Initiative of Alabama

APPENDIX A

Death Sentences Imposed in 1998 and 1999 Combined (Ranking: Death Sentences Per Capita 1998–1999 Combined)

State	Population	1998 and 1999 Total Sentenced to Death	Sentences to Death Per Capita in 1988 and 1999	Ranking by Death Sentenced Per Capita in 1998 and 1999 Combined
Alabama	4,369,862	41	1: 106,582	1
Oklahoma	3,358,044	21	1: 159,907	2
North Carolina	7,650,789	44	1: 173,882	3
Delaware	753,538	4	1: 188,385	4
Louisiana	4,372,035	19	1: 230,107	5
Texas	20,044 141	87	1: 230,392	6
Mississippi	2,768,619	12	1: 230,718	7
Nevada	1, 809,253	7	1: 258,465	8
Arkansas	2,551,373	9	1: 283,486	9
South Carolina	3,885,736	13	1: 298,903	10
Florida	15,111,244	45	1: 335,805	11
Arizona	4, 778,332	12	1: 398,194	12
Georgia	7,788,240	19	1: 409,907	13
Missouri	5,468,338	13	1: 420,641	14
Virginia	6,872,912	16	1: 429,557	15
Ohio	11,256,654	26	1: 432,948	16
Kentucky	3,960,825	9	1: 440,092	17
Pennsylvania	11,994,016	27	1: 444,223	18
California	33,145,121	74	1: 447,907	19
Wyoming	479,602	1	1: 479,602	20
Tennessee	5,483,535	10	1: 548,354	21
Idaho	1,251,700	2	1: 625,850	22
Oregon	3,316,154	5	1: 663,231	23
South Dakota	733,133	1	1: 733,133	24
Ilinois	12,128,370	15	1: 808,558	25
Indiana	5,942,901	5	1: 1,188,580	26
Kansas	2,654,052	2	1: 1,327,026	27
Maryland	5,171,634	3	1: 1,723,878	28
Washington	5,756,361	3	1: 1,918,787	29
Utah	2,129,836	1	1: 2,129,836	30
Connecticut	3,282,031	1	1:3,282,031	31
New York	18,196,601	5	1: 3,639,320	32
Colorado	4,056,133	1	1: 4,056,133	33
New Jersey	8,143,412	2	1: 4,071,706	34
Montana	882,779	0	N/A	35
Nebraska	1,666 028	0	N/A	35
New Hampshire	1,201,134	0	N/A	35
New Mexico	1,739,844	0	N/A	35

Statement of Former Prosecutors, Law Enforcement Officers, and Justice Department Officials

Dear Member of Congress:

The undersigned individuals are current and former prosecutors, law enforcement officers, and Justice Department officials who have served at the state and federal levels. Some of us support capital punishment and others of us oppose it. But we are united in our support for the federal Innocence Protection Act 2001 (S 486/HR 912).

Capital cases present unique challenges to our judicial system. The stakes are higher than in other criminal trials and the legal issues are often more complex. When the government seeks a death sentence, it must afford the defendant every procedural safeguard to assure the reliability of the fact-finding process. As prosecutors, we feel a special obligation to ensure that the capital punishment system is fair and accurate.

The Innocence Protection Act seeks to improve the administration of justice by ensuring the availability of post-conviction DNA testing in appropriate cases, and would establish standards for the appointment of capital defense attorneys. The interests of prosecutors are served if defendants have access to evidence that may establish innocence, even after conviction, and if they are represented by competent lawyers.

For these reasons, we are pleased to endorse the Innocence Protection Act. Please feel free to contact any of us to discuss this matter.

Mr. William G. Broaddus, Esq.
Former Attorney General
Commonwealth of Virginia

Mr. W.J. Michael Cody
Former Attorney General
State of Tennessee

Mr. Lee Fisher
Former Attorney General
State of Ohio

Mr. Scott Harshbarger
Former Attorney General
Commonwealth of Massachusetts

Mr. Charles M. Oberly, III
Former Attorney General
State of Delaware

Mr. Tyrone C. Fahner
Former Attorney General
State of Illinois

Mr. Charles Hynes
District Attorney
Kings County, NY

Mr. Ralph C. Martin, II
District Attorney
Suffolk County, MA

Mr. Terence Hallman
District Attorney
City & County of San Francisco, CA

Mr. E. Michael McCann
District Attorney
Milwaukee County, WI

Mr. Robert M. Morganthau
District Attorney
New York County, NY

Mr. William J. Kunkle, Jr.
Former Prosecutor
DuPage County, IL

Mr. Francis X. Bellotti
Former United States Attorney
Commonwealth of Massachusetts

The Honorable Phillip Heymann
Former United States Deputy

Attorney General
Department of Justice

The Honorable Robert S. Litt
Former Principal Associate Deputy
Attorney General
Department of Justice

The Honorable Irvin Nathan
Former Associate Deputy Attorney
General
Department of Justice

Ms. Laurie Robinson
Former Assistant Attorney General
Department of Justice

The Honorable Harold R. Tyler, Jr.
Former Deputy Attorney General
Department of Justice

The Honorable Gerald Kogan
Chief Justice
Florida Supreme Court (ret.)

COLUMBIA UNIVERSITY LAW SCHOOL
July 2, 2001

Senator Patrick Leahy
Chair
Senate Judiciary Committee
United States Senate
224 Dirksen Building
Washington, D.C. 20510

Senator Orrin Hatch
Senate Judiciary Committee
United States Senate
152 Dirksen Building
Washington, D.C. 20510

Re: Hearings on the Innocence Protection Act, June 27, 2001,

Dear Senator Leahy and Senator Hatch:

I understand that Alabama Attorney General Bill Pryor has inserted into the record of your committee's June 27, 2001 hearing on the Innocence Protection Act an October 27, 2000 speech at a bar meeting. General Pryor's speech refers to a study colleagues and I conducted last summer of rates of serious error in capital cases in Alabama and elsewhere in the United States. See James S. Liebman, Jeffrey Fagan & Valerie West, A Broken System: Error Rates in Capital Cases at *http://www.law.columbia.edu/instructionalservices/liebman/liebman final.pdf (June 2000)* [hereinafter, A Broken System], reprinted in part in James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995, 78 TEX. L. REV. 1839 (2000) [hereinafter Capital Attrition].*

General Pryor's speech contains inaccurate statements about our study and a faulty analysis of his own data on Alabama cases. I therefore respectfully request that you include this letter in the record of the hearing, immediately following General Pryor's speech, to set matters straight. I understand that the hearing record remains open for this purpose until July 5, 2001.

General Pryor's October 27 speech prompts the following nine responses (among others that would require more extended analysis than is appropriate here):

1. In our study, we showed that state and federal courts found serious error in, and reversed, 77 percent of the Alabama capital verdicts that were imposed and finally reviewed between 1973 and 1995. A Broken System, supra, at A–9. General Pryor implies that most of the errors we identified in Alabama occurred in the early part of our 1973–1995 study period, and that Alabama's rate of serious error in capital cases improved after that. In fact, the number of serious errors in Alabama capital verdicts discovered by state and federal courts during the 23-year study period held fairly steady, at about seven per year, throughout the entire study period-the

beginning as well as the end. Alabama errors were not, as General Pryor suggests, front-loaded to the early part of the period.

2. General Pryor also claims that many of the serious errors found in Alabama cases were due to Alabama's refusal to permit jurors to consider whether the defendant was guilty of an offense less than capital murder, thus giving jurors the Hobson's choice of either convicting the defendant capitally or acquitting him of homicide altogether. The United States Supreme Court ruled that practice unconstitutional in *Beck* v. *Alabama* in 1980. Why General Pryor believes the frequency of Beck error in Alabama cases is a point in Alabama's favor is unclear. Beck errors are serious, because (as the Supreme Court ruled) they call into question the accuracy and integrity of the jury's decision that the defendant was guilty of a capital crime. In any event, for the following reasons, it is inaccurate for General Pryor to suggest that Beck error was the main reason that 77 percent of the Alabama capital verdicts that were finally reviewed during our study period were overturned by the courts:

(A) Most (87%) of the Alabama reversals occurred at the direct appeal stage, where duly elected members of either the Alabama Court of Criminal Appeals or the Alabama Supreme Court overturned capital verdicts because of errors of state or federal law. The single most common basis for reversal at that stage was not Beck violations (as serious as they are) but, rather, unlawful practices designed to keep African-American citizens from serving as jurors in capital cases.

(B) Over half of the remaining Alabama reversals occurred at the state post-conviction stage, following rulings by either elected Alabama trial judges or, again, by elected members of the Alabama Court of Criminal Appeals and the Alabama Supreme Court. At that stage, 67% of the errors were of three types: incompetent lawyenng, prosecutorial suppression of evidence or other prosecutorial misconduct, and jury bias. See A Broken System, supra, at C–6.

(C) The most common source of error at the third and final (federal habeas corpus) review stage was, again, incompetent lawyering.

As one would expect of the judges elected by the citizens of Alabama or appointed by the President to uphold the law, their reasons for overturning more than three-fourths of the state's fully reviewed death sentences during the 23-year study period were serious and a cause for concern-not only about each of the cases in which error was found, but also about the reliability of the capital system as a whole.

3. General Pryor's speech claims that our study "does not define 'error rate' or "the basis for qualifying something as 'error.'" General Pryor did not read our study. (From the moment we issue the report last June, it has been publicly available for free to all members of the public on a number of web sites, including: http://www.law.columbia.edu/instructionalser-vices/liebman/liebman final.pdf). The study extensively defines both "error rate" and "the basis for something qualifying as 'error.'" See A Broken System, supra, at 5–6, 25–27 & nn.33, 36, 38, 40, 42; Appendices C and D. As the study explains:

(A) Our definition of error is the courts' own definition-we made no subjective judgments of our own, and instead relied entirely on the courts' own judgments. '

(B) Error defined by the courts as reversible (the only kind we counted) is serious error, because it requires a finding by a full set of courts that the defect in the case that required the state or federal courts to overturn a capital verdict and order a retrial of guilt-innocence, sentence, or both was "non-harmlesss," "actually prejudicial," or "inherently prejudicial" as the United States and Alabama Supreme Courts have carefully defined those legal standards.

4. General Pryor suggests that he called us to ask us to define these two phrases. We never received a telephone call, e-mail, letter or other inquiry of any sort from General Pryor or any member of his staff. Had he called, we would have happily supplied him with a copy of the Report and directed him to the definitions of "serious error" and "error rates" that are a prominent part of the text and supporting materials and are cited above.

