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THE ADEQUACY OF REPRESENTATION IN CAPITAL CASES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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THE ADEQUACY OF REPRESENTATION IN CAPITAL CASES

TUESDAY, APRIL 8, 2008

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:20 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senator Feingold.

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

Chairman FEINGOLD. I call the Committee to order. Good morning and welcome to this hearing of the Constitution Subcommittee entitled "The Adequacy of Representation in Capital Cases." We are honored to have with us this morning some very distinguished witnesses. I appreciate the effort they have made to be here today, and I also want to thank the Ranking Member, Senator Brownback, for working with me to put this hearing together. And I am sorry that he is understandably unable to attend. I very much appreciate his commitment to exploring these critically important issues related to capital punishment.

I will start by making a few remarks, and then we will turn to our panel of witnesses for their testimony.

As a result of the litigation before the Supreme Court challenging the constitutionality of lethal injection as a method of execution, there is currently a de facto moratorium on executions in this country. This presents us with an opportunity while executions are paused to take stock of one of the most serious problems still facing many State capital punishment systems, and that is the quality of representation for capital defendants. And that is the purpose of this hearing.

Specifically, today we will examine the adequacy of representation for individuals who have been charged with and convicted of capital crimes at the State level. We will discuss the unique challenges of capital litigation, and the unique resources and training capital defenders need to be fully effective.

The Supreme Court held in 1932, in *Powell* v. *Alabama*, that defendants have the right to counsel in capital cases. The Court explained that an execution resulting from a process pitting "the whole power of the state" against a prisoner charged with a capital offense who has no lawyer, and who may in the worst cir-

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cumstances even be illiterate, "would be little short of judicial murder."

Those are strong but appropriate words. Over the following decades, the Supreme Court continued to recognize the importance of the right to counsel, ultimately concluding in 1984 in *Strickland* v. *Washington* that the Sixth Amendment guarantees not just the appointment of counsel, but the effective—the effective—assistance of counsel.

Yet as the witnesses today know from the variety of perspectives they bring to this issue, these constitutional standards are just the beginning. The work done by a criminal defense attorney at every stage of a capital case and the experts and resources available to that attorney can literally mean the difference between life and death.

This is not a hypothetical. The right to effective assistance of counsel is not just a procedural right; it is not just lofty words in a Supreme Court decision. Failing to live up to that fundamental obligation can lead to innocent people being put on death row.

Just last week, an inmate in North Carolina, Glen Edward Chapman, was released after nearly 14 years on death row, bringing the number of death row exonerees to 128 people. A judge threw out Mr. Chapman's conviction for several reasons, including the complete failure of his attorneys to do any investigation into one of the murders he was convicted of committing—a death that new evidence suggests may not have been a murder at all but, rather, the result of a drug overdose. Local prosecutors decided not to retry Mr. Chapman and dismissed the charges. According to North Carolina newspapers, Mr. Chapman's incompetent defense was mounted by two lawyers with a history of alcohol abuse. News reports indicate that one admitted to drinking more than a pint of 80-proof rum every evening during other death penalty trials, and the other was disciplined by the State bar for his drinking problems.

Yet despite all this, Mr. Chapman on the day of his release is quoted as saying, "I have no bitterness." This after nearly 14 mistaken years on death row.

Mr. Chapman's story is astounding, but it is not unique. The quality of representation in capital cases in this country is uneven, at best. And the story also illustrates a critical point: The right to counsel is not abstract. It absolutely affects outcomes. Supreme Court Justice Ruth Bader Ginsburg has stated it about as plainly as possible: "People who are well represented at trial do not get the death penalty."

Obviously, inadequate representation is not unique to capital cases. But the challenges presented in a death penalty case are unique, and the consequences of inadequate representation catastrophic. Capital cases tend to be the most complicated homicide trials, and the penalty phase of a capital case is like nothing else in the criminal justice system. To do these cases right, at the trial, penalty, appellate, and State post-conviction stages, requires vast resources and proper training—not only for the defense attorneys who need to put in hundreds of hours of work, but also for the investigators, the forensic professionals, mitigation specialists, and other experts.

Yet those resources are not available in all too many cases. We will hear more about that from our witnesses today. These realities have led people of all political stripes—both supporters and opponents of the death penalty—to raise grave concerns about the state of capital punishment today. Judge William Sessions, the former FBI Director appointed by President Reagan, was unable to join us in person today, but he submitted written testimony, which without objection I will place in the record. In it he notes that while he supports capital punishment, "[w]hen a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined."

Unlike Judge Sessions, I oppose the death penalty. But as long as we have a death penalty, we owe it to those who are charged with capital crimes, we owe it to our criminal justice system, and we owe it to the principles of equal justice on which this Nation was founded, to make sure that they have good lawyers who have the resources they need to mount an effective defense.

This is not just the right thing to do. It is not just a high aspiration we should try to achieve at some point in the distant future. It is a moral imperative. And it is one that this country has failed to live up to for far too long.

We will now turn to the testimony from our witnesses. Will the witnesses please stand and raise your right hand to be sworn? Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GRECO. I do.

Mr. STEVENSON. I do.

Judge TEMIN. I do.

Mr. VERRILLI. I do.

Chairman FEINGOLD. Thank you very much, and you may be seated. I want to welcome you and thank you for being here with us this morning. I ask that each of you limit your remarks to 5 minutes, as we have a lot to discuss. Your full written statements will, of course, be included in the record.

Our first witness is Michael Greco. Mr. Greco is a former President of the American Bar Association, has served on the ABA Board of Governors, and has been a delegate in the ABA House of Delegates for more than 20 years. He is a partner at the law firm of Kirkpatrick & Lockhart Preston Gates Ellis in Boston.

Mr. Greco, thank you for your record and what you have done, and thank you for joining us. You may begin.

STATEMENT OF MICHAEL S. GRECO, FORMER PRESIDENT OF THE AMERICAN BAR ASSOCIATION, AND PARTNER, KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP, BOSTON, MASSACHUSETTS

Mr. GRECO. Thank you, Mr. Chairman, and thank you very much for giving the American Bar Association the opportunity to present testimony this morning on the subject of today's hearing, the adequacy of defense representation in capital cases and its impact on the administration of the death penalty.

This subject relates directly to Americans' most cherished constitutional principles: protecting the rights and freedoms of all citi-

zens, and ensuring that justice is done for all. My written statement to the Subcommittee details the many serious problems that the ABA's 4-year survey, just completed, has found with the administration of the death penalty in the United States. In the several minutes I have to speak, I will focus my remarks on two points: one, the deplorable quality of defense representation in death penalty cases in our country; and, two, the ABA's recommendations as to what measures Congress and death penalty jurisdictions should take to correct the situation that now exists.

I note at the outset that the American Bar Association has not taken a position on the constitutionality or appropriateness of the death penalty.

So the first issue, What has the ABA survey determined about the quality of death penalty representation in the United States? The ABA's findings, taken as a whole, establish that ineffective death penalty representation is pervasive throughout the States, and that the administration of the death penalty in America is shameful.

State governments for decades have failed to take necessary steps to address longstanding and systemic problems in administering the death penalty. As a consequence, too many defendants, especially those of low income, do not receive fair trials, and mistakes leading to injustice occur far too often.

Conducted by the ABA's Death Penalty Moratorium Project, the ABA survey examined the death penalty systems in eight States. State-based assessment teams, composed of experienced and respected individuals, conducted the surveys in each State. The research teams collected comprehensive data in 12 important areas, starting with the most important area—competency of defense representation.

While the scope and detail of the problems may differ among the States, most of the identified problems are disturbingly universal throughout all the States. Ineffective defense representation was found to exist in every State surveyed. Effective representation in a death penalty case requires lawyers with specialized training and experience in death penalty cases, fair compensation to the lawyers who undertake these cases, and funding for defense lawyers to engage necessary investigators and experts. These key elements are now generally being ignored in death penalty jurisdictions.

A comprehensive study conducted in the year 2000 established that between 1973 and 1995, State and Federal courts reviewing capital cases determined that retrials or resentencing were necessary in 68 percent of the cases reviewed. Competent defense counsel with adequate resources would have averted the constitutional errors that led to a miscarriage of justice, that led to cruel and unusual punishment for defendants, that led to lack of closure for victims' families, and to terribly wasteful use of taxpayer money. The ABA assessment criteria included five separate recommendations regarding competency of defense counsel.

Not one—not one—of the States surveyed fully complies with any of those criteria. Most egregiously, two of the States surveyed failed to provide for the appointment of counsel at all in post-conviction proceedings, leaving death row defendants desperate for legal assistance. The various causes that have contributed during the past

three decades to the current crisis are detailed in my written statement and are well known to many of us in this room. It suffices to say that these causes have greatly increased the risk that an innocent person may be executed, and that, in your words, Mr. Chairman, in your introduction, judicial murder may be committed.

But rather than focusing on the reasons that our justice system continues to fail indigent defendants, let me address instead what we must do to remedy the situation. What should Congress and the death penalty jurisdictions do? What measures to take to address and correct the deplorable situation?

First, Congress should carefully reexamine its policies and correct or repeal those that may have contributed to the current situation. For example, data should be collected on the effect that the Antiterrorism and Effective Death Penalty Reform Act of 1996 has had on the administration of the death penalty in our country. Next, Congress should consider new legislation to address the systemic problems that are detailed in the ABA survey, and implementation of any newly enacted legislation that affects death penalty procedures must be carefully monitored and evaluated. Congress needs to place greater emphasis on adequate funding to help death penalty jurisdictions eliminate the injustices detailed in the ABA survey.

This may be a little controversial, but I will say it in any event: The ABA believes that Congress should consider providing financial incentives to States or withholding funding from States that fail adequately to fund a competent death penalty system, as Congress has done in other areas.

Finally, the ABA guidelines discussed in my written statement provide death penalty jurisdictions with a clear blueprint for reform. Congress should express its approval of implementation of the ABA guidelines in every way possible. Significant resources—financial and human—must be committed by Congress and by death penalty jurisdictions to ensure that our justice system is fair and that innocent lives are not taken.

I close by quoting one of my predecessors and good friend, former ABA President John J. Curtin, Jr., of Boston, who nearly two decades ago said this: "A system that will take life must first give justice."

Thank you, Mr. Chairman, on behalf of the American Bar Association for this opportunity to address this important subject.

[The prepared statement of Mr. Greco appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Mr. Greco.

Our next witness is Bryan Stevenson. Mr. Stevenson is the founder and Executive Director of the Equal Justice Initiative in Montgomery, Alabama, and a clinical professor of law at NYU Law School. Since 1985, Mr. Stevenson has represented indigent defendants and death row prisoners and has secured relief for dozens of condemned prisoners. He is a recipient of the prestigious MacArthur Foundation's Genius Award and many other national awards for his work.

Mr. Stevenson, thank you for joining us and please proceed.

STATEMENT OF BRYAN STEVENSON, EXECUTIVE DIRECTOR, EQUAL JUSTICE INITIATIVE, CLINICAL PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, MONTGOMERY, ALABAMA

Mr. STEVENSON. Thank you, Mr. Chairman. I want to first extend my appreciation to you for convening this hearing and for your leadership in promoting fairness in the administration of criminal justice.

It is unfortunate, but I do not think controversial, for me to assert that our criminal justice system is incredibly wealth-sensitive. We have a criminal justice system in this country that in most jurisdictions treats you much better if you are rich and guilty than if you are poor and innocent. And while that is deplorable and horrific, in death penalty cases, it is unacceptable. This legacy of inadequate legal representation has now created an environment where the death penalty in most jurisdictions is fundamentally flawed by unreliability that is largely created by an inadequate indigent defense.

The U.S. Supreme Court has created standards, but these standards have not been met or satisfied in most death penalty jurisdictions. I would like to talk about this in three areas: first at the trial stage, then on direct appeal, and then in post-conviction.

You noted in your opening statement that we have now had nearly 130 people released from death row after being proved innocent. During that same 30-year time period, there have been 1,100 executions. This means that we are dealing with a rate of error in death penalty administration in this country that suggests that for every eight people executed, we have now identified one innocent person. The ratio of innocent people is actually much higher because we have not achieved finality in the other 3,500 cases, but it is a shocking rate of error.

It is my view that in most of those cases, wrongful convictions were largely the result of bad lawyering. While we have introduced DNA and other techniques to help us expose wrongful convictions, bad lawyering is the common denominator.

At the trial level, we have seen gross underfunding of capital defense work. In my State of Alabama, 60 percent of the people on death row were defended by lawyers appointed by courts who, by statute, could not be paid more than $1,000 for their out-of-court time to prepare the case for trial.

In Texas, hundreds of death row prisoners are awaiting execution after being represented by lawyers who could not receive more than $500 for experts or mitigation services.

In Oklahoma, in Mississippi, in Florida, in Virginia, in Georgia, and, in fact, in most of the States where the death penalty is most frequently imposed, there are hundreds of death row prisoners whose lawyers had their compensation capped at rates that made effective assistance impossible. And yet we have done nothing to confront that history. These are the cases that are now moving toward execution, and in the next 3 years, these condemned prisoners face death on those unreliable verdicts.

The problems at trial are animated by horrific incidents: sleeping lawyers, drunk lawyers, abusive lawyers. I was in Oklahoma last month testifying in a case where a death row prisoner had been

represented by a lawyer who was abusing drugs and alcohol; was actually admitted to a rehab center 3 weeks after the trial; who actually threatened his client 2 months after meeting him; asking the bailiffs to take off his handcuffs so this man could whup him, and notwithstanding all of this conflict, was allowed to represent this man. Not surprisingly, he was sentenced to death. Previously, the defendant was represented by an attorney who waived closing argument and presented no evidence at the penalty phase. This kind of advocacy is, unfortunately, not the exception. In too many jurisdictions, it is the norm.

The problem of trial advocacy is aggravated by problems on appeal. I have attached to my statement today a brief that was recently filed on behalf of a death row prisoner in Alabama. It is the main brief, the only brief to present and preserve issues in this death row prisoner's case. It is 11 pages long. It presents not a single coherent constitutional issue. This week, my office will file papers at the Alabama Supreme Court begging that court for the right to let a death row prisoner whose lawyer has failed to file a brief back into court. This is the third instance this year where a death row prisoner has had his appeals forfeited because a lawyer simply never filed a brief. These problems on direct appeal do not get resolved in post-conviction because our court has yet to recognize a right to counsel for even death row prisoners in collateral review.

There are 3,500 people on death row in this country. There are hundreds that are literally dying for legal representation. They cannot find lawyers. We do not provide them a constitutional right to counsel, and so we rely on pro bono lawyers, volunteer legal aid. In many jurisdictions, these lawyers cannot be found. We have two people in Alabama whose appeals will expire in the next 6 weeks if they do not find lawyers. We have not found them yet.

These problems of collateral review are also compromised by limits on compensation to appointed counsel. In my State, an appointed lawyer who represents someone on death row in collateral appeals by statute can only be paid $1,000. These problems are aggravated in many ways by post conviction law, by recent pronouncements from this Congress, and by the courts.

I just want to conclude by echoing one of the recommendations that was made by Mr. Greco. The Antiterrorism and Effective Death Penalty Act has absolutely aggravated the problem of bad lawyering. By insulating review of bad lawyering from Federal courts, we are tolerating greater and greater incompetence in these cases. We have now precluded remedies for constitutional violations because if the lawyer does not object, those issues do not get reviewed.

I just want to conclude by saying that none of our work to make the death penalty fair on race issues, on access issues, on resource issues can be achieved until we deal with bad lawyering. Just one quick example: I will be arguing a case at the Eleventh Circuit in a couple of months dealing with race bias. It is a case out of Selma, in Alabama. In that case, the prosecutor excluded all African-Americans from serving on the jury; he excluded 16 black people. It is a majority black county where an African-American was tried by an all-white jury. The prosecutor, in justifying these reasons, actu-

ally said that six of the African-Americans "looked like they were of low intelligence." Since the defense lawyer did not object, every court that has reviewed that evidence of bias and discrimination has upheld it.

The problem at the Eleventh Circuit will be getting the judges to confront this kind of race bias, what it means to that whole community to have someone executed with that kind of discrimination and bigotry, and what it means for this man that the lawyer failed to do his job. Because the lawyer failed to do his job, the court is not obligated to talk about the merits of the claim.

This problem of bad lawyering is central to fair and just administration of the law. Until we solve it, we are going to be fundamentally thwarted in our efforts to create reliable justice in these cases, and I really commend this Congress and the leadership of this Committee in helping us achieve that result.

Thank you.

[The prepared statement of Mr. Stevenson appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Stevenson, for your interesting testimony.

Our next witness is Judge Carolyn Engel Temin, a senior judge of the Court of Common Pleas of the First Judicial District of Pennsylvania in Philadelphia. She has presided over hundreds of capital cases. Before joining the bench in 1984, Judge Temin was an Assistant District Attorney in Philadelphia County, and she has also worked at the Defender Association of Philadelphia. She is the principal author of the Pennsylvania Bench Book for Criminal Proceedings and has been honored with numerous awards over the course of her distinguished career.

Judge Temin, thank you for joining us today, and you may begin.

STATEMENT OF CAROLYN ENGEL TEMIN, SENIOR JUDGE, COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA

Judge TEMIN. Thank you very much, Senator Feingold, for having a hearing that would bring these issues to the forefront.

As a sitting judge, I can tell you that nothing is worse than presiding over a penalty phase of a death case in which you are watching a lawyer do a bad job.

Since the recent trilogy of appellate cases coming down from the Supreme Court, it has become much easier in my jurisdiction to repair some of these problems on appeal on collateral attack. In Pennsylvania, you can only raise ineffective counsel on collateral attack, so, number one, you have to wait until it is time for the collateral attack after you have exhausted your direct appeal possibilities.

I also want to emphasize that collateral attack, although it is better than nothing, is not a very good panacea for the problems of ineffective assistance of counsel. These hearings, these post-conviction hearings, are extremely expensive and extremely laborious. They involve hiring all the people that should have been hired initially by trial counsel, by presenting that evidence to the post-conviction judge. And then if the defendant is granted a new penalty phase hearing and if that is eventually affirmed by the Supreme

Court of Pennsylvania, then doing it all over again at a new penalty phase hearing—and I can tell you after having presided over a number of them that nothing is worse than what I call a "standalone penalty phase hearing," where you basically pick a jury, bring 12 people in off the street, and tell them, "We don't have to worry about the guilt phase. The defendant has already been found guilty of murder in the first degree. You folks just have to decide life or death." These hearings present numerous problems, both for the prosecution and the defense. How the facts of the case are presented to the jury hearing only the penalty phase is a big problem. And these cases are often brought 20 and 30 years after the original trial where records are lost, witnesses die, and there may be irreparable prejudice to the defense. In fact, that issue is presently before me where the Defender Association in a case has raised the issue of whether the State, having been responsible for appointing a lawyer who has been found to be ineffective by the Supreme Court of Pennsylvania, is estopped from holding another penalty phase hearing because of prejudice caused to the defendant.

So, in my view, being able to get a new penalty phase on collateral attack is not the answer. The answer is to provide effective counsel in the first place. And I sit in a jurisdiction, Philadelphia—by the way, it is not just a State issue. Many States have statewide Defender Associations. In Pennsylvania, each county is different. So it can be a county-by-county problem as opposed to a State-by-State problem. We try to provide effective counsel. We have an excellent Defender Association, but they will only accept 20 percent of all murder cases. That is their policy.

For the rest of the cases, we rely on court-appointed counsel and then privately retained counsel. Court-appointed counsel must go through a certification program, which, of course, they sometimes only sit through. We also require the appointment of two counsel in every capital case, one of whom is the mitigation counsel, who has to be also trained in a separate course. But I will tell you that my experience is that private appointed counsel fall generally far below the standards of the Defender Association counsel.

I would just in my remaining time like to talk about what I think are things that can be done to ensure that every defendant in a capital case has effective assistance of counsel.

One is a suggestion that may sound revolutionary, it is done in other countries, and that is to say that every defendant in a capital case should be entitled to court-appointed counsel. This is done in other countries that do not have capital punishment. Bosnia and Herzegovina for one, which is an emerging democracy, allows defendants to have their own choice of court-appointed counsel in any case punishable by more than 10 years.

Then I think we have to adopt the standards, the ABA standards, as the law, as the minimum standards for appointed counsel.

And, third, we have to fund either specialized capital defender offices or existing defender offices to provide effective representation. Defender offices are able to develop their own what I call "stable of experts," so they are able to provide very good and effective experts in every case. And we would not have to rely on private counsel. The worst counsel are the privately retained counsel over whom the court has absolutely no control at all. With court-ap-

pointed counsel, we have some control over the preparation of the case, and also if counsel are doing a bad job before the trial, we can replace them.

So these are the things that I suggest, and I would suggest that the Congress can do some of the these that have been suggested by other panelists to encourage States to adopt the ABA standards and provide effective appointed counsel. And I want to underscore what Justice Ginsburg said, which Senator Feingold quite rightly referred to. The quality of counsel can often make the difference between life and death. We know that. And it isn't just following a laundry list of things that a lawyer must do. There are many subtle things that go into making an effective counsel: ability to connect with the jury, ability to strategize—just very subtle things that I as a trial judge see every day. And I think that these things are best provided by Defender Associations who have the ability to train their staff and have the ability to find adequate experts to represent their clients.

Thank you.

[The prepared statement of Judge Temin appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Judge Temin.

Our final witness is Donald Verrilli. Mr. Verrilli is a partner at the Washington, D.C., office of Jenner & Block. He has argued numerous cases before the U.S. Supreme Court, including *Wiggins* v. *Smith*, in which he successfully defended the right to effective counsel at the penalty phase of a capital proceeding. He is also an adjunct professor of constitutional law at the Georgetown University Law Center.

Mr. Verrilli, thank you for being here today, and you may begin.

STATEMENT OF DONALD B. VERRILLI, JR., PARTNER, JENNER & BLOCK LLP, WASHINGTON, D.C.

Mr. VERRILLI. Thank you, Mr. Chairman. I personally am very grateful that you have focused attention on this critically important issue that ought to matter to all of us in this profession a very great deal.

I have got a somewhat different perspective on this set of issues. I am a civil litigator, not a criminal lawyer. But I have for more than 20 years devoted a portion of my time pro bono to the representation of condemned prisoners on death row. I became involved in that because, as a law clerk more than 20 years ago, reviewing emergency stay applications with pending executions, it became painfully obvious to me that the quality of lawyering for those on death row and facing execution was abysmally bad, and I have tried over the course of my career to do something about that in a small way.

The *Wiggins* case, which managed after a 10-year odyssey to make its way to the Supreme Court, was a product of that, and it was a case for me that was quite illustrative and opened my eyes to what I think the real significant problems are. A key part of that problem, I think, begins with the unique nature of capital trial.

Of course, the defendant's life is on the line, and a critically important part of the defense counsel's job is to do everything possible to try to disprove the defendant's guilt. Then, of course, there is an

entirely separate phase in a capital trial, the penalty phase in which the—if the defendant is found guilty, the question becomes life or death, and the defense lawyer's job is to put together that case for life. And what we learned through the *Wiggins* case is that that is an extraordinarily laborious job. It requires hundreds, if not thousands, of hours of attorney time. It requires often tens of thousands of dollars' worth of expert assistance to build a meaningful case for life.

Indeed, when we took over the *Wiggins* case in the State post-conviction review, after the direct appeals were concluded, the first thing we learned as we dug in was that the trial lawyers simply had not done that. They had not put together anything with respect to trying to prove a case for life at the sentencing phase of the trial. So that is what we dug in and did, spent the kind of hours and resources I just described. And what we learned was that, in fact, this defendant, Mr. Wiggins, had had a horrific, horrific childhood and background, subject to awful abuse from his natural mother, who was an alcoholic, taken away at age 6, put into foster care where he was sexually molested by the foster father for a period of 6 years, removed from that home, put in another home where he was gang raped by the natural kids, naturally left that circumstance, ran away, became homeless.

That was the kind of background that we discovered through our efforts that had not been discovered before, had not been presented to the jury, and when we did present that evidence in the context of showing what counsel should have done in the initial trial, we were fortunate enough eventually to prevail in front of the Supreme Court. And so maybe you could think of that as a success story, I supposed, in that eventually justice was done in that case. The death sentence was vacated, and then Mr. Wiggins did not receive a death sentence on retrial. But really that is a failure, that story. That is a failure of the system. All of those thousands of hours of effort, all of those many years of time, all of the lack of closure for the victim's family, all the resources the State had to put in were totally unnecessary. They were all the product of bad lawyering at the outset.

And so I think that the notion that having this kind of focus on the post-conviction review with private pro bono firms coming in to do this work to save the day is really a mistaken notion. What we need is to be in a situation where you do not have to confront this kind of problem. And it seems to me it is pretty clear what the answer is, and it is twofold: One is training, and I feel quite certain that had Wiggins' trial lawyers received appropriate training—which they did not—they would have understood about the nature of the case they needed to build. And the other is, of course, resources. If you can contrast the thousands of hours of attorney time and the tens of thousands of dollars of disbursements for experts that we put in, the amount of time and the amount of money that is normally afforded—and Mr. Stevenson described very well, I think, the kinds of limits that prevail around this country, and you can see the vast gap between the two. The answer seems pretty glaringly obvious that this is about resources, that if you want to get effective lawyering, it has to be paid for. And that seems to me ought to be front and center in the debate.

Thank you.

[The prepared statement of Mr. Verrilli appears as a submission for the record.]

Chairman FEINGOLD. Thank you, sir, and I thank the entire panel.

Just before we move into questions, Senator Leahy, the Chairman of the Judiciary Committee, who, of course, has long been dedicated to this issue, has asked that his statement be placed in the record, and without objection, it will be placed in the record.

Mr. Greco, capital punishment can be a highly divisive issue, yet my understanding is that the teams that conducted the State-by-State evaluations for the ABA State Assessment Project, which found so many problems with the capital defense systems in all eight of the States that were studied, consisted of local experts from a variety of perspectives. Can you tell us a little bit more about the diversity of viewpoints that made up these State teams?

Mr. GRECO. Yes, Mr. Chairman. First, we deemed it important that the experts doing the State surveys be from the State in which the survey was being done. To that end, we had on the assessment teams prosecutors, defense counsel, legislators, current or retired, judges, current or retired, bar leaders, and other people, and access to others in the community so that the effort was made to make the assessment team as broadly representative of all aspects of the criminal justice system as possible. And we think we had such diversity on the assessment teams.

Chairman FEINGOLD. And I take it—and I hope I am right about this—that these teams were comprised of people who both supported and opposed the death penalty, and they all agreed that there were major flaws in each of these State systems. Is that correct?

Mr. GRECO. That is correct, Mr. Chairman. There was no litmus test for someone being appointed to be for or against the death penalty or for or against the moratorium. We wanted open-minded people who would look at the fairness of the State's capital system.

Chairman FEINGOLD. Judge Temin, you have explained that in Philadelphia there is a mixed system of representation for indigent defendants in capital cases, with some being represented by the Defender Association, but many more securing representation through court-appointed counsel. Is it true that not many lawyers are willing to take court appointments in capital cases? And why do you think that is?

Judge TEMIN. Yes, it is true. We have a very small group of lawyers that take appointments, and it makes it very difficult for us to list those cases in a timely manner because of the lawyers' schedules rather than the court schedules—sort of the opposite of the usual situation.

The reason is because it is such—well, first of all, they are underpaid. They are really providing pro bono representation. The lawyers are paid approximately $7,000 apiece for the team, which is far below what they are actually putting in and far below what they charge to their private clients.

And then getting experts is a very laborious process. Our court gives out about $1,500 to $2,000 automatically at the request for an expert. Experts do not work for that amount of money. They re-

quire 2 and 3 times that amount. And generally what happens is the lawyers have to bargain with the experts to get them to not charge their usual fee, and then petition the court specially for each expert to ask us to allow additional funds, which we generally do at the trial level, and then at the administrative level, that is sometimes cut down the lawyer's request for additional fees, which they are allowed to ask for, but they have to petition and file very specific, laborious petitions showing all their time. Usually the administrative judges feel it is their job to cut those down a little bit, and a lot of lawyers that I know have stopped—a lot of very good lawyers refuse to take appointments because it is just too much trouble to do. As a result, we have a very small number of lawyers who are able to take court appointments in capital cases.

Chairman FEINGOLD. And I take it, apart from the set fees, that it is difficult for lawyers to obtain additional compensation in these cases?

Judge TEMIN. Yes, they have to file a specific, very detailed petition stating all their time and so forth.

Chairman FEINGOLD. OK. Mr. Stevenson, following up on that, many States place limits on the fees that attorneys can be paid in a capital case, including limits as low as $2,000 in Mississippi. But most States that have caps also permit those limits to be waived in certain circumstances, often by allowing the attorney, as was just suggested by Judge Temin, to petition the court for additional compensation.

In your experience, are these types of waiver provisions effective in allowing attorneys to be compensated adequately for the work necessary to properly defend in a capital case?

Mr. STEVENSON. No. I mean, the problem is that you have to do the work before you know whether you are going to get paid. If you are a private lawyer in a system where you have other paying clients and you have other economic pressures, it just becomes unreasonable to do that kind of hopeful litigation.

And so, even when local judges frequently support the lawyer's appeal, as the Judge mentioned, there are administrative bodies that have the authority to cut these vouchers or cut these payments that have even been authorized by judges. So you have to worry about two levels of authorization—the local level and the administrative level. Most lawyers in a competitive economic environment simply cannot afford to give hundreds of hours of work to the system for free or without assurances that they will be paid.

That is aggravated by a larger problem. These improvements in compensation—and that is what we are talking about at this universe, where the caps have been waivable and what not—have all come in the last 5, 6, 7 years. I just want to emphasize that the majority of people on death row in this country were represented by lawyers at a period of time when even these waivers of caps were not available. And we have done absolutely nothing to assist those people whose convictions were fundamentally flawed by very, very rigid compensation caps.

Chairman FEINGOLD. Mr. Verrilli, say a bit more about why the sentencing phase of a capital case is so different from non-capital criminal cases and why it takes so much preparation.

Mr. VERRILLI. Yes, Mr. Chairman. I do think that is a critical point. Some decades ago, the Supreme Court insisted that we have a heightened degree of reliability in our capital sentencing process to minimize the degree of mistake. And one important part of that heightened degree of reliability has been the requirement that the sentencing jury be afforded the opportunity to have a comprehensive sense of the defendant's background and character, that the sentencing judgment is not just about the crime, it is about the defendant's background and character, as well as the circumstances of the crime, in order to allow the sentencing jury to make what Justice O'Connor described as a "reasoned moral response" about what the appropriate level of culpability should be. And the only way that a sentencing jury is going to be able to give that reasoned moral response and have it be one that we as a society can rely on as a just response is if the lawyers have done their job in preparation for that hearing. And what that means is just an extraordinary amount of digging into the defendant's background. You have got to learn all kinds of things that are very difficult to find. You have got to dig out information that may be decades old. You have got to track down witnesses that may have dispersed to the four corners of the globe. And you have got to get people very often to talk about subjects that are extremely difficult that they do not want to talk about—sexual abuse, drug abuse, other kinds of issues that are plainly relevant to that reasoned moral response and take a huge amount of work. Very often you really need experts to help do that.

But that is the link, Mr. Chairman, I think, between the nature of the proceeding and what the Constitution requires that proceeding to be like and the nature of the lawyer's job and the reason why we have got such a pervasive pattern of ineffectiveness of inadequate representation.

Chairman FEINGOLD. Thank you.

Mr. Greco, the ABA's detailed assessments of eight States' capital punishment systems led it to renew its call for a nationwide moratorium on executions, and those studies actually covered many issues. But how big of a role did the quality of indigent defense play in the ABA's decision to advocate for a moratorium?

Mr. GRECO. It was perhaps the primary reason for the call of the moratorium. And if I can go back in history slightly, in 1997, Mr. Chairman, the ABA House of Delegates adopted the moratorium resolution. How did that come about? Father Robert Drinan, who, after leaving Congress after 10 years in Congress, became—to our great joy—a leader in the American Bar Association. He chaired the ABA Section of Individual Rights and Responsibilities. It was Father Drinan who in 1997 convened a number of us to ask, Isn't it time that the ABA takes a position opposing the death penalty?

We debated it, we discussed it, and it was felt that it had to be done incrementally, that at that moment, an abolition resolution was not timely. But could we make the case that indigent defendants were not getting adequate legal representation because people on death row were being found innocent after years and years of incarceration, because there was racial discrimination in sentencing—all these problems needed to be brought to the attention of the American people by recommending a moratorium—let us

stop executing people, until each State that has the death penalty determines that it is administering the death penalty fairly.

The Sixth Amendment to the U.S. Constitution, Mr. Chairman, mentions lawyers, legal representation. It has been pointed out to me that no other profession is mentioned in the Bill of Rights except lawyers. Why is that? The answer is, I think, self-evident: the Founders felt that access to adequate legal representation when one's liberty or life is at stake is so paramount that they expressly wrote into the Sixth Amendment that lawyers shall be available to represent citizens who are accused of a crime and whose liberty or life is at stake.

We have to make good, we have to do better, on that promise in the Sixth Amendment, Mr. Chairman.

Chairman FEINGOLD. Thank you, sir.

This question is for any of the witnesses who would like to address it. As you all know, the 1984 Supreme Court case of *Strickland* v. *Washington* sets out the constitutional minimum requirements for what constitutes effective assistance of counsel. How effective is that constitutional minimum in providing defendants with the legal assistance and resources needed to defend against capital charges?

Mr. STEVENSON. Well, I will begin. It has been quite inadequate as a mechanism for ensuring adequate representation, and there are three reasons for that. One, first of all, to enforce that right, you have to have a lawyer. You have to have a lawyer who can do the kind of work that Mr. Verrilli's firm did in the *Wiggins* case. That kind of work is not possible unless there is access to a lawyer, and, of course, as I stated earlier, there is no right to counsel to have the lawyer make the showing that *Strickland* requires. And so in many of these jurisdictions, even in death penalty cases, people cannot even get to the point where they show that their lawyer was ineffective. That is the first problem.

The second problem is that enforcement of the Sixth Amendment has largely been abandoned, in my judgment, by the Federal courts as a result of the 1996 Antiterrorism and Effective Death Penalty Act. When this Congress passed the AEDPA, it insulated from review constitutional violations like the Sixth Amendment right to counsel, as a result of taking away from Federal courts the discretion to exercise de novo review.

Now these claims get procedurally defaulted. They get barred. They get shielded from Federal scrutiny, and as a consequence of that, the AEDPA has fundamentally undermined the rights provided in *Strickland*.

And, finally, the standard itself really gives, in my judgment, too much deference to State systems. There was a time when we would presume prejudice if the lawyer was drunk, if the lawyer was asleep during trial, if the lawyer was intoxicated. You would presume prejudice. It is just not fair to have a trial with that kind of advocacy. What *Strickland* requires is actually that you prove that something happened while the lawyer was asleep or something happened while the lawyer was intoxicated, and that kind of showing makes the expense of proving a violation much harder.

I think if we return to a standard that created presumptive prejudice, and that put the burden on States to provide adequate rep-

resentation, that would advance the Sixth Amendment in a way that would make our enforcement of the Constitution achievable.

Chairman FEINGOLD. Thank you.

Any other comments on that one? Judge?

Judge TEMIN. Well, I would just say that if you look at—the first prong of the *Strickland* standard was more often satisfied in appellate review and also in collateral attack. But the second prong, the prejudice standard, if you look at the decided cases, was almost never met. In order to have prejudice—I do not know what you had to show. Almost nobody met that standard. Courts just held that, well, yes, the lawyer was asleep, but the defendant was not prejudiced by that. And those of us who are actually in the courtrooms and see what happens know that, of course, it was prejudicial.

But if you look at the decided cases, they show that appellate courts were very loath to reverse cases under the *Strickland* standard. I think the latest trilogy of cases which go to more of a checklist kind of thing where they say the lawyer must do X, Y, and Z, or they are pro se ineffective, are doing much more toward granting appellate relief. But as I said in my initial remarks, that is very, very difficult and very expensive.

Chairman FEINGOLD. Judge, your testimony discusses the required training for defense attorneys who take court appointments in capital cases in Philadelphia, and that is surely better than not requiring any such specialized training. But is sitting through this training enough to create an effective capital defense lawyer?

Judge TEMIN. It is not. Even private counsel who take death cases have to be certified. They are not permitted to litigate capital cases unless they are certified. And just 2 months ago, I had a capital case in which during the penalty phase the lawyer put the mother of the defendant on to beg the jury not to take his life, and that was it. And there was nothing I could do about it. I was shocked and horrified. I had not seen a hearing like that for 20 years. This echoed back to the past, because in the past that is what lawyers did. They did not prepare at all for the penalty phase, and between the guilt phase and the penalty phase, there was usually a short recess, maybe a day, for the Commonwealth to get their case ready, and the lawyer would take the mother and relatives that were there out in the hallway and say, you know, "Get on the stand and tell the jury that they should not vote for execution." And that was the total preparation.

In fact, it might interest you to know that in the collateral attacks that are happening on those cases now, the same relatives that were on the stand, and they are asked by the prosecution, "Well, at the original hearing, didn't you say that he had a wonderful childhood and everything was fine, and now you are telling us, you know, he was abused?" And the answer is, "We were afraid to say that he had a bad childhood. We were afraid that the jury would hold that against him, and so we said everything was good."

But even today, we are getting very ineffective counsel who have sat through these training courses.

Chairman FEINGOLD. Mr. Greco, would you care to comment on what the ABA State Assessment Reports found with regard to attorney training and qualification requirements?

Mr. GRECO. Yes, Mr. Chairman. Thank you. Well, we found it deficient, in a word. The ABA guidelines are quite clear about what is needed to train lawyers who do death penalty representation. And my colleagues on the panel today in their own way have pointed to the importance of adequately trained lawyers to do the defense.

Let me give you a comparison. I would ask any judge, State or Federal, who appoints counsel to defend a death penalty case to think of it as appointing someone who is going to do brain surgery on a dying person. It is that technical, that important that that individual knows the laws, the contours that go into defending a death penalty case. I would ask those judges who make the appointments, "If it were regarding your family member with brain disease, would you want a brain surgeon or the local butcher to come in and do the work needed?" The answer is self-evident.

And so training is important. Some States have said to the ABA, well, we have rules, look, we have got regulations regarding qualifications. That is a step, but enforcement of those rules, where they exist, needs followup to make sure that the end product of that training is what it should be.

So it is a very serious problem, but it really goes back to the subject of this hearing, Mr. Chairman—adequate defense representation, a component of which is training and making sure that the people who are appointed to defend these cases, whether pro bono lawyers or private lawyers, have the requisite training.

Chairman FEINGOLD. Thank you, sir.

Mr. Verrilli, according to a report released last year by the State Bar of Texas, compensation for State post-conviction proceedings in Texas is generally limited to $25,000, and that has to cover paying support staff and hiring experts and investigators.

Now, that may sound like a lot, particularly compared to a State like Alabama, where if post-conviction counsel is appointed, he or she is only paid $1,000 total. But according to the ABA guidelines, post-conviction representation includes a reinvestigation of the entire case, including reading potentially thousands of pages of transcripts.

Sir, you have handled State post-conviction proceedings. For an attorney that does not have the resources of a national firm's pro bono practice, is $25,000 adequate to properly prepare for and litigate a post-conviction challenge to a death sentence? And what kind of odd incentives does capping the fees for post-conviction representation create for the attorneys?

Mr. VERRILLI. Yes, Mr. Chairman, I think there is no chance that that level of funding is going to be enough to get the job done effectively, and there are, it seems to me, three important points to make there.

One is—and I think, Mr. Chairman, you adverted to this—that the $25,000 includes the fees for experts. You could spend easily half that amount, or more, just for the experts.

The second point is that this is extremely labor-intensive activity, and it is unrealistic to think that you are going to be able to get anything like the amount of work done that you would need to get done to be effective within that cap.

And then, third, of course, because it is a cap, you have got an incentive to work hard until you reach the cap, and then what incentive do you have to work at all after that? It seems to me like—obviously, $25,000 is better than nothing, but it is nowhere near what is adequate to get the job done, particularly in the kinds of cases that I have had experience with.

Chairman FEINGOLD. Mr. Stevenson, would you like to comment on that given your work in Alabama and elsewhere?

Mr. STEVENSON. Well, yes, Senator. I do think that the inability of people on death row to get adequate representation in these collateral reviews is a central problem. As Mr. Verrilli indicated, there are very few jurisdictions where there is adequate compensation for that. Our capacity to involve private firms is increasingly exhausted, and so we now have a generation of death row prisoners who cannot access that kind of pro bono assistance.

We actually went to the U.S. Supreme Court last summer in a case that had support from former members of our Alabama Supreme Court asking the Court to revisit this question of whether death row prisoners should have a right to counsel. The last time the Court addressed this was in the 1980s, and at that time, the Court said that no one could show that a death row prisoner had been denied counsel for these kinds of collateral reviews.

Since then, of course, we have had people executed simply because they could not find a lawyer. That has happened in my State. That has happened in Texas. That has happened in other States.

With the introduction of the Antiterrorism and Effective Death Penalty Act, which, for the first time, put a time limit on how much time is available for a death row prisoner to find a lawyer, now you are on the clock once your conviction and death sentence is affirmed. You only have 12 months to find that lawyer.

The problem of finding adequate representation has been greatly aggravated by caps on compensation, by the AEDPA, and by a culture that is now tolerating executions in this environment. And so, yes, I think it is a huge problem. We have 3,500 people on death row in this country, many of whom are going to be at risk of execution in the next couple years, who have not had reliable assessments or evaluations of their convictions and sentences.

Mr. VERRILLI. Mr. Chairman, if I could just followup on that quickly.

Chairman FEINGOLD. Yes.

Mr. VERRILLI. In terms of what private firms can do, you know, of course, we do everything we can. But I can say from personal experience that we get deluged with calls to take on these cases. We take on some, but there is no possible way that we could or firms could generally fill that gap and take on all these cases.

Chairman FEINGOLD. Even States that have State-funded public defender services face serious shortfalls when it comes to indigent defense. Mr. Greco, according to one of the ABA reports, Tennessee public defender offices are so underfunded that, on average, each lawyer is assigned 600 cases per year, and that is in addition to their prior caseload. And in Florida, the legislature makes it a habit to provide public defender offices with half the funding that State's attorney's offices get.

Can these overworked and underfunded offices capably handle capital cases and the enormous amount of work they entail?

Mr. GRECO. No. Simply no. How can a lawyer, who is working as hard as she or he can, handle 14 capital cases at one time and do a competent job for each of those 14 individuals? It is impossible. The ABA encourages States to have statewide public defender systems with necessary training and all the necessary support, and manageable caseloads, and assistance from the other members of the statewide public defender's system given to help lawyers in the counties where these cases are happening.

We do not have a handle yet on how many States have statewide public defender systems. We think very few. Tennessee is one of them. But even when you have a public defender statewide system and you burden a lawyer with 600 cases, 12 to 14 of which are at any time death cases, it is unrealistic to expect that that lawyer is going to do the kind of job that is required. So that has to be addressed as well.

Mr. STEVENSON. Can I just add to that? It is important to recognize that the pressures created by death penalty litigation are part of a broader context where there have also been growing pressures that really are created by mass incarceration. In 1972, there were 200,000 people in jails and prisons in this country. Today there are 2.3 million. The dramatic increase in the number of cases coming into State defender programs and appellate defender programs has been overwhelming for these offices. And most of them do not have segregated, detailed, and designated resources for their death penalty work, so they are trying to manage this tidal wave of cases and the reliance on incarceration to deal with a whole host of problems that we did not previously use the criminal justice system to manage.

So, it is important that this problem be put in context, and I think it is a huge challenge for these defender programs.

Chairman FEINGOLD. Thank you, and I appreciate your answer to all of my questions. Let me give you each, if you want, a chance to say something in conclusion. Mr. Greco?

Mr. GRECO. Thank you, Mr. Chairman. I recall a saying that I first heard when I was a young lawyer in New England thirty-five years ago, when friends of ours in Maine would be given to say, "If it ain't broke, don't fix it." Well, the death penalty system in the United States is broken, and we need to fix it. And I hope that under your leadership, Mr. Chairman, some things will get done to improve the way the death penalty is administered in our country.

Chairman FEINGOLD. Thank you.

Mr. Stevenson?

Mr. STEVENSON. Well, I would just like to say that I do think the death penalty invites a lot of difficult conversation about the morality and the integrity of systems and whatnot. I ultimately think, though, that this issue is a lens into a broader commitment to human rights and justice. I mean, you do not judge the character of a community or a society or the civility of the society or the commitment of that society to justice by looking at how you treat the privileged or the powerful or the wealthy. You judge the character and the commitment to justice of a society and a community by how you treat the hated, the despised, the rejected, the condemned.

In this country, that's people on death row. When we ignore their basic right to counsel and we do not really do the things that we must do to ensure fair and reliable judgment, we not only undermine fairness in that arena, I think we undermine our commitment to human rights. I think we vitiate the integrity of the whole system.

The way we have dealt with death penalty cases and our absence of commitment on indigent defense, I think, has changed the moral question posed by capital punishment. I think in this country where we have tolerated so much bias and discrimination—in my State, there are hundreds of people buried in the ground who were lynched, and on that history, we are now dealing with the death penalty that has horrific racial features. My State produced the Scottsboro boys and *Powell* v. *Alabama*, and yet we fail fundamentally to meet the legal needs of the poor. And when that happens, I think the moral question changes. I think the death penalty in this country is no longer a question of whether certain people deserve to die for the crimes they commit. I think the question has become: Do States, the Federal Government, do jurisdictions deserve to kill when they fundamentally fail to meet the basic obligation of providing counsel and providing fair and just treatment? And consequently, I sincerely hope this Committee can advance the necessary work to make equal justice real.

Thank you.

Chairman FEINGOLD. Thank you for those excellent remarks.

Judge Temin?

Judge TEMIN. Yes, in closing, I would just like to thank you again for providing an opportunity to air these issues. It is very important for the Federal Government to recognize the importance of what has been said by my colleagues on the panel and to take leadership, because we at the State level then can refer to the Federal solution as precedent. And very often the Federal Government has taken the lead, and we as State judges have been able to refer to that and to follow that. And I hope that will happen because judges are somewhat at a loss to prevent a—well, to solve the solution to this problem. It has to be done outside of the courtroom, and then it will affect the justice in the courtroom. If we do not have effective counsel, we do not have a just system. And I have to second what has been said by my colleagues.

Chairman FEINGOLD. Thank you so much, Judge.

Mr. Verrilli?

Mr. VERRILLI. The entire legitimacy of our criminal justice system depends on the right to counsel. It is an adversarial system, and without effective counsel, we can have no confidence in the results of our criminal process.

We in the big firms will continue to do our part to try to redress this gaping chasm that now exists. But it is a systemic problem that goes far beyond our ability to solve it on a pro bono basis, and for that reason, Mr. Chairman, I am very grateful that you have focused this Committee's and the country's attention on this important issue.

Chairman FEINGOLD. Well, let me thank all the witnesses for their testimony and this thoughtful discussion. I appreciate your taking the time to be here, and thank you for your insights. What

we have learned today about the problems with the representation of capital defendants is of great concern to me, and I hope we can continue this conversation, and I am interested in seeing what we can do in this area.

Regardless of the outcome of the lethal injection litigation in the Supreme Court, executions are eventually going to resume in this country. Before that happens, we must aspire to do better, so that every person charged with a capital crime has access to an effective, adequately compensated team of lawyers and other professionals, and so that every person already on death row has a full opportunity to vindicate their Sixth Amendment rights on appeal. It is all too clear from this hearing just how far we are from reaching that goal.

Finally, before we close, without objection, I will place some items in the hearing record. These include the chapters of the ABA State Assessment Reports covering defense services; the 2007 report of the State Bar of Texas Task Force on Habeas Counsel Training and Qualifications; a March 28, 2008, letter from 17 California judges expressing concern about California's death penalty system; the chapter of the Constitution Project's Mandatory Justice Report on ensuring effective counsel; a May 2007 Spangenburg Group report called "Resources of the Prosecution and Indigent Defense Functions in Tennessee"; and the executive summary of an ABA report entitled "Gideon's Broken Promise."

The hearing record will remain open for 1 week for additional materials to be submitted. Written questions for the witnesses must be submitted by the close of business 1 week from today, and we will ask the witnesses to respond to those questions promptly so the record of this hearing can be completed.

Thanks so much, everyone. The hearing is adjourned.

[Whereupon, at 11:25 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

1. Do you agree that the proposed regulations are dangerous and deficient? If so, can you explain how they could exacerbate the problems with representation in capital cases identified in the hearing?

ANSWER: The ABA agrees that the proposed regulations are "deficient" because as currently drafted, they will not permit the Attorney General to determine if the state has established "a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel" in state post-conviction proceedings brought by indigent prisoners who have been sentenced to death as required by Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005. 28 U.S.C. § 2265(a)(1)

While the ABA has not taken a position on whether Section 507 is good policy, the approach taken by the Department of Justice fails to implement and otherwise ignores key aspects of the compromise inherent in the legislation.

First, the proposed regulations ignore significant aspects of the implementing legislation, as well as established legal benchmarks for how key terms in the legislation are to be understood and defined. These flaws include (a) the failure to consider whether the state has established a mechanism for the appointment of ***competent*** counsel, as opposed to any counsel, (b) the failure to limit the consideration of state mechanisms for the compensation of counsel to post-conviction capital cases, as opposed to all post-conviction representations, (c) the failure to implement the statutory requirement that the Attorney General determine the date on which the state's mechanism was effective, and (d) the use of illustrative examples that suggest the Attorney General will certify programs that fall short of established minimum standards regarding the competence, compensation and expense reimbursement of counsel.

Second, the proposed regulations fail to establish uniform standards regarding the content of state applications, as well as the criteria the Attorney General is to utilize in evaluating applications. This *ad hoc* approach to the statutory task does nothing to prevent arbitrary and capricious evaluation of applications.

Third, while the proposed regulations adopt "notice" and "comment" procedures for review of applications, the process for the Attorney General's review and consideration of applications falls well below the standards for agency rulemaking action under the Administrative Procedures Act, as well as the Due Process Clause. In particular, the process for the Attorney General's review and consideration of applications (a) fails to ensure that interested parties have adequate notice of the application and a reasonable opportunity to be heard, (b) expressly contemplates *ex parte* communications between the Attorney General

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and the state applicant, (c) fails to require that any determination is based on reasoned consideration of the evidence, and (d) fails to provide for a procedure by which interested persons can seek review or decertification of a state program once it has been certified, even if the operation of the program falls short of the statutory standard.

The proposed regulations, in short, are deeply and fundamentally flawed. For these reasons, the ABA also agrees that the proposed regulations are "dangerous" because implementation will necessarily affect the ability of death row prisoners to obtain the competent assistance of counsel, fair judicial review of their convictions and sentences, adequate due process, and justice.

2. Attorney General Mukasey has not yet made any public statement on his intentions with respect to the regulations. Is there anything you believe he should keep in mind in deciding whether and how to implement them?

ANSWER: Attorney General Mukasey should remember that he first and foremost has an obligation to ensure justice for all those who enter the criminal justice system. He should take careful note and understand the thousands of Comments -- including those authored by the ABA -- that expressed serious concerns with the proposed regulations. Attorney General Mukasey should utilize the ABA Guidelines for the Appointment and Performance of Defense Counsel when assessing whether a jurisdiction has met its statutory obligations to indigent death row prisoners in state post-conviction proceedings such that it would be entitled to receive the benefits identified in Section 507 of the USA PATRIOT Improvement and Reauthorization Act of 2005.

3. To be consistent with the goals of our criminal justice system and the Innocence Protection Act, how would you recommend revisiting the regulations or the statutory law on habeas review in capital cases?

ANSWER: Attorney General Mukasey should not finalize the regulations as currently drafted and published without first making substantial modifications that meaningfully address the concerns of the Commentators. These changes should include but are not limited to incorporation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

The American Bar Association stands ready to assist the Attorney General and the Department of Justice with regard to improving the proposed regulations.

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Question on DOJ "opt-in" regulations for all witnesses
Submitted by Senator Kennedy

As you may know, the Department of Justice recently issued highly controversial regulations on death penalty appeals in federal courts, under which the Attorney General can certify states for special "fast-track" procedures that will require federal courts to review a state's capital cases on a faster and more limited basis.

In the Patriot Act reauthorization, Congress authorized the Department of Justice to issue regulations on this subject. The intention was that if states develop systems to guarantee adequate representation of death row prisoners, they can receive the benefits of abridged federal court review. The goal was to encourage states to provide adequate counsel to such prisoners and help make sure that innocent persons are not sentenced to death.

The proposed regulations make a mockery of this goal. They fail to provide any meaningful definitions, standards, or requirements to ensure that states have in fact established counsel systems that comply with Congress's intent. They also fail to provide any safeguards to shield the certification process from conflicts of interest or political influence. As a result, federal court review of death sentences will be severely curtailed, even in cases in which the defendant may not have received a full and fair trial.

These regulations have produced intense controversy. Comments from the Judicial Conference, the American Bar Association, capital defense organizations, federal public defenders of all 50 states, and many others insist that the regulations are poorly drafted and dangerous. They're vague; they flout well-settled case law; they impose significant burdens on the federal courts; and they create an unacceptable risk that innocent prisoners will be denied justice. As Chairman Leahy, Senator Feingold, and I stated in our comments to the Department, these regulations are "unclear, unjust, and unwise." (Document ID: DOJ-2007-0110-0166, regarding OJP Docket No. 1464, available at http://www.regulations.gov)

If the regulations are implemented, they will cause protracted litigation and public outrage, and deal a serious blow to the nation's commitment to due process and equal justice for all.

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Questions:

- Do you agree that the proposed regulations are dangerous and deficient? If so, can you explain how they could exacerbate the problems with representation in capital cases identified in the hearing?

- Attorney General Mukasey has not yet made any public statement on his intentions with respect to the regulations. Is there anything you believe he should keep in mind in deciding whether and how to implement them?

- To be consistent with the goals of our criminal justice system and the Innocence Protection Act, how would you recommend revising the regulations or the statutory law on habeas review in capital cases?

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BRYAN A. STEVENSON
RESPONSES ON DOJ "OPT-IN" REGULATIONS
(Senator Kennedy)

1. Yes, I agree that the proposed regulations are dangerous and deficient. I think the structure of this mechanism itself is problematic because the Attorney General, as the nation's top prosecutor, should not have a controlling role in determining how the defense function is implemented or measured as these regulations now permit. I think the structure and the role of the Attorney General in enforcing capital punishment creates an inherent problem with any regulatory scheme. To address this, proposed regulations would have to be very sensitive and attentive to the defense function in capital cases in every state and give a great deal of consideration to the historic problems of counsel in death penalty cases. The proposed regulations identified so far do not do this at all. The lack of definitions, standards, or requirements make compliance with the regulations arbitrary and meaningless.

The certification process that has been proposed has no independence or autonomy from political or prosecutorial forces. These forces simply want faster executions with inadequate regard for the longstanding problems of adequate legal assistance to defendants, which is critical to reliable and fair verdicts. Not only are the proposed regulations unworkable and poorly conceived and drafted, they do not provide a realistic or effective framework for judicial interpretation or implementation.

The DOJ should withdraw their proposed regulations and begin a process that involves experienced capital defense litigators to shape meaningful and informed requirements that could improve representation of death row prisoners and capital defendants.