5. General Pryor says we "cannot supply you with a list of the names of all of the cases [w]e considered." This is inaccurate. We have case lists for all 34 states in our study. Those lists will be posted on a publicly accessible web site maintained by the University of Michigan when we complete our study late this year or early next year. In the meantime, we have made the lists available to requesters, including the press, pursuant to a data-sharing agreement drafted by the General Counsel of Columbia University.

6. General Pryor says we "cannot give you a baseline of non-capital cases with which to compare his error rate." General Pryor did not read our report. The baseline to which he refers was published in the Texas Law Review ("Capital Attrition ") at p. 1854, with sources provided in footnote 49.

7. In his speech, General Pryor says we cannot defend our "conclusion that the high error rate [w]e found . . . means that there is a risk of an innocent person being executed . . . ." We would like to directly study the number of innocent individuals executed in the United States in the modern era, but no such study is possible because state attorneys in Virginia and elsewhere have consistently refused to disclose the information in their files (including DNA samples) that are indispensable to any such inquiry. See, e.g., Frank Green, DNA Tests Not Likely after an Execution: Va. Opposing Third Request of its Kind, Richmond Times-Dispatch, March 26, 2001. Like other Americans, therefore, we are forced to rely on evidence of risk, because the evidence of what actually happened is not available. The evidence of risk is substantial, in Alabama as elsewhere. When jurors are forbidden to convict defendants of the crime they actually committed and instead are required either to convict them of a more serious crime, of which they are innocent, or release them altogether-this being the Beck error that the Attorney General acknowledges occurred with some frequency in Alabama-that creates an obvious risk that people who did not commit a capital crime will be executed. The same is true of defendants denied a jury of their peers because African-Americans were excluded, defendants represented by incompetent lawyers, and defendants prosecuted by officials who withheld evidence of innocence. Yet, these are the very kinds of errors that were most common in Alabama, as elsewhere, during our study period. Such error puts a difficult burden on appellate courts to catch and correct all the problems. When there is so much error (e.g., in 77 percent of the fully reviewed cases in Alabama), and when the error is so serious, there is a risk-a real risk-that some of it will slip through the inspection process and never be caught. If American Airlines or U.S. Airlines had a 77 percent rate of equipment failure, we would undoubtedly conclude that the risk of innocent death is far too high-no matter how good those airlines' inspection procedures were for catching problems. The same is true here.

8. General Pryor reports his own data about all Alabama capital cases from the 1970s until October of last year. His figures confirm our findings. He reports 281 death sentences, of which 180 have not reached a final outcome in the courts, and 10 more were ended prior to a final outcome when the prisoners died in prison while the review process was continuing. Of the 91 remaining death verdicts, which were finally determined, 63 were reversed by the courts, 4 were abandoned by prosecutors as the result of settlements after errors were challenged in court, and only the remaining 124 cases were cleared by the courts. The reversal rate revealed by General Pryor's own figures thus is 67 (63 + 4) overturned out of 91 fully reviewed, or 74 percent. We found a 77 percent reversal rate for the period through 1995. General Pryor has carried the study forward through the first half of 2000, and found that the reversal rate remains about three-quarters, with only a negligible improvement in the most recent years.

9. General Pryor reports a smaller figure as the reversal rate. He gets his figure by using the 281 death verdicts imposed in Alabama, not the 91 verdicts that were actually reviewed by the courts, as his base. That is not an appropriate way to calculate an error rate because it inaccurately assumes that 100 percent of the thus far unreviewed cases (A) have been reviewed, and (B) have all been found to be without error. When 74 percent of the reviewed cases were found to contain reversible error, it is not appropriate to assume (as General Pryor does) that none of the unreviewed cases contain such errors. To use another example, if an automobile plant manufactured 281 vehicles, but only subjected 91 of them to inspections, and if 67 of the inspected vehicles were found too flawed to go to market and had to be sent back for retooling or scrap, we would not permit the plant to report a 124% error rate (as bad as that rate would be) by dividing 281 by 67. Instead, we would demand to know how many of the inspected cars were found to have serious problems-meaning 91 divided by 67, or 74 percent. The same applies here.

Thank you very much for the opportunity to insert these comments in the record of the July 27 hearing.

Sincerely,

JAMES S. LIEBMAN
Simon H. Rifkind Professor of Law
Columbia Law School

LINDQUIST & VENNUM P.L.L.P.
MINNEAPOLIS MN 55402–2205
June 26, 2001

Hon. Patrick Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

I have been asked to share with you and the Judiciary Committee some experience that I have had representing an innocent person who spent thirteen years on death row in the State of Louisiana. On January 2, 2001, Albert Burrell walked out of the Louisiana State Penitentiary at Angola a free man. Unfortunately, Mr. Burrell is unable to tell you his own story using his own words. He is mentally retarded, schizophrenic and most likely suffered a serious brain injury as a child. He is also illiterate. Given his disabilities, he most likely does not know and is probably incapable of understanding the various ways in which the system failed to protect him.

In the fall of 1987, Mr. Burrell was convicted for murdering two elderly residents of Northern Louisiana over the Labor Day holiday weekend in 1986. The day after the jury determined his guilt, they unanimously agreed that he should die for his crimes. Mr. Burrell was then sent to death row at Angola. The conviction and death sentence was unanimously affirmed by the Louisiana Supreme Court. Similarly, two motions for a new trial were presented to the trial court but were rejected.

My law firm agreed to represent Mr. Burrell on a pro bono basis in early 1992. Over the years, as we were slowly granted access to the State's files on the case, our investigation uncovered substantial misconduct by law enforcement officers and prosecutors in securing the convictions of Mr. Burrell and his co-defendant, Michael Graham. Police investigation reports and witness statements that contradicted both trial testimony and the State's theory of the case had been suppressed. The State also withheld information concerning plea agreements with a jailhouse snitch that, at least with respect to Mr. Burrell, the State knew was lying. The significant government misconduct involved in Mr. Burrell's case most likely could fill a separate hearing of your committee. Nevertheless, in the summer of 1996, a warrant for Mr. Burrell's execution was issued. When we finally obtained a stay, Mr. Burrell was only seventeen days from execution.

As if misconduct by the State were not enough, a review of the record in Mr. Burrell's case also revealed a shocking incompetence by his counsel. Mr. Burrell was represented at trial by two young lawyers. The lead attorney, Keith Mullins, had been out of law school less than four years. His associate, Roderick Gibson, had been in practice less than two. Neither lawyer had ever tried a capital murder case; in fact Mr. Mullins had only handled a relatively few felony cases of any kind in his career.

As an initial matter, the lawyers were woefully unprepared when they began the trial. They did not investigate Mr. Burrell's significant mental health history—Mr. Mullins told me many years later when I interviewed him that he did not realize that Mr. Burrell had mental health problems. Instead, he simply thought Mr. Burrell was "a little slow." They did not investigate the long standing child custody dispute between Mr. Burrell and his ex-wife, a critical prosecution witness who admitted to me that she lied about Mr. Burrell in order to regain custody of her son away Mr. Burrell, her ex-husband. They did not investigate a civil settlement that Mr. Burrell received from his former in-laws for injuries he received during an assault by his former father-in-law. The source of this money would have fully explained why Mr. Burrell supposedly had more money than his ex-wife had ever known him to have at the time of the murders. The State had advanced a theory that Mr. Burrell got the money from the victims after he killed them.

The defense team also did absolutely nothing to prepare for the penalty phase of the case. When it came time for that part of the trial, the defense called only one witness, Mr. Burrell, and then elicited no useful or relevant testimony. No effort was made to present any mitigating facts before the jury. Any lawyer who were to read the very short transcript of the penalty phase of that trial (it's less than 20 pages) would be ashamed for the profession.

The defense provided by these lawyers was worse than ineffective; in many instances, the defense lawyers blundered so badly that they themselves elicited damaging evidence against their own client, evidence that in at least one instance could not have been presented to the jury. For example, during Mr. Mullins' cross examination of law enforcement officers, he questioned why they had never asked Mr.

Burrell about his alibi. The response was that Mr. Burrell refused to talk with police without a lawyer being present and that Mr. Mullins later refused to permit the police to interview Mr. Burrell. The State could never have even mentioned Mr. Burrell's invocation of his right to remain silent but for Mr. Mullins pitiful examination. In another example, after a critical prosecution witness had admitted that the man she had seen on the night of the murders was not Mr. Burrell, Mr. Mullins bumbled his way through the remainder of the examinaiton that by the time it was completed, the witness was claiming that perhaps it was possible the man she saw was his client. The message that Mr. Mullins communicated to the jury during that exchange must have been that he thought his own client guilty.

Mr. Mullins was also unable to demonstrate even basic trial skills, such as impeaching witnesses. Almost every time he made an attempt at the impeachment of a witness during the course of the trial (such opportunities were numerous in a case that the prosecutor had originally opined should not even be presented to the grand jury), the State's objections were sustained. Mr. Mullins was not able to follow the correct procedures. At one point, the trial judge took pity on Mr. Mullins and actually explained the steps he needed to follow in order to lay proper foundation for reputation testimony. Even then, Mr. Mullins was unable to lay the foundation and failed to get the testimony before the jury. This list of the lawyers' shortcomings is, by no means, exhaustive. These are just some of the examples.

Incompetence alone, however, does not explain the poor defense that Mr. Burrell received from the lawyers. After Mr. Burrell's conviction and death sentence, Keith Mullins was indicted in federal court in Louisiana for cocaine trafficking. He ultimately pled guilty to a marijuana charge and was sentenced to serve a prison term. He did, however, receive a downward departure from the federal sentencing guidelines because of his own previously undisclosed mental illness. He was subsequently disbarred from the practice of law.

His associate, Mr. Gibson, was also criminally charged after Mr. Burrell's conviction. He ultimately pled guility to stealing client money. He too has been disbarred.

Mr. Burrell never had a chance. Between the unscrupulous prosecution and the incompetent defense, Mr. Burrell's fate was certain. Thankfully, we prevented the State of Louisiana from killing him and were able to secure his release after the State concluded following its own investigation that there was no credible evidence tying him to the murders. Today, Albert Burrell lives on a very small ranch in Texas with his sister.

The Innocence Protection Act is a critical first step to helping ensure that cases such as Mr. Burrell's do not recur. I strongly urge its adoption.

Respectfully yours,

CHARLES J. LLOYD

Statement of Clive Stafford Smith, Director, Louisiana Crisis Assistance Center

Chairman, Members of the Committee:

Thank you for inviting me to address the problems with the defense of those charged with capital crimes in the State of Louisiana. As a lawyer, I have been involved in defending capital cases for 17 years. Since 1993, I have been the director of the *Louisiana Crisis Assistance Center*, a not-for-profit legal services organization founded to address the crisis in capital defense representation in that state.