With regard to the issues identified at the hearing, there are hundreds and hundreds of cases that were adjudicated in clearly deficient systems. Collateral review of these cases is the only effective mechanism for providing remedies to innocent people on death row and people wrongly convicted or sentenced to death. There is no question that implementation of the proposed regulations would seriously undermine crucial review of death penalty cases by terminating appeals and eliminating safeguards. This will certainly result in wrongful executions and a capital punishment process that is even less credible and reliable than the very flawed system currently in place.

2. I would urge Attorney General Mukasey to keep in mind that the integrity of the Justice Department is very much implicated when it weighs in on something as serious and important as capital punishment. He risks a great deal if he endorses or attempts to implement rules that make executions in this country even more unreliable and carefully evaluated than they are presently. I think the Justice Department is strongest when it is

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scrupulous in its commitment to rulemaking and conduct that upholds the highest standards of integrity and fairness. These proposed regulations for death penalty defense in no way satisfy those standards, and the character of the Justice Department under his leadership will absolutely be undermined if the regulations are not reconsidered and rewritten.

3. At a minimum, there needs to be definitions in the regulations with regard to competency and compensation. Instead of simply requiring compensation or competency, there should be explicit, detailed definitions so states know what is required of them. Requiring a state to have a compensation mechanism and competency standards is too broad and general. There should be specific guidelines regarding these requirements for certification. The examples in the proposed regulations are not sufficient. They only outline sample cases that would be adequate. However, a state is not required to follow any one particular example.

With regard to the statutory law on habeas review, there are several solutions I think would advance a desperately needed discussion and effort to restore fairness and reliability to the administration of criminal justice. **The first solution I would propose is to mandate the appointment of skilled counsel to every condemned prisoner under sentence of death who seeks collateral review of his conviction or sentence.** Many states do not provide counsel for condemned prisoners, and all prisoners are subject to stringent filing requirements, statutes of limitations, and other procedural restrictions. Since the United States Supreme Court has not recognized a right to counsel in postconviction proceedings,[1] it is up to any state that seeks to execute people to ensure that all death-sentenced prisoners have skilled, adequately trained counsel. Through the AEDPA, Congress has recognized the legitimacy of this basic requirement by enticing states with heightened restrictions in federal habeas corpus review if they provide collateral postconviction counsel.[2]

Second, we should repeal the AEDPA or suspend it in states that fail to meet basic requirements with regard to the quality of counsel. Under the AEDPA, the consequence of inadequate legal representation in capital cases is not only unfair and unreliable convictions and death sentences, but also insulation of these problems and errors from review because counsel fails to preserve issues or comply with the procedural requirements that must be satisfied for postconviction remedies. It makes no sense to make procedural requirements more demanding and harsh as the AEDPA does, especially in jurisdictions where there are deficiencies in the defense counsel function. Many states have opted to continue administering criminal justice with grossly underfunded and inadequate indigent defense systems, a choice that increases the number of federal habeas corpus filings necessary to enforce constitutional protections. Additionally, in some states, judges are elected on campaigns that promise to resist protecting the rights of criminal defendants and prisoners. Some judges may also feel political pressure to be harsh on capital defendants to ensure promotions. Additionally, some state court judges summarily adopt findings and legal rulings prepared by state prosecutors in state postconviction. All of this casts doubt on

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fairness, independence, and reliability of postconviction appeals.

Also, if states have unreasonable statutes of limitations that do not address whether prisoners have counsel, or fail to provide some form of legal assistance, prisoners should not be precluded from federal review. Many states have opted not to provide the kind of review the AEDPA assumes when it requires federal judges to defer to state court rulings and findings.[3] Only by allowing the petitioner to show that deficiencies in the state court review process warrant no such deference can any meaningful hope of reform be created.[4] Asking that federal judges first determine if constitutional rights have been violated in a particular case and then evaluate whether a remedy for that violation is warranted would simplify the process of habeas corpus review.

Finally, we should suspend procedural defaults and preclusion where critical constitutional interests are in question. The appeal and postconviction review process should be a mechanism for ensuring that police, prosecutors, and other criminal justice players with great power and discretion act legally. Abuse of power by judges, lawyers, and law enforcement officials is not easily identified internally. Many of the constitutional violations implicated by this abuse cannot be brought to light without meaningful postconviction review. Ensuring that these claims are reviewed on the merits in state and federal habeas corpus proceedings is important not only to innocent and wrongly-sentenced prisoners, but also to the larger society, which relies on those with power to exercise it lawfully and responsibly. States frequently attempt, and often succeed in their efforts, to shield illegal conduct by state officials in criminal cases from scrutiny because indigent prisoners cannot get around procedural or other preclusion rules.

The importance of maintaining a just system requires review on the merits of some constitutional claims unless a prisoner has inexcusably failed to prosecute the claim or has knowingly violated important procedural rules. Racial bias claims constitute an important example of such an issue. Habeas corpus litigation has been the mechanism by which the United States Supreme Court has done important work to allow racial minorities to participate in grand juries, in trial juries, and as grand jury forepersons.[5] The perception of unfairness is exacerbated by the lack of racial diversity among judges and prosecutors. Failing to address clear evidence of racial bias in criminal cases by invoking procedural defaults or preclusion facilitates racially discriminatory conduct and does great harm to the integrity of criminal justice review. Where claims presented in individual cases threaten the integrity of the criminal justice system as a whole, such as claims of racial bias, and also claims of innocence and inadequate legal representation, there should be a fundamental commitment to ensure that the laws of the Constitution have been upheld without regard for procedural technicalities that only insulate unconstitutional conduct by judges or prosecutors from remedy.

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ENDNOTES

1. *See Barbour v. Haley*, 417 F.3d 1222 (11th Cir. 2006).

2. 28 U.S.C. § 2265 (1996); *see also* USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 507 (2006).

3. 28 U.S.C. § 2254(d)–(e) (1996).

4. This was the practice prior to the enactment of the AEDPA. *See, e.g.*, *Townsend v. Sain*, 372 U.S. 293 (1963).

5. *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Rose v. Mitchell*, 443 U.S. 545 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977).

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Additional Questions for Professor Bryan Stevenson:

1. In your testimony, you cite a figure of 130 death row prisoners who have been released from death row or exonerated. This is a very troubling number. To what extent, if you know or can give an opinion, were those defendants wrongly convicted or sentenced to die because they were represented by incompetent counsel?

2. Do you have any knowledge, or an opinion based on your experience, of how many people still on death row have been wrongly convicted or sentenced to die because they were represented by incompetent counsel?

3. What motivates the policies of some states in regard to payment or lack of payment of appointed counsel at the trial phase and the failure to provide counsel at the post-conviction stage?

4. If the motivation for those policies is economic, is there not a compelling argument that it is more cost effective to appoint and adequately pay competent lawyers for defendants at all stages of capital cases than to cap payment at extraordinarily low levels and not appoint counsel for post conviction proceedings?

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BRYAN A. STEVENSON
RESPONSES TO ADDITIONAL QUESTIONS

1. Inadequate legal assistance is the number one cause of wrongful convictions of innocent people in death penalty cases. There is frequently prosecutorial or police misconduct in these cases or bad science, but these problems can only be overcome with adequate legal aid to the accused. Exonerations of innocent people sentenced to death have demonstrated the dangerousness of capital punishment when there is insufficient attention paid to adequate legal assistance. There has been an average of five exonerations per year–and in many cases, this is due to discovery of evidence that should have been presented at trial.[1]

Due to the complexity of capital trials and the experience and training necessary to try a capital case, it is almost certain that inexperienced and underpaid trial counsel will make mistakes. Many states do not provide training for appointed counsel or ensure that appointed counsel has the experience inherently required for a capital trial. Many states do not provide adequate compensation for appointed counsel to conduct thorough investigations or hire experts. In 130 cases involving exonerated death row prisoners, it is highly likely that trial counsel made errors that led to their clients' convictions and sentences. While it is difficult to know exactly how many improper death sentences were a result of incompetent counsel, it is a huge problem. It has been estimated that the rate of "serious error" in capital cases is 68%.[2] This undoubtedly is due in a substantial way to incompetent counsel.

2. I believe there are hundreds of wrongly convicted or improperly sentenced people on death row as a result of inadequate legal defense. There are approximately 3,500 people currently on death row. This includes people on death row in Texas who were defended by attorneys whose investigative and expert expenses were capped at $500.[3] In some rural areas in Texas, lawyers have received no more than $800 to handle an entire capital case.[4] Defense attorneys in Texas today are often paid so little by the hour that they do not profit at all, and in many cases, end up effectively giving money to the State as their compensation doesn't even cover their overhead expenses.[5]

In addition, people still on Virginia's death row were provided lawyers who were effectively paid an hourly rate of less than $20 an hour.[6] In Pennsylvania, there are currently death row prisoners who were sentenced to death in the 1980s and 1990s when 80% of the capital cases were handled by appointed lawyers who received a flat fee of $1700 plus $400 for each day in court.[7] Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.[8]

It is inherent in the system that underpaid, inexperienced, and untrained counsel in capital cases will make errors and will not have the resources to conduct adequate

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investigations and preparation. Many states do not have training for capital cases and will appoint lawyers to capital cases who have little, or even no, capital experience.[9] Some states assign counsel for capital trials at random, without regard to their training or experience.[10] Incompetent counsel is definitely the leading cause of wrongful convictions or death sentences.

3. The politics of death make it difficult for states to devote the resources necessary to protecting the rights of criminal defendants who are hated and demonized. All states must manage limited resources, and protecting the rights of powerless and unpopular suspects by allocating adequate resources to the defense function is extremely rare. State prosecutors, and in some situations elected judges, face much harder challenges in pursuing death sentences when the accused is represented by a strong advocate with adequate funding. Consequently, it is against the interest of pro-death penalty legislators, policymakers, and decisionmakers to invest adequately in the defense function. Moreover, too few leaders articulate the importance of a fair and reliable system as a value that does not simply protect the rights of the accused, but also the integrity of the entire system.

4. Yes, as evidenced by the number of exonerations, with competent counsel, the likelihood of conviction and a death sentence is greatly reduced. Many costly death sentences are imposed wrongly and needlessly because we have not provided adequate legal defense services. The expense to states is quite high as a result of this approach. The cost of the death penalty is very high. An unreliable death penalty that requires a lot of scrutiny and review is even more expensive. The California death penalty system costs taxpayers $114 million per year beyond the costs of keeping people in prison for life.[11] Taxpayers have paid more than $250 million for each of the state's executions.[12] Similarly, in North Carolina, the death penalty costs $2.16 million per execution more than the costs of sentencing people to life imprisonment.[13] The majority of those costs occur at the trial level.[14]

Furthermore, in Florida, enforcing the death penalty costs $51 million per year above what it would cost to sentence all people convicted of first-degree murder to life in prison without parole.[15] Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of $24 million for each execution.[16] In Texas, a death penalty case costs an average of $2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.[17]

Of course, the cost of a wrongful execution is incalculable. Execution of an innocent person and condemnation of an innocent person imposes an inestimable charge on the integrity of our system of justice and threatens our core values and commitment to fairness. This cost cannot be avoided unless there is adequate funding of the defense function at trial and in the postconviction process.

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ENDNOTES

1. *See* Death Penalty Information Center, Facts About the Death Penalty, http://www.deathpenaltyinfo.org/FactSheet.pdf, last visited Apr. 23, 2008.

2. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases*, 1973-1995, 78 TEX. L. REV. 1839, 1850 (2000).

3. Until 1995, Texas, which has one of the largest death row populations in United States (currently at 370), capped the entire amount defense counsel could request for investigative and expert expenses at $500. *Lackey v. State*, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982)(discussing Tex. Code Crim. Proc. Art. 26.05 (1980)); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 77-98 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf, last visited Apr. 1, 2008; http://www.texasdefender.org/facts.asp, last visited Apr. 1, 2008; Death Penalty Information Center, *Facts About the Death Penalty*, http://deathpenaltyinfo.org/FactSheet.pdf, last visited Apr. 23, 2008.

4. *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 799 (citing Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, Nat'l L.J., June 11, 1990, at 34).

5.Talia Nye-Keif, *"Capital" Punishment or "Lack-of-Capital" Punishment? Indigent Death Penalty Defendants are Penalized by a Procedurally Flawed Counsel Appointment Process*, 10 SCHOLAR 211, 216-17 (Winter 2008) (defense counsel in Texas representing indigent defendants report that they receive, on average, $39.81 per hour, and their overhead expenses are, on average, $71.36 per hour).

6. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 366 (1993).

7. *See* Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995, at 22 (Magazine). Philadelphia represents less than 13% of Pennsylvania's population but over half of the state's death row population. *See* John M. Baer, *Faulkner, Mumia in Mix: State Senate Hearing Set on Moratorium for Death Penalty*, PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that, in 2000, Philadelphia is responsible for 55% (126/230) of the state's death row population; 88% (111/126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).

8. For example, in Mississippi, counsel appointed to represent an indigent defendant faces a $1000 cap on compensation. In a capital case, two attorneys can be appointed for total compensation not to exceed $2000. MISS CODE ANN. § 99-15-17 (1980). Similarly, there are death row inmates in Kentucky who were represented by appointed counsel who faced a $2500 cap on compensation. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994)(citing The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations, reprinted in THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1993, at 11).

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9. Recommendation No. 107, American Bar Association, Feb. 3, 1997, available at http://www.abanet.org/irr/rpt107.html, last visited Apr. 28, 2008.

10. *Id.*

11. Rone Tempest, *Death Row Often Means a Long Life; California Condemns Many Murderers, But Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at B1.

12. *Id.*

13.Philip J. Cook, Donna B. Slawson, & Lori A. Gries, *The Costs of Processing Murder Cases in North Carolina,* Terry Sanford Institute of Public Policy, Duke University (May 1993), available at http://www.deathpenaltyinfo.org/northcarolina.pdf, last visited Apr. 23, 2008.

14. *Id.*

15. S.V. Date, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually*, PALM BEACH POST (FL), Jan. 4, 2000, at 1A.

16. *Id.*

17. C Hoppe, *Executions Cost Texas Millions*, THE DALLAS MORNING NEWS, Mar. 8, 1992, at 1A.

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SUBMISSIONS FOR THE RECORD

MANDATORY JUSTICE:
The DEATH PENALTY REVISITED

An Initiative of The Constitution Project

45332.014

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SUMMARY OF RECOMMENDATIONS

CHAPTER I: ENSURING EFFECTIVE COUNSEL

1. 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' performance. An existing public defender system may comply if it implements the proper standards and procedures.

2. Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.

3. 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.

CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS

4-7. There should be only five factors rendering a murderer eligible for capital punishment. Jurisdictions should exclude from death eligibility those cases in which eligibility is based solely upon felony murder and should not use felony murder as an aggravating circumstance. Individuals with severe mental disorders should not be eligible for the death penalty, and states should establish reliable procedures to determine the issue of mental retardation. (2005 Update.)

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CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

8. Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.

9. 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."

CHAPTER IV: SAFEGUARDING RACIAL FAIRNESS

10. 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.

CHAPTER V: ENSURING SYSTEMS FOR PROPORTIONALITY REVIEW

11. 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, non-arbitrary, 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.

CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES

EXCULPATORY AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE

12. Legislation should provide that, notwithstanding any procedural bars or time limitations, exculpatory DNA evidence may be presented at a hearing to determine whether a conviction or death sentence was wrongful, and if so, that any erroneous conviction or sentence be vacated.

13. Where the results of post-conviction DNA testing exclude the defendant or are inconsistent with the prosecution's theory, prosecutors should promptly consent to vacate the conviction, and should not retry (or threaten to retry) the defendant unless convinced that compelling evidence remains of the defendant's guilt beyond a reasonable doubt. (2005 Update.)

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14. 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.

15. Capital defendants who establish a credible claim of innocence should have access to post-conviction relief, even after all avenues for relief have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)

LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES

16. All jurisdictions should (a) review capital cases in which defendants were exonerated to identify the causes of the error and to correct systemic flaws; (b) adequately fund Capital Case Innocence Projects; (c) establish a Capital Case Early Warning Coordinating Council to identify systemic flaws in an effort to avert mistaken convictions *before* they happen; and d) fund efforts to increase sensitivity to innocence issues in capital cases among students, the police, judges, and the American public. (2005 Update.)

DNA EVIDENCE

17. 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.

18. Government officials should promptly and readily consent to DNA testing on biological evidence from criminal investigations that remains in their custody. The state should also make evidence available for DNA testing in cases in which defendants convicted of capital crimes have already been executed and post-mortem DNA testing may be probative of guilt or innocence. (2005 Update.)

19. If the government fails to submit DNA profiles from the defendant's or a related case to DNA databanks, the defendant should have the right to petition a court for, and that court should have the power to issue, an order that the government submit the profiles to those databanks. (2005 Update.)

FORENSIC LABORATORIES

20. The testimony of a prosecution forensic examiner not associated with an accredited forensics laboratory should be excluded from evidence. (2005 Update.)

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21. Laboratories should be accredited only when they meet stringent scientific standards. (2005 Update.)

22. Forensics laboratories should audit all death penalty cases when there is reason to believe that an examiner engaged in forensic fraud or an egregious act of forensic negligence in any case (whether capital or not) during the examiner's professional career. (2005 Update.)

VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS

23. Custodial interrogations of a suspect in a homicide case should be videotaped or digitally video recorded whenever practicable. Recordings should include the entire custodial interrogation process. Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established. Where no recording is practicable, any statements made by the homicide suspect should later be repeated to the suspect and his or her comments recorded. Only a substantial violation of these rules requires suppression at trial of a resulting statement. (2005 Update.)

CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY

24. Appellate courts reviewing capital convictions for sufficiency of the evidence should reverse if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)

25. 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.

26. The judge in a death penalty trial should instruct the jury that if any juror has lingering doubt about the defendant's guilt, that doubt may be considered as a "mitigating" circumstance that weighs against a death sentence.

27. 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.

CHAPTER VIII: ROLE OF PROSECUTORS

28. 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

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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.

29. Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifications and statements of informants and co-defendants) particularly subject to human error.

30. Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced. (2005 Update.)

31. All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death eligible cases. Prosecutors in death eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee should be required to issue binding approvals or disapprovals of proposed capital charges, with an accompanying explanation. Each jurisdiction should forbid prosecutors from filing a capital charge without the committee's approval. (2005 Update.)

32. Foreign nationals who were not afforded rights to consular notification and access under the Vienna Convention on Consular Relations (VCCR) should not be eligible for the death penalty. The chief law enforcement officer for each state with capital punishment and for the federal government should ensure full compliance with the VCCR. An independent authority should report regularly to the chief executive or legislature about compliance with the VCCR. (2005 Update.)

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Charles A. Gruber, Chief of Police, South Barrington Police Department; Past President, International Association of Chiefs of Police; Past President, Illinois Association of Chiefs of Police

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Paula M. Kurland, Victim Advocate; Founding Member, Bridges to Life (a victim-offender program in Texas); Mother of murder victim

David Lawrence, Jr., President, The Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

Timothy Lynch, Director, Project on Criminal Justice, Cato Institute**

The Honorable Abner J. Mikva, Visiting Professor of Law, University of Chicago Law School; former Member of Congress (D-IL); former Chief Judge, United States Court of Appeals for the D.C. Circuit; White House Counsel, Clinton administration

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LeRoy Riddick, M.D., Forensic Pathologist ***

Chase Riveland, former Secretary, Department of Corrections, State of Washington

Laurie O. Robinson, Director of Science in Criminology Program and Senior Fellow, Program on Crime Policy, Department of Criminology, University of Pennsylvania; former Assistant Attorney General, Office of Justice Programs, United States Department of Justice, Clinton administration

The Honorable Kurt L. Schmoke, Dean, Howard University Law School; former Mayor, City of Baltimore, Maryland; former State's Attorney for the City of Baltimore, Maryland **

The Honorable William S. Sessions, Director, Federal Bureau of Investigation, Reagan and G.H.W. Bush administrations; former Chief Judge, United States District Court for the Western District of Texas

G. Elaine Smith, Esq., Past President, American Baptist Churches (United States of America)

B. Frank Stokes, Special Agent, Federal Bureau of Investigation, Retired; Private Investigator

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Reporters for *Mandatory Justice: Eighteen Reforms to the Death Penalty*

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CHAPTER I: ENSURING EFFECTIVE COUNSEL

SUMMARY

1. 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' performance. An existing public defender system may comply if it implements the proper standards and procedures.

2. Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.

3. 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.

Overview to Chapter I

The lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error — including the real possibility of executing an innocent person. A defendant tried without adequate counsel is far more likely to be charged with and convicted of a capital crime and to receive a death sentence. Indeed, as capital litigator and Yale law professor Stephen Bright has observed, the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die — far more important than the nature of the crime or the character of the accused.[1]

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The lack of adequate counsel is a one-two punch. Substandard counsel is more likely not only to result in a client's receiving a death sentence, but also to create an inadequate trial record through failure to investigate and failure to preserve objections. The attorney's errors, unless they meet the problematic standards of *Strickland v. Washington*, 466 U.S. 668 (1984) (discussed below) not only adversely affect the client at trial and sentencing, but also vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later. Furthermore, because there is no constitutional right to counsel after the first state appeal, even in capital cases, some states do not appoint counsel for post-conviction or *habeas corpus* review, further insulating trial errors from correction.

Death penalty litigation is a highly specialized, legally complex field, a "minefield for the unwary," in the words of the ABA Criminal Justice Section.[2] Adequate preparation requires not only a grasp of rapidly changing substantive and procedural doctrine, but also labor-intensive and time-consuming factual investigation. Capital attorneys, from the trial stage through post-conviction review, should be well-trained, experienced, and adequately compensated, and should have sufficient time and resources to perform competently when representing clients who are facing the possibility of execution. Instead, study after study documents a national crisis in the quality of counsel in death penalty cases and calls for reform — with little success.

Some states (for example, Alabama, Mississippi, and Texas) have no public defender system, and no central appointing authority to screen and monitor appointed counsel.

Many states assign only a single lawyer to represent a capital defendant; do not require any level of experience or expertise; do not provide or require training; do not screen out lawyers with serious disciplinary records; fail to monitor performance of counsel; inadequately compensate counsel; and refuse to provide funds for crucial investigators, experts, and other essential resources. Unsurprisingly, few attorneys are willing to take on capital cases, and those who do are often "thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital case."[3]

EDITOR'S NOTE

Alabama and Mississippi still have no public defender system. Texas has now created a Task Force on Indigent Defense, although no statewide public defender system yet exists and the state's standards for indigent defense do not comply with the ABA's recommendations governing appointed counsel.

Nevertheless, courts have found that the vast majority of this attorney incompetence does not fall below the lax standards for effective counsel under *Strickland*, which requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. Therefore, the client continues to pay for the attorney's errors, sometimes with

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his or her life. The state, the families of victims, and society as a whole pay the price as well. Litigation becomes increasingly protracted, complicated, and costly, putting legitimate convictions at risk, subjecting the victims' families to continuing uncertainty, and depriving society of the knowledge that the real perpetrator is behind bars. In short, the likelihood of error precludes the assurance that the outcome is fair or reliable.

Our recommendations seek to improve this state of affairs in three overlapping ways. First, we recommend the creation of central, independent authorities to appoint, monitor, train, and screen capital attorneys, and otherwise ensure the quality of capital representation — at all stages of litigation. Second, we recommend that each jurisdiction adopt standards for the appointment of counsel by these authorities, and, additionally, that each jurisdiction adopt standards ensuring adequate compensation of such counsel, as well as adequate funding for expert and investigative services. Third, we recommend that the current standard of review for ineffective assistance be replaced, in capital sentencing, with a more stringent standard better keyed to the particular requisites of capital representation.

RECOMMENDATION 1: Each State Should Create 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.[4] 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.

COMMENTARY

This recommendation, similar to recommendations made by the ABA, the National Legal Aid Defender Association (NLADA), and other groups, is based on the recognition that each jurisdiction needs a formal, centralized, and reasoned process for ensuring that every capital defendant receives competent counsel. Without such a process, as numerous studies have shown, competent representation becomes more a matter of luck than a constitutional guarantee.

The recommendation provides two approaches to achieving this centralization. In jurisdictions with a public defender system or other centralized appointing authority, that authority may be fully adequate, either currently or by adding steps to ensure proper monitoring, training, and

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EDITOR'S NOTE

Key actors on the national and state levels have recently recognized the acute problems with counsel in capital cases. The Innocence Protection Act, which encourages states to enhance training and resources for capital defense lawyers and provides for increased DNA testing, became law in October 2004 as part of the Justice for All Act. President George W. Bush, in his 2005 State of the Union address, declared that capital cases must be handled more carefully and that more resources should be directed to correcting the problem of inadequate defense lawyers.

In a dramatic statement in his May 2005 State of the Judiciary Address to the Joint Session of the Louisiana House and Senate, that state's Supreme Court's Chief Justice, Pascal F. Calogero, Jr., spoke about his court's recent finding that the state's present indigent defense system is "terribly flawed." He urged the legislature to remedy the situation, saying that until it makes adequate funds available, "upon motion of the defendants [in capital cases], the trial judge may halt the prosecution . . . until adequate funds become available to provide for these indigent defendants' constitutionally protected right to counsel." Justice Calogero concluded that the "opinion does not unfairly put the courts in the position of siding with the defense [but] . . . simply recognized the fact that the courts, as guardians of a fair and equitable process, must not let the state take a person's liberty without due process."

other assistance. Such training and assistance should be available to all capital defense attorneys in the jurisdiction. In jurisdictions with no public defender system in place, the recommendation calls for establishing a central appointing authority. It provides some flexibility in determining who appoints or sits on the central appointing authority. However, the independence of the authority and its freedom from judicial or prosecutorial conflicts are crucial to ensure that its members can act without partisanship and in a manner consistent with the highest professional standards.

Some of the recommendation's language is identical to that of the 1990 ABA recommendations, but the ABA recommendations have been widely ignored. 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 cheaply, their presence in the halls of the courthouse, or other factors poorly correlated with zealous or even competent representation. Many of them have little knowledge of capital litigation or even criminal law in general. Many of them have little experience or skill in the courtroom. A disproportionate number of them have records of disciplinary action, and even disbarment.[5] Even the best of these lawyers are placed in a situation in which most incentives are skewed toward doing a cursory job, or even losing — especially in high profile cases. Establishing independent appointing authorities to alleviate many of these problems is a crucial and central recommendation of this Committee.

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RECOMMENDATION 2: Each Jurisdiction Should Provide Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provide 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 post-conviction 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."[6] 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.

COMMENTARY

Qualifications of Counsel

Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants. It is also a safeguard far too often ignored. All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation. The most crucial stage of any capital case is trial. Qualified counsel at this stage would add immeasurably to the effort to keep the trial "the main event" in the capital process, and to streamline the post-trial appellate and post-conviction procedures. But even with improved representation at trial, the need for quality legal representation at post-trial stages will continue to be great, given the unacceptability of error, the rapid changes in the substantive law, and the possibilities of newly discovered evidence at later stages.

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. We recommend that jurisdictions adopt the ABA or NLADA standards for appointment of counsel in capital cases. At the trial level, these include, among other requirements, that (a) 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; (b) co-counsel have at least three years of criminal litigation experience; (c) each counsel have significant experience in jury trials of serious felony cases; (d) each attorney have had recent training in death penalty litigation; and (e) each attorney

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have 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, at all stages, a set of stringent and uniform minimum standards should be adopted, implemented, and enforced.