There is an old saying in capital defense circles in the United States that 'capital punishment means them without the capital get the punishment.' Nowhere was this adage more true in 1993 than Louisiana. At that time, people facing the death penalty were represented by lawyers paid next to nothing for their work on these complicated and emotionally difficult cases. The caseload, and lack of resources, of some of the public defenders had reached such crisis limits that one lawyer in the western part of the state attempted suicide on the morning of a capital trial.

Plus ça change, plus ça reste même. A decade ago, a study commissioned by the state Supreme Court indicated that a minimum of $21 million was needed to provide basic defense services in Louisiana. Ten years on, and the vast majority of the funds have not been forthcoming.

The profile of indigent defense in Louisiana is balkanized chaos. The first major problem is the inadequate funding. Most states fund indigent defense through a central government. Not so Louisiana, where the majority of the inadequate funding comes from traffic tickets issued by the local police. In one parish, when the public

defender was too aggressive, the police stopped writing tickets, bringing the office close to bankruptcy. The local indigent defender boards are appointed by the judges, and must ask the judges for any increase on the ticket assessment. They come under heavy pressure not to rock the political boat, and 35 of the 41 districts do not even collect the maximum income permitted, $35 per ticket.

The second problem is the quality of counsel in both capital and non-capital cases. In the vast majority of Louisiana's 41 districts, public defenders are part time. This means that they have private practices on the side—or, to be more honest, they have public defender jobs "on the side." In New Orleans, for example, a public defender is permitted to ask a client to retain him (generally, upon the promise that he can expect better representation that way).

The number of lawyers available is wholly inadequate. We are currently conducting a study of three of the largest districts, in New Orleans, Baton Rouge and Lake Charles. In Baton Rouge, public defenders average 3 80 open cases at any given moment. The numbers that are opened during a year range to a high of over 700 cases. Given that most of us do not know that many people in the world, it is obviously impossible to provide that number of clients with effective representation. This is all the more true when one considers that even the director is part time, and most of them probably spend less than half their time on their indigent work.

Since 1994, there has theoretically been a requirement that lawyers be "certified" for trying capital cases. Unfortunately, when the regulation was enacted, opponents ensured that a rider was added saying that the provision would create no rights that could be raised on appeal. Thus, Dan Bright was sentenced to death for a crime he did not commit after being represented by a lawyer who was drunk during the trial. The lawyer only called one witness (Mr. Bright's mother) at the penalty phase, and asked her only two questions—her name and whether she knew her own son. Shareef Cousin, a sixteen year old, was likewise sentenced to death for a crime he did not commit; his lawyer's first step in preparing for a penalty phase was a phone call made to my home after the guilty verdict.

Overall resources are pitiful. In Lake Charles, the average time the lawyers spend visiting their felony clients at the jail (including capital clients) was 69.6 seconds per year. With only one investigator, the office generates only one witness interview memo per two hundred clients. I have never tried a case, capital or non-capital, without consulting an expert on some subject or other; in Lake Charles, they average only one expert per two hundred cases.

The lack of investigative assistance is a monumental problem in capital and non-capital cases alike. No criminal charge, from a car accident to a capital case, should proceed without a complete investigation. "At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin* v. *Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). Yet Lake Charles has one investigator who is responsible for a current office caseload of roughly 9,000 cases, including, at the moment, twelve capital cases. The New Orleans public defenders have only six investigators who are meant to provide assistance in 16 felony courts, as well as another dozen juvenile, magistrate and municipal courts. At a most basic level, the imbalance between prosecution and defense is reflected by the fact that the Office of the District Attorney has 24 investigators, in addition to the assistance of the thousands of officers with the NOPD. The public defenders receive no federal funds, while grants are made readily available to the prosecution.

Consider the impact of this inequity: In an experiment from January 1999 to June 2000, my office took over the burden of capital preliminary hearings from the public defenders. We were ultimately involved in precisely 100 cases where citizens had been arrested for capital murder, and preliminary hearings were held. Where, before, there had been no investigation to determine whether the client was properly charged, we put an investigative team on each case. When we exposed the truth, the State chose to dismiss the charges against almost half (49) of these citizens. In that 18 month period, in not one case where we did the preliminary hearing was the client ultimately found guilty of first degree murder, let alone receive the death penalty.

This might be considered a success story; sadly, it is not. First, we must remember the hundreds of men and women who were arrested before 1999. Angola Penitentiary holds 90 people on Death Row, and over 3,460 serving life without the possibility of parole. The Australian State of Victoria, with a population roughly twice as large as Louisiana, does not have that many people in prison for any charge. Yet many of those serving life or death in Louisiana stem from New Orleans convictions, and were apparently victims of the earlier system. Second, and perhaps even more sad, my office's intervention was so successful that we came under heavy criticism from those committed to the status quo ante, who prefer that the PD's ineffectual

boat remain afloat. We have recently been forced out of providing this critical service.

The availability of expert assistance is also critical to fairness. In 1985, the United States Supreme Court held that an indigent capital defendant has the right to a state-funded expert. *Ake* v. *Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). In Louisiana, enormous problems are posed by scientific evidence that is downright bogus. This is partly due to the inadequate funding and expertise in the local crime labs, and partly due to the lack of experts available to the defense. In one of the smaller parishes, for example, an experienced public defender admitted to using just one independent expert in twenty years.

The same is true across the state. Ricky Coston spent two years awaiting a trial for his life in New Orleans, before being acquitted in December 1998. The only evidence that purportedly linked him to the crime was a single fiber. The NOPD crime lab technician simply should not have been acting as an expert in any kind of criminal case. He began doing fiber analysis in criminal cases before he had his first training seminar in the speciality, and initially issued a report saying that a fiber from Ricky's jacket matched the victim's green blanket. He amended the report to reflect that it matched a blue sweater. The sweater turned out to be a pair of socks. My office secured two independent experts to review the work-apparently, the first time the defense had ever challenged his findings—and determined that the picture of the "matching" fibers was falsified. I reported this profound misconduct to the NOPD, which took no action. I filed a federal civil rights suit on behalf of Mr. Coston, which the NOPD felt constrained to settle. Still they took no action against the technician, who is still working on capital cases.

In recent years, the Orleans Parish public defender office has been faced with several thousand clients, and dozens of people charged with capital murder every year. The office has a total budget of only $2 million, representing a handful of dollars a case. Faced with a choice between paying staff salaries and the experts needed for the defense, the office actively opposes lawyers seeking funds for independent experts, and the director recently sought to fire a staff attorney for asking for one.

Across the United States, there is much talk of DNA as a significant forensic tool. However, it is not relevant to the vast majority of criminal prosecutions and, even where it might prove helpful, it is rarely used in Louisiana. My office has been involved in more than 150 capital cases in the past five years, and DNA has been used in only one. While a DNA testing bill was passed by the state legislature this year, it is the same old story: No funds were appropriated to pay for it, and the legislature refused to include a provision mandating that the state preserve evidence for possible testing. The vast majority of those who could benefit are at the Angola State Penitentiary without lawyers or resources, yet they must prove to a judge that the evidence can demonstrate innocence before they will even have a right to testing.

Another major factor, that implicates the lack of resources for a defense investigation, is the lack of discovery in criminal cases. To an average citizen, the law must seem bizarre: The contents of the police file are not discoverable until after the client is on death row, and has lost his first appeal of right—in other words, until after it is most needed. Unfortunately, there has been a pattern of abusing even these limited discovery obligations. New Orleans has a particularly shocking reputation in this regard. Curtis Kyles was on death row for several years until the United States Supreme Court ordered a new trial based on the suppression of evidence. *Kyles* v. *Whitley*, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). And yet his case is by no means the most extreme example. John Thompson came within days of execution two years ago before it came to light that the prosecutor had destroyed blood evidence that categorically excluded him as the perpetrator of the robbery that enhanced his case to one where the death sentence would be imposed.

So far, six persons sentenced to death in Louisiana have subsequently been found innocent by the state process. Shareef Cousin was, at the age of sixteen, the youngest person sentenced to Death Row in the world. In 1995, Shareef was charged with a politically sensitive crime in New Orleans that "had to be solved." A white tourist in the French Quarter was tragically killed by a group of three black youths. Not only did defense lawyers fail to call upwards of twenty witnesses who could have demonstrated beyond any doubt that a videotape of Shareef playing basketball in a neighborhood gym was being taped at the precise time of the crime; but the prosecution literally kidnaped four alibi witnesses and held them in the D.A.'s office until the trial was over.

Our office took over his case on appeal, and for the retrial. Our investigation uncovered even greater misconduct on the part of the police and prosecutors. The authorities knew the identities of the actual perpetrators just days after the crime, but declined to arrest and prosecute them. Along with four hundred pages of informa-

tion that led directly to the real perpetrators, the prosecution intentionally suppressed the sole eye-witness's statement in which she said she had not been wearing her glasses, and could not identify anyone. Shockingly, one NOPD detective apparently secured the $10,500 Crimestoppers reward by calling in a false tip against Shareeλ After we exposed some of this abuse, the district attorney's office was forced to dismiss the case.

We were so horrified by the misconduct that permeated the local authorities that we felt that something had to be done on a systemic level. However, our research revealed that no local prosecutor had ever been prosecuted for these kinds of criminal acts-after all, which prosecutor is going to place a brother or sister prosecutor in prison? More surprising, no prosecutor from New Orleans has ever been sanctioned by the bar for such actions. Mr. Cousin's sister reported the prosecutor who suppressed evidence in that case to the bar association, and yet no action has been taken on her charges in four years.

Left with only one option, we filed a federal civil rights suit against the prosecutors who were responsible. Recently, United States District Judge Sarah Vance dismissed the suit against them, holding that prosecutors were "absolutely immune" from suit for any actions taken in the course of the prosecution—including kidnaping witnesses, falsifying evidence, and acting out of racial animus. What has the world come to, when a prosecutor can rely on the federal courts to grant him immunity for the criminal offenses he committed in placing a child on Death Row for a crime he did not commit? This is very much a federal concern—the federal courts fashioned this "immunity" out of whole judicial cloth, without any input by Congress, casting a protective blanket over state prosecutors even when they are guilty of intentional criminal acts taken in bad faith. It is, with due respect, Congress that should take that blanket back. Those charged with defending capital clients in Louisiana, for one, do not have the resources to keep on fighting this hopeless battle against such misconduct.

Indeed, there is a desperate need for federal intervention in the way that federal employees contribute to the imbalance in capital cases in Louisiana. Two weeks ago, I was conducting a postconviction hearing in the case of Dan Bright, who was originally sentenced to death in 1996. At the time of the trial, the State knew that the co-defendant had written statements insisting that Mr. Bright was innocent, but they manipulated the case so the co-defendant could not be called as a witness. As I previously mentioned, Mr. Bright was represented by a lawyer who was inebriated during the capital trial, and an innocent man was sentenced to death. In post-conviction proceedings, we filed a Freedom of Information Act request, and the DOJ provided a page of materials that was heavily redacted. It reflected a statement by an informant (whose name was likewise redacted) saying:

that daniel bright, aka "poonie" is in jail for the murder committed by

_____

The name of the true perpetrator of this murder was blacked out. Thus, the DOJ knew of a witness who could expose the real killer before Mr. Bright's state court trial. The DOJ knew Mr. Bright was on trial for his life, and did not bring this information to the attention of the state or the defense. Even worse, the United States Attorney is now actively opposing the defense request for either the name of the informant or the name of the perpetrator now. The U.S. Attorney has filed a motion to remove our subpoena to federal court and quash it. He provides no discussion of why the federal government should suppress evidence of the real killer, but rather seems to be saying that Might makes Right: "We have the power, so therefore we will [ab]use it."

Indeed, the Fifth Circuit has judicially fashioned a rule of "sovereign immunity" that allows any federal agency to refuse to honor subpoenas issued in state court. State of Louisiana v. Sparks, 978 F. 2d 226, 232-3 (5th Cir. 1992). This is another rule fashioned out of judicial whole cloth; it is within the power of the federal government to amend it and, with all due respect, this Committee should get on with the task.

Another huge factor in the conviction of the innocent in Louisiana is, sad to say, the number of corrupt police officers. Without meaning to denigrate the large numbers of fine officers on the beat, the number of bad apples is frightening. In various capital cases, we secured judicial findings that New Orleans police officers had committed perjury. We brought these to the attention of the NOPD hierarchy; they did not even bother to ask for the documentary evidence. We notified the NOPD that the lead detective in the Cousin case had apparently falsified the evidence in order to collect the $10,500 CrimeStoppers award; they showed no interest. In another capital case, we were representing a witness who had been told by an NOPD officer

that they had the "winning" Crimestoppers number, and she could have it if she toe'd the right line; we met with representatives of the U.S. Attorney, with a view to setting up a sting on the officer, but was told that this, and all our other complaints, were matters for the state authorities.

The resources in post-conviction are also pitiful. To be sure, this year the State of Louisiana established a post-conviction office. However, the legislature refused to fund the new mandate. Rather, the state simply did away with the fund for expert assistance that had previously existed, and raided some of the other limited funds that had been dedicated to capital litigation. Additionally, this came five years after the elimination of federal funding for a similar office. Now, then, there are three full-time lawyers for the 90 people who expect to be in post-conviction over the next couple of years. As a result, my office is trying to help in seven cases, although we are told that we will receive not one cent for this work next year.

It is no fun trying to defend a capital client without resources, and with both hands tied behind your back. Yet the problems of the defense lawyer are utterly inconsequential compared to the horrors of facing a capital charge, or sitting on Death Row, for a crime that one did not commit. I have had the privilege of being involve in the defense of more than 50 men, women and children who faced death for something they patently did not do. Even as I prepare this statement for this Committee, I could name at least two people on Death Row who I think are almost definitely innocent. I could name half a dozen who are now serving life without parole. How can we possibly allow such tragedies to persist?

Statement of Charles J. Press, Director, Mississippi Post-Conviction Counsel Project

Chairman, Members of the Committee:

I appreciate the opportunity to address the Committee on this extremely important issue. As an attorney, I have been representing death row prisoners on direct appeal, state post-conviction, and federal habeas corpus proceedings for nearly 9 years, both in California and Mississippi. Since December of 1998, I have been the Director of the Mississippi Post-Conviction Counsel Project, a two-person, non-profit office which directly represents death sentenced prisoners in post-conviction and federal habeas corpus proceedings, and assists lawyers handling capital cases in all stages of litigation. Having observed how the judicial system treats capital cases in both California and Mississippi has given me a unique perspective on how the amount of resources available to represent those facing the death penalty is perhaps the single most important factor in ensuring that the unfathomable never happens: the execution of an innocent person.

Mississippi is the poorest of the 50 states, and the resources devoted to the defense of those facing the death penalty are a reflection of that. There is no statewide public defender system in Mississippi. Of the 82 counties in Mississippi, only 3 counties have full-time public defender offices: Hinds County, which includes Jackson, the largest city in Mississippi; Washington County, which includes Greenville, the fifth largest city; and Jackson County, which includes Pascagoula, the ninth largest city. Not surprisingly, of the 63 persons on Mississippi's death row, only 4 of these are from Jackson County, and none are from either Hinds or Washington County. This is despite the fact that the homicide rates in Jackson and Greenville are among the highest in the state, and Jackson has one of the highest homicide rates in the nation.

The overwhelming majority of people in Mississippi facing the death penalty, nearly all of whom are indigent, are represented by court-appointed counsel with little, or no experience in handling death penalty cases. Mississippi has no standards for appointment of counsel in capital cases. Recently, a lawyer who had been admitted to the Mississippi Bar for less than a year was appointed to represent a criminal defendant facing the death penalty. In fact, his only criminal experience prior to this appointment was defending HIMSELF on a charge of driving while intoxicated.

Most attorneys who represent criminal defendants facing the death penalty have a busy private practice and take criminal appointments in capital cases to supplement their income. Unfortunately, the income these attorneys derive from capital cases is scant. In Mississippi, under Miss. Code Ann. Section 15–17, attorneys handling capital cases are only entitled to $1,000 as compensation. Furthermore, attorneys are only entitled to be reimbursed for actual expenses or a presumptive rate of $25 per hour. See *Wilson* v. *State*, 574 So. 2d 1338 (Miss. 1990).

The result of these meager fees is that lawyers spend very little time preparing for capital cases when they know, at the outset, that they will only be receiving a flat fee of $1,000. The livelihood of these attorneys is made by the hourly billing and fees they generate from paying clients. They simply cannot afford to take time away from their paying clients to represent their clients who are facing the death penalty. As a result, they ignore their capital clients and prepare little, if at all, for their trials.

Some attorneys handling capital cases have contracts with one or more judicial circuits to handle ALL criminal cases from that circuit. These contracts are for a fixed fee per year. Many of these contracts are for $30,000 or less. Attorneys operating under these contracts often refer to themselves as "part-time public defenders" because they also represent fee-paying clients to supplement their income. Unfortunately, these attorneys are generally not allowed to refuse appointments in criminal cases under these contracts. If they do, the judge can rescind the entire contract. Many attorneys who have attempted to refuse appointments in death penalty cases because they were unqualified are told by judges that their contact will be terminated unless they accept the appointment. Having never represented a person facing the death penalty is not a valid reason for a refusing a capital case appointment under this system.

Trial judges in Mississippi have sole discretion over appointing and compensating lawyers to represent capital defendants. They also have complete discretion regarding appointment and funding for experts, and other assistance. Although there are some judges who pay more than the $1,000 fee for capital cases, the overwhelming majority do not. Because trial judges are elected by a constituency that overwhelmingly supports capital punishment, there is extreme political pressure to ensure that defendants facing the death penalty receive as little money from the county budget as possible. The fact that many of these counties are among the poorest in the nation only further ensures that indigent capital defendants will receive the bare minimum towards their legal representation. In Quitman County, the County Supervisors had to raise property taxes on all residents simply to pay for two death penalty trials. Other counties have reported being unable to purchase a much needed new fire truck or constructing sewer systems for small towns where residents still use outhouses. Judges, therefore, do not want to be put in a position of depleting county funds to pay for a person charged with a capital crime.

The result of having underpaid, unqualified lawyers representing capital defendants is clear: defendants facing the death penalty are not receiving their constitutional right to effective counsel. Capital trials in Mississippi, from the beginning of jury selection until sentencing, are usually completed within a week. By contrast, jury selection in a capital trial in California can often last several weeks. Per capita, Mississippi has the fifth largest death row in the nation.

In one recent case, a lawyer handling a death penalty had not interviewed a single witness the weekend before the trial was to begin. Neither he, nor co-counsel, had ever tried a capital case before. Lead counsel was provided with sample motions challenging the DNA evidence, which was riddled with errors, as well as a motion for a continuance. Counsel, however, decided not to file any of these motions or ask for more time to prepare. Jury selection began on Monday morning. By Wednesday afternoon, the client had been convicted and sentenced to death.

In July of 2000, Mississippi passed legislation to create a state-funded capital trial office and authorized the Governor to appoint a Director. However, because the Governor has yet to appoint a Director to this new office, it is unclear when the office will open its doors. Even when it does, it will face significant obstacles. The legislation provides for a Director, three attorneys, and two investigators. With dozens of capital indictments pending statewide in Mississippi each year, the new office, even if it has qualified personnel, will not be able to provide representation to all defendants facing the death penalty. Moreover, the legislation did nothing toward creating standards for the appointment of counsel in capital cases, or raising the $1000 flat fee also remains. Trial judges retain the authority over appointment of counsel. Therefore, a trial judge has the power to refuse appointing the new office to a capital case. Although, on the surface, it would seem as if a trial judge would prefer to appoint an office with attorneys who would not seek compensation from the judge's county, qualified, experienced capital counsel will likely seek expert assistance, which must still be paid out of county funds. A trial judge can ensure that his county will not bear the cost of an expensive capital trial if he appoints a lawyer who does not know to ask for expert assistance.

The situation regarding appeals and post-conviction for death sentenced prisoners is hardly better. Under Mississippi law, the SAME lawyer who represents a client facing the death penalty at trial MUST represent the defendant on direct appeal. If new counsel represents a death sentenced prisoner on direct appeal, counsel must

raise all issues of ineffective assistance of counsel in the same appeal, without the benefit of having the resources provided to post-conviction counsel for discovery, investigative and expert assistance. Therefore, the same, unqualified attorney who represented the client at trial is now representing him on his primary challenge to his conviction and death sentence. Moreover, counsel is given the same, meager $1,000 as compensation.