Compensation of Counsel

A major cause of inadequacy of capital representation is the lack of adequate compensation for those taking on demanding, time-consuming cases, which, if done correctly, demand thousands of hours of preparation time. Douglas Vick estimates that a capital case may take from 500 to 1,200 hours at the trial level alone, and an additional 700 to 1,000 hours for direct appeal of a death sentence, with hundreds of additional hours required at each successive stage.[7] Assuming an hourly wage of $100, he estimates that the cost of attorney time in a typical capital case, excluding any additional services, would be about $190,000. Many jurisdictions impose shockingly low maximum hourly rates or arbitrary fee caps for capital defense.[8] Even the most dedicated lawyer will find it difficult to spend the time needed on a capital case under these conditions. As the NLADA notes, these are "confiscatory rates" that impermissibly interfere with the Sixth Amendment right to counsel.[9] Moreover, courts often will not make funds available for reasonable expert, investigative, support, or other expenses. Factual investigation, including witness interviews, document review, and forensic (for example, DNA, blood, or ballistics) testing, is a crucial component of adequate preparation for both trial and sentencing in capital cases. In addition, the defense's frequent inability to hire experts on central issues in a case, such as forensics or psychological background, is another major obstacle to the fairness of the proceedings, particularly in light of far greater prosecutorial access to such resources. 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.

Each jurisdiction should develop standards that avoid arbitrary ceilings or flat payment rates, and instead take into consideration the number of hours expended plus the effort, efficiency, and skill of capital counsel.[10] The hourly rate should reflect the extraordinary responsibilities and commitment required of counsel in death penalty cases.[11] Failure to provide adequate funding and resources is a failure of the system that forces even the most committed attorneys to provide inadequate assistance. Its consequences should fall not on the capital defendant, but on the government. One model for imposing such consequences is that proposed by the ABA: Where the capital defendant was not provided with qualified and adequately compensated counsel, several procedural barriers to review should be held inapplicable.

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RECOMMENDATION 3: The *Strickland v. Washington* Standard for Effective Assistance of Counsel at Capital Sentencing Should be Replaced.

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.[12] 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.

COMMENTARY

The adoption of a more stringent standard can be accomplished by each state, either legislatively or judicially, so long as the state court relies on state rather than federal law.[13] The current Supreme Court standard for effective assistance of counsel, *Strickland v. Washington*, permits "effective but fatal counsel" and requires the defendant to show both that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.[14] Randall Coyne and Lyn Entzeroth observe:

> Myriad cases in which defendants have actually been executed confirm that *Strickland's* minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences.[15]

Strickland is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases for two reasons. First, the standard is inadequate simply because the consequences of attorney error at trial are so great in a capital case, and the opportunities for error so vast. Second, the standard, inadequate as it has been in measuring the competence of attorneys at trial, has proven especially poorly suited for measuring competence in the punishment phase of a capital trial. Moreover, the requirement that the capital defendant prove not only the ineffectiveness of counsel, but also that it caused the defendant prejudice, is extremely hard to satisfy when the question is whether he or she would have received a different sentence had counsel done a better job. Given the unpredictability of a jury's decision whether to exercise mercy in light of a particular set of facts, and given the fact that the attorney's very failure to investigate deprives the defendant of crucial information, the standard rarely can be met. The harshness of

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Strickland's prejudice prong means that capital defendants whose counsel was ineffective even under *Strickland's* stringent ineffectiveness prong will nevertheless be executed unless they can meet the onerous standard of demonstrating a reasonable probability that, if not for attorney incompetence, they would not have been sentenced to death. Instead of perpetuating this unfair standard, we should shift the burden to the state. After a finding of attorney ineffectiveness, if the state cannot show that the defendant would have been sentenced to death even with competent counsel, the sentence ought to be reversed and the defendant re-sentenced.

EDITOR'S NOTE

In *Rompilla v. Beard*,[E1] and *Wiggins v. Smith*,[E2] the Supreme Court overturned two death sentences because the defense lawyers failed to investigate and present mitigating evidence at sentencing.

In case after case, attorneys who failed to present any mitigation evidence at all, or who have presented a bare minimum of such evidence, were found to have satisfied *Strickland*.[16] Yet mitigation evidence is an absolutely essential part of the punishment phase.[17] As capital litigation expert Welsh White has observed, "the failure to present mitigation evidence is a virtual invitation to impose the death penalty."[18] The proper development of mitigating evidence involves a complete construction of the defendant's social history, including all significant relationships and events. This duty cannot be satisfied merely by interviewing the defendant. Moreover, the utility of offering mitigation evidence cannot be determined in advance of a thorough investigation. Indeed, White asserts that every capital attorney he interviewed agreed that "developing the defendant's social history will always lead to some mitigating evidence that can be effectively presented at the penalty phase."[19] There may be the rare case in which an attorney makes an informed decision not to put on any mitigation evidence, but such a scenario is highly unlikely. Therefore, there should be a strong presumption in favor of the attorney's duty to put on some mitigation evidence.

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March 28, 2008

California Commission on the Fair Administration of Justice
Attn: John Van de Kamp, Chair
900 Lafayette Street, Suite 608
Santa Clara, California 95050

Dear Commissioners,

We, the undersigned, are current and retired judges who served on the Supreme Court, Courts of Appeal, and/or Superior Court in California. We have, individually and collectively, many years of experience with California's criminal justice system generally and with its death penalty in particular. We write to express our concerns about the current application and administration of the death penalty in California.

We are particularly concerned about the impact of death penalty cases on our courts. Death penalty cases consume an exorbitant amount of the most precious judicial resource: court time. Every aspect of a death penalty case takes more court time than a non-death penalty homicide case. This burden has fallen largely on the trial courts, which have adjudicated literally thousands of cases involving the death penalty since reinstatement in 1977. While much attention has been focused on the difficulties of the California Supreme Court in handling death penalty cases, almost no attention has been given to the problems faced by the trial courts. With the state budget crisis now being declared an "emergency" situation, we anticipate that judicial resources will become even scarcer and that these problems will only become worse.

We are also concerned about the fairness of California's death penalty. Our justice system is premised on the idea that equally matched advocates presenting their case to a neutral fact finder will result in a just outcome. We are concerned that California's death penalty system fails to achieve this ideal because California continues to provide insufficient resources to defense attorneys in death penalty cases. Most people facing the death penalty are too poor to hire their own attorneys. Some lucky defendants are represented by fine court appointed attorneys or public defenders. But far too many are represented by attorneys who do not have the resources they need to conduct a proper investigation and defense.

We encourage the California Commission on the Fair Administration of Justice to consider the myriad problems with California's death penalty, only some of which have been detailed here. Any attempt to reform California's death penalty must be comprehensive, and must ensure a means of providing sustained and sufficient resources for the entire system. We urge the Commission to consider recommending a moratorium on the death penalty in California until systemic reforms are implemented.

Sincerely,

Judge Demetrios Agretellis
Ret., Alameda County Superior Court

Judge Michael Ballachey
Ret., Alameda County Superior Court

Judge Ken Chotiner
Ret., Los Angeles Superior Court

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Judge LaDoris Cordell
Ret., Santa Clara County Superior Court

Judge Roderic Duncan
Ret., Alameda County Superior Court

Judge Mark Eaton
Ret., Alameda County Superior Court

Judge James P. Gray
Orange County Superior Court

Judge Ron Greenberg
Ret., Alameda County Superior Court

Associate Justice Joseph Grodin
Ret., California Supreme Court

Judge Richard Hodge
Ret., Alameda County Superior Court

Judge Ellen James
Ret., Contra Costa Superior Court

Associate Justice William A. Newsom, Jr.
Ret., California Court of Appeal

Associate Justice Cruz Reynoso
Ret., California Supreme Court

Judge Jennie Rhine
Ret., Alameda County Superior Court

Judge David M. Rothman
Ret., Los Angeles Superior Court

Judge Harold Shabo
Ret., Los Angeles Superior Court

Judge Norman Spellberg
Ret., Contra Costa Superior Court

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Opening Statement of U.S. Senator Russ Feingold
Senate Judiciary Committee,
Subcommittee on the Constitution Hearing
"The Adequacy of Representation in Capital Cases"

April 8, 2008

As a result of the litigation before the Supreme Court challenging the constitutionality of lethal injection as a method of execution, there is currently a de facto moratorium on executions in this country. This presents us with an opportunity while executions are paused to take stock of one of the most serious problems still facing many state capital punishment systems: the quality of representation for capital defendants. That is the purpose of this hearing.

Specifically, today we will examine the adequacy of representation for individuals who have been charged with and convicted of capital crimes at the state level. We will discuss the unique challenges of capital litigation, and the unique resources and training capital defenders need to be fully effective.

The Supreme Court held in 1932, in Powell v. Alabama, that defendants have the right to counsel in capital cases. The Court explained that an execution resulting from a process pitting 'the whole power of the state' against a prisoner charged with a capital offense who has no lawyer, and who may in the worst circumstances even be illiterate, 'would be little short of judicial murder.'

Those are strong but appropriate words. Over the following decades the Supreme Court continued to recognize the importance of the right to counsel, ultimately concluding in 1984 in Strickland v. Washington that the Sixth Amendment guarantees not just the appointment of counsel, but the effective assistance of counsel.

Yet as the witnesses today know from the variety of perspectives they bring to this issue, these constitutional standards are just the beginning. The work done by a criminal defense attorney at every stage of a capital case, and the experts and resources available to that attorney, can literally mean the difference between life and death.

This is not a hypothetical. The right to effective assistance of counsel is not just a procedural right; it's not just lofty words in a Supreme Court decision. Failing to live up to that fundamental obligation can lead to innocent people being put on death row.

Just last week an inmate in North Carolina, Glen Edward Chapman, was released after nearly 14 years on death row, bringing the number of death row exonerees to 128 people. A judge threw out Mr. Chapman's conviction for several reasons, including the complete failure of his attorneys to do any investigation into one of the murders he was convicted of committing – a death that new evidence suggests may not have been a murder at all, but rather the result of a drug overdose. Local prosecutors decided not to retry Mr. Chapman, and dismissed the charges. According to North Carolina newspapers, Mr.

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Chapman's incompetent defense was mounted by two lawyers with a history of alcohol abuse. News reports indicate that one admitted to drinking more than a pint of 80-proof rum every evening during other death penalty trials, and the other was disciplined by the state bar for his drinking problems.

Yet despite all this, Mr. Chapman on the day of his release is quoted as saying, 'I have no bitterness.' This after nearly 14 mistaken years on death row.

Mr. Chapman's story is astounding, but it is not unique. The quality of representation in capital cases in this country is uneven, at best. And the story also illustrates a critical point: The right to counsel is not abstract. It absolutely affects outcomes. Supreme Court Justice Ruth Bader Ginsburg has stated it about as plainly as possible: 'People who are well represented at trial do not get the death penalty.'

Obviously, inadequate representation is not unique to capital cases. But the challenges presented in a death penalty case are unique, and the consequences of inadequate representation catastrophic. Capital cases tend to be the most complicated homicide trials, and the penalty phase of a capital case is like nothing else in the criminal justice system. To do these cases right, at the trial, penalty, appellate, and state post-conviction stages, requires vast resources and proper training – not only for the defense attorneys who need to put in hundreds of hours of work, but also investigators, forensic professionals, mitigation specialists and other experts.

Yet those resources are not available in all too many cases. We will hear more about that from our witnesses today. These realities have led people of all political stripes – both supporters and opponents of the death penalty – to raise grave concerns about the state of capital punishment today. Judge William Sessions, the former FBI Director appointed by President Reagan, was unable to join us in person today, but he submitted written testimony, which without objection I will place in the record. In it he notes that while he supports capital punishment, '[w]hen a criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined.'

Unlike Judge Sessions, I oppose the death penalty. But as long as we have a death penalty, we owe it to those who are charged with capital crimes, we owe it to our criminal justice system, and we owe it to the principles of equal justice on which this nation was founded, to make sure they have good lawyers who have the resources they need to mount an effective defense.

This is not just the right thing to do. It is not just a high aspiration we should try to achieve at some point in the distant future. It is a moral imperative. And it is one that this country has failed to live up to, for far too long."

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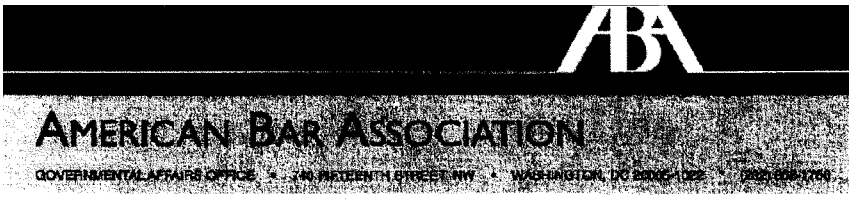

TESTIMONY OF

MICHAEL S. GRECO

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

of the

UNITED STATES SENATE

for the hearing on

"The Adequacy of Representation in Capital Cases"

April 8, 2008

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Mr. Chairman and Members of the Subcommittee:

Good morning. Thank you for the opportunity to appear today and share our views with the Subcommittee. I am Michael S. Greco, a partner in the law firm of Kirkpatrick & Lockhart Preston Gates Ellis, LLP, and former President of the American Bar Association (2005-2006).

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President William H. Neukom to share with you our findings and concerns about the current state of representation in death penalty cases.

The over-arching theme of my term as ABA President was renaissance – a rebirth and reaffirmation of the legal profession's core values and America's constitutional principles. My priorities as President included protecting the rights and freedoms of American citizens, safeguarding the independence of the judiciary and other institutions of America's democracy, addressing the legal needs of lower-income citizens, advancement of women, people of color and persons with disabilities in the legal profession, and improvements to the Association and the legal profession.

The subject of today's hearing, the competency of defense counsel in capital cases and how that impacts the administration of the death penalty in our county, relates directly to a reaffirmation of America's constitutional principles; to protecting the rights and freedoms of citizens; and to ensuring that justice is done for all.

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The public often assesses the value of our legal system by its perception of how well it functions. Capital cases are the most visible and complicated of all criminal cases, and the consequences of making mistakes in these cases are the most extreme. Despite this knowledge, state governments have failed for many years to take the steps they must to address long-standing and systemic problems in our death penalty counsel systems. As a consequence, I fear that too many poor defendants do not receive fair trials, and that mistakes and errors occur too often. A system that wrongly sentences people to death is not a system that is functioning well, and our entire legal system suffers as a consequence.

Let me be clear at the outset about where the American Bar Association stands on this issue. Except for its opposition to imposing the death penalty on individuals who committed their crimes while juveniles, individuals with mental retardation, and individuals with serious mental illness, the ABA has not taken a position on the constitutionality or appropriateness of the death penalty. However, in the decades since the death penalty was reinstated in 1976, the Association has adopted a series of policies concerning the administration of capital punishment, and the ABA has made the right to effective assistance of counsel for all defendants and at all stages of a capital case a priority.

The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. In 1989, for example, the Association first adopted ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines). These Guidelines were greatly expanded and updated in 2003 to detail the minimal effort

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required by defense counsel and death penalty jurisdictions to ensure competent legal representation. They are now the accepted standard of care for the defense of death penalty cases, are cited by state and federal courts, including the US Supreme Court, and have been adopted in a number of death penalty jurisdictions.

The Association also undertakes to help provide volunteer legal representation for indigent death row inmates through its Death Penalty Representation Project. Over the years, the Representation Project has worked with state governments to improve funding, training and standards for defense counsel and to implement and train judges and lawyers about the ABA Guidelines. It currently is the only organization working on a nationwide basis to recruit and train volunteer pro bono lawyers for the hundreds of indigent death row prisoners who lack counsel.

In 1997, the House of Delegates of the Association voted overwhelmingly to call for a halt to executions in the jurisdictions that have the death penalty until each such state and the federal government implement procedures that (a) eliminate discrimination in capital sentencing and (b) guarantee fundamental fairness and due process to those facing capital punishment. The Association was prompted to take this important step in part because of two important and devastating developments.

First, Congress passed the Antiterrorism and Effective Death Penalty Reform Act of 1996 (AEDPA) (P.L. 104-132), which imposed statutes of limitations on death row appeals for the first time and sharply curtailed the availability of appellate review. At the same time, Congress also eliminated all federal funding from the Post-Conviction Defender Organizations that had represented many death row prisoners and had advised appointed and pro bono lawyers who handled capital habeas corpus cases in state and

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federal courts. Because many state governments failed to replace this critical funding, public resources to provide effective and experienced legal assistance to capital defendants and death row prisoners all but disappeared, just at the time when the law became more complicated than ever before. These two steps taken by Congress, in our view, have had disastrous consequences on the quality and availability of legal representation for persons facing a possible death sentence and have significantly and regrettably heightened the risk that an innocent person may be executed.

Since the reinstatement of capital punishment, the ABA has studied the administration of the death penalty throughout the nation. The ABA has developed and advocated policies for capital cases that urge the appointment of competent and adequately funded counsel, the elimination of racial discrimination, and a guarantee that individuals who have been sentenced to death have their convictions and sentences fully reviewed on the merits by state and federal courts.

In its most ambitious effort to study the administration of the death penalty in the United States, the Association recently concluded a four-year assessment of the death penalty systems in eight states: Alabama, Arizona, Florida, Georgia, Indiana, Pennsylvania, Ohio, and Tennessee.

Overview of State Death Penalty Assessments

The ABA Death Penalty Moratorium Implementation Project (the Moratorium Project) determined in February 2003 to examine eight state death penalty systems to preliminarily determine the extent to which they achieve fairness and accuracy and provide due process. The assessments were not designed to replace the comprehensive

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state-funded studies necessary in capital jurisdictions, but instead were intended to highlight individual state systems' successes and inadequacies.

In conducting the assessments, the Moratorium Project began by recruiting local state-based assessment teams composed of experienced and respected individuals in each of the eight states surveyed. Each team was chaired by a law school professor and included or had access to current or former defense attorneys, current or former prosecutors, individuals active in the state bar association, current or former judges, state legislators, and others who the Moratorium Project and/or team leaders felt should be included to complete the assessment in a timely, comprehensive manner. Team members were recruited without regard to their position on the death penalty or on a moratorium on executions and were asked only to approach the issue with an open mind. Once recruited, Assessment Team members provided guidance during the research process and served as reviewers as the report was drafted. Each team leader hired law students to collect the data, review the case law, and conduct any necessary interviews.

The Moratorium Project collected researched and collected data in twelve important areas: (1) preservation and testing of DNA evidence; (2) identification and interrogation procedures; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services; (6) the direct appeal process; (7) procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings; (8) clemency proceedings; (9) jury instructions; (10) an independent judiciary; (11) racial and ethnic minorities; and (12) mental retardation and mental illness. Once the data had been collected, it was sent to the Moratorium Project. The attorneys at the Moratorium Project then worked with the team members to draft the report.

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Overview of Assessment Findings on Defense Lawyering

After completion of eight state assessments, it is beyond dispute that each state system studied has grave problems that call into question its fairness and whether justice is being done. While the scope and detail of the problems differ among states, some of the identified problems are disturbingly universal. The largest and most problematic of these is the quality and availability of competent legal representation for capital defendants and death row prisoners.

The effectiveness of defense counsel is the most critical factor that determines whether an individual will receive a fair trial, and the death penalty. Although anecdotes about inadequate defenses long have been reported throughout the United States, a comprehensive study[1] in 2000 shows definitively that ineffective legal representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective representation in any aspect of a capital proceeding requires, at the least: a) lawyers who have substantial specialized training and experience in the complex laws and procedures that govern a death penalty case; b) full and fair compensation to the lawyers who undertake these cases; and c) adequate funding for engaging necessary investigators and experts. The ABA Guidelines speak of a "defense team" approach, which reflects the necessary "pool" of expertise that is required for the delivery of high quality legal representation in all capital cases.

[1] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://www.thejusticeproject.org/press/reports/broken-system-studies.html (last visited on Aug. 4, 2006).

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Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—that is, there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.[2] The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.[3] In many of those cases, competent and adequately funded trial counsel might have helped avert the constitutional errors that infected the trial and that led to a miscarriage of justice.

In the majority of capital trials, however, a defendant lacks the means to hire a lawyer with sufficient knowledge and resources to provide adequate representation. Consequently, they must rely on the lawyers that the state provides -- often newly admitted, inexperienced, or incompetent court-appointed lawyers, or overburdened public defenders.

Although lawyers and the organized bar long have provided, and will continue to provide, *pro bono* representation in capital cases, most such *pro bono* representation is limited to post-conviction proceedings—after avoidable injustice has occurred. Jurisdictions that have the death penalty also have the primary—and constitutionally required—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and adequate funding for experts, resources and fees.

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[2] Strickland v. Washington, 466 U.S. 668 (1984).
[3] *Supra* n.1.

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Unfortunately, in too many death penalty cases, and in too many states, the responsibility is being ignored. The ABA assessment criteria included five separate recommendations regarding competency of defense counsel. Not one of the eight states surveyed fully complies with any of them.

The quality of defense representation therefore is problematic in every state studied by the ABA, leaving no doubt that states are failing to ensure that all—or even most—capital defendants receive qualified lawyers at trial, on appeal, and through state post-conviction proceedings. One reason for this situation is the failure of many states to fund and staff a statewide indigent capital defense system, instead of the county-by-county system now in place.

Statewide organization is the best means for the effective provision of defense services, because jurisdiction-wide organization and funding can best ameliorate local disparities in resources and quality of representation, and insulate the administration of defense services from local political pressures. Of the eight states studied, however, not one fully complies with this recommendation, despite the fact that some states have recognized the benefits of a true statewide defender system. For example, in Arizona, the state's Capital Case Commission unanimously stated that "establishing a statewide public defender office for capital cases would be the best and most effective way to improve death penalty trials in Arizona." Nevertheless, with the exception of post-conviction proceedings, Arizona has not shifted from its county-by-county system to a statewide system.

Regardless of whether indigent defense is provided on a statewide or county-by-county basis, the disturbing fact is that at this time in the United States, states are failing

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to ensure that capital defendants and death row inmates receive competent, well trained and adequately funded counsel at all stages of the capital proceedings. And it is vital that effective representation be provided at *every* stage of the proceedings— because each level of appellate review plays a unique role in death penalty proceedings, because evidence of innocence and/or constitutional errors are not always immediately available, and because the law may change over the years as legal and social norms evolve (for example, the law now excludes the mentally retarded and juveniles from death penalty eligibility). .

Most egregiously, two of the states surveyed by the ABA —Georgia and Alabama— fail to provide for the appointment of counsel in post-conviction proceedings at all, leaving death row defendants desperate for legal assistance. In Alabama, of the 130 death row inmates in state post-conviction or federal *habeas corpus* proceedings pending in June 2003, 92 of them were represented by out-of state law firms or public interest groups, 18 were represented by the Equal Justice Initiative of Alabama, 17 were represented by in-state private counsel, and three were unrepresented. In April 2006, approximately fifteen of Alabama's death row inmates in the final round of state post-conviction appeals had no lawyers at all to represent them.

Even in states that do appoint counsel in state post-conviction proceedings, serious problems abound. For example, district public defender offices in Tennessee are burdened by some of the highest caseloads in the country and presently are short a shocking 123 attorneys. The Office of the Post-Conviction Defender in Tennessee must contend with a crushing caseload and has only five assistant post-conviction defenders, each of whom must handle twelve to fourteen capital cases at any one time.

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Another factor contributing to the sorry state of defense lawyering in capital cases is the failure of many states to provide for the appointment of two lawyers at every stage of a capital case, and for adequate funding for investigators and mitigation specialists to be retained, as the ABA Guidelines require.

In addition, many states do not enforce meaningful standards for the defense attorneys handling death penalty cases. The ABA Guidelines emphasize the importance of *qualitative* skills and experiences that attorneys must have before being appointed to handle a case rather than simply requiring a specific number of years of practice or number of trials. In Florida, registry attorneys (private attorneys who meet Florida's training and experience requirements and may represent capital defendants and/or death row inmates) need only minimal trial experience to qualify for appointment and their performance is not monitored once they have been appointed. The failure to ensure that only qualified counsel are appointed has negatively affected the quality of legal representation that defendants are receiving. Florida legislators and Supreme Court justices have publicly criticized the performance of registry attorneys on a number of occasions, including Florida Supreme Court Justice Raoul Cantero's testimony that the representation provided by registry attorneys is "[s]ome of the worst lawyering" he has ever seen.

States that have moderately more robust qualification requirements also have serious problems. For example, in Ohio, the state requires some, but not enough, quantitative measures of training and experience, but unqualified lawyers are still appointed to represent capital defendants. In fact, of the 239 Ohio Supreme Court capital case decisions between 1984 and 2004, ineffective assistance of counsel claims were

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raised in 150. While only two cases were successfully appealed on these grounds, the court criticized defense counsel for his/her performance in an additional 10 cases. Dissenting judges would have granted relief based on ineffective assistance of counsel in two other cases, and the court found that counsel's representation was deficient, but that the deficiency was harmless error in a final two cases. In Hamblin v. Mitchell, 354 F.3d 482, 485 (6th Cir. 2003), for example, one of Hamblin's appointed trial defense counsel had no experience with death penalty cases, later was disbarred, and "admitted...that he did essentially nothing by way of preparation for the penalty phase of this trial."

Another serious problem in the eight states surveyed was inadequate compensation of defense counsel. The compensation paid to appointed capital defense attorneys is often woefully inadequate, dipping to well under $50 per hour in some cases. Poor compensation inevitably means that the only lawyers who are available to handle capital cases are often inexperienced, ill-prepared, and unskilled. The few competent lawyers who agree to represent capital defendants are generally financially unable to handle more than one capital case because of the time involved and the low fees. In Ohio, the Office of the Ohio Public Defender sets *maximum* hourly rates and total expenditures, but counties are able – and do – pay fees that are much lower. So while the Office of the Ohio Public Defender will reimburse counties for up to $95/hour in capital trials and appeals, to a total of $75,000 at trial and $25,000 on appeal and in state post-conviction proceedings, Cuyahoga County, for instance, only pays appointed attorneys an hourly rate of $45 an hour, up to $25,000 at trial, up to $5,000 for capital appeals, and up to $170 in state post-conviction proceedings.

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A number of Ohio private attorneys with experience in capital cases have commented publicly that they will no longer handle death penalty cases due to the low pay. In Pennsylvania, compensation rates for private appointed counsel are set on a county-by-county basis: in Philadelphia County, lead counsel in death penalty cases are provided $400 per day after the first-half day or $60 per hour for in-court work and $50 per hour for out-of-court work, while in Dauphin County capital attorneys receive a flat fee of $6,000, and in York County, capital attorneys receive $55 per hour.

Conclusion

Providing effective legal representation is an essential component of a legal system that is fair and accurate. Through the process of conducting state death penalty assessments, the ABA has confirmed that the problem of ineffective defense representation is a consistent and systemic problem throughout the states surveyed, regardless of jurisdiction. Because the ABA has assessed a critical number of death penalty states, and based on our long-standing work and experience in this area, we can reasonably conclude that the same problems exist in jurisdictions that were not assessed.

The fundamental principle of fairness that we cherish in America requires that justice must be done before a person is put to death. Effective defense representation at every stage of the proceedings in death penalty cases is a *sine qua non* of that principle.

In view of the findings in the ABA's eight state death penalty assessments, it can fairly but lamentably be said that the administration of the death penalty in America is woeful. Much work needs to be done, and significantly more resources – financial and

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human -- must be committed in death penalty jurisdictions if this sorry situation is to be improved, and the right of all citizens to a fair trial is to be achieved.

Appointing, training, and funding qualified and experienced defense counsel in all capital cases is the only way we can meet these expectations. The ABA's work confirms that all members of the legal system must commit to reform and change so that we can make good on the promise of justice for all, including capital defendants.

On behalf of the American Bar Association, I appreciate this opportunity to appear before the Committee to address this important issue.

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AMERICAN BAR ASSOCIATION
STATE DEATH PENALTY ASSESSMENTS
KEY FINDINGS

As a society, we must do all we can to ensure a fair and accurate system for every person who faces the death penalty. When a life is at stake, there is no room for error or injustice. The American Bar Association, working with in-state teams, assessed the fairness and accuracy of eight state death penalty systems. To do this, the state-based teams researched twelve issues: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) the treatment of racial and ethnic minorities; and (12) mental retardation and mental illness. While the requisite data often was not collected, maintained, or made available in a way that made analysis possible, general themes emerged in each of the topic areas. Ultimately, serious problems were found in every state death penalty system.