Until 1998, death sentenced prisoners in Mississippi were not afforded the right to counsel in post-conviction proceedings. However, under pressure from a federal law suit challenging the lack of post-conviction counsel, the Mississippi legislature, in July of 2000, created the Office of Capital Post-Conviction Counsel. This new office, consisting of a Director, two staff attorneys, and one investigator, is responsible for either directly representing, or finding alternate counsel for all 63 prisoners. For those cases where alternate counsel has been appointed, most of the lawyers are from states other than Mississippi. While the Mississippi Supreme Court created standards that counsel must meet before they can be appointed to represent death sentenced prisoners in post-conviction proceedings, only a handful of lawyers in Mississippi meet these qualifications. This, of course, is in large part because the right to counsel did not exist prior to 1998, so few Mississippi lawyers have ever handed a death penalty case in post-conviction proceedings.

The Mississippi Supreme Court has also allowed attorneys representing death sentenced prisoners in post-conviction proceedings to receive higher compensation than the $1,000 rate, and to seek funds for investigative and expert assistance. These attorneys, however, must request these fees from the trial courts. Although the fees are now being paid from a state fund, many trial judges still continue to withhold money for investigative and expert assistance, and some post-conviction lawyers are still being compensated only $1,000 for their work. The state post-conviction fund must not only cover the funds to compensate private attorneys, but pay for investigative and expert assistance in all of these cases, including those cases being handled by the state office.

There has been much discussion of the many, many prisoners who have been released from death rows across the country after it was later determined that they were innocent. One of these prisoners, Sabrina Butler, is from Mississippi. However, because so many death sentenced prisoners were represented by lawyers who were underpaid, inexperienced, and unqualified, there can be little confidence in the outcome of these trials. A three-day trial is hardly the kind of adversarial proceeding that is required for the judicial process to properly function in its truth seeking mission. Whether there are innocent people presently on death row in Mississippi is unclear. However, as innocent people have been freed from death penalty states where the quality of legal representation is much higher, it certainly cannot be assumed that all 63 prisoners on Mississippi's death row are guilty of the crimes for which they have been convicted.

Statement of Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender

My name is Michael Pescetta. I am an Assistant Federal Public Defender and I am chief of the Capital Habeas Unit in the Office of the Federal Public Defender for the District of Nevada. Our unit litigates most of the federal habeas corpus proceedings resulting from judgments of death in Nevada state courts, and currently we are providing representation in twenty-three such cases. We are therefore familiar with the issues that are routinely presented in these cases and with the problems arising in state court litigation of capital cases.

I have been litigating capital appeals and habeas corpus cases since 1983, first in California (initially as an attorney for the California State Public Defender, and then as Director of Capital Litigation, overseeing all of the capital cases in that office, from 1988 to 1992) and since 1992 in Nevada. I was the director of the death penalty resource center for Nevada from 1992 until 1995, when the resource center was de-funded. I currently litigate only capital habeas corpus cases.

Nevada is in continuing crisis with respect to representation in capital cases. The salient factor is that Nevada has the highest death row population per capita of any state in the nation and the fewest lawyers per capital case of any state. Currently, approximately 30 lawyers are responsible for representing all of the 85 individuals who are under capital sentence; and, with the exception of the approximately 10 to 15 capital trial lawyers in public defender offices, these are the same lawyers who provide representation in capital cases at trial. The effect of this situation on the

quality of representation is severe: there are simply too few lawyers who are willing to provide representation in capital cases, particularly in habeas proceedings, and many of the lawyers who do provide representation are woefully unskilled.

The Nevada state system is generally in a position to fund litigation in capital cases if it wishes to. The county public defender offices in Clark County (Las Vegas) and Washoe County (Reno) pay attorney salaries that are competitive with those paid by prosecution offices. While budgets for ancillary services, such as expert witnesses, maybe limited by the county commissions, in general public defender offices have been able to secure funds for such services when attorneys request them. When private counsel is appointed by the court, Nevada statutes provide for compensation of counsel at a rate of $75 per hour in capital cases. There is a presumptive cap of $12,000 for attorney compensation in capital trial cases, and of $750 in capital habeas corpus cases, and a presumptive cap of $300 for reimbursement for ancillary services. Nev. Rev. Stats. §§ 7.125, 7.135. These limits are generally recognized as inadequate for competent representation and they are normally exceeded when counsel requests additional funds, although the amounts actually authorized vary greatly among individual trial judges.

Unfortunately, the potential availability of resources for litigating capital cases does not normally translate into adequate litigation, primarily due to the quality of counsel. In public defender offices, the problem is frequently that lawyers fail to recognize the need for adequate investigation or ancillary services—until last year, neither of the two county public defender offices had any organized training programs at all—and have often treated the litigation of capital cases as routine. In general, the salaries paid in the two largest public defender offices have contributed to a career civil service mentality on the part of lawyers and administrators, and a concomitant unwillingness to antagonize other parts of the criminal justice system, at the expense of vigorous advocacy on behalf of clients. Public defender offices also have not historically used their budgets to hire adequate numbers of investigators to allow them to conduct sufficient investigation in all capital cases, much less in all cases. (For instance, until the year 2000, the Clark County Public Defender's Office had approximately 8 investigators on staff and a yearly caseload of over 31,000 cases.) It appears that this situation does affect the vigor of defense advocacy: a recent study conducted by the Spangenberg Group for the Department of Justice, Bureau of Justice Assistance, and the American Bar Association showed that the trial rate for the Clark County Public Defender is under 0.6%, while the national urban average trial rate is 4–7%.

While the Nevada Supreme Court has imposed experience standards for counsel, Nev. Sup. Ct. Rule 250(2)(b, c), there is no assessment of the quality of representation as a basis for appointment. There is also no formal mechanism for the appointment of counsel other than public defender offices, and individual judges recruit and select attorneys for appointment unilaterally. As a result, lawyers who have done seriously inadequate work on capital cases continue to be appointed to do more of them. In particular, in state habeas corpus proceedings, in which only private counsel are appointed, so few lawyers are willing to accept appointment that courts routinely appoint lawyers whose representation is so inadequate that subsequent federal proceedings require significantly greater expenditure of resources on both procedural and substantive issues. For instance, in over 20% of the capital cases currently pending in state habeas proceedings, representation is being provided by lawyers who have never filed a discovery motion or a motion for funds for ancillary services in any habeas proceeding. It is not uncommon for these lawyers to attempt to litigate claims of ineffective assistance of counsel without even obtaining the files of previous counsel. While these problems have been drawn to the attention of the Nevada Supreme Court and the state trial courts, they have been unwilling to intervene or to mandate closer scrutiny of counsel's actions in state habeas proceedings, and the emphasis has remained on simply processing capital cases through that system in any way possible.

Fundamentally, the problem of adequate representation in capital cases reflects the legal culture in Nevada. Criminal defense lawyers who provide representation in indigent cases, as opposed to representing paying clients, are not held in the same respect as other lawyers, and criminal cases involving indigents are treated with less concern than others. Some defense lawyers appointed in capital cases often treat them as routine and simply do not have the interest in or dedication to this type of work that would motivate them to improve their skills. The Nevada Supreme Court routinely expresses concern about the quality of representation in capital cases, but its actions are often not consistent with its expressed position. For instance, the court has criticized defense counsel, sometimes vehemently, for not raising available issues at the first opportunity, see *Beiarano* v. *Warden*, 112 Nev. 1466, 1470, 929 P.2d 922, 925 (1996), but when thorough counsel attempts to raise all

available constitutional claims on appeal the court seeks to discourage it. See *Hernandez* v. *State*, 2001 WL 668460 (June 14, 2001.) The state trial courts act similarly: they normally do not demand that counsel provide quality representation in capital habeas cases, and (along with the state bar) routinely ignore complaints from clients about counsel's actions in failing to communicate with the client, to raise issues pointed out by the client, or to conduct adequate investigation.

The low quality of defense advocacy has a pernicious systemic effect, because the corrective function of a vigorous defense on the criminal justice system as a whole normally does not occur. For instance, one of the commonest complaints of the defense bar in Clark County is the failure of the district attorney's office to comply with its disclosure obligations under *Kyles* v. *Whitley*, 514 U.S. 419 (1995), despite purportedly maintaining an "open file" discovery policy. In 1998 and 1999 the Federal Public Defender conducted depositions of the records custodians of the district attorney's office and the Las Vegas Metropolitan Police Department, in a 17-year-old capital case. These depositions revealed that the district attorney's office has no institutional mechanism for ensuring that disclosable evidence in the possession of the police is included in the disclosure to the defense as required by Kyles. This revelation had no effect on the practices of the district attorney, which has been found in subsequent cases to have failed to disclose evidence in the possession of the police; and it has not changed the motion practice of the majority of defense counsel, who continue to rely upon the "open file" policy. Similarly, in a case involving a claim of actual innocence, in which evidence relating to other suspects was concealed by Washoe County authorities for almost 20 years, *Mazzan* v. *Warden*, 116 Nev.—, 993 P.2d 25 (2000), the revelation of the failure to disclose has not had any reported effect on the discovery policies currently in force or in most defense counsel's motion practice with respect to discovery. These are only the most obvious instances in which an absence of vigorous defense advocacy, and appropriate judicial response to such advocacy, has left the state system as a whole functioning below acceptable constitutional standards.

Providing thorough and competent representation at all stages of all capital cases is currently not a reality in the Nevada state system. That goal will be attained, if at all, only with the maturation of the criminal defense bar and with an insistence by the state courts on vigorous and thorough defense advocacy in capital cases.

FEDERAL COURT DIVISION
DEFENDER ASSOCIATION OF PHILADELPHIA
PHILADELPHIA, PA 19106
July 5, 2001

Senator Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510
Senator Orrin G. Hatch
104 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senators Leahy and Hatch:

I am writing in regard to S. 486 (The Innocence Protection Act). I am the Chief Federal Defender for the Eastern District of Pennsylvania. In addition to representing indigent defendants charged with federal crimes, my office also represents some prisoners in federal habeas corpus proceedings challenging death sentences imposed by the state courts of Pennsylvania. As such, I and my staff are familiar with standards for quality, and compensation, of counsel in the Commonwealth of Pennsylvania.

I understand that the Innocence Protection Act seeks to insure minimal standards governing the competency of counsel who handle death penalty cases in state court. Of Pennsylvania's 67 counties, only one (Philadelphia) has standards governing appointment of counsel. In this regard, Senator Leahy quoted the 1990 Joint Task Force on Death Penalty Litigation in Pennsylvania, that the lack of standards has led Pennsylvania to having "one of the worst systems in the country for providing indigent defense services," and has experienced "problem [s] of major proportions."

Indeed, in some cases being handled by my office we have seen stark examples of inexperienced and unqualified counsel being appointed to these cases. Scott

Blystone was represented by a part-time public defender who had one year's experience as a judicial law clerk and had been practicing law for 3½ months at the time of his appointment (Fayette County); Carolyn King was represented by a civil practitioner who specialized in family law who had tried a single criminal case, a one-day trial on drug charges (Lebanon County); Lawrence Christy was represented by two lawyers, one who had graduated from law school three years before trial and had asked for help from the court because he had never tried a capital case, and the other who had graduated from lave school two years earlier and had never tried any criminal case; James Carpenter (York County) was represented on direct appeal by an attorney who had one year of experience who had never represented a client in any appellate proceedings prior to this capital case.

While Philadelphia County has standards, that jurisdiction is responsible for 55% of the Pennsylvania's capital convictions. According to the Pennsylvania Department of Corrections 117 of Pennsylvania's death row inmates (45% of the Commonwealth's death row of 241) are from counties that have no published standards governing compensation of counsel, provision of investigators and experts, and qualifications of counsel.

The capital representation crisis in Pennsylvania is not a semantic question as to whether Pennsylvania provides standards at the county, rather than state-wide, level. It is that Pennsylvania has no adequate system for capital appointments and compensation at any level. As Chief Judge Becker of the United States Court of Appeals for the Third Circuit found, the issue of whether Pennsylvania provides adequate standards and resources for capital representation is not amenable to "county-by county or case-by-case determination." The Commonwealth of Pennsylvania itself admitted "that Pennsylvania does not meet the [capital representation] requirements of [the AEDPA] as of January 31, 1997, and that it has not met them previously." *Death Row Prisoners of Pennsylvunia* v. *Ridge*, 106 F.3d 35, 36 (3d Cir. 1997).

While it is true that the Philadelphia standards would prevent some of the more egregious examples of capital non-representation that occur elsewhere in Pennsylvania, the appointment system is neither neutral nor effective. The City courts have been sued on numerous occasions by appointed counsel because of non-payment and underpayment, and—as was the case at the time of the Task Force report in 1990—many lawyers have stated that they will not take cases because they cannot afford to do so. Even an experienced capital defense lawyer cannot be effective if s/he is not paid adequately for the hours required to properly handle a case or does not have money for experts or investigators. Counsel qualified for appointment on Philadelphia's list have been found ineffective in five recent post-conviction cases for failing to investigate and present mitigating evidence, and a sixth lawyer who is on Philadelphia's appointment list was found ineffective for failing to investigate and present mitigating evidence in a case tried in a neighboring county.

In short, the observations of the 1990 Task Force report, cited by Senator Leahy during the hearing, retain their force today, notwithstanding any isolated suggestions to the contrary made during the hearing. Pennsylvania would greatly benefit from the adoption of uniform standards governing these important issues.

I respectfully request that this letter be made a part of the record.

Respectfully,

MAUREEN KEARNEY ROWLEY
Chief Federal Defender

Statement of Hon. Gordon H. Smith, a U.S. Senator from the State of Oregon

I would like to thank you, Chairman Leahy, Senator Hatch, and the rest of my colleagues on the committee for allowing me to speak today. I would also like to thank you for holding this hearing, which will help focus the Senate's, and the nation's, attention on importance of providing competent counsel in death penalty cases.

This subject is important to me because I sit before you today as a proponent of the death penalty. I believe that some crimes are so odious, and so heinous that the death penalty is the only appropriate punishment. I believe further that the death penalty deters crime, and that it ultimately saves lives as a result. But I can only support the death penalty in good conscience if I am convinced, and the American people are convinced, that no innocent person is ever executed, and that people on trial for their lives have adequate legal representation. Competent counsel is a

minimum requirement for justice in these cases, and I believe that federal leadership is necessary to ensure that every person on trial for his or her life receives qualified legal representation.

Mr. Chairman, we are very lucky in Oregon to have one of the most progressive systems in America for ensuring adequate legal representation in capital cases. Defense attorneys undergo a rigorous state approval process. Prospective capital defense attorneys must have several years of experience, including experience with murder cases, must attend regular legal training or education programs on capital cases, and must be able to provide at least five letters of recommendation from state judges, defense attorneys, or district attorneys attesting to the attorney's fitness for defending death penalty cases. These are all minimum requirements in the state of Oregon.

In addition, Mr. Chairman, Oregon spends far more defending the indigent than it does prosecuting them. Next year, Oregon will likely spend in the neighborhood of $80 million for indigent defense and approximately $50 million on prosecutions. Oregon has also centralized its indigent defense funding at the state level to ensure that the quality of defense will not vary with the economic fortunes of individual counties. I understand that legal representation cannot always be measured by dollar figures, but I believe that Oregon's commitment to competent counsel is reflected in the resources the state has dedicated to ensure it.

I believe that the federal government must ensure that we, as a nation, are also fully committed to nationwide standards for competent counsel. I have been fortunate to work with the chairman of this committee on legislation that would lead to the development of national standards for legal services in capital cases. I believe that the federal government should study existing systems for appointing counsel in capital cases, determine the minimum standards that states should meet in providing representation, and ensure that states abide by these standards. By establishing these requirements, the federal government's leadership can help secure the nation's confidence in our application of the death penalty.

Mr. Chairman, I'm not here because I believe that incompetent defense counsel has become the norm in courtrooms across America. But our system of justice simply cannot tolerate severely overworked, underpaid, and even unqualified attorneys representing Americans on trial for their lives. I want to urge this committee to do all it can to make our excellent system of justice even better. Helping ensure competent counsel nationwide is a good step in that direction. We cannot afford mistakes in death penalty cases, and Americans must be confident that defendants in capital cases are receiving adequate representation.

Statement of Maurie Levin, Texas Defender Service

BACKGROUND

My name is Maurie Levin. I am the Managing Attorney of the Austin office of Texas Defender Service (TDS), a private nonprofit with offices in Austin and Houston, Texas. Since 1995, TDS has provided direct representation to indigent inmates on Texas's death row, consulted with other lawyers litigating capital cases at the trial and post-conviction level, and intervened in unusual cases where expert legal assistance was urgently needed. Senator Leahy's office asked that I describe for this Committee the appointment and compensation process in Texas.

Texas Defender Service is the only organization in Texas, public or private, that concentrates exclusively on tracking capital cases and representing indigent defendants charged with and/or facing a capital sentence. We thus serve as a primary source of information about the death penalty in Texas for other organizations, the public, and the press. In October 2000, TDS released A State of Denial, the most comprehensive report to date on the administration of the death penalty in Texas.[1] Local, national, and international media covered its release. The nine chapters of the report outlined many of the deficiencies in the Texas system, including official misconduct, the use of phony experts, racism and the death penalty, the execution of the mentally retarded, and the inadequacies in the representation provided. It also underscored the fact that the deficiencies in the system are all exacerbated, masked, and allowed to continue when defense counsel fails to fulfill her role as a zealous advocate for the defendant and due process.

[1] The report is available on our web site at: www.texasdefender.org.

THE STATE OF INDIGENT CAPITAL DEFENSE IN TEXAS

Texas is replete with the horror stories that result from the inadequate counsel that is provided to inmates facing a sentence of death. Texas, of course, is home to the now infamous sleeping lawyer cases—where capital trial counsel actually slept through significant portions of trial, and where the Texas appellate court deemed that to be nonetheless adequate representation. And lest we dismiss those stories as rare aberrations of the past, recent studies from a variety of sources confirm that the typical attorney appointed to represent an indigent capital defendant in Texas is a solo practitioner who may or may not have any capital experience, is eight times more likely than the next lawyer to have suffered some form of disciplinary action for ethical lapses, and will get paid an hourly rate that cannot even cover her office overhead, and only for a fraction of the hours necessary to do a competent job. In addition, she will be fully aware that zealous advocacy may risk future appointments from the Court that hands her the cases that provide her day-to-day livelihood. In short, it is a system that makes it a fairly safe bet that counsel cannot and will not do a competent job representing their capital clients.

Despite the increased attention to these problems, and the reforms implemented in the last legislative session, they still exist. While the Fair Defense Act, courageously championed and skillfully stewarded through to passage by Senator Rodney Ellis, takes crucial first steps to improve indigent defense overall, its effect on capital cases will be extremely limited. Moreover, it does not affect the quality of post-conviction representation at all—the crucial stage of the appeals where people are discovered to be innocent, and exonerated. In short, we still have a long, long way to go.

To fully understand the nature and extent of the problem, it is necessary to understand how the Texas system works. In explaining the process, and providing examples and statistics, I rely upon TDS' Report, *A State of Denial*, the capital chapter of *The Fair Defense Report*, released this past year by Texas Appleseed,[2] an earlier study by a Subcommittee of the State Bar, reflecting the results of a comprehensive survey of attorneys, judges, and courthouse personnel,[3] and newspaper studies and articles. Each of these reports bears out the anecdotal evidence and describes numerous profoundly disturbing systemic deficiencies.

The Texas system is marked by the following features:

- Disparity in the manner in which counsel are appointed, the quality of counsel, and the compensation and funding provided. Texas' appointment system is county-based. There are 254 counties, and numerous courts within each county. Some say that there are 800 different appointment and compensation systems—a different one for each court.
- A lack of meaningful statewide standards. Up until 1995, there were no standards whatsoever governing the appointment of counsel in capital cases. Anyone, even a tax attorney, could be appointed to represent a defendant facing a sentence of death—and were. In 1995, legislative revisions required that each of the nine administrative regions establish regional standards, but the results were minimal at best, and the failure to comply with the statute bore no consequences—except for the defendant.

For example, the Dallas Morning News recently found that 24 attorneys who had been designated as qualified to represent capital murder defendants had been disciplined for misconduct, one having been suspended from practice twice. As the News observed: "The judge who ordered the most recent suspension [of this attorney] . . . . delayed its activation so the attorney could finish a capital murder case he had been appointed to handle. He has since received other death penalty cases—as well as another reprimand from the bar." The same News study confirmed that the trial lawyers who had represented Texas death row inmates had been disciplined at approximately eight times the rate of lawyers as a whole.[4]

In a study conducted by the Chicago Tribune, they found that in one out of three of the cases examined, the trial lawyer presented no evidence, or only one witness at the sentencing phase of trial—the phase where the jury decides whether their client should live or dies.[5]

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[2] A copy of The Fair Defense Report may be obtained from Texas Appleseed at www.appleseeds.net/tx.

[3] See Allan K. Butcher & Michael K. Moore, Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas 12 (Sept. 22, 2000), at http://www.uta.edu/pols/moore/indigent/whitepaper.htm.

[4] Defense Called Lacking for Death Row Indigents, But System Supporters Say Most Attorneys Effective, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A.

[5] Steve Mills and Ken Armstrong, Flawed Trial Lead to Death Chamber, CHICAGO TUNE, June 11, 2000, at Sec. 1, p. 1.