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Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, as well as full and fair compensation to the lawyers who undertake capital cases and resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. After examining eight states, the themes that emerged include:

- Many states are failing to provide a statewide indigent capital defense system, providing services instead on a county-by-county basis;
- The judiciary remains primarily responsible for appointing defense counsel;
- Some states are failing to provide for the appointment of counsel in post-conviction proceedings and all states are failing to provide for the appointment of counsel in clemency proceedings;
- Capital indigent defense systems, whether statewide or county-by-county, generally are significantly underfunded;
- Many states are failing to provide for the appointment of two lawyers at all stages of a capital case, nor are they guaranteeing access to investigators and mitigation specialists;
- Many states are requiring only minimal training and experience for attorneys handling death penalty cases; and
- The compensation paid to appointed capital defense attorneys is often woefully inadequate, dipping to well under $50 per hour in some cases.

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ABA Death Penalty Assessment Reports

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/alabama/report.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/arizona/Report.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/florida/report.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/georgia/report.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/ohio/finalreport.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/pennsylvania/finalreport.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Tennessee Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/tennessee/finalreport.pdf

Evaluating Fairness and Accuracy in State Death Penalty Systems: The Indiana Death Penalty Assessment Report
http://www.abanet.org/moratorium/assessmentproject/indiana/report.pdf

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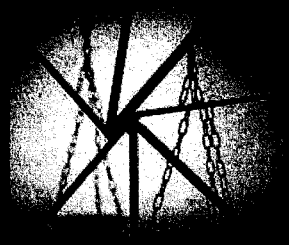
GIDEON'S BROKEN PROMISE:

AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE



A Report on the American Bar Association's Hearings
on the Right to Counsel in Criminal Proceedings

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Executive Summary

During the 40th anniversary year of the U.S. Supreme Court's decision in *Gideon v. Wainwright* establishing the right to counsel in state court proceedings for indigents accused of serious crimes, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) held a series of public hearings to examine whether *Gideon's* promise is being kept. Throughout 2003, extensive testimony was received from 32 expert witnesses familiar with the delivery of indigent defense services in their respective jurisdictions. Their comments were recorded in hundreds of pages of transcripts and then meticulously analyzed.[1]

The witnesses were from all geographic parts of the U.S. and represented 22 large and small states, as well as the major kinds of indigent defense delivery systems and payment methods. Because of the diversity and location of their jurisdictions, we believe the witnesses' comments accurately captured the widespread difficulties in delivering adequate defense services for the poor not only in the states of the witnesses, but in much of the rest of the country as well.

This report is based upon what we learned during our hearings. Our Main Findings and Recommendations, listed below and discussed in this report, also draw upon the expertise that ABA SCLAID has developed during its many years of advocacy on behalf of effective legal services for both persons in need of civil legal assistance and those accused of criminal and juvenile misconduct.

Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.

As the Introduction to this report explains, *Gideon* was the start of a right to counsel revolution in the United States. Today, consistent with the Sixth Amendment to the U.S. Constitution, persons cannot be deprived of their liberty in state criminal or juvenile courts, even if charged with minor offenses, unless counsel has represented them or they have knowingly and intelligently relinquished their right to legal representation. During the past decade, the flood of defendants wrongfully convicted has underscored the importance of providing effective defense services for the indigent. While there are many reasons why our justice systems far too often convict innocent persons, clearly one of the best bulwarks against mistakes is having effective, well-trained defense lawyers.

Yet, as Part II of this report demonstrates, defense services in the U.S. are not adequately funded, leading to all kinds of problems. These include a lack of funds to attract and compensate defense attorneys; pay for experts, investigative and other support services; cover the cost of training counsel; and reduce excessive caseloads. Too often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent, thereby violating ethical duties to their clients

under rules of professional conduct. Meanwhile, judges sometimes fail to honor the independence of counsel and routinely accept legal representation in their courtrooms that is patently inadequate. This report also identifies significant structural problems with indigent defense services since in most jurisdictions there is an absence of oversight to ensure uniform, quality services; sometimes simply a failure to provide counsel; and improper waivers of counsel and guilty pleas accepted without lawyers.

Part III of this report on Strategies for Reform presents information on recent legislative and other efforts in several states to enhance funding of indigent defense and to establish greater statewide oversight of representation. While these efforts represent important progress, invariably the funding and structures to ensure effective defense services in these jurisdictions are still not adequate. Part IV on Model Approaches to Providing Services discusses notable programs in several states to foster quality and oversight through statewide structures, resource centers, and expansion of the scope of representation.

Part V outlines our nine Main Findings, which are listed below:

- **Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.**
- **Funding for indigent defense services is shamefully inadequate.**
- **Lawyers who provide representation in indigent defense systems sometimes violate their professional duties by failing to furnish competent representation.**
- **Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record.**
- **Judges and elected officials often exercise undue influence over indigent defense attorneys, threatening the professional independence of the defense function.**
- **Indigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.**
- **Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.**
- **The organized bar too often has failed to provide the requisite leadership in the indigent defense area.**
- **Model approaches to providing quality indigent defense services exist in this country, but these models often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.**

Our seven recommendations for repairing *Gideon's* broken promise are discussed in Part VI of the report:

- **To fulfill the constitutional guarantee of effective assistance of counsel, state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense should be in parity with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects.**

- **To fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings.**

- **State governments should establish oversight organizations that ensure the delivery of independent, uniform, quality indigent defense representation in all criminal and juvenile delinquency proceedings.**

- **Attorneys and defense programs should refuse to continue indigent defense representation, or to accept new cases for representation, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations.**

- **Judges should fully respect the independence of defense lawyers who represent the indigent, but judges should also be willing to report to appropriate authorities defense lawyers who violate ethical duties to their clients. Judges also should report prosecutors who seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, or who otherwise give legal advice to such persons, other than the advice to secure counsel. Judges should never attempt to encourage persons to waive their right to counsel, and no waiver should ever be accepted unless it is knowing, voluntary, intelligent, and on the record.**

- **State and local bar associations should be actively involved in evaluating and monitoring criminal and juvenile delinquency proceedings to ensure that defense counsel is provided in all cases to which the right to counsel attaches and that independent and quality representation is furnished. Bar associations should be steadfast in advocating on behalf of such defense services.**

- **In addition to state and local bar associations, many other organizations and individuals should become involved in efforts to reform indigent defense systems.**

Our nation has been in search of *Gideon's* promise for 40 years. As this report shows, we must continue to try harder if we are to deliver on the constitutional guarantee of effective defense services in criminal and juvenile cases. The recommendations in this report, if implemented, will go a long way towards making indigent defense services a meaningful reality for all indigent persons unable to afford counsel.

Statement by Senator Edward M. Kennedy

The death penalty brings out the worst in the American criminal justice system. It has proven ineffective as a deterrent and cannot be carried out in a humane way. The validity of the verdicts on which it is based are often left in doubt, leaving real fears that innocent people have been put to death.

In many states, the responsibility of representing defendants in capital cases is often left in the hands of lawyers least prepared for the task. Death penalty cases raise the most complex issues faced by criminal defense attorneys. The procedures alone are intricate and require experience to understand. Many states lack capital defense units or public defenders dedicated to this complex litigation, and instead rely on appointed attorneys, whose compensation is at levels more consistent with minor offenses than death penalty cases.

The situation is even worse at the post-conviction level. States must provide some form of representation at trial, but no such obligation exists when a defendant complains after trial that his attorney was deficient or erred in some way. Some states provide attorneys for this important stage, but others leave it to defendants with little or no education, training, or assistance. Yet to defend their innocence and protect their lives, they have to

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navigate a legal system that even many lawyers are hard-pressed to understand.

The passage of the Antiterrorism and Effective Death Penalty Act exacerbated this problem by reducing funds for organizations that assist death row inmates and imposing new limitations on access to federal courts.

The death penalty is an issue that invokes strong passions. Many strongly support it, and just as many vehemently oppose it. But surely, when it is clear that defendants who face the death penalty are not receiving even the basic protection of competent counsel, we should be able to agree that this problem must be fixed. If the death penalty itself is to continue, it can only do so in a system that ensures it is not imposed unfairly or by mistake, and that has the basic protections that the rule of law demands.

If our country is to continue to be a beacon of freedom and democracy, we have to get our own house in order. If criminal defendants facing death sentences are not adequately represented in our own country, how can we criticize other nations for the same thing?

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On "The Adequacy of Representation in Capital Cases"
April 8, 2007

I thank Senator Feingold and the Subcommittee on the Constitution for holding this hearing on such an important issue for the Committee and for the country. Senator Feingold has worked for many years with me and others to try to ensure that our criminal justice system reflects the fairness and protections that our Founders intended.

In 2000, I introduced the Innocence Protection Act , which aimed to improve the administration of justice by ensuring that defendants in the most serious cases have access to counsel and, where appropriate, access to post-conviction DNA testing necessary to prove their innocence in those cases where the system got it grievously wrong. That legislation and this Committee have attempted to ensure that our system gets it right, particularly when the stakes are as high and the results as final as they are in capital cases. The conviction of innocent defendants is a tragedy that our system of criminal justice is designed to prevent. With it comes the corresponding criminal justice nightmare that the actual wrongdoer remains undiscovered, and possibly at large, committing additional crimes.

It took hard work and time, but in 2004, Congress passed the Innocence Protection Act as an important part of the Justice for All Act. Congress recognized the need for important changes in criminal justice procedure and forensics despite resistance from the current administration. It was an unprecedented, bipartisan piece of criminal justice reform legislation intended to ensure that law enforcement has all the tools it needs to find and convict those who commit serious crimes, but also that innocent people have the means to establish and prove their innocence. It was the most significant step Congress had taken in many years to improve the quality of justice in this country and to restore public confidence in the integrity of the American justice system.

According to the Death Penalty Information Center, more than 120 innocent people have now been freed from death row – a truly alarming number. And it is in everyone's interest for the guilty parties to be found and punished. Addressing those imperatives was the purpose of the Justice for All Act. Now, more than three years later, this Committee is working to make sure that the letter and the spirit of that law are being followed, and that our justice system is working as it should.

In January, this Committee held its first hearing of the year to look at key parts of the Justice for All Act, including the Kirk Bloodsworth Post Conviction DNA Testing grant program. That program was intended to provide grants for states to conduct DNA tests in cases in which someone has already been convicted – but key DNA evidence was not tested. Exactly that kind of evidence exonerated Kirk Bloodsworth, who was a young man just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime that he did not commit. I was troubled to find then that more than three years after the passage of the Act, with Congress having appropriated almost $14 million to the Bloodsworth program, not a dime has been released to the states for this worthy purpose.

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That hearing in January and our oversight appears to be having an effect. The day before that hearing, the Department of Justice issued a new solicitation for states to apply for Bloodsworth grants. We understand that more states have applied for the grants than in the past, and Department officials assure us that they are working hard to see that money is given out and that the Act's statutory requirements are interpreted in a meaningful way so that states will preserve important evidence, but not in such an extreme way as to exclude every state from qualifying for the program. I have been heartened by the positive steps the Department has taken on the Bloodsworth program, but I will be watching closely to make sure that the Department follows through on the promise of these good first steps.

I hope the Department will also work to correct an important problem with the Paul Coverdell Forensic Science Improvement Grants Program, which also came out in that January hearing. The Department must make sure that states have an independent check in cases of lab misconduct to maintain the integrity of the important forensic work funded by that key program.

Today, Senator Feingold is leading the way in following up on a different and equally important aspect of the same issue. If we sanction the use of a penalty as final as capital punishment, we must be sure that the system is working properly. The catastrophe of executing an innocent person is not one that we can ever tolerate. Unfortunately, the number of innocent people freed from death row to date illustrates that this is not an idle concern.

The best way to ensure that justice is done is to have exceptional counsel on both sides of these cases. As a prosecutor, I always knew that it was better to have good opposing counsel. With properly trained attorneys and appropriate resources on all sides, we can have much more confidence in our system of justice. Unfortunately, our track record on representation of capital defendants has not been good.

Despite some important first steps in the Innocence Protection Act, I fear that our system of representation in capital cases is still far from adequate. We need a clear-eyed assessment of the current situation, and I thank Senator Feingold for taking on this important issue.

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Statement of

William S. Sessions

Submitted to the
Subcommittee on the Constitution
of the United States Senate Committee on the Judiciary

April 8, 2008

Chairman Feingold, Senator Brownback, and Members of the Subcommittee:

I am sorry I cannot be with you in person today to testify on the subject of effective assistance of counsel for defendants charged with a capital crime. I served as a United States Attorney, as a United States District Court Judge, and then as Chief Judge, on the United States District Court for the Western District of Texas. I was then appointed by President Reagan to serve as the Director of the Federal Bureau of Investigation. I have devoted much of my career to law enforcement and the fair and effective operation of the criminal justice system.

In my view, we face a crisis in the administration of capital punishment in this country. While I support capital punishment, I am committed to ensuring that the death penalty is fairly administered and is not procured through violations of constitutional guarantees. I am now a partner at the law firm of Holland & Knight LLP, and serve on the Constitution Project's bipartisan Death Penalty Committee, which includes supporters of the death penalty, like myself, as well as opponents. This committee of current and former prosecutors, judges, policymakers, law enforcement officers, victim advocates, defense lawyers, and other experts was created to address "the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death."[1]

Because the Death Penalty Committee's members believe that adequate legal representation is essential to the effective functioning of the adversarial system, and that the failure to provide such representation is "likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error," the very first of our consensus recommendations addresses the "lack of adequate counsel to represent capital defendants."

When those constitutional guarantees are threatened, so is the ability of the adversarial system to produce just results. Ensuring that those on trial for their lives have adequate defense counsel is of paramount importance. When a

[1] The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* ix (2001) *available at* http://www.constitutionproject.org/pdf/mandatory_justice.pdf

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criminal defendant is forced to pay with his life for his lawyer's errors, the effectiveness of the criminal justice system as a whole is undermined.

In 1984, the Supreme Court stated in *Strickland v. Washington* that the "Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."

Reality has yet to live up to the Court's standard. Indeed, the Death Penalty Committee's report concluded that "the quality of defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused . . . ," and that the Court's *Strickland* standard is poorly suited for capital cases and should be replaced with a higher standard of professional competence.[2] Rather than placing the burden of proof on the defendant in proving ineffective counsel, the burden should be shifted to the state to show that even with competent counsel a defendant still would have been sentenced to death. This may be the only way to ensure that we have done due diligence in preventing the wrong people from being convicted and sentenced to death.

In 2000 and 2002, Columbia University released a two-part study that evaluated error rates in capital cases from 1973 to 1995, and found that two-thirds of those cases were overturned for serious constitutional errors. It concluded that one of the most common errors was egregiously incompetent defense lawyers who failed to look for, and often missed, important evidence that the defendant was innocent. Last October, the American Bar Association reported on its three-year examination of the capital punishment systems in eight states across the country. This examination found that capital indigent defense is generally significantly underfunded, that compensation paid to appointed capital defense attorneys is most often inadequate, and that many states require only minimal training and experience for defense counsel in capital cases.

As *Mandatory Justice: The Death Penalty Revisited* notes, jurisdictions that impose capital punishment should create an independent authority to screen, appoint, train and supervise attorneys who represent defendants charged with a capital crime. These attorneys should meet minimum standards of performance and should be available throughout the entire process of a capital proceeding.

In addition, capital defense attorneys should be adequately compensated, and capital defendants should be provided with the funds to hire experts and investigators. Without proper funding a lawyer is seriously hampered in adequately defending his client. On March 17, 2008, the Georgia Supreme Court

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[2] The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* 1 (2005), *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf

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voted to deny a new trial to Troy Anthony Davis. While inconsistent witness statements and missing evidence raise questions about Mr. Davis' guilt, it also appears that he received poor representation as his case proceeded through the courts. In fact, a lawyer from the Georgia Resource Center, assigned to represent Mr. Davis, stated in an affidavit that because the Center's budget was dramatically cut, "[w]e were simply trying to avert total disaster rather than provide any kind of active or effective representation."

Without adequate funding there is little hope that a lawyer representing a capital defendant can properly examine documents, interview witnesses, and hire experts to examine the defendant's mental state and analyze forensic evidence. These practices, and others, are the backbone of any adequate defense – capital and non-capital. They are absolutely essential for society to be certain that the right person is convicted of a crime. We should always remember that when the wrong person is convicted, the real perpetrator remains free, perhaps to commit more crimes.

The United States criminal justice system is recognized as one of the best in the world, but it is not perfect. Just last week, on April 2, the 128th person on death row was exonerated and released from North Carolina's death row. While the appointment of adequate, well-resourced, and experienced counsel in capital cases is primarily the responsibility of the states and localities, Congress has the ability and, I believe, the obligation, to ensure that the states fulfill this responsibility.

Thank you for your attention to this vital matter.

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Resources of the Prosecution and Indigent Defense Functions in Tennessee

May 2007

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INTRODUCTION

In June 2006, The Spangenberg Group (TSG) contracted with The Justice Project Education Fund and The Tennessee Justice Project to collect data for the creation of a Resource Balance Sheet for a side-by-side comparison of prosecution and defense resources expended in Tennessee. To conduct the comparison, we examined fiscal year 2005 funding information from the District Attorney General's Conference; the Public Defender's Conference; court-appointed counsel fees and expenses maintained by the Director of the Administrative Office of the Courts; additional state government organizations involved in the areas of law, safety and correction; county and local funding for prosecution and defense; federal funds; and in-kind resources available to the prosecution and defense.

The primary source of data used by TSG for calculating fiscal year 2005 expenditures for both prosecution and defense was the *State of Tennessee Budget, Fiscal Year 2006-2007, Volume I: Law, Safety and Corrections*. In addition to containing the 2006-2007 budget, the report contains actual 2004-2005 expenditures for every agency or department in the state relating to law, safety and corrections. The budget report contains two sections. The first section sets out all requests for improvements in the individual agencies' budgets for 2006-2007. The second section sets out the actual expenditures for each agency in 2004-2005, the estimated budget for 2005-2006, the baseline budget for 2006-2007, the requests from the agencies for additional state funds or improvement funds for 2006-2007, and the total recommended budget for each agency for 2006-2007.

In examining the FY 2006-2007 budget of the state of Tennessee, we looked at all expenditures for each agency or sub-agency, but used only the total *actual* expenditures reported from FY 2004-2005 in our calculations.

In Part I of this report, we calculate the actual prosecution expenditures, and then the indigent prosecution expenditures. In doing this, we began with the budget of the District Attorney General Offices and Executive Director for FY 2004-2005. We then looked at the FY 2004-2005 actual expenditures for other law, safety and corrections agencies reported in the budget book. For the purposes of this report, we included those agencies or sub-agencies that devote all or a portion of their work to the prosecution function. The expenditures of most law, safety and corrections line items were reduced according to the estimated percentage of work-related time and expenses pertaining to the prosecution function. However, it was not possible to calculate the precise percentage of actual expenditures devoted to the prosecution or defense function for each agency or sub-agency in 2004-2005. In some instances we were able to estimate the percentage of the line item attributable to the prosecution function after contacting state officials from the agency or sub-agency indicated. In other instances, we assumed a percentage of the actual expenditures for the budget item attributable to the prosecution function based upon information contained in the budget book and our 30 years of experience dealing with other criminal court expenditures in over half of the states in the country.

For purposes of comparing total prosecution and defense resources, we then reduced the grand total of prosecution expenditures according to a percentage that could be fairly attributable to the prosecution of *indigent* cases – that is, cases handled by public defenders or court-

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appointed counsel only, excluding those handled by private attorneys. The Administrative Office of the Courts has indicated that it does not track the percentage of all indigent cases in the state, nor is there another source for such data. However, in our knowledge and experience in studying both indigency rates and indigent defense systems across the country, we have found that in a number of jurisdictions, the average rate of indigency frequently ranges between 75% and 80%.

In Part II of this report, we calculate the actual expenditures for the indigent defense function. In doing so, we began with the actual expenditures of the District Public Defender's Conference and the Executive Director for FY 2004-2005. We included the Indigent Defense Fund of the Administrative Office of the Courts which funds assigned counsel in conflict cases as well as expert, investigative and other support services for the defense. To these state expenditures, we added other federal, county and local resources. Because all defense expenditures are attributable to the indigent defense function, 100% was used for comparison with the 75–80% prosecution expenditures.

Finally, in Part III we make the bottom-line comparison between indigent prosecution and defense funding, and we provide additional evidence in support of our conclusion. First, we calculate the attorney unit cost for both the indigent prosecution and indigent defense functions and compare the results. Second, we cite the disparity in need of additional attorney positions between the prosecution and the defense according to the Comptroller's latest updates of the prosecution and defense case-weighting studies.

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PART 1:

FY 2005 EXPENDITURES FOR THE PROSECUTION FUNCTION

I. State Funds and Expenses for the Prosecution Function

A. District Attorneys General Conference

There are 31 District Attorneys General, elected in each of the state's judicial districts, who serve as the state's prosecutors for all state criminal violations.

> In addition, they prosecute all criminal cases in the federal courts that are removed from a state court and give opinions to county officials on criminal law relating to their office. Further, district attorneys and their assistants consult with and advise law enforcement agencies on cases or investigations within their district. In 19 judicial districts, the district attorney has contracted with the Department of Human Services to enforce court-ordered child support obligations through the IV-D Child Support Enforcement Program.[1]

Because the function of the District Attorneys General is the prosecution of cases, we have attributed the full line item expenditures to the prosecution function. As with all other prosecution line items, the percentage of indigent cases will be applied later to the grand total of prosecution expenditures.

Table 1:
District Attorney General Conference's Annual Appropriation for 2004-2005

Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
304.01 - District Attorney General	$53,188,200	100%	$53,188,200
304.05 - District Attorney General Conference	$361,500	100%	$361,500
304.10 - Executive Director	$1,864,500	100%	$1,864,500
Department Total	$55,414,200		**$55,414,200**

B. Other State Expenditures Attributable to District Attorneys General from the Law, Safety and Corrections Budget for FY 2005

In addition to the direct appropriations set out in Table 1, the District Attorneys General receive additional state funds either directly or indirectly from a number of other state agencies, including the following:

[1] State of Tennessee Budget, Fiscal Year 2006-2007, Volume 1, p. B-197.

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1. Attorney General and Reporter

The Attorney General and Reporter is Tennessee's chief legal officer. The responsibilities related to the prosecution function include prosecuting criminal cases in the appellate courts and providing departments, agencies and the General Assembly with legal advice. The Attorney General under Tennessee law represents the state in all criminal appeals whereas the appellate function for indigent defendants is provided by the district public defenders and assigned counsel. The Attorney General also represents the state in criminal appellate matters in federal court.

It is estimated that 14 percent of the Attorney General and Reporter budget statewide in 2004-2005 was attributable to the prosecution function.[2] The total expenditure amount allocated to the Attorney General and Reporter in FY 2005 was $24,991,900. Therefore, the funds allocated to the prosecution function from the Attorney General and Reporter totaled **$3,498,866**.[3]

2. Board of Probation and Parole

The Board of Probation and Parole manages the release and supervision of adult felons and conducts parole hearings in state and local prisons and jails. The Field Services Division of the board has eight district offices and 37 field offices. This division is responsible for writing pre-sentence investigation reports for use by the court and the board in sentencing considerations. Probation/parole officers in the division "report violations of probation and parole to the court and the Board, and may recommend what action should be imposed." In addition, they are responsible for "presenting facts and evidence to the court and board at revocation hearings as well as other formal hearings, conducting home and employment visits, monitoring community service work, providing intensive supervision... and locating absconders."[4]

It is estimated that 5 percent of the Probation and Parole Services line item is attributable to the prosecution function; this work includes preparing pre-sentence investigation reports, investigating probationers/parolees, and preparing for and testifying at revocation hearings and other hearings. Since the total allocations for the Probation and Parole Services were $50,759,500, we have estimated that **$2,537,975** should be charged against the state's prosecution function.

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[2] We were informed by officials in the Attorney General's Office that approximately 25 attorneys are assigned to criminal matters, which amounts to approximately 14% of the office's budget for line item 303.01 in FY 2005.
[3] The Attorney General's Office handles all appeals for the prosecutor while the Public Defender's Office handles all of its own appeals. Therefore, we have included the estimated time that attorneys in the Attorney General's Office work on an appeal to the prosecution function.
[4] Tennessee Board of Probation and Parole, Field Services Division, Statutory Authority and Responsibilities; see http://www2.Tennessee.gov/bop/bop_fs_SAR.htm.

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3. Tennessee Bureau of Investigation

"The Tennessee Bureau of Investigation (TBI) is responsible for assisting the District Attorneys General and local law enforcement agencies in the investigation and prosecution of criminal offenses." Each of the five divisions of TBI are either directly involved in the investigation and prosecution of crime or directly support those efforts. The Criminal Investigation division provides "expertise in investigative support to district attorneys and state and local law enforcement agencies" and conducts independent investigations of misconduct and fraud. "The Drug Investigations division has original jurisdiction to investigate violations of Tennessee's drug control laws." The Forensic Services division "provides forensic examinations for the law enforcement community and medical examiners statewide." "The Information Systems division provides support to investigative activities through records management, systems operations, fingerprint identification, and uniform crime reporting." Finally, "[t]he Administrative Services division provides overall direction and support for the bureau."[5]

Given that all divisions of TBI are involved in investigating and prosecuting crime or supporting such work, all **$50,546,200** of TBI's budget is attributable to the prosecution function.

4. Department of Safety

The Department of Safety enforces the laws governing the use of state and federal roads, which includes criminal investigation. The department also provides training assistance to local law enforcement officers. The Administrative Support Services division is responsible for overall administration of the department and includes a legal section that provides general legal counsel and administers asset forfeiture cases stemming from the Drug Control Act. The Motor Vehicle Operations unit provides support to the personnel who investigate violations of motor vehicle laws. The Tennessee Highway Patrol enforces all motor vehicle and driver license laws and investigates accidents. The Criminal Investigations Division (CID) investigates and prosecutes violations of Tennessee's auto theft laws, and provides investigative support in felony cases. The Technical Services division maintains general records and data for the Department of Safety.

Table 2 provides the total FY 2005 expenditures for sub-agencies of the Department of Public Safety and the percentage of each sub-agency to which we have allocated prosecution funding. When taking all of the sub-agencies of the Department of Safety into account, the total amount allocated to the prosecution function from the Department of Safety is **$18,828,970**.

5. Governor's Highway Safety Office

The Governor's Highway Safety Office distributed a total of **$2,551,651** in grants in FY 2005 to eighteen Judicial District Attorney Generals' Offices from the National Highway Traffic Safety Administration. The grant awards were made to provide resources that allow drunken driving prosecutors to decrease the number of dismissed or reduced DUI charges. Therefore, all of these funds are attributable to the prosecution function.

[5] State of Tennessee Budget, Fiscal Year 2006-2007, Volume 1, p. B-221.

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On this and the following page, Table 2 sets out the FY 2005 state agency and sub-agency spending with ten line items that we believe provided direct or indirect services to the prosecution function.