One particularly egregious example is that of Joe Lee Guy, whose attorney ingested cocaine on the way to trial, consumed alcohol during court breaks, and had been disciplined numerous times both before and after Guy's capital trial.[6] In fact, he could not complete the appeal of Guy's case because of a recent suspension. These facts only came to light after TDS intervened on the eve of Mr. Guy's scheduled execution, and recruited a law firm to represent Mr. Guy on a pro bono basis. It is worthwhile noting that Mr. Guy, the lookout, was the only one of the three defendants who was sentenced to death—his two co-defendants, the "shooters," were both sentenced to life after their attorneys presented a compelling case for life on their behalf. It is a particularly good example of the title of Stephen Bright's oft-quoted statement: "the death sentence not for the worst crime, but for the worst lawyer."

While the Fair Defense Act establishes, for the first time, minimum statewide standards for capital trial counsel, the standards that Texas legislators were willing to pass are fairly minimal, requiring only that counsel have five years of experience in criminal litigation (defense or prosecution), and only "significant" felony experience as defense counsel. Moreover, without the funding necessary to enable qualified counsel to litigate these cases, and the concomitant support and independence necessary to make that possible, these standards will affect very little change, and will not prevent horror stories such as sleeping or drug-addicted capital counsel.

Impermissible factors, irrelevant to questions of qualifications, affect the elected judiciary's appointing decisions and compromise the quality and independence of appointed counsel. According to the State Bar Study, nearly half the judges reported that their peers "sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of defense they provide*," and over half indicated that the "attorney's need for income" influenced the appointment decision. Significant numbers of judges reported that their appointment decisions were affected by whether a defense attorney was a personal friend (39.5%), a political supporter (35.1%), or a contributor to the judge's reelection campaign (30.3%).[7]

While the Fair Defense Act permits and encourages counties to establish a different, more neutral appointment system, it does not require them to do so, and in fact permits them to retain their current system. There is nothing to say that judges will not continue to appoint attorneys based not on their qualifications, but on the basis of how quickly and cheaply they move cases through the courts, or how much was donated to the appointing judge's reelection campaign.

Trial courts do not provide the resources necessary to defend a person accused of a capital crime. Compensation varies drastically between the counties. In many of the more rural counties, it is not enough to cover overhead expenses. In others, "fixed" or "flat" fee structures provide incentives for attorneys to do as little work as possible on the case. In one county, compensation for out of court time is limited to 60 hours—one twentieth of the amount of time that is spent, on average, preparing for a federal capital trial. Until 1995, Texas law capped the entire amount defense counsel could request for investigative and expert expenses at $500, and anecdotal evidence indicates that many judges still apply the old limits.

For example, the attorney who represented Paul Richard Colella in his 1992 Cameron County capital murder trial was not reimbursed for an investigator and was not paid until almost two years after the trial ended.[8] When he was paid, he received only $9,000 for handling both the trial and the initial appeal of the case. Dividing this payment by the attorney's estimates of the number of hours he worked yields an average of approximately $20 per houror less than one-third the hourly overhead rate in the average Texas criminal defense attorney's practice.[9]

There is a lack of any centralized body of expertise upon which attorneys might draw for resources and assistance. The State Bar Study found that 66% of the appointed lawyers were solo practitioners and the vast majority of the remainder practiced in small firms, most of which were merely clusters of lawyers sharing office expenses. Most of the attorneys reported that only half of their practice involved criminal cases, while the remainder involved civil matters.[10] Thus, most lawyers

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[6] Dan Malone and Steve McGonigle, Questions of Competence Arise in Death Row Appeal: Lawyer with History of Problems Defends Handling of Case, DALLAS MORNING NEWS, Sept. 11, 2000, at A1. See also Linda Kane, Death Row Inmate's Lubbock Attorney Used Drugs, Alcohol, LUBBOCK AVALANCHE-JOURNAL, Sept. 10, 2000, at 12A; A State of Denial, p. 111.

[7] BUTCHER & MOORE, MUTING GIDEON's TRUMPET 12 (Sept. 22, 2000).

[8] Application for Writ of Habeas Corpus at 61–62 and Exh. 62, Ex parte Colella (CCA No. 37,418).

[9] BUTCHER & MOORE, MUTING GIDEON's TRUMPET 15 (Sept. 22, 2000) (reporting that Texas criminal defense attorneys report overhead costs of $71/hr).

[10] Id.

confronting a capital case, if they are interested in providing an adequate defense, must grapple alone with a body of unfamiliar and complex death penalty law, and direct an investigation into the client's background, which can require expertise far beyond the typical criminal case. Unlike the cadre of experienced prosecutors trying these cases, many attorneys appointed to capital cases must start, each time, learning the law from the ground up.

The courts do not take responsibility for correcting the egregious problems—such as snoozing counsel—that are clearly displayed before them. The judge presiding over Calvin Burdine's trial (whose lawyer slept through significant portions of the trial) stated that "the Constitution doesn't say the lawyer has to be awake." The Texas Court of Criminal Appeals routinely denies any remedy to inmates whose court-appointed lawyers perform poorly. Thus, that (elected) Court denied relief to two death row inmates whose lawyers slept through trial, and in the past five years have achieved one of the lowest reversal rates for capital cases in the entire country: three percent.

Errors are generally not revealed in post-conviction proceedings—the appellate proceedings which are supposed to serve as the safeguard to our system—because appointed counsel are profoundly inexperienced, inadequate, and underfunded. In fact, the post-conviction appointment system simply repeats the errors replete at trial, thus making it highly likely that we are not even aware of many of the horror stories regarding what occurs at trial.

In Joe Guy's case, discussed above, the state post-conviction attorney appointed to represent him failed (in her nine page petition) to raise the fact either that trial counsel was struggling with drug and alcohol addiction, or that the investigator appointed to assist counsel had become the beneficiary of the surviving victim's estate. It was only by chance that TDS discovered the case, and its horrifying facts, shortly before Mr. Guy's scheduled execution.

Moreover, the courts appear indifferent to the glaring inadequacies of the work produced. For instance, in a study of over half the post-conviction appeals filed in Texas since 1995, we found that in 42%, post-conviction counsel appeared to have conducted no new investigation, and raised no extra-record claims—even though these are the only type of claims that can be considered for review at this stage.[11] In many cases, appointed attorneys merely repeated, verbatim, claims which had already been rejected by the courts in a previous appeal. In almost one out of five of the cases reviewed, the post-conviction application was less than fifteen pages long—barely long enough to contain the minimal procedural formalities. In a number of cases where such patently inadequate applications were filed, subsequent investigation has revealed significant constitutional errors—such as that of Joe Guy, as well as a possible claim of innocence—that were not included, and would have remained undiscovered if TDS had not become involved.

CONCLUSION

The lethal consequences of the Texas capital system are concrete. Every year, Texas leads the country in number of executions. Last year, Texas set a "record " for the number of executions in one year: 40. We execute disproportionate numbers of people of color, persons who are mentally ill, mentally retarded, and juveniles. Because of the inadequacies of the system—primarily the inadequacies of trial and post conviction counsel—it is also highly likely that we are executing people who are innocent or not eligible for a sentence of death. Tragically, it is the hallmark of the Texas system that its most pervasive feature is its efficiency in burying its mistakes. The Innocence Protection Act is an essential step in bringing these problems to light, and in providing the resources and enforcement mechanisms necessary to provide indigent inmates facing a sentence of death the competent counsel to which they are constitutionally entitled.

Statement of Denise Young, Attorney, Tempe, Arizona

I am an attorney licensed to practice law in Arizona since 1982. Since 1989, my practice has been devoted entirely to representing defendants under sentence of death in appeal and post-conviction proceedings in the state and federal courts, and assisting other defense counsel in representing their clients in all stages of capital proceedings including pre-trial, trial and post-conviction proceedings. I was also the

[11] " See A State of Denial, supra, pp. 104–118.

former director of the Arizona Capital Representation Project, a capital post-conviction defender organization, from 1989 until July, 1996.

I have been asked to describe the manner in which the Arizona courts appoint and compensate counsel for indigent persons in potential capital trials in Arizona. The answer to that question is not an easy one because Arizona has no statewide capital defense office, and no unified system of indigent capital defense. As a result, the costs of capital trials are largely borne individually by each of Arizona's fifteen counties. Due in no small part to Arizona's failure to provide a statewide system of indigent defense with quality counsel and adequate funding for experts and resources, Arizona's reversible error rate is shockingly high. A comprehensive study conducted by Professor James Liebman recently found that Arizona's overall reversible error rate for capital cases is 79 per cent.

State funds account for a very small portion of expenditures on indigent defense in Arizona. In 1999, the state allocated $5 million over two years for prosecution, indigent defense services, and the court system. A rough estimate suggests that of this $5 million, no more than $1 million, approximately one-fifth of total state funding, went to indigent defense.

Compared with other states that provide funds, Arizona ranks at the very bottom in state assistance towards indigent defense representation. Twenty-three states fund indigent defense entirely at the state level. In about half of the remaining twenty-seven states, state funds account for at least 50% of the money spent on indigent defense. Only two states, Pennsylvania and South Dakota, provide no state funding. Assuming that Arizona does indeed spend at least $1 million annually on indigent defense, it ranks last among the 48 states which provide some state funding, based on a per capita comparison of state expenditures.

Because indigent defense services in Arizona are administered at the county level, each county has responsibility for establishing and managing its own system to find, appoint and compensate counsel to represent the person charged with first degree murder where the state is seeking a death sentence. Not surprisingly, the practices in this system vary widely from county to county, with no systematic statewide procedure for compensation, defense training or support. Capital representation at trial is undertaken primarily by a scattering of public and legal defender offices, sporadically located in some counties. Because these offices are typically grossly underfunded and overworked, contract attorneys represent a substantial number of capital defendants at trial. The majority of attorneys handling first degree murder cases at any stage do not practice exclusively in the highly technical and specialized area of capital defense.

Defense procedures vary widely from county to county and there is no systematic procedure for ensuring adequate compensation, litigation expenses, training or support. Since 1996, the Arizona Rules of Criminal Procedure have provided some qualifications for appointment of attorneys. The qualifications, however, speak only to the number of years in criminal work, not to the quality of work done over those years. Arizona Rule of Criminal Procedure 6.8 (b) requires that capital trial counsel have "practiced in the area of state criminal litigation for five years" before appointment, and been "lead" counsel in nine felony jury trials and lead or co-counsel in one capital murder jury trial. It is left to individual courts and counties to determine whether those minimal qualifications are met. Trial co-counsel, upon whom major responsibility is frequently thrust, need have no prior legal experience. Nonmandatory provisions of the rule recommend that appellate and post-conviction counsel should have some appellate or post-conviction experience in felony cases, but the lawyer need not have any capital experience. Additionally, trial counsel is to complete, within one year before the initial appointment, six hours of training in "the area of capital defense." After appointment, no further capital training is required, although "within one year prior to any subsequent appointment" in a capital case, trial counsel must have completed twelve hours of training "in the area of criminal defense."

Trial defense attorneys who are handling these cases in Arizona's counties do not receive adequate resources or assistance, including necessary investigative and expert assistance to competently handle the guilt and penalty phases of the capital case. For example, in Pima County (the second most populous county), private contract attorneys represent about 83% of the county's capital defendants. As is characteristic of defense attorneys statewide, most of these attorneys do not practice exclusively in capital defense. Pursuant to these contracts, an attorney is paid $3000 for providing representation in a serious felony case, and $800 for other felonies. In first-degree murder cases, lead defense counsel is paid $75 per hour up to a maximum of $15,000, compensating about 200 hours of work, and co-counsel receives

$60 per hour up to a limit of $7,500, compensating about 183 hours of work.[1] In stark comparison to Arizona's estimation, the New York State Defender's Association has estimated an attorney's time for a death penalty trial at 800 to 900 billable hours. Even if one aggregates lead counsel and cocounsel's time, totaling 383 hours, the ceiling on this compensation in Arizona is grossly inadequate to permit competent representation.

In Maricopa County, Arizona's most populous county, attorneys are appointed from one of four public defender offices, unless a conflict arises. In those cases, attorneys who have contracted with the county to accept court-appointed criminal cases are appointed. Contracts are based on a flat fee. For example, under the major felony contract, which includes first degree murder cases in which the state is seeking death, attorneys are paid $72,000 over a twelve month period to represent nine defendants regardless of the number of hours involved in the case and the number of pending criminal cases each defendant may have. If any of those cases end in a mistrial, or result in a new trial, the contracting attorney receives no additional compensation to retry the case. The contract also obligates the attorney to undertake representation of three more defendants for an additional $8,000 each. If any one of these potential twelve cases is a first degree murder case where the state is seeking death, the attorney is paid "an additional $8,000 when the jury is empaneled." *State* v. *Rivas*, No. CR 1995011272, pp. 6–7 (Mar.Cty.Sup.Ct. Jan, 29, 2001).

In a recent capital case, a Maricopa County criminal defense attorney operating under this contract in a capital case spent 220 hours preparing for the trial. Although these hours are far below those competent counsel must spend to adequately prepare for a capital trial, the county paid the attorney only $16,000.00. Following the client's conviction of first degree murder, the attorney requested additional compensation to prepare for the sentencing phase which he estimated would require an additional 100 hours.[2] The request was refused by the contracting agency. It was also refused by the judge to whom the case had been assigned. Eventually, another judge took over the case, and upon counsel's motion for reconsideration, ordered the contracting agency to meet with the attorney to negotiate reasonable additional compensation for the completion of the work. Id., p. 13. That matter is still pending.[3]

In rural Yuma County, capital cases that cannot be handled by the public defender offices are given to the *lowest* bidder. In one such case, the "winning" bid was a contingency fee with an ugly twist: the lawyer was to receive one lump sum payment up front and a second lump sum if the case went to trial. The client did not want to go to trial and informed his lawyer on numerous occasions that he would accept any plea that did not include a death sentence. The lawyer, however, stood to make a tidy sum if he spent little time on the case and took it to trial. The lawyer did nothing to try to settle the case, and no plea was offered.

Although this case had been remanded for a new trial following postconviction proceedings based on previous trial counsel's failure to present a viable defense that was available to the client, the new trial lawyer failed to even review the postconviction file in the case. He failed to consult with an available expert, already appointed by the court, regarding this defense and he failed to present this defense at trial.

The lawyer failed to communicate with the client in any form for stretches of six months at a time before trial, and again before sentencing. During one of the very few visits between the lawyer and client, both the client and second counsel observed evidence that the lawyer had been consuming alcohol before the visit. In an unrelated case, a different client listened to this same lawyer describe Yuma as a place where the only thing to do at the end of each trial day was get drunk in the hotel bar. The lawyer also said, in public, that his Yuma client was "guilty from the beginning" and the whole trial was a waste of the lawyer's time.

Before trial began, second counsel on this case (who had never tried a capital case before) moved to withdraw, informing the court that it would be unethical for her to continue when it was clear that the client was not receiving adequate representation. In spite of second counsel's sworn testimony that she did not believe the cli-

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[1] The contract does provide that more funds might be available if "special circumstances" are present. What constitutes "special circumstances," however, is unknown.

[2] This estimate, too, is excessively low. Competent investigation for the penalty phase of a capital case begins long before the capital trial begins and generally consumes hundreds of hours.

[3] Another rural county, Yavapai County, also requires counsel to enter into a contract which pays a flat fee for representation in a set number of cases, usually for $70,000. Rural Graham County also uses contract attorneys who are paid $80,000 to provide representation in 100 cases.

ent's attorney was performing effectively-because he failed to conduct any investigation, failed to file necessary motions, failed to communicate with the client or second counsel, and failed to review the file in the case—the court refused to appoint a new lawyer, and instead removed second counsel from the case.

Also before the trial began, the client was subpoenaed as a witness against the lawyer in a criminal case involving another defendant and was asked to testify about the incompetent representation he was receiving and the complete breakdown of his relationship with the lawyer. In spite of the obvious conflict of interest this created, the lawyer failed to withdraw from representation, and the trial court refused to appoint new counsel.

During a recent hearing, the client again requested, and was denied, new counsel. Since his conviction almost one year ago, his attorneys have had almost no communication with him, regularly refusing his collect telephone calls and ignoring his requests for meetings. They have failed to participate in any way in the mitigation investigation in the case, or prepare in any way for the upcoming penalty phase hearing. Shortly after the recent hearing on the motion for new counsel, the mitigation specialist on the case was replaced by a new mitigation specialist.

In another case from a rural county, the client was granted a new sentencing based on counsel's ineffectiveness in failing to present meaningful evidence in mitigation when there was much available which should have been investigated and presented. The lawyer appointed to handle the case at the resentencing failed to hire a mitigation specialist, and conducted very little of his own investigation into mitigation evidence. The lawyer presented only a few witnesses at the resentencing, including a mental health expert who had recently been arrested on domesticrelated charges. The lawyer communicated with the client only a few times in the two years leading up to the resentencing. The client was recently sentenced to death again.

The number of death sentences originating from certain counties is extraordinarily high per capita. Two of Arizona's counties (Maricopa and Pima) are densely populated and contain the state's two largest cities from which the greatest number of death sentences originate. However, eight other counties which are sparsely populated and presumably should account for a small portion of first degree murders state-wide actually contribute over a quarter of all of the inmates on death row.

Arizona has no thorough, unified system of review to determine whether counsel is conducting work in a professional manner. Thus far, as noted above, the quality of representation has been poor. Indigent defendants are frequently appointed counsel who fail to object to constitutional violations, to preserve the objection by properly raising the supporting facts and appropriate provisions of the state and federal constitutions, to investigate, or to request funds needed to investigate and hire necessary experts to identify all the constitutional violations in the case. In this last year, counsel have allowed their clients to plead guilty to first degree murder with no agreement as to sentence, and the defendants were ultimately sentenced to death. A vast number of meritorious claims are barred from later consideration by rulings of waiver, preclusion, and procedural default due to the attorney's failure to raise issues properly, or at all. In Arizona, courts are routinely procedurally barred from hearing the constitutional violations alleged in the cases of numerous capital defendants who have been executed such as Don Harding, whose appointed public defender advised him to represent himself in the hope that the client might create some reversible error, and Luis Mata, whose appointed counsel presented no defense, and little mitigation despite overwhelming evidence that Mr. Mata was brain-damaged and functionally mentally retarded. Those who are facing execution include Ramon MartinezVillareal, a severely mentally ill and mentally retarded Mexican national whose attorney failed to present any evidence concerning his multiple disabilities at his capital trial and sentencing. Although his death sentence was set aside by the federal district court based on his trial counsel's ineffectiveness, that ruling was vacated by the Ninth Circuit Court of Appeals when it concluded that the issue was waived because trial counsel, who continued representing Mr. MartinezVillareal in state and federal postconviction proceedings, failed to raise his own incompetence.

If counsel does attempt to investigate, testing and expert consultation are exceedingly difficult to obtain, whereas prosecution funding is nearly unlimited. The Arizona Supreme Court recently recognized this pervasive inequality: "Superior resources for prosecutors and the constant battle for funds faced by indigent defendants and their counsel, especially in our rural counties, will perpetuate or perhaps even exacerbate the disparity that already exists between rich and poor." *State* v. *Hoskins*, 14 P.3d 997 (Ariz. 2000) (Zlaket, C.J., dissenting). In one small county where a defendant actually was afforded competent counsel, the trial court refused to approve payment for even one mental health expert, appointment of whom was crucial in presentation of the client's mental health defense. Counsel was forced to

file a special action to the Arizona Supreme Court two times to gain the bare resources necessary to protect his client's constitutional right to present a defense. Other defendants, without diligent and ethical counsel, have not been so lucky.

Unlike other states, Arizona's legislators have done little to fill the funding void. Senate Bill 1486 was introduced in the legislature this year to create a capital defense trial office for the rural counties, despite the fact that the vast majority of capital cases are initiated in Maricopa and Pima counties and that nearly 80% of the capital cases in which ineffective counsel claims were granted derived from Maricopa and Pima counties. The proposed office was also grossly underfunded, allocating only $981,250.00 for nine full-time employees and expenses "necessary to carry out the duties of the office." It did not allow the office to undertake representation until "the state has served notice of intent to seek death," although it is well-recognized that some of the most important work that can be done in a potential capital case is early investigation that will convince the prosecutor not to seek a death sentence in a particular case. The bill, however, had a short life, and like other initiatives to improve indigent defense for capital defenders in Arizona, died in a legislative appropriations committee because the appropriations chairperson believed that attempting to provide competent counsel through a statewide office was not a state issue.

In sum, is no reliable system of indigent defense for defendants charged with capital murder exists in Arizona. Quality of counsel is not ensured and investigative and expert resources are scarce. Although the magnitude of these problems as they impact capital defendants is widely recognized, as recent debate and resulting proposals from the Attorney General's Capital Case Commission demonstrate, there is no mechanism in place capable of addressing these problems, and no funding available to create such a mechanism.