Table 2: Other State 2004-2005 Funds Attributable to the Prosecution Function

Attorney General and Reporter 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	**Total Expenditure for Line Item**	**Percent of Expenditure to Prosecution Function**	**Total Expenditure Allocated for Prosecution Function**
303.01 Attorney General and Reporter	$24,991,900	14%	$3,498,866
Subtotal			*$3,498,866*

Board of Probation and Parole 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	**Total Expenditure for Line Item**	**Percent of Expenditure to Prosecution Function**	**Total Expenditure Allocated for Prosecution Function**
324.02 - Probation and Parole Services	$50,759,500	5%	$2,537,975
Subtotal			*$2,537,975*

Tennessee Bureau of Investigation 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	**Total Expenditure for Line Item**	**Percent of Expenditure to Prosecution Function**	**Total Expenditure Allocated for Prosecution Function**
348.00 - Tennessee Bureau of Investigation	$50,546,200	100%	$50,546,200
Subtotal			*$50,546,200*

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Table 2 (continued)

Department of Safety 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	**Total Expenditure for Line Item**	**Percent of Expenditure to Prosecution Function**	**Total Expenditure Allocated for Prosecution Function**
Administrative Support Services			
349.01 - Administration	$6,515,500	10%	$651,550
349.07 - Motor Vehicle Operations	$7,382,100	10%	$738,210
Enforcement			
349.03 - Highway Patrol	$82,427,600	20%	$16,485,520
349.06 - Auto Theft Investigations	$76,700	10%	$7,670
349.14 - C.I.D. Anti-Theft Unit	$688,700	10%	$68,870
Technical Services			
349.13 - Technical Services	$8,771,500	10%	$877,150
Subtotal			*$18,828,970*

Governor's Highway Safety Office 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	**Total Expenditure for Line Item**	**Percent of Expenditure to Prosecution Function**	**Total Expenditure Allocated for Prosecution Function**
National Highway Traffic Safety Administration Grant Allocation	$2,551,651		$2,551,651
Subtotal			*$2,551,651*

Grand Total **$77,963,662**

II. Federal, County and City Funds Allocated to the Prosecution Function

In determining the funding set forth in this section, we reviewed reports by the Comptroller. We reviewed the *Study of Funds Outside the State Accounting System Available to the Administrative Office of the Courts, the District Attorneys General, and the District Public Defenders* (Audit of Non-State Funds). This study is conducted annually by the Office of the Comptroller of the Treasury, Division of County Audit and Office of Research and the Office of Legislative Budget Analysis and is reported to the Office of Finance Ways and Means Committee. We also reviewed the Comptroller's *Review of Funds Administered by District Attorneys General and Judicial District Drug Task Forces, First Through Thirty-First Judicial Districts for FY 2005*.

Chapter 464 of the Public Acts of 2001 directs the Office of the Comptroller of the Treasury and the Office of Legislative Budget Analysis to study the issue of any funds maintained by judges, public defenders or district attorneys outside the state accounting system. Specifically, the mandate states:

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> From funds appropriated to the Office of the Comptroller of the Treasury and the Office of Legislative Budget Analysis, such offices are directed to study the issue of funds maintained outside of the state accounting system that the Administrative Office of the Courts, the District Attorney Generals Conference, and the District Public Defenders Conference, do not report to the Senate House Finance Ways and Means Committee, as to the following matters:
>
> 1. The source of any funds maintained outside of the state's public accounting system;
> 2. The disposition of such funds;
> 3. The statutory basis for disposition of such funds; and
> 4. Accountability controls that are in place or are needed with respect to such funds.

For several years, the auditor has raised issues regarding frequent failure to place non-state funds within the state accounting system as required by law.

The recent Audit of Non-State Funds found that "some local governments appropriated and expended general funds of the local government to enhance operation of state court judges, district attorneys general, and district public defenders. District attorneys general also have funds available to spend at their sole discretion for the operation of their offices."

The study also revealed the following key issues:

1. In some instances, state court judges use personal funds to establish petty cash accounts.
2. The salaries of some state employees in the Office of the District Attorney General were supplemented with local funds appropriated by the local legislative body and with funds available locally to the District Attorneys General to be used at their discretion. Also, some employees' salaries in the Office of District Public Defenders were supplemented with local funds appropriated by the local legislative body. These supplements resulted in state employees being compensated at a salary higher than the salary provided by the state for that position. In some instances, local government fully funded employees' salaries, and those employees are considered county employees.
3. Salary supplements paid to state employees with local funds were not uniformly reported to the Tennessee Consolidated Retirement System.
4. Local funds were provided to state employees for travel when state funds were not available for that purpose, and in some instances exceeded state travel regulations.
5. Funds expended locally for the state court judges, district attorneys general, and public defenders were not actively monitored by the Administrative Office of the Courts, the District Attorneys General Conference, and the District Public Defenders Conference, respectively, but are subject to audit by the Comptroller of the Treasury.

Funds available to state court judges, district attorneys general, and district public defenders that are not expended to their administrative bodies and conferences and are not on

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that state's accounting system raise serious concerns for accountability. The funds not on the state's accounting system are audited; however, there is no system in place to provide legislators with a clear and total picture of the staffing and operating needs of the courts, the district attorneys and public defenders.

A number of federal, county and city funds are allocated to the prosecution function each year. Below we describe portions of the auditor's report for FY 2005 that provide information on the distribution of federal, county and city funds allocated to prosecution function.

A. Funds Administered by District Attorneys General

1. District Attorney General Fund

The District Attorney General Fund is used primarily to account for fees received from the Fraud and Economic Crimes Prosecution Act of 1984. In addition, this fund is also used to account for other sources of revenues received by the District Attorneys General, such as investment income, miscellaneous refunds, copy fees, contributions, proceeds from confiscated property, and other local revenues. The revenue from the District Attorney General Fund for FY 2005 totaled **$1,161,040**.

2. Drug Task Force Fund

Some judicial districts have established multi-jurisdictional drug task forces under the leadership of the District Attorneys General. These drug task forces were created by contract between the participating district attorneys general, and city and county governments, and approved by their respective legislative bodies. Drug Task Force funds are to be deposited with the county trustee in each judicial district, and county trustees credit these funds to a Judicial District Drug Fund. The total funding received by the District Attorneys General from the Drug Task Force Fund for FY 2005 was **$13,295,009**.

3. Federal Asset Forfeiture Fund

Under the United States Department of Justice Comprehensive Crime Control Act of 1984, the Office of the U.S. Attorney General has the authority to share federally forfeited property with cooperating state and local law enforcement agencies. The purpose of this Act is to punish and deter criminal activity by depriving criminals of property used for or acquired through illegal activities; to enhance cooperation among federal, state, and local law enforcement agencies through equitable sharing of assets recovered through the program; and to procure revenues to enhance forfeitures and strengthen law enforcement. The Offices of the District Attorney General in the Thirtieth Judicial District and the Twentieth Judicial District are participating in the forfeiture program. The total revenue received from this fund by the District Attorneys General was **$127,934** in FY 2005.

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4. Metro/County Appropriations Fund

This consists of funds appropriated by the counties and cities in the Twenty-Third Judicial District. The revenue generated from this fund was **$482,649** in FY 2005.

5. Mediation Services Fund

The Mediation Services Fund consists of funds received from a one dollar litigation tax that is assessed on all cases in the General Sessions and Juvenile Courts in Davidson County and other appropriations received by the Twentieth Judicial District for the support and operation of victim-offender mediation centers. The District Attorneys General received **$57,820** from the Mediation Services Fund in FY 2005.

Table 3 below summarizes the total funds received by the District Attorneys General from the sources listed above.

Table 3: FY 2005 Revenue from Funds Administered by the District Attorneys General

Funds	Revenue
General Fund	$1,161,040
Drug Task Force Fund	$13,295,009
Federal Asset Forfeiture	$127,934
Metro/County Appropriations	$482,649
Mediation Services	$57,820
Other Funds	$278,451
Total	**$15,402,903**

B. Other Funds Available to District Attorneys General

The District Attorneys General have two additional funds available to them. *The FY 2006-2007 Tennessee State Budget Office of State Comptroller, Audit of Non-State Funds for FY 2005*, shows Attorney General reserve funds (as of 6/30/05) totaling **$12,026,756**. These reserve funds are end-of-the-year non-state funds that remain available for each of the 31 District Attorneys General Offices. The same Audit of Non-State Funds also shows an additional **$13,415,159** in non-state (federal, county and local) appropriations and states as follows: In addition to the above-noted revenues, some counties and cities appropriated and "expended funds for the benefit of the judicial districts, primarily for salaries." The total amount of these county/city funds for FY 2005 amounted to **$25,441,915** statewide.

III. Total FY 2005 Funds for Prosecution in Tennessee

Together, state and non-state funds for the prosecution in Tennessee for FY 2005 are set out in Table 4:

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Table 4: FY 2005 TOTAL PROSECUTION FUNDING	
Funds	**Revenue**
State Appropriations (Table 1)	$55,414,200
Other State Prosecution Funds (Table 2)	$77,963,662
Funds Administered by District Attorneys General (Table 3)	$15,402,903
Non-State Reserve Funds	$12,026,756
Other Non-State Funds	$13,415,159
Total	**$174,222,680**

The total figure for prosecution funding is a conservative one for two reasons. First, it does not include in-kind resources (discussed below). Second, in some cases, we excluded from Other State Prosecution Funds (Table 2) state agencies for which we were unable to confirm a specific function relevant to the prosecution of cases, although it appears such function may exist. For instance, the Department of Correction (DOC) has a State Prosecutions line item. According to the budget book, State Prosecutions "provides payments to counties for other correctional expenditures, such as witness fees, criminal court costs and transportation, jury boarding, and medical costs for convicted felons."[6] While the budget item for DOC State Prosecutions is $108,810,400, no portion of this was used in this report.

Finally, in order to determine the total prosecution funding in indigent cases, Table 5 applies the average range of 75%-80% for the indigency rate to the grand total of prosecution funding in Table 4 from all sources.

Table 5: FY 2005 TOTAL INDIGENT PROSECUTION FUNDING		
Prosecution Funding	**Indigency Rate**	**Indigent Prosecution Funding**
$174,222,680	75%	$130,667,010
$174,222,680	80%	$139,378,144
Total Indigent Prosecution Funding Range: $130 - $139 Million		

IV. In-Kind Prosecution Resources

In addition to the state and non-state appropriated funds available to the prosecution function in Tennessee, each District Attorneys General Office in the state has available to it the resources of state, county and local law enforcement agencies to assist in the investigation and preparation of the prosecution's case, including the investigation of witnesses, collection of evidence, and use of state experts. These resources are provided by each law enforcement agency to the District Attorneys General at no direct cost to them. In addition to these state and local resources, all District Attorneys General also have the in-kind resources of the federal

[6] *Id.* at B-207.

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government, including the services of federal law enforcement agencies and federal crime labs. While it is not possible to allocate specific dollar amounts to these federal state, county and local in-kind services, it is safe to state that they raise the FY 2005 appropriated figure to well in excess of the $174.2 million calculated in Table 4.

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PART 2:

FY 2005 EXPENDITURES FOR THE INDIGENT DEFENSE FUNCTION

I. District Public Defenders Conference

In each of Tennessee's 31 judicial districts, the voters publicly elect a public defender to serve their district. Each of these judicial districts has an independent public defender office. The state funds these public defender offices with the exception of Shelby County (Memphis) and Davidson County (Nashville), which have their own separate public defender offices funded through a combination of state and local monies. Public defenders are appointed in any indigent criminal prosecution or juvenile delinquency proceeding involving the possible deprivation of liberty, or in any habeas corpus or other post-conviction proceeding.

Each elected public defender participates in the Tennessee District Public Defenders Conference. The Conference helps public defenders across the state discharge their official duties and assists with the enactment of laws and rules of procedure necessary for the effective administration of justice. The Executive Committee of the District Public Defenders Conference is the decision-making body of the Conference.

The Office of the Executive Director of the Conference is the central administrative office for all but two of the district public defenders (Nashville and Memphis). The Executive Director is responsible for budgeting, payroll, purchasing, personnel, and administration of all fiscal matters pertaining to the operation of district public defender offices. Other duties include coordinating defense efforts of the various district public defenders, development of training programs, and maintaining liaison with various state government agencies. The Executive Director is elected by the district public defenders for a four-year term.

One hundred percent of the Public Defenders Conference 2004-2005 state budget of **$30,438,300** was attributable to the defense function. These funds also include the budget of the Executive Director of the Conference and state funds provided to the Shelby and Davidson public defender program.

II. Office of the Post-Conviction Defender

In addition to the District Public Defenders Conference, Tennessee has an Office of the Post-Conviction Defender which was established in 1995. The commission oversees the budget for, and appoints the head of, the statewide Post-Conviction Defender Office that is responsible for representing indigent persons convicted and sentenced to death in collateral actions and some direct appeals in state court. "The office also provides continuing legal education and consulting services to attorneys representing indigent defendants in capital cases and recruiting qualified members of the private bar who are willing to provide representation in state death penalty proceedings."[7]

One hundred percent of the 2004-2005 state Office of the Post-Conviction Defender

[7] State of Tennessee Budget, Fiscal Year 2006-2007, Volume 1, pg. B-201.

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budget of **$1,176,600** was attributable to the defense function.

Table 6 sets out the total FY 2005 state appropriation for the District Public Defenders Conference and the Office of the Post-Conviction Defender.

Table 6: FY 2005 District Public Defenders Conference and Post-Conviction Defender Appropriations	
District Public Defenders Conference	
Line Item	**Expenditure**
306.01 - District Public Defenders	$25,176,100
306.03 - Executive Director of the Public Defenders Conference	$939,800
306.10 - Shelby County Public Defender	$2,840,400
306.12 Davidson County Public Defender	$1,482,000
306.00 - Department Total	$30,438,300
Office of the Post-Conviction Defender	
Line Item	**Expenditure**
308.00 - Office of the Post-Conviction Defender	$1,176,600
Total	**$31,614,900**

III. Assigned Counsel Fees and Expenses

From a fund often referred to as the Indigent Defense Fund (IDF), the Administrative Office of the Courts (AOC) pays for the compensation of court-appointed private counsel and for the costs of necessary supporting defense services, such as investigative and forensic expert services, as authorized by the court. To the extent expenses for the same type of supporting defense services are not covered by their own budget, public defender attorneys also draw from these funds for the same type of supporting defense services. The 2005 Executive Secretary to the Supreme Court's Fees and Expenses for Court-Appointed Counsel amounted to $18,728,784 in FY 2005; however, $5,175,940 of these funds involved payments to court-appointed guardian ad litems, termination of parental rights, and abuse and neglect cases. Because the resource comparison in this study is limited to adult criminal and juvenile delinquency cases, the result was an expenditure of **$13,552,844** for criminal cases in FY 2005.

IV. Non-State Public Defender Resources

A. 75 Percent of Prosecution's Local Funding Increase

According to the Tennessee Code Annotated:

> From and after July 1, 1992, any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) to the office of the public defender in such district for the purpose of indigent criminal defense.[8]

[8] TENN. CODE ANN. § 16-2-518 (1992).

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Each judicial district was required to report a baseline figure for each District Attorney General Office as of 1992 for the purposes of calculating annual increases. It has been reported to us that for public defenders to obtain a funding increase of 75 percent of a district attorney general office's local funding, the public defender must obtain these additional funds from the county by applying to the county legislative body. At the present time, we are only aware of three Public Defender Offices that are receiving these funds: Knox County, which receives $1,220,502; Hamilton County, which receives $272,000; and Shelby County, which receives $304,677, for a total of **$1,797,179**.

B. $12.50 Local Assessment on Criminal Prosecutions

There is an additional statute that provides for non-state general fund appropriation for the district public defender offices. Tennessee Code Annotated § 40-14-210 allows each county to supplement the funds of the district public defender offices by assessing a $12.50 fee on every misdemeanor and felony prosecution. The money is collected by the courts in the county, and by vote of the county legislature disbursed to the county public defender. However, as Table 7 shows, not all District Public Defender Offices receive these funds. The total amount generated from the assessments is **$1,248,563** for FY 2005.

Table 7: Money Distributed to District Public Defender Offices in FY 2005 from the $12.50 Fee on Criminal Prosecutions

District	2005 Collection
District 5	$75,000
District 6	$220,000
District 7	$12,000
District 8	$62,534
District 13	$118,061
District 15	$182,492
District 19	$165,630
District 20	$151,700
District 22	$55,645
District 30	$205,501
Total	**$1,248,563**

C. Other District and Local Government Funding

District and local governments can also contribute additional funds to the public defender offices in their jurisdiction, but it is unclear if any public defender offices across the state receive such funds. Again, the Knoxville District Public Defender Office receives local contributions. In addition, both the Davidson and Shelby Public Defender Offices receive a large annual appropriation from their district governments. Davidson County received $3,352,000 and Shelby County received $4,834,000 in FY 2005 totaling **$8,186,000**.

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Total statewide public defender and assigned counsel resources for FY 2005 from state, county and local funds are set out in Table 8.

Table 8: FY 2005 TOTAL PUBLIC DEFENDER AND ASSIGNED COUNSEL FUNDING	
Funds	**Revenue**
Total District Public Defender's Conference and Post-Conviction Defender Appropriations	$31,614,900
Private Assigned Counsel Fees and Expenses (State)	$13,552,844
75% District Attorney Yearly Increase	$1,797,179
$12.50 Local Assessment on Criminal Prosecution	$1,248,563
Davidson and Shelby District Appropriations	$8,186,000
Federal Grant Monies[9]	$14,230
Total	**$56,413,716**

IV. In-Kind Public Defender Resources

There is no comparison between the in-kind services provided to prosecution and indigent defense. The only in-kind resources that we could find for indigent defense programs and court-appointed attorneys were negligible, consisting of some small amount of space, telephone, and other miscellaneous expenses provided by a few counties for indigent defense.

[9] The Shelby County Public Defender Office received a federal grant in FY 2005.

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PART 3:

CONCLUSION AND ADDITIONAL EVIDENCE

I. Bottom-Line Comparison

In studying the FY 2005 funding from all sources appropriated to both the prosecution and the defense through both direct and indirect appropriations, and comparing that portion that is attributable to indigent cases, we find **$130 – 139 million** available to the prosecution function, compared to **$56.4 million** available for indigent defense. Therefore, indigent prosecution funding is between two and two-and-a-half times greater than indigent defense funding. In addition, this comparison does not factor in the additional resources that are provided to the prosecution in the form of federal, state, county, and local in-kind services that we believe well exceed the dollar amount cited.

II. Additional Evidence in Support of Findings

In addition to the bottom-line comparison of total FY 2005 budget expenditures, below we cite two additional comparisons that bolster our findings. First, we calculate the indigent unit cost per prosecuting attorney and public defender, using funding from all sources and statewide attorney positions. Second, we cite the great disparity between the prosecution and defense in the need for additional attorney positions, as reported recently by the Comptroller's case-weighting updates.

A. Attorney Unit Cost

The Tennessee General Assembly created the District Public Defenders Conference in 1989. The state legislature relied on several different mechanisms for determining the number of district public defenders needed, but staffing was never based upon the caseload or workload of the public defenders. When the conference was first created, a statutory provision required that public defender offices receive half the number of state-funded staff attorney positions that were allocated in the district attorney offices in their respective districts. This ratio was subsequently modified so that public defender offices would receive attorney positions equivalent to 75 percent of those provided to the district attorney offices. However, the district attorneys successfully lobbied for another change to the statutory scheme with the result that public defenders are now entitled to 75 percent of only *locally* funded positions provided by the district attorneys. As we stated earlier, very few counties provide these additional funds for public defenders throughout the state.

In an effort to determine the workload needs and devise a solid workload standard among public defenders, prosecutors, and judges, the Tennessee legislature provided funds for a quantitative case-weighting study of each of the three agencies in 1998. In 1999, the National Center for State Courts, The Spangenberg Group, and the American Prosecutor's Research Institute (APRI) joined together to conduct the case-weighting study in Tennessee under the direction of the Office of the Comptroller. After completion of the study, in September/October

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of 1999, APRI presented a paper that noted the variety of funding sources available to the prosecution in Tennessee:

> Many of the offices of the District Attorney General have been successful in securing funding from sources other than the state appropriation such as municipal and county funding, or state and federal grants. Nearly half of the existing assistant positions in three urban districts are funded by non-state funds.

This statement bolsters our findings in the current study (some eight years later) comparing the limited resources of public defenders to those of the prosecutors in Tennessee.

Following the completion of the case-weighting study, the legislature passed a statute that requires courts, public defenders, and district attorneys to determine workload based upon a common definition of case. After accepting the case-weighting study, the legislature required that the Comptroller of the Treasury's Office of Research perform an annual update of the results of the 1999 study to determine what progress had been made and what problems continued to exist.

In February 2007, the Comptroller of the Treasury updated the 1999 reports as mandated by the Tennessee legislature, producing *FY 2005-2006: Tennessee District Attorney Weighted Caseload Study Update* and *FY 2005-2006: Tennessee Weighted Caseload Study Update, District Public Defenders*. At the time that the reports were updated, there were a total of 425 full-time district attorneys and assistant district attorneys in Tennessee among the 31 judicial districts. According to the Comptroller, of these 425 positions, 291 are assistant district attorney (ADA) positions funded by direct state appropriation and 103 full-time ADA positions are locally funded; 31 elected district attorney (DA) positions are state funded. In addition to these 425 positions supported by state and local funds, a footnote in the Comptroller's report indicates that another 34 attorneys are funded by federal grants. Therefore, the total number of district attorneys and assistant district attorneys in Tennessee at the time of the study was **459**.

As we calculated in Table 4 of this report, the total funds from all sources available to the district attorneys in FY 2005 was $174,222,680. In Table 5, we multiplied this figure by 75 and 80 percent to provide a range of funding for the prosecution of indigent cases only, and this produced a range of $130,667,010 to $139,378,144. In Table 9 below, using the total figures of indigent prosecution funding, we calculated an annual cost for each full-time prosecutor in Tennessee handling indigent cases. First, we multiplied the total number of full-time district attorneys and assistant district attorneys from the FY 2005-2006 Comptroller's report, 459, by the indigency rates of 75 percent and 80 percent. This produced figures of 344 attorneys and 367 attorneys, respectively. We then divided these figures into the respective shares of indigent prosecution funding to produce two estimates for the cost of one indigent prosecuting attorney unit – that is, the amount of total funding provided from all sources per single prosecuting attorney position. This produced two figures for indigent prosecution attorney unit cost. As displayed in Table 9, the attorney unit cost is nearly equivalent at 75 percent and 80 percent and produces an approximate cost of **$379,800**.

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Table 9: Indigent Prosecution - Attorney Unit Cost			
		@ 75% Indigency	@ 80% Indigency
Total Prosecution Funding	$174,222,680	$130,667,010	$139,378,144
Total DA/ADA Positions	459	344	367
Positions/Funding = Total Attorney Unit Cost		**$379,846**	**$379,777**

We then examined equivalent Comptroller's FY 2005-2006 case-weighting report for the public defender. The auditor reported a total of **309** full-time public defender attorneys from all funding sources in the state, including those attorneys who filled investigator positions. We divided the 309 full-time attorney positions into the total resources available to public defense from all sources for FY 2005, or $56,413,716. As displayed in Table 10, this produced a public defender unit cost of **$182,569**. It should be noted that in order to equally compare the prosecution and defense unit costs, we included assigned counsel (conflict) funding in the total indigent defender figure even though such funds are employed almost entirely for private court-appointed counsel.

Table 10: Indigent Defense Attorney Unit Cost	
Total Indigent Defense Funding	$56,413,716
Total Public Defender Positions	309
Positions/Funding = Total Attorney Unit Cost	**$182,569**

Thus, the attorney unit cost for indigent prosecution is just over double that of the attorney unit cost for indigent defense.

B. Attorney Positions Needed

Finally, the Comptroller's latest updates of the case-weighting reports for the prosecution and defense indicate that statewide, in order to meet the standards of the original case-weighting study, district attorneys needed an additional **22** attorney positions while public defenders needed an additional **122.8** attorney positions.

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STATE BAR OF TEXAS
TASK FORCE ON HABEAS COUNSEL TRAINING & QUALIFICATIONS

TASK FORCE REPORT
April 27, 2007

State Bar President Martha Dickie determined that there was a need to create a Task Force on Habeas Counsel Training & Qualifications in response to concerns raised by the State Bar's Standing Committee on Legal Services to the Poor in Criminal Matters, by the Board of Directors' Subcommittee on Legal Services and by individual members of the Board regarding the quality of representation provided by some Texas lawyers in state capital habeas proceedings.

On October 27, 2006, after having consulted with the Hon. Barbara Walther, Chair of the Judicial Section of the State Bar, President Dickie appointed twelve Task Force members whom she believed to be uniquely qualified to study capital habeas practice in Texas and to recommend measures to effectively address any problems and issues which the Task Force might identify.

I. Recommendations of the Task Force

After meeting together and with experts experienced in capital habeas litigation, the Task Force has concluded that there are recurring problems which undermine the integrity of capital habeas practice in the Texas courts and makes the following recommendations:

- That a State Public Defender Office be established to represent individuals seeking habeas relief in Texas death penalty cases. Except in those cases in which a conflict of interest arises, the lawyers in this office would have the

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responsibility for representing all indigent individuals seeking such habeas relief. The office should be headed by a Chief Counsel with a well respected and recognized record of representing individuals in capital habeas proceedings.

- That this office be supported with adequate funding that will allow the lawyers of the office to fully investigate all cases and to provide effective capital habeas representation to all of their clients.
- That an appointment system be created to provide for the appointment of lawyers not employed by the State Public Defender Office to provide capital habeas representation in those cases in which a conflict of interest arises and the State Public Defender Office cannot participate.
- That this appointment system be supported with adequate funding that will allow the appointed lawyers to fully investigate all cases to provide effective capital habeas representation to all of their clients without experiencing substantial financial losses.

II. How the Task Force Came to These Recommendations

Members of the Task Force came together in Austin on three occasions. After the first meeting, a request was made to the Hon. Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, for a judicial liaison to be named to the Task Force. Because of her concerns about capital habeas issues of which she had first hand knowledge as a member of the Court, the Hon. Cheryl Johnson agreed to accept this position and provided valuable assistance to the Task Force.

Jim Marcus, Adjunct Clinical Professor at the University of Texas School of Law's Capital Punishment Center, and Andrea Keilen, Director of the Texas Defender Service, also provided valuable assistance to the Task Force. Each has had significant experience in capital habeas litigation and was able to advise the Task Force as to the challenges faced by habeas counsel and the problems with habeas counsel which each has observed.

Robert L. Spangenberg of the Spangenberg Group prepared a report from a study which his group had conducted on capital habeas issues in Texas and in other states. He strongly recommended to the Task Force that a statewide office be created to represent

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the majority of applicants in capital habeas proceedings. [Note: Mr. Spangenberg is well known to those in the criminal justice system in Texas and, also, to members of the Texas Legislature for his preparation of *The Fair Defense Report* in December 2000, as part of the Texas Appleseed Project.] He also provided valuable assistance to the committee.

Members of the Task Force were also provided with the *Guidelines and Standards for Texas Capital Cases* which were adopted on April 21, 2006, by the State Bar's Board of Directors. These *Guidelines and Standards* contain a lengthy section on the duties of habeas counsel.

III. The Importance of Capital Habeas Proceedings in Texas

An applicant in a capital habeas proceeding has one final opportunity to raise issues of constitutional dimension in order to establish his innocence or to show that he did not receive a fair trial. Habeas proceedings are the only opportunity available to those sentenced to death to raise post conviction claims of prosecutorial misconduct or ineffective assistance of trial counsel and to present evidence not developed or discovered during trial – including evidence as to the actual innocence of the applicant.

The very nature of capital habeas practice demands that the lawyers who represent those convicted of capital murder and sentenced to death have the ability and the desire to provide the effective assistance of counsel to their clients. This is a highly specialized area of practice. The Texas and federal courts are unforgiving when deadlines are not met. Often, even excellent and well-respected criminal lawyers are neither cognizant of nor well equipped to deal with the pitfalls that can result in irreparable harm to the client – a client for whom the consequence of a crucial mistake will be death.

To render effective assistance, habeas counsel must understand that the state habeas proceeding is not a second direct appeal. Claims based on evidence already presented at trial are reserved for direct appeals and are not cognizable in state habeas proceedings. Habeas representation, therefore, must include a thorough and independent investigation of all aspects of the case and habeas counsel cannot assume that the trial record presents either a complete or accurate picture of the facts and issues in the case. This investigation must include not only a newfound look at the facts in the case but,

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also, an investigation of any mitigating evidence that was not presented at trial and any evidence of mental retardation.

Because the scope and nature of federal habeas review is totally dependent on the quality of representation provided by state habeas counsel, such counsel must understand that a federal court will find procedural default if a claim for relief is not presented in a state habeas proceeding and, thereafter, is presented to a federal district court.

In short, if counsel does not include everything that is conceivably proper to raise in a state habeas proceeding, the opportunity to submit new evidence and to challenge in the federal courts the effectiveness of trial and appellate counsel in the federal courts is irretrievably lost.

IV. Discussion of Task Force Recommendations

A. State Public Defender Office

On March 1, 2007, the Task Force issued a preliminary report to President Dickie recommending that a State Public Defender Office be established and that it be adequately funded. That recommendation has not changed.

The creation of such a statewide office would address four problems that currently impact those individuals seeking capital habeas relief, those lawyers, who are appointed to represent them, the district judges who appoint those lawyers and the judges of the Court of Criminal Appeals who review those lawyers' work product:

1. Capital habeas applicants are not receiving consistently competent representation. In Texas, capital habeas applicants have a statutory (not constitutional) right to representation by counsel during these proceedings. Article 11.071 of the Texas Code of Criminal Procedure, as amended, governs habeas proceedings in death penalty cases.

In Article 11.071 §2(c), the legislature provides that the convicting court shall appoint *competent* counsel. This statutory provision was interpreted by the Court of Criminal Appeals in *Ex Parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) which held that, while a prisoner sentenced to death has the right to the appointment of competent counsel in a habeas proceeding, the competence of such counsel is unrelated to his or her actual

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representation or work on a specific case. If the lawyer is on the approved appointment list, that lawyer is competent to be appointed, regardless of what he or she did after the appointment. In effect, *Ex Parte Graves* distinguished between "competent" counsel and "effective" counsel and held that, in capital habeas cases, prisoners are entitled to the former but not the latter.

As mentioned earlier, the Task Force was made aware of recurring problems which undermine the integrity of capital habeas practice in the Texas courts. The following were mentioned as being recurring problems:

- Some lawyers on the Court of Criminal Appeals' appointment list have accepted appointments and then "farmed out" these cases to other lawyers who were not on the Court's approved appointment list.
- Some lawyers with a history of serious disciplinary problems have, nevertheless, been appointed and have failed to carry out their obligations to their clients.
- Some lawyers who have accepted appointments have admitted to being unqualified, inexperienced and/or overburdened. Thus, they were unable to do the meaningful work required of them.
- Some lawyers have filed petitions that were only two to four pages in length and raised no cognizable issue.
- Some lawyers have filed petitions that clearly indicate that there has been a failure to investigate and present evidence outside of the trial record; rather, these lawyers have treated the state habeas proceeding as a second direct appeal.
- Some petitions – or partial petitions – were cut and pasted verbatim from other petitions in other cases. These were done without any regard to the factual circumstances of the case at bar or the legal issues of the case.

2. The district judges who have the responsibility for the appointment of habeas counsel do not have the information or means to determine which lawyers on the Court of Criminal Appeals' approved appointment list are overburdened, poorly trained, unmotivated, or are under confidential investigation for disciplinary violations. Unfortunately, the district judges who have appointed the lawyers who perform poorly do

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not learn of the problems until after an application for writ of habeas corpus is filed. At that time, it is simply too late in the process for the district judges to remedy the problem.

3. The lawyers who are taking their appointments seriously and are spending the required time to investigate the cases and prepare their writs are not being properly compensated for their work. Some cases can take upwards of 800 hours of lawyer time to prepare an effective writ, depending on the complexity of the issues and the length of the trial court record. Add to this the expenses associated with investigating the case and paying fees to mitigation and mental retardation experts and it is obvious that many lawyers and law firms are spending much more than the compensation which they receive. Counties want the state to pay the lawyers' bills and are often capping compensation at the state limit of $25,000 – even on complicated and time-consuming cases.

Under our present system, a habeas lawyer may make a claim for reimbursement for expenses incurred. If the convicting court denies the request in whole or in part, the court must state the reasons for such a denial in a written order. The lawyer's only avenue for relief is the filing of a motion for reconsideration. This is hardly an adequate remedy.

4. The lawyers who accept capital habeas appointments are presently accountable to no one. It would be anticipated that the Chief Counsel of a State Public Defender Office would carefully select the lawyers who would work in the office, require disclosures of confidential disciplinary complaints as a condition of employment, monitor the lawyers' performance and have personal knowledge of their work ethic. Such a day to day observation of the lawyers in the office by the Chief Counsel cannot be duplicated by any group created by the bench or bar.

B. There is a Need to Establish an Effective Counsel Appointment Process for Capital Habeas Proceedings

Even with the establishment of a State Public Defender Office, situations will arise in which the appointment of a private lawyer is necessary; e.g.; when two or more individuals are convicted of capital murder in the same case.

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While the Task Force is fully supportive of the Court of Criminal Appeals' actions to improve the appointment process as set out in paragraph V, below, it recommends these additional provisions to help ensure quality and accountability:

- An entity or group should be appointed to maintain the list of lawyers eligible for appointment in capital habeas proceedings. This entity or group must be knowledgeable of what is required in providing effective capital habeas representation, must be able to identify qualified Texas lawyers who are eligible to be placed on the appointment list, and must be able to review and monitor the list to ensure that those lawyers who show themselves unqualified to represent defendants in capital habeas proceedings are removed from the list.
- While the entity or group recommended above would maintain the appointment list, the Court of Criminal Appeals should continue in its role as the appointment authority as to who is qualified for such an appointment.
- In order to increase accountability in capital habeas representation, every lawyer filing a capital habeas writ should be required to certify that he or she actually did the work on the writ. If more than one lawyer worked on the writ, each of them should sign the writ and certify their direct involvement.

C. The Need to Implement an Adequate Funding Structure

This recommendation seeks to address two issues currently hindering the ability of appointed counsel to provide effective representation in capital habeas proceedings:

1. There are currently problems with the adequacy of compensation. As mentioned in paragraph IV.A.3, the current state maximum for compensation of appointed lawyers in capital habeas proceedings is $25,000. While each county can pay appointed lawyers more than the $25,000, this is rarely done. Not only is this amount intended to compensate counsel for his or her work on the writ, the lawyer must use these funds to pay for experts, investigators and support staff so necessary to the provision of effective assistance of counsel, or pay these expenses from his or her own pocket. In the great majority of cases in which effective representation is rendered, this amount is grossly inadequate. This inadequacy of funding puts the appointed lawyer at an unfair

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disadvantage when compared to that of the State's lawyers – either from the Office of Attorney General or from the larger district attorneys' offices.

The *Guidelines and Standards for Texas Capital Counsel* assert that appointed counsel in death-penalty cases should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court.

2. There are currently problems with the appropriate allocation of compensation. The Task Force recommends that the compensation paid to lawyers appointed to represent inmates in capital habeas proceedings be broken out and separately allocated to attorney's fees and to non-attorney's fees and expenses, such as investigator and expert fees, support staff and other expenses necessary to effective representation. The *Guidelines and Standards for Texas Capital Counsel* address this issue as well for capital cases and provide that non-attorney members of the defense team (e.g.; investigators and mitigation experts) should be compensated at rates commensurate with high-quality legal representation.

V. The Commendable Actions of the Court of Criminal Appeals

Until quite recently, the performance of Texas capital habeas lawyers was neither regulated nor monitored by any court or government agency. Unfortunately, this resulted in a list containing lawyers who were, at best, unqualified to serve as capital habeas counsel and at worst, lawyers who, as mentioned in paragraph IV.A.1., filed habeas writs copied verbatim from writs filed in other cases, lawyers who filed writs with absolutely no cognizable claims, lawyers who were serving suspensions from the practice of law for neglecting their clients and even lawyers who were deceased.

In December 2006, however, the Court of Criminal Appeals commendably amended their rules for the appointment of capital habeas counsel. These rules have substantially tightened up the eligibility standards for appointment, including requirements that each lawyer on the appointment list must exhibit continued proficiency and commitment to providing quality representation and that each lawyer must certify, on a biennial basis,

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that he or she has completed a minimum of six CLE hours devoted to the law and practice of writs of habeas corpus, with an emphasis on death-penalty cases. A continuing duty has also been imposed on each lawyer on the list to report to the Court of Criminal Appeals a finding by any federal or state court of ineffective assistance of counsel during any criminal case, or a public disciplinary action by any federal or state licensing authority.

Additionally, the Court iterated its discretionary authority to remove any lawyer from the appointment list if it determines that the lawyer has, in any filed application for writ of habeas corpus, demonstrated "substandard proficiency" in representing defendants in death-penalty cases; has been found by any court to have rendered ineffective assistance of counsel in any criminal case; has engaged in unprofessional or unethical behavior; or has failed to inform the Court of any action required to be reported under the rules.

VI. Senators Ellis' and Duncan's Proposed Legislation

In the current legislative session, Senator Ellis and Senator Duncan have filed a bill (S.B. 1655) that would establish a Capital Writs Committee of the Texas Judicial Council and would create a Statewide Office of Capital Writs. On April 10, 2007, President Dickie, Presiding Judge Keller and Judge Johnson testified concerning S.B. 1655 before the Senate Committee on Criminal Justice. During her testimony, President Dickie expressed the State Bar's support of the bill. The Committee favorably voted the bill out of Committee and it went to the Senate for action. On April 16th, the bill passed the Senate with no discussion.

Pursuant to this bill, the State Bar President would appoint the five members of the Capital Writs Committee who would serve at the pleasure of the State Bar President and would be composed of:

- Three attorneys who are members of the State Bar of Texas and who are not employed as prosecutors or law enforcement officials, one of whom must have knowledge of and experience with habeas corpus proceedings in this state;
- One state district judge; and,

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- One state appellate judge who is not a member of the court of criminal appeals.

The Capital Writs Committee would elect one member to serve as the presiding officer and would submit to the Court of Criminal Appeals a list of three to five persons it recommends for appointment as the Director of an Office of Capital Writs.

The Office of Capital Writs would be prohibited from representing a defendant in a federal habeas review and would be authorized to refuse any appointment on the basis of a conflict of interest, the lack of sufficient resources to provide adequate representation for the defendant, the inability of the office to provide representation of the defendant in accordance with the rules of professional conduct, or on a showing of other good cause.

The Task Force has reviewed S.B. 1655 and would recommend that the State Bar continue to support the adoption of the bill during the current legislative session.

VII. Conclusion

The members of the Task Force would like to express their appreciation to State Bar President Dickie and Judge Barbara Walther for the opportunity to serve on this Task Force and to be entrusted with studying and making recommendations concerning an issue of the utmost importance to our system of justice. The Task Force also extends its gratitude to the Texas Court of Criminal Appeals for its assistance and counsel provided through the person of Judge Cheryl Johnson and, also, to Jim Marcus, Andrea Keilen and Robert L. Spangenberg. Without their contributions and the support of the Court of Criminal Appeals, the work of the Task Force would have been of substantially reduced value.

As a matter of personal privilege, the co-chairs wish to express their appreciation to all of the members of the Task Force who worked so diligently on this project.

Respectfully Submitted:

F. R. (Buck) Niles, Co-Chair

Judge Willford Flowers, Co-Chair

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HABEAS COUNSEL TASK FORCE REPORT
ATTACHMENT A

TASK FORCE ON HABEAS COUNSEL TRAINING AND QUALIFICATION
ROSTER

Mr. Buck Files (Co-Chair)
State Bar Board of Directors

Hon. Wilford Flowers (Co-Chair)
147th District Court

Hon. Steve Ables
216th Judicial District

Ms. Betty Blackwell
Chair, Commission for Lawyer Discipline

Mr. Don Clemmer
Texas Attorney General's Office

Hon. David Evans
48th District Court

Hon. Belinda Hill
230th District Court

Mr. Randy Leavitt
First Assistant Travis County Attorney

Prof. Michael Moore
UT Arlington
Public Member

Prof. Walter Steele, Jr.
SMU Law School

Hon. Ben Woodward
119th District Court

Justice Carolyn Wright
5th District Court of Appeals

Judge Cheryl Johnson
Texas Court of Criminal Appeals Liaison

Ms. Andrea Keilen (*Advisory Member*)
Texas Defender Service

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STATEMENT BEFORE THE UNITED STATES SENATE JUDICIARY

COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION

APRIL 8, 2008

BRYAN A. STEVENSON

Equal Justice Initiative of Alabama, Executive Director
NYU School of Law, Professor of Clinical Law

The Adequacy of Representation in Capital Cases

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Honorable Members of the United States Senate Judiciary Committee Subcommittee on the Constitution:

Thank you for the opportunity to appear before this Committee. There remains considerable doubt about America's system of capital punishment. Although we have now executed 1100 people in this country during the last 30 years,[1] there are fundamental problems with the fairness, reliability and propriety of the death penalty in state and federal courts. In the last few years, we have uncovered a shocking rate of error in death penalty cases. Nearly 130 death row prisoners have been released from death row after being proved innocent or exonerated.[2] Hundreds of other death row prisoners have had their convictions and death sentences overturned after it was established that they were illegally convicted or sentenced.[3] Most disturbingly, there has been evidence that innocent people may have been executed.[4] These problems with capital punishment have lead to a decline in the rate of executions and a decrease in the death sentencing rate in recent years.[5] A few months ago, New Jersey became the first state since the 1960's to completely abolish capital punishment. However, capital punishment remains a costly and dominant feature of the state and federal criminal justice system.

Many jurisdictions have implemented no reforms or review of their death penalty schemes and the practice of executing prisoners and imposing death sentences goes on without much reflection or review. Perhaps the single most significant problem with the administration of capital punishment is the inadequacy of indigent defense for capital defendants. Without competent and skilled counsel in death penalty cases, there can be no

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reliability or fairness in the outcomes of these proceedings.

Last month, I testified as an expert in a death penalty case in Oklahoma where a court was examining whether James Fisher had received adequate legal assistance at his capital trial. It was my second trip to Oklahoma on this case. Ten years ago, a federal appeals court reversed Mr. Fisher's capital murder conviction and death sentence because his appointed counsel maintained a trial schedule "so heavy he sometimes would finish one case in the morning and begin trying a new case in the afternoon while the jury was still deliberating."[6] He was completely unfamiliar with the State's evidence and witnesses, conducted no investigation for Mr. Fisher, and called no witnesses. At the penalty phase, counsel called no witnesses and waived opening and closing arguments.[7] Not surprisingly, Mr. Fisher was sentenced to death.

At his new trial in 2005, Mr. Fisher was represented by counsel who was abusing alcohol and suffering from drug addiction. This attorney was suspended from the practice of law and entered a rehab facility three months after Mr. Fisher's trial. At trial, the lawyer presented none of the available evidence or witnesses who could have assisted Mr. Fisher. Prior to trial, the lawyer got angry at Mr. Fisher, called him derogatory names and asked the guards to remove Mr. Fisher's handcuffs so he could "kick his ass."[8] When Mr. Fisher complained to the court and insisted he would rather represent himself than be represented by his new counsel, he was barred from court during the trial. Mr. Fisher was therefore not present during his trial, when his impaired lawyer presented almost none of the available evidence and he was found guilty and sentenced to death.

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Legal Assistance for Capital Defendants at Trial is Inadequate

Unfortunately, examples of inadequate representation are not exceptional. Alabama has no state public defender offices and trial judges appoint counsel, many of whom have little training or experience in capital litigation. Of the 203 people currently on Alabama's death row, more than half (59%) were represented by appointed lawyers whose compensation for preparing the case was capped at $1000 by state statute.[9] There are very few mitigation experts or investigative services available and even though compensation has improved in recent years, compliance with the ABA Guidelines on Adequate Representation in Capital Cases is almost never accomplished.

There are people on death row in Texas who were defended by attorneys who had investigative and expert expenses capped at $500.[10] In some rural areas in Texas, lawyers have received no more than $800 to handle a capital case.[11] People still on Virginia's death row were provided lawyers who were effectively paid an hourly rate of less than $20 an hour.[12] In Pennsylvania, there are currently death row prisoners who were sentenced to death in Philadelphia in the 1980s and 1990s when 80% of the capital cases were handled by appointed lawyers who received a flat fee of $1700 plus $400 for each day in court.[13] Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.[14]

Underfunded indigent defense has predictably caused flawed representation in many cases with corresponding doubts about the reliability and fairness of the verdict and sentence. Indigent accused facing execution have been represented by sleeping attorneys,[15] drunk

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attorneys,[16] attorneys who are almost completely unfamiliar with trial advocacy, criminal defense generally, or death penalty law and procedure in particular,[17] and attorneys who otherwise cannot provide the assurance of reliability or fairness in the client's conviction and death sentence.

Even in states where there are public defender systems, funding and compensation for attorneys remains low and resources for investigation and experts is scarce.

Lawyers who are appointed to capital cases often do not have the resources, training and experience necessary to defend such a case. Capital cases involve different and complex investigative, preparation, and trial methods than other criminal cases.[18] Lawyers who are not aware of these differences cannot be as effective. This becomes especially important during the penalty phase when defense counsel should present mitigating evidence. Lawyers with insufficient time, resources, or training will not know the best way to proceed in the penalty phase, denying indigent capital defendants an effective and compelling mitigation presentation.

The states with the most active death rows are those that have historically poor records of providing competent counsel to people accused of capital crimes.[19] In such a system, the risk of wrongful convictions and error is unacceptably high. I currently represent Anthony Ray Hinton who is an innocent man who has been on Alabama's death row for 21 years. Mr. Hinton was charged with two separate shooting murders that occurred during robberies at two fast food restaurants. There were no eyewitnesses and fingerprints found at each crime scene did not match Mr. Hinton. The only evidence linking Mr. Hinton to the murders was

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a victim in a third shooting who misidentified Mr. Hinton. He was never charged with this third crime, but State lab technicians said that bullets recovered from all three crimes were fired from the same gun and matched a weapon recovered from Mr. Hinton's mother.[20] The State conceded at trial that there was no connection between the murders and Mr. Hinton other then the weapon match, and the State has repeatedly acknowledged that without a weapon match, Mr. Hinton should be released.[21]

Beyond that, at the time of the third shooting, Mr. Hinton was working in a locked warehouse 15 miles from the crime scene.[22] His supervisor and other employees confirmed his innocence when they testified to this, as did a polygraph test given by the police. However, Mr. Hinton was still prosecuted for capital murder and the judge would not admit the exculpatory polygraph test at trial.[23] Mr. Hinton, who is poor, received court-appointed counsel whose compensation for preparing the case was capped at $1000 by Alabama law.[24] This lawyer did not receive adequate funds to hire an expert to challenge the State's faulty gun evidence or to fully develop evidence of Mr. Hinton's innocence. Mr. Hinton was convicted and given two death sentences.

Since Alabama is the only state in the country that does not provide legal assistance to death row prisoners after their convictions are affirmed,[25] Mr. Hinton desperately tried to find his own volunteer legal assistance to prove his innocence, and my office ended up volunteering to take on his case.

At a State postconviction hearing in 2002, three of the country's top gun experts testified that they concluded that the crime bullets could not be matched to the weapon

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recovered from Mr. Hinton's mother and that the State had erred in making that claim.[26] It was also revealed that the State pressured witnesses into giving false statements implicating Mr. Hinton.[27] The trial court, however, did not rule on Mr. Hinton's evidence of innocence for two and a half years and then signed an order prepared by the State denying relief, in part, because the evidence of innocence was presented too late.[28] The Court of Criminal Appeals upheld Mr. Hinton's conviction in a 3-2 decision.[29] This again shows how important it is that trial counsel be given the resources to hire experts and conduct thorough investigations. As a result of this inadequate representation, many people are illegally and wrongly convicted and sentenced to death.

The effort to provide adequate legal assistance to capital defendants has proved to be unobtainable in many states and there is a tremendous need for dramatic reform. The failure to provide consistent, reliable legal assistance to capital defendants has deeply compromised and weakened the integrity of the entire criminal justice system and more must be done to confront this problem.

Legal Representation on Direct Appeal

This week my office will file a motion in the Alabama Supreme Court begging that court to permit yet another death row prisoner's direct appeal to be heard after an appointed lawyer failed to file necessary appeal papers or a brief, potentially forfeiting all constitutional claims and appellate review for this condemned prisoner. This is the third case in the last two years where a death row prisoner's appointed lawyer has failed to file a brief or an

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appeal in the initial review process.

As stated previously, Alabama has no state public defender or appellate defender offices and trial judges appoint counsel for death row prisoners in the initial direct appeal process, most of whom have little training or experience in appellate capital litigation. Compensation for these lawyers is capped at $2000.[30] This includes the appeal and the petition for writ of certiorari to the Alabama Supreme Court.[31] This low compensation, combined with insufficient training and experience, often leads to inadequate lawyering.

For instance, some appointed lawyers do not seek oral argument or file reply briefs in response to the State, which is represented by a unit of capital litigation specialists who are funded by the state to prosecute capital cases on appeal. In one case, last November, an 11-page brief was filed on behalf of a death row prisoner by appointed counsel with no discernible issues presented.[32] Although the Court of Criminal Appeals told counsel during oral argument that the brief was "scant," it would not accept additional briefing our office prepared when we tried to intervene.

This is not an isolated incident. Lawyers often fail to adequately represent their clients on appeal and fail to file the required and necessary paperwork. In another case in Alabama, a lawyer moved his office and failed to notify either the court or his client. Because of this, he did not receive notice that his application for rehearing had been overruled, and so he missed the deadline for filing an appeal to the Alabama Supreme Court, and consequently was denied appellate review.[33]

In the absence of a statewide public defender system, appointed lawyers who do not

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receive adequate compensation often untimely forfeit their clients' rights. Appellate representation involves reading through the trial transcript, which can be thousands of pages, conferring with the client, and researching and writing legal pleadings. These tasks require hundreds of hours of work. Because of compensation limits, attorneys who represent inmates on direct appeal are forced to either work for free or refuse to provide critically important work.

After Congress passed the AEDPA in 1996, the primary responsibility for ensuring that capital murder convictions and death sentences are constitutionally imposed shifted to state appeal courts on direct review. Yet, in too many jurisdictions review of these cases is fundamentally undermined by the failure of states to provide adequate legal assistance to the poor.

No Right to Counsel in State Postconviction

Deficiencies in state systems result in wrongful convictions and unreliable verdicts and sentences that must be corrected and addressed in postconviction proceedings. However, state postconviction proceedings in many states are non-responsive to these problems and even less reliable than the state trial process. Alabama does nothing to provide any incarcerated person counsel for postconviction review. If a condemned prisoner can get a petition timely filed within the statute of limitations, the court has the discretion to appoint a lawyer, but the lawyer's compensation is limited to $1000 for the entire case.[34] Lawyers do not want, and generally will not accept, those appointments. Furthermore, there is no financial incentive for a lawyer to do voluntary, uncompensated work assisting a condemned

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inmate to draft and file a postconviction pleading.

Despite the fact that Alabama now has the fastest-growing death row population in the United States,[35] it has no postconviction public defender office. Alabama appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It provides no paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts outside the trial record. It also maintains no central agency to monitor the progress of capital postconviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support.

Alabama's failure to provide any legal assistance to death-row inmates forces those inmates who cannot find volunteer lawyers to file State postconviction petitions *pro se*. Inadequate legal assistance is especially problematic because the Alabama postconviction process, which is governed by Rule 32 of the Alabama Rules of Criminal Procedure, is marked by strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other technical pitfalls that cannot practicably be navigated without highly-skilled counsel.[36]

The Alabama Attorney General's Office routinely moves to dismiss claims in petitions filed by death row prisoners on procedural grounds such as lack of specificity, lack of factual development, and failure to comply with complex procedural rules that are not well understood. Lacking the ability to interview witnesses, gather records, or investigate factual questions before filing, (let alone the legal skills to understand what form of allegations will

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make a pleading "sufficiently specific" to satisfy Rule 32.6(b)(requiring a "clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds)) prisoners without skilled counsel are at risk of summary dismissal.[37]

Moreover, death row prisoners cannot typically obtain independent judicial factfinding or decisionmaking in State postconviction proceedings without the assiduous efforts of competent and dedicated counsel. Many prisoners executed by Alabama have had constitutional claims that were barred from federal review because they could not obtain adequate legal assistance in State postconviction proceedings.

Many prisoners currently on death row have faced similar situations. For example, Christopher Barbour was forced to file a State postconviction petition *pro se* on March 4, 1997. The judge then appointed counsel, who represented Mr. Barbour at an evidentiary hearing on March 18, 1998. Appointed counsel did not file a post-hearing brief or proposed order and never filed a notice of appeal after Mr. Barbour's petition was denied on April 21, 1998. The State did not provide counsel for an appeal, and Mr. Barbour therefore lost his State postconviction claims by default. It is important to note, however, that, in Alabama, the fact that a prisoner is without counsel when the default occurred does not excuse the default.[38] So, the Alabama Supreme Court ordered Mr. Barbour's execution on May 25, 2001.[39] Just two days before this date, volunteer counsel obtained a stay from the United States District Court for the Middle District of Alabama.[40]

Postconviction proceedings are often the first and only opportunity for prisoners to make many federal claims, including ineffective assistance of counsel, juror misconduct, and

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Brady violations. These claims require discovery and pleading of facts not in the trial record, and they require familiarity with State postconviction procedure. It is very difficult for prisoners to bring these claims effectively without legal assistance.

The Supreme Court has consistently recognized the need for counsel in criminal proceedings. Starting in 1932 with *Powell v. Alabama*, the Court recognized counsel as "fundamental" to due process.[41] This should extend to postconviction proceedings where the constitutional rights that the claims are based on, such as effective assistance of counsel, are central to the criminal justice system. "Lawyers in criminal courts are necessities, not luxuries."[42] Without counsel to represent indigent people accused of capital crimes, justice is not served. Former Alabama judges acknowledged this fact as amici in support of Mr. Barbour after the 11th Circuit ruled there was no right to counsel in postconviction proceedings, which would have prevented defaults like Mr. Barbour's.[43] These four judges, three of whom had been Alabama Supreme Court justices, wrote to the court that it is not acceptable that innocent people are convicted and sentenced to death, which happens in Alabama due to a lack of sufficient counsel.[44] Without counsel in postconviction proceedings there are instances where justice simply is not served.[45] This is especially true when many of the people who are innocent are not exonerated until the later stages of the process that become increasingly hard for indigent Alabama inmates to get to. Thus, it is hugely important that there is a system in place to provide counsel to indigent people accused of capital crimes even in postconviction proceedings so that Constitutional claims are not lost due to lack of legal assistance.

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Conclusion

Effective legal counsel is essential to a fair and reliable criminal justice system. Without it, countless number of people are convicted and sentenced to death without ever having a competent, fair, reliable trial. Currently, representation in capital cases is inadequate. Too often, prisoners are required to find their own volunteer counsel to right the errors that have been committed by trial counsel. When some of the most fundamental claims, including ineffective assistance of counsel and *Brady* violations, are left unheard because of ineffective counsel or lack of counsel, our criminal justice system cannot be fair and reliable. This leads to many innocent people being convicted and having no ability to seek relief. Federal habeas and State postconviction plays an important role in making sure that tragic errors in capital cases are not insulated from correction that is required by the United States Constitution. Competent counsel is necessary to navigating this appellate process.

Even before that point, though, it is imperative that trial counsel investigates and researches adequately and is given the resources and compensation to be able to do this thoroughly. It is also hugely important that trial counsel that is appointed is trained and experienced in capital cases and is not someone who is unwilling or unable to take on and do the work required of a capital case.

I appreciate this Committee's time and attention to these very important matters.

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Endnotes

1. *See* Death Penalty Information Center, *Facts about the Death Penalty*, http://deathpenaltyinfo.org/FactSheet.pdf, last visited April 6, 2008.

2. *See* Death Penalty Information Center, *Innocence and the Death Penalty*, http://deathpenaltyinfo.org/article.php?did=412&scid=6, last visited April 6, 2008.

3. *See* James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part II: Why is There So Much Error in Capital Cases and What Can Be Done About It* 11 (2002), available at http://www2.law.columbia.edu/brokensystem2/report.pdf, last visited April 2, 2008.

4. *See* National Coalition to Abolish the Death Penalty, *Innocent and Executed: Four Chapters in the Life and Death of America's Death Penalty*, available at https://secure.democracyinaction.org/dia/organizationsORG/ncadp/images/InnocentAndExecuted.pdf, last visited April 7, 2008.

5. *See* Death Penalty Information Center, *The Death Penalty in 2006: Year End Report*, http://www.deathpenaltyinfo.org/2006YearEnd.pdf, last visited April 6, 2008.

6. *Fisher v. Gibson*, 282 F.3d 1283, 1293 (10th Cir. 2002).

7. *Id.* at 1305.

8. *See* Brief for James T. Fisher, *Fisher v. Oklahoma* (Okla. Ct. of Crim. App. 2006)(No. D-2005-460)(affidavit of Brenda McCray). Mr. Albert apparently had a similar run-in with a previous client, whom he provoked into hitting him so that he could then get relieved because of a conflict. *Id.*

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9. *See* ALA. CODE § 15-12-21(d)(1999). On June 10, 1999, compensation for appointed attorneys was increased to $50 per hour for in-court work and $30 per hour for out-of-court work. The 1999 amendment removed the cap for in-court work in capital cases but fees for out-of-court work remained capped at $1000. Effective October 1, 2000, compensation for appointed attorneys increased to $60 per hour for in-court work and $40 per hour for out-of-court work and the $1000 cap on out-of-court fees in capital cases was eliminated. ALA. CODE § 15-12-21(d)(2002); *see also* Alabama Department of Corrections, *Alabama Inmates Currently on Death Row,* http://www.doc.state.al.us/deathrow.asp, last visited April 6, 2008.

10. Until 1995, Texas, which has one of the largest death row populations in United States (currently at 370), capped the entire amount defense counsel could request for investigative and expert expenses at $500. *Lackey v. State,* 638 S.W.2d 439, 441 (Tex. Crim. App. 1982)(discussing Tex. Code Crim. Proc. Art. 26.05 (1980)); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 77-98 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf, last visited April 1, 2008; http://www.texasdefender.org/facts.asp, last visited April 1, 2008; Death Penalty Information Center, *Facts About the Death Penalty,* http://deathpenaltyinfo.org/FactSheet.pdf, last visited April 3, 2008.

11. *See* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake,* 1997 ANN. SURV. AM. L. 783, 799 (citing Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel,* Nat'l L.J., June 11, 1990, at 34).

12. *See* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel,* 68 IND. L.J. 363, 366 (1993).

13. *See* Tina Rosenberg, *Deadliest D.A.,* N.Y. TIMES, July 16, 1995 at 22 (Magazine). Philadelphia represents less than 13% of Pennsylvania's population but over half of the State's death row population. *See* John M. Baer, *Faulkner, Mumia in Mix: State Senate Hearing Set on Moratorium for Death Penalty,* PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that, in 2000, Philadelphia is responsible for 55% (126/230) of the state's death row population; 88% (111/126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).

14. For example, in Mississippi, counsel appointed to represent an indigent defendant faces a $1000 cap on compensation. In a capital case, two attorneys can be appointed for total compensation not to exceed $2000. MISS CODE ANN. § 99-15-17 (1980). Similarly, there are death row inmates in Kentucky who were represented by appointed counsel who faced a $2500 cap on compensation. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer,* 103 YALE L.J. 1835, 1853 (1994)(citing The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations, reprinted in THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1993, at 11).

15. *See, e.g., Ex parte McFarland,* 163 S.W.3d 743 (Tex. Crim. App. 2005)(upholding death sentence where lead attorney slept through major portions of trial); *Ex parte Burdine,* 901 S.W.2d 456, 457 (Tex. Crim. App. 1995)(Maloney, J., dissenting)(denying death row prisoner's application for postconviction relief where lead attorney slept during trial); *Burdine v. Johnson,* 262

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F.3d 336 (5th Cir. 2001); *see also* Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 89-95 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf (discussing capital cases in which counsel slept through trial and the defendant was sentenced to death), last visited April 1, 2008.

16. *See, e.g.*, *Guy v. Cockrell*, 2002 WL 32785533 at *4 (5th Cir. July 23, 2002)(trial counsel conceded using cocaine during capital trial); *Haney v. State*, 603 So.2d 368, 377-78 (Ala. Crim. App. 1991)(affirming death sentence even though trial had to be suspended for a day because the appointed defense lawyer was too drunk to go forward); *see also* Texas Defender Service, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS 38-39 (2002), http://texasdefender.org/chapters.pdf, last visited April 1, 2008.

17. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2104-2109 n.175-190(2000)(discussing numerous examples of incompetent lawyers appointed to handle capital cases and studies documenting the inexperience and incompetence of attorneys appointed to represent capital defendants in most death penalty states); Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 79-98 (2000), http://texasdefender.org/state%20of%20denial/Chap6.pdf, last visited April 1, 2008.

18. *See* Sean D. O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 MICH. L. REV. 1067, 1075 (2007)(book review)(reviewing *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* by Welsh S. White).

19. *Id.* at 1086 (citing James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part II: Why is There So Much Error in Capital Cases and What Can Be Done About It* 11 (2002), available at http://www2.law.columbia.edu/brokensystem2/report.pdf, last visited April 2, 2008).

20. Trial Transcript, *Hinton v. State*, No. CC-85-3363, 3364 (Jefferson Co. Cir. Ct.) at R. 33-34, 423-24, 836, 1724; Postconviction Transcript, *Hinton v. State*, No. CC-85-3363.60, 3364.60 (Jefferson Co. Cir. Ct.) at PC. 2485-90. At trial, two Alabama Department of Forensic Science ("DFS") witnesses wrongly concluded that bullets recovered from the three crimes could be linked to a single weapon and that the weapon was found in the home of Mr. Hinton's mother. The State withheld DFS reports which made it clear that the DFS witnesses could not reliably match the recovered bullets in this case to a single weapon or to Mr. Hinton. The suppressed evidence would have clearly impeached the DFS witnesses and prevented a wrongful conviction. Postconviction Transcript, *Hinton v. State*, No. CC-85-3363.60, 3364.60 (Jefferson Co. Cir. Ct.) at PC. 2485-90.

21. *Id.* at R. 33-34, 423-24, 836, 1724, 827-28, 836.

22. Mr. Hinton presented evidence that he was working when the crime took place at 12:14 a.m. His supervisor and other employees confirmed that Mr. Hinton arrived at work at 11:57 p.m. on the night of the third offense, clocked in at 12:00 a.m., was given his work assignment at about 12:10 a.m., was checked on by his supervisor around 12:40 a.m., and was closely supervised during his six-hour shift. *Id.* at R. 1023, 1345, 1350, 1396, 1398.

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23. Trial Transcript, *Hinton v. State*, No. CC-85-3363, 3364 (Jefferson Co. Cir. Ct.) at R. 2025-28, 2150-53.The polygraph test exonerated Mr. Hinton of any involvement in any of the three crimes.

24. ALA. CODE § 15-12-21(d)(1999).

25. *See* Brief for the Constitution Project as Amicus Curiae in Support of Petitioners, at 2-3, *Barbour v. Allen* (2007) (No. 06-10605).

26. *See Hinton v. State*, __ So. 2d __, 2006 WL 1125605 at *13-15 (Ala. Crim. App. Apr. 28, 2006)

27. See *id.* at *21-22.

28. The State filed no legal response to Mr. Hinton's arguments after the evidentiary hearing. Instead, the State simply gave the judge a 144-page order to sign, which actually was a computer disk containing an order to be signed. After two and a half years, the judge signed the State's order without making any changes.

29. *Hinton v. State*, __ So. 2d __, 2006 WL1125605 (Ala. Crim. App. Apr. 28, 2006).

30. Ala. Code. Ann. 15-12-22(d)(3)(1975).

31. *Id.*

32. *See* Brief and Argument of Appellant, *Billups v. Alabama* (No. CR-05-0773). *See* Appendix A.

33. In August 2005, the Alabama Court of Criminal Appeals affirmed Michael Carruth's capital murder conviction and death sentence. *Carruth v. State*, 927 So.2d 866 (Ala. Crim. App. 2005). A timely application for rehearing was filed. While that application was pending, Mr. Carruth's appointed counsel, Steve Guthrie, moved offices and did not inform the Alabama Court of Criminal Appeals or Mr. Carruth of his change of address. Consequently, neither Mr. Guthrie nor Mr. Carruth learned that the court overruled Mr. Carruth's rehearing application in October 2005 and did not know that the time for appealing to the Alabama Supreme Court had expired fourteen days later.

34. Alabama law limits compensation to appointed counsel in State postconviction cases to $1000 per case. ALA. CODE § 15-12-23 (1975)(as amended by Act 99-427(1999).

35. According to the Bureau of Justice Statistics, Alabama has led the nation in the rate of new death sentences for the last five years. In 2006, Alabama sentenced six times more people to death than Texas. *See* Bureau of Justice Statistics, Capital Punishment 2006, Statistical Tables, http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st04.htm, last visited April 1, 2008; Bureau of Justice Statistics, Capital Punishment Statistics, http://www.ojp.usdoj.gov/bjs/cp.htm, last visited April 1, 2008.

36. This has lead to at least seven death row prisoners in the last few years in Alabama having to navigate state postconviction proceedings without the assistance of volunteer counsel. All of these prisoners either have their cases dismissed or are otherwise precluded from state court review as a

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result of their inability to obtain adequate legal assistance.

37. Unrepresented condemned inmates may also fall afoul of technical rules. An example is the case of Joseph Smith. On September 27, 2002, Mr. Smith filed a *pro se* State postconviction petition in the Mobile County Circuit Court after he was unable to find volunteer counsel. The State moved to dismiss Mr. Smith's petition and sent a letter to the circuit judge asserting that it was unnecessary to appoint counsel for Mr. Smith: "Typically, the State would not file a motion to dismiss a Rule 32 petition when the petitioner is on death row until an attorney has been appointed. This case, however, is different because the statute of limitations has expired. While the State has no objection to the appointment of counsel for Smith, the appointment of counsel would not change to [sic] fact that Smith filed an untimely Rule 32 petition that is due to be summarily dismissed." State's Letter of Oct. 7, 2002, to Hon. James C. Wood, in *Smith v. State*, Mobile Co. Cir. Ct. No. CC-98-2064. Without appointing counsel, the circuit judge subsequently signed the State's proposed order dismissing Mr. Smith's *pro se* State postconviction petition as untimely. *Smith v. State*, order of Oct. 9, 2002.

38. *See Culotta v. Mitchem*, 2006 WL 752947 (M.D. Ala. March 22, 2006)(citing *Coleman v. Thompson*, 501 U.S. 722 (1991)).

39. *Barbour v. Haley*, 145 F. Supp. 2d 1280, 1282 (M.D. Ala. 2001).

40. *Id.*

41. *Powell v. Alabama*, 287 U.S. 45 (1932).

42. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

43. *See* Brief of Amici Curiae Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari, *Barbour v. Allen* (2007) (No. 06-10605)(on behalf of Former Alabama Supreme Court Justices Douglas Johnstone, Ernest Hornsby, and Ralph Cook, and former Alabama Court of Appeals Judge William Bowen); *see also Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006). The Supreme Court denied certiorari. *Barbour v. Allen*, 127 S.Ct. 2996 (2007).

44. *Id.* at 1, 18-20.

45. *Id.* at 19.

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Testimony of Judge Carolyn Engel Temin

Ineffective Assistance of Counsel in Death Penalty Cases:
The Problem and Some Suggested Solutions From a Trial Judge's Perspective

I have been a trial judge for over 24 years and from 1994 until 1999, I served as the Calendar Judge for all homicide cases filed in Philadelphia County. We usually average between 300-350 filings a year and of those approximately 100 are filed as capital cases. During my career I have presided over pre-trial, trial and post-trial hearings in literally hundreds of capital cases.

It is always upsetting for a judge to preside over a trial in which one of the attorneys doesn't know what he or she is doing. It is especially aggravating to preside over a capital case where this is true. Despite the fact that judges have awesome authority, during the actual trial of the case there is very little that a judge can do to affect the performance of counsel. And, until recently, it was almost impossible to attain redress for ineffective counsel at the appellate level. Courts were even willing to deny relief to defendants whose counsel had failed to prove obvious mitigating factors on the ground that it was "harmless error" due to overwhelming evidence of aggravators. In my view, there is no place for the "harmless error" doctrine in capital penalty phase jurisprudence. Experience teaches us that the jury is affected by everything they hear and no one can predict how a particular mitigator or aggravator will be weighed.

More recently, since the decision in the case of *Williams v. Taylor*, 529 U.S. 362 (2000) and the subsequent decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard, 345 U.S. 374* (2005), the Supreme Court has begun to establish minimum standards defining effective assistance of counsel. In these decisions, the Court has developed what some authors label "a checklist approach" which was advocated many years ago by Judge David Bazelon in his dissent in the case of *DeCoster III*, 624 F.2d 264-299. The experience in my jurisdiction has been that following these decisions, there have

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been a great number of penalty phase reversals and grantings of new penalty phase hearings in cases tried prior to the year 2000. But the fact that defendants who have had ineffective counsel at trial can now get redressed on appeal is not really an effective solution to the problem of ineffective counsel. Among other things, this is a very expensive solution. In my jurisdiction defendants must first take a direct appeal to the Supreme Court of Pennsylvania in which they cannot raise the issue of ineffective assistance of counsel since our Supreme Court has ruled that issue must, with few exceptions, be raised in a collateral attack called a Post-Conviction Relief Act petition. It may be anywhere from two to four years before defendants are able to file such a petition since they first have to exhaust their direct appeal rights. The hearings on these petitions are extremely lengthy and expensive. At these hearings the post-conviction counsel normally present the court with all the evidence that they claim should have been presented at the initial penalty phase hearing. If a new penalty phase hearing is granted, and if that is affirmed by the Supreme Court, then a new penalty phase hearing must be held at which the same evidence will be presented but this time with the consequences of ending up with a sentencing verdict. The initial post-conviction hearing involves costs for investigators, psychiatrists, psychologists, sociologists, and the cost of transportation for witnesses from various parts of the country and correctional institutions. If the grant of a new penalty phase is affirmed, and it is usually is, then the cost of having these people testify again can be added to the total. In 99% of these cases the defendants have appointed counsel, since people who are under sentence of death rarely have funds to hire their own lawyer, so the counsel fees must also be added on to the costs of the hearings. In addition to the financial costs there are the problems of conducting a penalty phase hearing sometimes 10 or 20 years, maybe even 30 years after the initial trial. Very often records have disappeared or been destroyed, and necessary witnesses, both for the prosecution and the defense have died. Obviously, redress on appeal, although better than nothing, is an extremely laborious and expensive process. The best solution is to guarantee effective counsel from the beginning of the case. How do we do this?

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In Philadelphia we are fortunate to have a Defender Association (a private non-profit organization that operates as a public defender) with a special unit of lawyers who try homicide cases. They are very experienced in the trial of capital cases and provide outstanding representation. In addition, they have their own investigators and stable of experts whom they can call upon as needed. Unfortunately, the Defender Association is only willing to accept 20% of Philadelphia's homicide cases. At the present time we have an unusually high number of 500 homicide cases awaiting trial in Philadelphia. This means that only 100 of these are represented by the Defender Association. The remaining 400 are represented by a combination of appointed counsel and privately retained counsel. For many years we have required counsel who wish to represent defendants in capital cases to be "certified". This means that they must undergo specialized training provided by the Philadelphia Bar Association and successfully complete the course. We also have a rule that requires the appointment of two defense counsel in every capital case, one of whom acts as the guilt phase counsel and the second of whom is the mitigation phase counsel. Counsel who wish to be mitigation counsel must undergo a different kind of certification process. Unfortunately, undergoing these certification courses does not necessarily produce what I consider to be effective counsel in all cases. There is more to being an effective trial lawyer than merely fulfilling a checklist of requirements or sitting through a required course. Many of the attributes of an effective trial counsel are subtle and require specialized training such as that provided by the National Institute for Trial Advocacy located in Louisville, Colorado.

I would like to suggest three measures that I think would go very far toward guaranteeing that every defendant in a capital case is provided with effective trained and experienced counsel. First, I would like to suggest that all persons accused of capital crimes be eligible for appointed counsel regardless of their financial condition. This would mean that we would remove the indigency requirements in capital cases and that any defendant who wanted an appointed lawyer would be entitled to one. This is, obviously, not presently constitutionally required. Nevertheless, it is something that the legislature could enact. It may

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seem revolutionary, but actually it is being done in other parts of the world. I have worked as an international judge and currently work as a short-term consultant in the country of Bosnia and Herzegovina. This is a country which arose out of a communist regime and the legal system appurtenant thereto to go through an horrendous war and survive as a growing democracy. Its current Code of Criminal Procedure was enacted in 2003. Although the death penalty has been abolished under the constitution of Bosnia which incorporates the European Convention on Human Rights, nevertheless, anyone charged with an offense punishable by more than 10 years is entitled to have court-appointed counsel, of their own choice, regardless of their economic condition. Presently, in the United States, although everyone charged with a crime is entitled to counsel, a person must prove that they are indigent before receiving court-appointed counsel and of course, they do not get counsel of their own choice. I am not suggesting that we go as far as providing counsel, "of their own choice". In fact, I have suggested to the authorities running the system of justice in Bosnia that this goes far beyond what justice requires and creates a situation where lawyers are sometimes double-dipping by getting paid by clients and then also appointed by the Court. I am strongly suggesting, however, that everyone charged with a capital offense be entitled regardless of financial condition to court-appointed counsel.

Second, I suggest that the *ABA Standards for the Appointment and Performance of Defense Counsel in Death Cases (February 2003)* be enacted into law as the minimum requirements for counsel in capital cases.

Third, I suggest that funds be provided to establish capital public defender offices in those states which do not have them or to provide additional funds to existing public defender systems which have already proven their excellence such as the one in the State of Colorado and the one in Philadelphia, just to name a few. It has already been demonstrated that these specialized units of existing defender offices or specialized capital defender offices provide both the training, experience and the necessary adjunct staff of

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experts to ensure that defendants are given more than the constitutionally mandated requirements for effective counsel.

I hope that these suggestions are helpful to the Committee and I will be glad to answer any questions that you may have concerning my comments.

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THE ADEQUACY OF REPRESENTATION IN CAPITAL CASES

Testimony of Donald B. Verrilli, Jr.
Jenner & Block

Senate Judiciary Committee, Subcommittee on the Constitution
April 8, 2008

Mr. Chairman and members of the Subcommittee:

Thank you for inviting me to speak on the subject of the adequacy of representation in capital cases, an issue that has been of great importance to me for the more than 20 years that I have been practicing law. Unlike some others testifying this morning, I cannot make any claim to expertise on this question. I am a civil litigator, not a criminal lawyer. But throughout my career, I have felt it important to devote a meaningful percentage of my time to pro bono work, and much of that work has been representing death sentenced prisoners in postconviction challenges. I have represented several people over the years in these kinds of cases. One of the cases, involving a Maryland prisoner named Kevin Wiggins, ended up making its way to the Supreme Court. That experience has given me a window on this process, and has reinforced powerfully a point that should be obvious but perhaps is not -- assuring effective representation for capital defendants is critical to the very legitimacy of our system of justice. It is not just a matter of the stakes for the defendant -- which obviously could not be higher. If defense lawyers do not do their job, we can have no confidence in the outcome of capital trials, and no faith that a death sentence is just.

The right place to start in thinking about the issue of adequate representation in capital cases is the special nature of a capital trial. The capital sentencing process presents unique challenges for, and imposes unique obligations on, defense counsel. Those obligations and challenges flow from the constitutional requirement, which has been part of our Eighth Amendment law for more than three decades, that sentencing procedures in capital cases must provide an opportunity for a defendant to offer any argument in mitigation of sentencing. That is, a defendant must be given the opportunity to put before the sentencer any aspect of his background or character, as well as any circumstance of the criminal act itself, that might reasonably lead a sentencing jury to conclude that the defendant should receive a penalty less then death. As the Supreme Court, speaking through Justice O'Connor, put it in the 1989 decision in *Penry v. Lynaugh*, "[e]vidence about a the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." 492 U.S. at 319. The goal of the process is to ensure a "reasoned moral response" on the part of the sentencer -- to evaluate the defendant's culpability not only in terms of the facts of the crime itself but also, and more importantly, in the context of the defendant's life history.

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This elemental constitutional requirement -- a process that ensures a "reasoned moral response" at the sentencing phase of a capital trial -- defines and directs the professional responsibilities of defense counsel. To be sure, defense counsel must do the hard work necessary to contest the prosecution's proof of guilt to the underlying crime. That will mean thorough investigation of the facts of the crime, interviewing witnesses, developing DNA evidence in appropriate cases, etc. But daunting as that work is, it is only part of the task. Defense counsel must build the case for life to be presented at the sentencing hearing in the event the client is convicted at the guilt/innocence stage of the proceeding. In very many (probably most) cases, the lawyer's best hope will lie in convincing the jury to spare the client at sentencing, and not in convincing the jury to acquit at the guilt-innocence phase of the proceedings.

Yet in case after case we see that defense counsel does not do the work needed. That was the point of the Supreme Court's decision in the case I litigated, *Wiggins v. Smith*. In that case, defense counsel decided that they had a good case at the guilt/innocence phase of the trial -- that they could defeat the prosecution's effort to show beyond a reasonable doubt that Mr. Wiggins committed the murder with which he had been charged. So they developed that part of the case -- the case for innocence. But they did next to nothing to develop the case for life -- the argument that Wiggins should be considered less culpable based on his background, character and life experience, and therefore spared death if convicted of the crime. As it turned out, they did not prevail at the guilt/innocence phase. So all they were left with to try to spare Wiggins' life at sentencing was the argument to the sentencing jury that the evidence of his guilt was not so clear and that they should err on the side of caution in deciding the appropriate sentence.

We took the case on at the postconviction stage and stayed with it for the more than 10 years it took to work the case through first state and then federal postconviction review. What we tried to do at the postconviction stage was replicate the work that should have been done earlier. We gathered all the evidence we could about Wiggins' background, upbringing and emotional and psychological health. Critically, we retained a "social history" expert to help us develop that evidence -- someone trained in what it takes to ferret out information from old records and expert in the kinds of interview techniques needed to get people to talk about difficult subjects. Through this effort, which involved hundreds of hours of attorney time in addition to the services of the social history expert, we were able to put together a mitigation case that the Supreme Court would ultimately describe as "powerful." As it turns out, Wiggins had an almost unimaginably horrible childhood. We was routinely abused by his alcoholic mother -- including one instance in which she took his hands and forced them onto a heated burner on the stove to teach the young boy a lesson about playing with matches -- and often went unfed. This persisted until he was 6 years old, when the social services authorities took him from her and placed him in foster care. Unfortunately, he fared little better in the foster care system, which in Baltimore, Maryland at the time was notoriously bad. His foster father in one of his first placements sexually molested him routinely over the course of several years -- leading him eventually to request a different placement. When the authorities moved him to another home, he was subjected to gang rapes by the natural

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sons of the new foster family. Eventually he ran away from home as a teenager and lived on the streets. One police officer we found told us that he remembers Wiggins sleeping underneath parked buses at the municipal bus depot in the winter months. Not surprisingly in view of this history, the school and medical records documenting his youth showed a variety of ailments over the years suggesting malnutrition and abuse, as well as repeated diagnoses of borderline mental retardation.

Eventually, of course, the Supreme Court found that Wiggins was denied his Sixth Amendment right to the effective assistance of counsel. Specifically, the Court held that the failure of Wiggins' lawyers to conduct a thorough investigation of his background failed to meet the minimal standards to which counsel must conform to provide effective assistance. And it found that Wiggins was prejudiced by his counsel's ineffectiveness because there was a reasonable possibility that a sentencing jury hearing the evidence that Wiggins' trial lawyers never developed would have decided not to impose a death sentence. On retrial, we continued to represent Wiggins on retrial proceedings in Maryland. We put in hundreds of additional hours of effort to build a case in mitigation and eventually persuaded the prosecution to agree to a plea bargain that eliminated the possibility of a death sentence.

It is possible, I suppose, to say that the Wiggins story is a success story, that it shows how pro bono representation by large corporate firms can make a difference. But the opposite is true. We are proud of our work on this and other cases. But the fact that we need to step in to do such work represents a failure of the system -- one that frustrates the interests of justice all around. The postconviction proceedings in Wiggins' case took more than a decade to resolve, and absorbed enormous resources not only of our firm but also of the state, which had to defend the hard-fought case. During that entire time, there was no certainty and no finality. Wiggins was forced to live with the possibility that he would eventually be executed. The victim's family was denied closure, and the public's confidence in our system of justice was certainly sapped by the interminable delays. All of that could have been avoided had Wiggins' trial counsel done their job effectively in the first place.

This kind of story is all too common. Lawyers routinely fail to do the hard work that is required of them to represent defendants effectively in capital cases. Not every case ends in vindication of the defendant's interests as *Wiggins* did. But many do. And the fact that the representation afforded capital defendants is so often so inadequate is a big part of the reason why postconviction proceedings (state and federal) have assumed such an important role in adding at least some measure of fairness to our capital punishment system. This is not because the norms have not been articulated clearly. The ABA has spoken in clear terms in setting standards for the profession to govern capital defense. And the Supreme Court has spoken in clear terms as well, not only in *Wiggins* but also in the 2000 decision in *Williams v. Taylor*, 529 U.S. 362, and the 2005 decision in *Rompilla v. Beard*, 545 U.S. 374.

Yet in a dishearteningly high number of cases trial lawyers defending people accused of capital crimes continue to fail to do the work necessary to defend their clients

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effectively. Sometimes, the explanation will be bad decision-making. A lawyer may feel that he or she has a better strategy for gaining acquittal or avoiding death, one that does not require a thorough investigation. Of course, until a lawyer does the thorough investigation, there is no way to know which strategic option is in the client's best interest. Or a lawyer may simply not comprehend what is required to provide effective representation. Or a lawyer may simply not want to rock the boat in situations where there is no professionalized public defender system and lawyers depend on appointments from local judges to sustain their practice. Most often, however, it is simply a matter of resources. After all, effective representation of a capital defendant often means an investment of many hundreds of hours of lawyer and investigator time. At fixed fees per case, or at the shockingly low hourly rates that have historically prevailed in some locations, a lawyer's own economic well-being would be put at risk by investing the needed effort. Similarly, without access to resources, a lawyer cannot retain the experts needed to develop a case effectively.

The right answer here is clear: more resources. Lawyers defending those accused of capital crimes need to be paid at a level that enables them to put in the effort needed -- the hundreds of hours that it typically takes to do the job right. They need the funds to hire experts -- DNA experts, psychologists, social history experts. And they need the funds to hire investigators to help them dig deeply into the client's history. Ensuring these resources serves everyone's interests. Effective representation at trial increases the public's confidence in the outcome of criminal trials. It takes the pressure off postconviction proceedings, and ensures that the initial trial remains the main event. Postconviction proceedings can function as a safety valve for the rare case -- rather than the backstop for inadequate lawyering at trial. We get more certainty. We get fewer delays. Most importantly, we serve the interests of justice and vindicate the fundamental importance of the right to counsel. That is something that no amount of pro bono representation after the fact in postconviction proceedings can accomplish. Victory in a postconviction proceeding -- particularly one in which the conviction or sentence is invalidated based on ineffective assistance of counsel at trial -- may ultimately advance the interests of justice, but it represents a failure of the system, and an expensive one at that. And private firms cannot possibly handle on a pro bono basis all of the cases that need to be handled under our current system, especially given the hundreds or thousands of hours of attorney time that must be invested to do those cases effectively. We should be investing in the integrity of the criminal trial process, so a case like Wiggins becomes a rare exception and not typical example of our failings.

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